Federal Court  Cour fédérale

Date: 20110504

Docket: T-558-09

Citation: 2011 FC 518

Ottawa, Ontario, May 4, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

JAKA HOLDINGS LTD., JEAN TRAN, AND PHUOC NGUYEN

Applicants

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] Jaka Holdings Ltd. ("Jaka"), Jean Tran and Phuoc Nguyen (collectively the "Applicants") seek judicial review of the decision dated March 12, 2009, made by Ms. Sandra Brownlee, the Director of Regina Tax Services Office (the "Director"), Canada Revenue Agency (the "CRA" or the "Respondent").

[2] In that decision, the Director denied Jaka's second level request for the cancellation of penalties and/or interest, assessed under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the

"*Income Tax Act*") and the *Excise Tax Act*, R.S.C. 1985, c. E-15, as well as its request for relief from gross negligence penalties.

BACKGROUND

[3] No tribunal record was requested in connection with this application for judicial review, and no tribunal record was filed. The relevant facts will be taken from the affidavits, including exhibits, filed on behalf of the parties.

[4] The Applicants filed two Affidavits of Ms. Jean Tran, the sole shareholder of Jaka. The first, sworn to on May 20, 2009, purports to set out a timeline for the conduct of an audit of Jaka by the CRA that began in October 2003.

[5] In her second Affidavit, sworn to on August 13, 2009, Ms. Tran attached a letter from Counsel for the CRA, purporting to set out the amounts claimed by the CRA. This letter, dated August 7, 2009 purports to be a statement of interest and penalties claimed from Jaka, Ms. Tran and Mr. Nguyen.

[6] The CRA filed three Affidavits. The first is the Affidavit of Sheila Nixon, a Director with the Regina Tax Services Offices of the CRA. Ms. Nixon attached five documents as exhibits to her Affidavit.

[7] The Respondent also filed two Affidavits of Brian Mills. Mr. Mills is a team leader in the Audit Division in the Regina Tax Services Offices of the CRA.

[8] Both the Affidavits of Mr. Mills, each dated June 25, 2009, relate to the first level refusal of the waiver requests advanced on behalf of Jaka, Ms. Tran and Mr. Nguyen.

[9] Mr. Mills wrote the first level refusal letter to Jaka on June 25, 2008. He advised Jaka that it could request an independent review of his decision.

[10] On September 15, 2008, Jaka requested an independent review of its request to waive or cancel penalties and/or interest.

[11] Mr. Mills wrote the refusal letters to Ms. Tran and Mr. Nguyen on February 26, 2009. He advised both Ms. Tran and Mr. Nguyen that they could request a second administrative review. There is nothing in the record to show that they have done so.

[12] As discussed, the CRA began an audit of Jaka in October 2003. It is unclear from the materials filed if the individual Applicants were also subject to an audit but that is irrelevant to this proceeding since the only decision that is subject to this application for judicial review is the decision dated March 12, 2009 and that decision concerns only the corporation Jaka.

[13] Both the Applicants and the Respondent included in their respective application records the first level review decisions made by Mr. Mills relating to the individual Applicants. These decisions are dated February 26, 2009.

[14] Mr. Mills' decisions of February 26, 2009 are not mentioned in the application for judicial review. They are not the subject of this application for judicial review and will not be addressed on their merits. However, the production of these two decisions raises a question of procedural fairness since there is a marked similarity between the two decisions of Mr. Mills and that of the Director, beginning with the opening paragraph. All of these decisions follow a similar structure.

DISCUSSION

[15] The first matter to be addressed is the appropriate standard of review. According to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, decisions of statutory decision-makers are reviewable either on the standard of correctness or of reasonableness.

[16] According to the Supreme Court of Canada's decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at para. 43, the standard of correctness will apply to questions of procedural fairness. The standard of reasonableness will apply to questions of fact and of questions of mixed fact and law; see *Dunsmuir* at para. 53.

[17] Where the prior jurisprudence has already established the appropriate standard of review, that standard can be used; see *Dunsmuir* at para. 57. In *Telfer v. Canada (Revenue Agency)* (2009), 386 N.R. 212 at para. 24, the Federal Court of Appeal stated that the decision to cancel or waive penalties and interest is a discretionary one, reviewable on the standard of reasonableness.

[18] In *Ralph v. Attorney General of Canada* (2010), 410 N.R. 175 (F.C.A.), the Federal Court of Appeal commented on the absence of a tribunal record and said as follows at paras. 29 to 32:

> [29] Some confusion arose before this Court as to what evidence was before the Board. This was because on the application for judicial review in the Federal Court no certified tribunal record was requested or filed. Instead, each party filed an affidavit in the Federal Court. It was not clear that the narrative contained in the affidavits was confined to information provided to the Board, or that documents in the Appeal Book had been placed before the Board.
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> …
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> [31] This confusion should be avoided in a future case. Rule 317 of the *Federal Courts Rules* allows a party to request material in the possession of a decision-maker. An applicant for judicial review in the Federal Court may include such a request in its notice of application. Rule 318 then obliges a decision-maker to transmit a certified copy of the requested material to the Court and the person making the request within 20 days of the service of the request under Rule 317.
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> [32] In the present case, the appellant did make a request that the Board provide a copy of the record before it to the Registry of the Federal Court of Appeal. This request was contained in the notice of appeal filed with this Court. Such form of request is neither proper nor effective. Evidence not before the Federal Court cannot be placed before this Court on an appeal unless an order is granted permitting a party to file new evidence. See: Rule 351. The appropriate time for invoking Rule 317 is by requesting material in the notice of application in the Federal Court.

[19] As noted at the beginning of these reasons, no tribunal record was requested by the Applicants in their Notice of Application for judicial review. The purpose of requesting the tribunal record is to allow the Court to review the documents that were actually before the Federal Board when it made its decision; see the decision in *Canada (Attorney General) v. Canada (Information Commissioner)*, [1998] 1 F.C. 337 at para. 26.

[20] In this case, Ms. Nixon made reference in her Affidavit to the documents that were before Ms. Brownlee, the decision-maker, at the time she made her decision. According to paragraph 16 of Ms. Nixon's Affidavit, those five documents consisted of the following:

> 1. The first level request made by Jaka dated March 14, 2008;
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> 2. First level report dated April 16, 2008;
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> 3. First level decision dated June 25, 2008;
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> 4. Jaka's second level request dated September 15, 2008; and
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> 5. Second level report dated February 25, 2009.

[21] In their Application Record, the Applicants included a list of documents which they called "supporting materials". That list consists of the following:

> (a) March 12, 2009, decision letter from Canada Revenue Agency;
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> (b) February 26, 2009, decision letter to Jean Tran from Canada Revenue Agency;
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> (c) February 26, 2009, decision letter to Phuoc Nguyen from Canada Revenue Agency;
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> (d) September 15, 2008, letter from Darryl Lucke to Canada Revenue Agency;
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> (e) June 25, 2008, letter from Canada Revenue Agency to Darryl Lucke;
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> (f) February 13, 2008, Applicants' Request for Taxpayer Relief;
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> (g) February 19, 2008, letters to JAKA Holdings from Canada Revenue Agency regarding GST Arrears and Income Tax Arrears;
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> (h) February 19, 2008, letter to Phuoc Nguyen from Canada Revenue Agency regarding Income Tax Arrears;

[22] There was some overlap between the materials produced by the Applicants and the materials identified in paragraph 16 of Ms. Nixon's Affidavit. Specifically, both the Applicants and the Respondent have produced copies of the Applicants' request for taxpayer relief under cover of a letter dated March 14, 2008, the first level decision dated June 25, 2008 and the second level request on behalf of Jaka dated September 15, 2008.

[23] In the ordinary course of events, documents that were not before the decision-maker would not be considered. However, in this case, an issue of procedural fairness has arisen with respect to an apparent similarity between the contents of the two first level decisions contained in the letters dated February 26, 2009, concerning the two individual Applicants, and the decision dated March 12, 2009 concerning Jaka.

[24] The decisions dated February 26, 2009 were written by Mr. Mills. Mr. Mills was also the author of the first level decision with respect to Jaka. The February 26, 2009 decisions are included in the Applicants' Application Record however, these decisions are also included in the Respondent's Application Record, as exhibits to the two Affidavits of Mr. Mills.

[25] These decisions are not, and cannot, be the subject of this application for judicial review. In the first place, the application for judicial review specifically states that it concerns the decision of March 12, 2009, concerning Jaka. Secondly, pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7 and the *Federal Courts Rules*, SOR/98-106 (the "Rules"), an application for judicial review can relate to only one decision.

[26] Nonetheless, the production of the decisions relating to the individual Applicants raises an issue of procedural fairness, specifically that of fettering of discretion of the decision-maker. This issue was not addressed by either the Applicants or the Respondent upon the hearing of this application for judicial review on April 7, 2011. The issue was raised by the Court, at the conclusion of the hearing on that date and the Direction was issued, giving the parties the opportunity to address this issue, should they wish to do so.

[27] Both parties did address this question and further submissions were heard from both parties at a resumption of the hearing on April 26, 2011.

[28] The Applicants argue that the many similarities between the second level decision of March 12, 2009 and the first level decisions of February 26, 2009 suggests that the March 12th decision was effectively "copied" from the earlier decisions of February 26th, and that this "copying" amounts to a breach of procedural fairness that is the fettering of discretion by the decision-maker.

[29] For its part, the Respondent submits that since the fairness relief request was made on behalf of all three Applicants and the three Applicants relied on the same grounds, it is not surprising that the decisions dealing with the three Applicants would show some similarities.

[30] I am not persuaded by this argument. While the request for taxpayer relief was presented on behalf of the three Applicants, it is apparent from reviewing the materials that were before the Director, that is the materials identified in paragraph 16 of Ms. Nixon's Affidavit, that Jaka was the

principal focus of the audit activities of the CRA. It is unclear from the materials filed by the parties if the individual Applicants were also subject to an audit.

[31] The similarity of the three decisions is very disturbing and has not been explained. The Respondent, in making the above submissions, merely attempts to offer a justification.

[32] It is well-established that a remedy in an application for judicial review is discretionary. It is equally well-established that not every breach of procedural fairness will give rise to a remedy. In this regard, I refer to the decisions in *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 and *Stevens v. Conservative Party of Canada*, [2006] 2 F.C.R. 315 (F.C.A.).

[33] In *Stevens*, the Federal Court of Appeal said the following at para. 52:

> It is not uncommon that a court, in its discretion, refuses to quash a decision made unlawfully. Although the absence of prejudice is the reason most often cited, it is not the only one; the extent of the consequences, for example, could be another reason as valid as the lack of consequences. (See *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at pages 228-229 ("remedies . . . are impractical"); *Canadian Cable Television Assn. v. American College Sports Collective of Canada, Inc.*, [1991] 3 F.C. 626 (C.A.); *Nooshinravan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 598; *Angus v. Canada*, [1990] 3 F.C. 410 (C.A.), at page 440); *Devinat v. Canada (Immigration and Refugee Board)*, [2000] 2 F.C. 212 (C.A.), at paragraph 71 *et seq*.).

[34] In the circumstances of this case, in particular having regard to the state of the record as presented by the parties, I am not prepared to find that a truly independent review by a different decision-maker would yield the result that was rendered by the Director. In other words, I am not

prepared to assume that the breach of procedural fairness resulting from the apparent copying of a prior decision carries no consequences for the Applicant Jaka.

[35] In these special circumstances, I am prepared to allow this application for judicial review. The decision of March 12, 2009 is set aside and the matter remitted to another decision-maker for determination.

[36] In the exercise of my discretion over costs, pursuant to the Rules, I make no order as to costs. Neither party raised the issue which is determinative of this application and in my opinion, each party can bear its own costs.

ORDER

THIS COURT ORDERS that the application for judicial review is allowed, the decision of March 12, 2009 is set aside and the matter is remitted to a different decision-maker for determination. In the exercise of my discretion over costs pursuant to the *Federal Courts Rules*, SOR/98-106, there is no order as to costs.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-558-09
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DATED:	May 4, 2011

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