Federal Court  Cour fédérale

Date: 20100910

Docket: T-1607-09

Citation: 2010 FC 892

Ottawa, Ontario, September 10, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

LENVEST ENTERPRISES INC.

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Mr. Doug McLean, Director of Winnipeg Tax Services Office (the Minister's delegate) who is an official of the Canada Revenue Agency (CRA), denying the Applicant's request for taxpayer relief from penalties and arrears interest reassessed because of late filing of T1135 forms concerning foreign investment property.

[2] There are seven applications for judicial review involving different corporate entities which are all related and are collectively referred to as the Asper Group of Companies. These applications

were not consolidated but were heard together in one hearing. The essential facts and issues are common to all.

[3] The Applicant had applied for relief under subsection 220(3.1) of the *Income Tax Act* (the Act) which gives the Minister the discretion to waive penalties and interest. This request was refused. The Applicant submitted the following: First, that the Minister fettered his discretion by only considering the Taxpayer Relief Guidelines when subsection 220(3.1) has broader application and, second, the Minister's decision was unreasonable.

[4] For the reasons that follow, I am denying the application for judicial review.

Background

[5] The Applicant in this proceeding is one of seven related companies (collectively referred to the Asper Group Corporations), those being:

a. Leonard Asper Holdings Inc.

b. David Asper Holdings Inc.

c. Canwest Direction Ltd.

d. Daremax Enterprises Ltd.

e. Stemijon Investments Ltd.

f. Lenvest Enterprises Inc.

g. Canwest Communications Corporation.

[6] The Asper Group Corporations operate under a common administration for accounting and tax reporting purposes. Brooke & Partners (the Applicant's representative) prepares the Asper Group Corporations' financial statements and attends to income tax compliance filings. While the particular details of each corporation may vary, decisions as to matters such as what reporting forms need to filed are made on a common basis by the Applicant's representative, who then files the required forms. It is not disputed that the Applicant is responsible for the actions of its financial representative.

[7] The foreign income verification statement, the T1135 form, is required to be filed annually when the total cost amount of all specified foreign property owned by the taxpayer is more than $100,000, under section 233.3(3) of the Act. The Applicant held foreign property upon which income was earned. In 1998 and 1999, T1135 forms were filed for the Asper Group Corporations' foreign holdings.

[8] All foreign investments owned by the Asper Group Corporations are administered through professional money managers which report all investments and related income on a monthly basis as well as issuing annual reports. The Applicant's representative understood that these money managers were also required to report trading activity and income to the CRA. Further, the Asper Group Corporations reported all income from their respective foreign property. After a review of existing reporting arrangements, the Applicant's representative concluded that T1135 forms were not required where an investment portfolio was managed by a Canadian investment manager subject to Canadian tax reporting requirements. It should be noted that there is no suggestion here that income was not reported in order to avoid paying taxes.

[9] The Applicant did not file T1135 forms for each of the taxation years 2001 to 2003. Mr. Fred de Koning, a chartered accountant with the Applicant's representative explained in his affidavit at paragraph 11:

> "For years subsequent to 1999, the Asper Group did not originally file T1135 information returns. The original decision not to file T1135 forms was based on a conclusion that where an investment portfolio was managed by a Canadian investment manager subject to Canadian tax reporting requirements, T1135 forms were not required to be filed."

[10] In April 2005 the CRA alerted the Asper Group of Companies that the Applicant had not filed T1135s since 2000. It asked for access to the companies' general ledger/trial balance depicting the type of investments it owns for the 2001-2003 taxation years. On June 2, 2005 the Applicant's representative sent a letter to the CRA that included the missing T1135s, providing by way of explanation:

> "We had, up until 1999, ensured that T1135's were filed for these corporations. However, based on a mistaken conclusion and the confidence that all income from foreign investments was being properly and conscientiously reported, we decided T1135's did not apply. This was a conscious decision that was made while knowing that all tax reporting was being complied with for all foreign investment property."

[11] In December 2005 the CRA wrote that it was processing the T1135s. In response to an oral request that no penalties be assigned pursuant to section 162(7) of the *Income Tax Act* (ITA) the CRA decided that penalties would be applied in respect of each of the taxation years for which the T1135 form was filed late.

[12] The Applicant wrote to the CRA's Fairness Committee, asking that the penalties and interest be waived. It submitted that its favourable compliance history with the CRA led one auditor to the

conclusion that penalties would not likely be assessed. It also referred to a “one chance policy” contained in a communiqué from the CRA. The “one chance policy” applies when the taxpayer demonstrated a misunderstanding of the law and subsequently filed voluntarily. Factors which were taken into account under this policy included the taxpayer’s compliance history, knowledge of tax matters, taxpayer’s degree of involvement in preparing the return and books and records; and whether the related income was reported.

[13] The CRA replied on September 10, 2008. It denied the Applicant’s request for relief from penalties and interest. It found the Applicant’s situation did not fall within the scenarios contemplated by the taxpayer relief guidelines as outlined in paragraph 23 of the Information Circular (IC) 07-01 which provides a list of three situations that may justify waiving penalties and/or interest:

1. Extraordinary circumstances beyond the taxpayer’s control,
2. Actions of the CRA, or
3. Inability to pay or financial hardship.

[14] The CRA decided none of these situations applied to this case. It then considered the “one chance” policy. The CRA found while the policy was no longer in effect when the T1135s were eventually filed, it was willing to consider its application since the returns at issue were for tax years when it was in effect. However, the CRA found the policy was only available to taxpayers who filed reports voluntarily.

[15] The Applicants made a second level taxpayer relief request on July 8, 2009. The Applicant asked the CRA to reconsider the penalties and interest. It suggested that the penalties were not fair and reasonable. The Applicant also raised the issue of the long delay between its request for relief and the decision.

Decision Under Review

[16] The Minister's delegate, Mr. McLean, denied the second level fairness request on August 28, 2009. He approved a reduction of interest charged for six months to address the lengthy delay in replying to the first request for relief. However, the rest of the request was denied. The Minister's delegate wrote:

> "I have determined that I cannot grant your request to cancel the late filing penalty and the balance of the arrears interest. While I can sympathize with your position, the Taxpayer Relief Provisions do not allow for cancellation of penalties and interest when a Taxpayer, or their representative, lacks knowledge or fails to meet filing deadlines. I trust this explains the Agency's position in this matter."

[17] The Applicant filed for judicial review on September 25, 2009.

Legislation

Income Tax Act, (1985, c. 1 (5th Supp.))

220 (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or	220 (3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard

before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.

…

(3) A reporting entity for a taxation year or fiscal period shall file with the Minister for the year or period a return in prescribed form on or before the day that is

(a) where the entity is a partnership, the day on or before which a return is required by section 229 of the Income Tax Regulations to be filed in respect of the fiscal period of the partnership or would be required to be so filed if that section applied to the partnership; and

(b) where the entity is not a partnership, the entity's filing-due date for the year.

ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

…

(3) Un déclarant pour une année d'imposition ou un exercice est tenu de présenter au ministre pour l'année ou l'exercice une déclaration sur le formulaire prescrit au plus tard à la date suivante :

a) si le déclarant est une société de personnes, la date où une déclaration doit être produite pour son exercice, en application de l'article 229 du Règlement de l'impôt sur le revenu, ou devrait ainsi être produite si cet article s'appliquait à lui;

b) sinon, la date d'échéance de production qui lui est applicable pour l'année.

Federal Courts Act, (R.S.C, 1985, c. F-7)

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.
…
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or
(f) acted in any other way that was contrary to law.

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
…
(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
f) a agi de toute autre façon contraire à la loi.

Issues

[18] The Applicant raises two issues.

1. Did the Minister err in his interpretation of the scope of his discretion to waive penalties and interest pursuant to section 220(3.1) of the ITA?

2. Was the Minister's decision reasonable in denying the relief the Applicant sought pursuant to section 220(3.1) of the Act?

Standard of Review

[19] The Supreme Court of Canada has held that there are but two standards of review, correctness and reasonableness: *Dunsmuir v. New Brunswick* 2008 SCC 9 para. 45 (*Dunsmuir*). Where the jurisprudence has previously determined the standard of review with respect to judicial review of an administrative decision, then the standard of review may be considered to have been settled: *Dunsmuir* para. 62.

[20] The applicable standard of review for discretionary decisions of the Minister is reasonableness: *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153. It relied on *Dunsmuir* which describes the standard at para. 47 as:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the

> decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Analysis

[21] The Applicant submitted that the Minister's delegate fettered his discretion by limiting himself to remedies in the Taxpayer Relief Guidelines, the three scenarios set out in the guidelines, namely:

a. Extraordinary circumstances beyond the taxpayer's control,

b. Actions of the CRA, or

c. Inability to pay or financial hardship.

[22] The Applicant relied on Justice Campbell's finding in *Nixon v. Canada (Minister of National Revenue)*, 2008 FC 917 at para. 5:

> A detailed consideration of the Guidelines is important with respect to the present Application because it appears that the Decision was rendered under a misapprehension of their content. As set out above, s. 220(3.1) of the Act gives broad open-ended discretion to the Minister in granting penalty relief, and, of course, this discretion is available to the Minister's delegates in considering specific situations presented by applying taxpayers. The Guidelines are careful to state that this broad legally approved discretion is not affected by the Guidelines:
>
> 6. These are only guidelines. They are not intended to be exhaustive, and are not meant to restrict the spirit or intent of the legislation.

[23] The Applicant argued the Minister's representative demonstrated sympathy for the Applicant's situation, but seemed to express the idea that his discretion did not "allow" him to grant

the relief sought. Essentially, the Minister would be saying his “hands were tied”, and if this is so, then he would have been misinterpreting his discretion under section 220(3.1) of the Act.

[24] The Applicant also submitted that the decision not to file the T1135 forms was the result of confusion. It cited guidelines on penalties associated with failure to file T1135 forms:

> “No penalty will be assessed where it appears there was confusion concerning obligations and it is the first time a penalty is considered.”

[25] The Applicant submitted that if there was confusion with respect to the rules, then the CRA should have been more lenient about penalties. At the very minimum, the CRA should have accepted that the Applicant’s representative was interpreting the rules in good faith, relying on accurate and timely reports being made to the CRA by money managers. It wrote: “The conclusion was wrong, but that does not detract from the reasonableness of the belief that the forms did not have to be filed.”

[26] Furthermore, the Applicant argued that the Minister’s delegate did not properly consider the relevant factors in granting or denying relief. The Applicant submitted that all those factors should have pointed in the Applicant’s favour.

[27] Finally, with respect to not waiving interest on the penalties, the Applicant argued the Minister’s delegate based his decision on an estimate of average time and failed to consider the request on the specific facts of the application.

Did the Minister err in his interpretation of the scope of his discretion to waive penalties and interest pursuant to section 220(3.1) of the ITA?

[28] The Applicant argued that the Minister's representative unreasonably limited his own discretion when he wrote: "I have determined that I cannot grant your request to cancel the late filing penalty and the balance of the arrears interest. … the Taxpayer Relief Provisions do not allow for cancellation of penalties and interest when a Taxpayer, or their representative, lacks the knowledge or fails to meet filing deadlines."

[29] The Applicant brought to the fore the expressions, "I cannot" and "…Taxpayer Relief Provisions do not allow…" The Applicant submitted that the Act provides the Minister with broad discretion to waive penalties and interest and he should not have limited himself to the three provisions foreseen in the guidelines.

[30] The Minister's section 220(3.1) discretion is not bound by statutory criteria. He is bound only by the duty of procedural fairness. This conclusion emerges in cases cited by both the Applicant and Respondent. In *Estate of the Late Henry H. Floyd v. Minister of National Revenue,* (1993) 93 D.T.C. 5499 (F.C.T.D.), Justice Dube wrote:

> At the outset, I should point out that it is not for the Court to decide whether the interest otherwise payable by the taxpayer ought to be waived or cancelled. It is within the discretion of the Minister. The function of the Court in this judicial review, as I understand it, is to determine whether or not the Minister failed to observe procedural fairness or erred in law in making his decision, as outlined under subsection 18.1(4) of the Federal Court Act.

[31] The Applicant's argument that the Minister ignored factors other than the scenarios provided in the relief guidelines is not supported by the Record.

[32] The Minister's delegate had before him the Applicant's July 8, 2009 request for a second review, the July 30, 2009 Taxpayer Relief Report, the CRA's International Tax Directorate's communiqué regarding Penalties Under Foreign Reporting Requirements, and the CRA's Information Circular IC07-1 entitled Taxpayer Relief Provisions.

[33] The July 30, 2009 Taxpayer Relief Report contained a review of the Applicant's initial request for taxpayer relief and the corresponding decision which referenced the "one chance" policy. The scope of the review in the Report went beyond the three scenarios provided in the Taxpayer Relief Provisions.

[34] Given the extent of the information before him, I find the Minister's delegate to have considered the taxpayer relief policy beyond the three scenarios given in the Taxpayer Relief Guidelines.

[35] I am not prepared to infer that the Minister's delegate's expression of sympathy was a telltale sign the delegate would have concluded differently had he misunderstood the breadth of his discretion. This was a courteous expression of sympathy for the consequences of the Applicant's mistake.

[36] I am satisfied the Minister's delegate did not fetter his discretion in coming to his decision to deny the relief sought by the Applicant.

Was the Minister's decision reasonable in denying the relief the Applicant sought pursuant to section 220(3.1) of the Act?

[37] The Minister's discretion in section 220(3.1) must lead to a reasonable outcome, the reasons for which must be justified, transparent and intelligible and "…within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" as provided in *Dunsmuir*.

[38] The Applicant submitted that the decision not to file the forms was through an "administrative oversight", despite having previously characterized the omission as resulting from a "mistaken conclusion". The Applicant stressed that all income related to the foreign investments were properly reported.

[39] The Minister's delegate was well apprised of the explanation put forward by the Applicant. He was also cognizant of the facts of the case. In examination on his affidavit, the Minister's delegate explained that the taxpayer is responsible for errors on the part of the taxpayer's representative. He noted that there was a conscious decision not to file the T1135 forms; the taxpayer's representative was a professional accountant; and the returns were filed only after compliance action commenced.

[40] In my view, the Minister's delegate's reasons responded to the facts before him. He characterized the decision as a conscious decision by the Applicant's representative or the Applicant, one that was lacking due diligence rather that confusion. I find the reasoning draws a conclusion that was within the range of possible outcomes defensible on the facts. Moreover, since

section 220(3.1) of the does not obligate the Minister to provide relief, the decision was clearly defensible in respect of the law as well as the facts.

[41] Finally, the Minister's delegate accepted the Applicant's submission on relief from interest penalties because of the excessive delay. In doing so, the Minister's delegate took into account the fact that the CRA typically takes 6 months to make a decision on a taxpayer's request for relief. Since the Minister's delegate had all relevant dates before him as well as the recommendation of the Report writers, I find his decision to cancel the interest incurred because of additional delay was indeed reasonable

Conclusion

[42] I conclude the Minister's delegate has not made a reviewable error.

[43] The application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. I conclude the Minister’s delegate has not made a reviewable error.

2. The application for judicial review is dismissed.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1607-09
STYLE OF CAUSE:	LENVEST ENTERPRISES INC. v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 15, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN J.
DATED:	SEPTEMBER 10, 2010

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