Federal Court  Cour fédérale

Date: 20171129

Docket: T-2049-16

Citation: 2017 FC 1075

Toronto, Ontario, November 29, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

DOUGAL & CO INC

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review [Application] under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, of a refusal [Decision] by the Minister of National Revenue [Minister] to reduce or cancel interest and penalties under section 281.1 of the *Excise Tax Act*, RSC, 1985, c E-15 [*ETA*]. By order dated February 1, 2017, Prothonotary Milczynski granted the

Applicant leave to be represented in these proceedings by its sole director and shareholder, Dougal Bichan.

[2] The Applicant now seeks relief from the payment of interest and penalties levied against it by Canada Revenue Agency [CRA] between 2004 and 2011, submitting that the Decision does not address all the facts, including the circumstances of Mr. Bichan's marriage breakdown and attendant psychological distress.

[3] I appreciate that the Applicant company is essentially self-represented by its principal, Mr. Bichan, and as such is not knowledgeable about the role of this Court on an application for judicial review. Nevertheless, the Applicant cannot advance in this Application a position relating to Mr. Bichan's marriage breakdown or mental state, because this argument was available to the Applicant but not relied upon in its requests to CRA.

[4] For the reasons that follow, and on the basis of the record properly before this Court, I find that the Decision was reasonable. The Application is accordingly dismissed. I have declined, however, to award the costs requested by the Respondent.

II. Background

[5] By request dated February 10, 2014, the Applicant sought relief from penalties and interest on its GST/HST account levied between 2004 and 2011 [First Request]. The First Request was based solely on "financial hardship/inability to pay". By follow up letter received by CRA on March 4, 2015, the Applicant sent further supporting materials at the request of a

Taxpayer Relief Officer [TRO] reviewing the file, including bank statements, invoices, and profit loss and balance sheets. The TRO recommended that the First Request be refused. This recommendation was accepted by a Senior TRO and Team Leader. The Team Leader then refused the First Request [First Refusal] on behalf of the Minister by letter dated March 30, 2015.

[6] The First Refusal was based on the following reasons: the Applicant had (i) a history of non-compliance with its tax obligations, (ii) knowingly allowed a balance to exist upon which interest had accrued, (iii) not exercised reasonable care, and (iv) not acted quickly to remedy delays or omissions. In the First Refusal, the Team Leader also noted CRA's definition of financial hardship as being a situation where the corporation's continuity of business operations would be jeopardized without the requested relief.

[7] On or around May 4, 2015, the Applicant requested that the First Refusal be administratively reviewed [Second Request], arguing that the First Refusal failed to refer to evidence or offer support for its conclusions.

[8] A different TRO reviewed the Second Request and again recommended its refusal. This recommendation was accepted by a Senior TRO and another Team Leader, who then refused the Second Request on behalf of the Minister [Second Refusal], by letter dated October 29, 2015.

[9] In the Second Refusal, the Team Leader noted that, in determining financial hardship, the Applicant's "operational continuity" had been considered, and particularly whether it was able to

continue employing its employees. The Team Leader concluded that the Applicant was still operational and had never had employees, meaning it was not suffering "financial hardship" as defined by the CRA. It was also noted that the Applicant's financials indicated a surplus in 2014, showing an ability to pay the penalties and interest owed.

[10] The Applicant sought judicial review of the Second Refusal, which the parties settled by agreement to refer the matter for reconsideration [Third Request]. A Senior TRO conducted the reconsideration and recommended refusal. Another Senior TRO and Team Leader agreed with the recommendation.

[11] The Decision refusing the Third Request was ultimately communicated to the Applicant by letter dated October 31, 2016 by the Regional Chief of Appeals for the CRA's Atlantic Region. The negative Decision (which is the subject of this Application) indicated that taxpayer relief under section 281.1 of the *ETA* was discretionary, and would ordinarily not be granted absent circumstances beyond the registrant's control, or circumstances relating to the actions of the CRA, the registrant's inability to pay, or financial hardship. The Decision set out that the Applicant's explanations provided in previous relief requests, financial information, and history of compliance, had all been considered.

[12] While it was accepted that the Applicant experienced a drop in revenue from the tax year ending in March 2003 to March 2004, the Decision noted that compliance issues began prior to 2004 and continued until 2011 (including late filing of returns). It was found that the Applicant had provided no reason that would permit a finding that the Applicant was prevented from filing

its returns by the required dates. As such, relief from the penalties relating to the Applicant's late remittances was not granted.

[13] The Decision further noted that, although any amounts which the Applicant collected from its clients were deemed to be held in trust until sent to the Receiver General, the Applicant had admitted to using such trust monies to fund its business operations. Further, payments had been made by the Applicant to CRA since 2012 through a "requirement to pay" (a collections mechanism issued to one of the Applicant's receivables, roughly equivalent to a garnishment), and the Applicant's business operations had not been jeopardized. To the contrary, the Applicant had turned a profit in 2013, 2014, and 2015.

III. Issues and Standard of Review

[14] The standard of review of a discretionary decision under section 281.1 of the *ETA* is reasonableness (*Price v Canada (National Revenue)*, 2016 FC 906 at para 11). This Court should intervene only if the Decision was unreasonable, such that it was unjustified, unintelligible or lacked transparency, or fell outside of the "range of possible, acceptable outcomes" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[15] Furthermore, as explained to Mr. Bichan during the hearing, the Court cannot put itself into the Minister's shoes and consider the Applicant's request anew (*North Vancouver Airlines Ltd v Canada (Minister of National Revenue)*, 2006 FC 531 at para 41 [*North Vancouver*]). The Applicant must demonstrate a reviewable error in the Decision justifying this Court's interference.

IV. Analysis

[16] In *Gordon v Canada (Attorney General)*, 2016 FC 643, Justice Mactavish summarized the Minister's discretion under section 281.1 of the *ETA* as follows:

> [14] Subsection 280(1) of the *Excise Tax Act* imposes liability for penalties and interest on amounts owing to the Receiver General in accordance with the Act. However, subsection 281.1(1) of the Act provides the Minister and his Delegates with a broad discretionary power to waive or cancel interest owed by a taxpayer: *Guerra v. Canada Revenue Agency*, 2009 FC 459 at para. 17, 348 F.T.R. 1.
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> [15] The Act is silent, however, regarding the manner in which the Minister should make this decision, as well as the appropriate criteria the Minister should apply in doing so. As a result, the CRA has developed a number of guidelines to assist the Minister when considering a taxpayer's request for relief.

[17] At all material times during the course of this matter, Information Circular IC07-1 provided guidance to the Minister with respect to section 281.1 of the *ETA*. The Information Circular indicates, for example, that financial hardship, inability to pay or extraordinary circumstances beyond an applicant's control may justify taxpayer relief. In making such a determination, the Minister's delegates may consider the taxpayer's history of non-compliance, whether a balance was knowingly allowed to exist, whether the taxpayer was careless or negligent in conducting its affairs, and whether the taxpayer acted quickly to remedy delays or omissions.

[18] The Respondent also relies upon the affidavit of the Senior TRO who reviewed the Third Request and recommended its refusal. Ordinarily, a decision-maker is not permitted to file an affidavit in support of either party to a judicial review; however, there are exceptions to this

general rule, including to clarify procedural elements (*Girard v Canada (Attorney General)*, 2007 FC 966 at paras 10-11). Here, I find that the Senior TRO's affidavit is admissible only to the extent that it clarifies procedural elements of the Decision under review (see *Coley v Canada (National Revenue)*, 2017 FC 210 [*Coley*] at para 7).

[19] The Applicant, for its part, relies upon two affidavits sworn by Mr. Bichan and attendant exhibits. Much of the material contained in these affidavits, however, was not before the Minister's delegates at the time of the Decision; for example, Mr. Bichan exhibits a letter written after the Applicant received the Decision, as well as materials and arguments relating to the breakdown of Mr. Bichan's marriage.

[20] The Applicant's Requests for taxpayer relief were made on the sole basis of financial hardship and inability to pay. The Applicant raised circumstances relating to Mr. Bichan's marriage breakdown for the first time in its letter to the Chief of Appeals post-dating the Decision. It continues to advance these arguments in this Application, and Mr. Bichan addressed them in his oral arguments to the Court.

[21] I find that the evidence submitted by the Applicant relating to the purported "extraordinary circumstances" of Mr. Bichan's marriage breakdown is not admissible. The information was simply not before the Minister's delegates at the time of the Decision — or at the time of the First and Second Refusals (*Coley* at para 11). Neither does the evidence relate to a breach of procedural fairness (*Gauthier v Canada (Attorney General)*, 2017 FC 697 at para 13).

[22] Mr. Dougal effectively admitted to this late disclosure of what he considers to be material facts, when he deposed for the purposes of this Application that he only recently turned his mind to his marriage breakdown and mental distress as the true cause of his non-compliance with his tax obligations.

[23] I agree with the Respondent that the burden lies with the Applicant to provide the Minister, in taxpayer relief applications, with all necessary evidence prior to the rendering of a decision (*3651541 Canada Inc v Canada (Attorney General)*, 2007 FC 1255 at paragraph 20; *Coley* at para 37).

[24] The Applicant cannot now, on judicial review, advance arguments and lead evidence relating to the breakdown of Mr. Bichan's marriage or his mental condition, because these arguments were available to the Applicant but not pursued before the Minister's delegates (*Formosi v Canada Revenue Agency*, 2010 FC 326 at para 3).

[25] Given the foregoing, the key question, and indeed the only legal issue before me now, is whether the Decision under review is reasonable, based on the evidence before the Minister's delegates at the time the Decision was made.

[26] In that regard, the Applicant submits that the Minister's delegates unreasonably judged its financial situation based on the same criteria as the Minister would a large corporation, which it submits to be unrealistic and unfair.

[27] Furthermore, Mr. Bichan deposes that he was told by a CRA representative that the financial situation of a company's director is not considered in assessing the financial health of a company, which the Applicant argues does not make sense in the context of a closely-held corporation with a single shareholder and employee. The Applicant also takes issue with the Minister's delegates' inference that a company that is operating cannot therefore be experiencing financial difficulties. It submits that a small company's ability to turn a profit may vary considerably from year to year.

[28] I cannot agree with the Applicant's position. This Court has recognized that sections 281.1(1) and (2) of the *ETA* confer a broad discretion upon the Minister to waive or cancel interest, and that the scope of judicial intervention is limited (*North Vancouver* at para 42). I do not find that the Decision was unreasonable for the any of the reasons advanced by the Applicant.

[29] To the contrary, I find that the Decision was rendered after an extensive review of the Applicant's circumstances (*Coley* at para 37). I find it was reasonable for the Minister's delegates to separate Mr. Bichan's personal financial hardship from that of the Applicant (*North Vancouver* at para 59).

[30] A court must respect the legal relationships created by a taxpayer and not inquire into underlying "economic realities" *(Meredith v Canada (Attorney General)*, 2002 FCA 258 at para 12, cited in *Caine v Canada Revenue Agency*, 2011 FC 11 at para 67 [*Caine*]). *Caine* also

invoked *Wishing Star Fishing Co v "BC Baron" (The)* (1987), 45 DLR (4th) 321 (FCA) as follows:

> 14 [It is] tempting ... to disregard separate corporate existence and to analyze an act in terms of the individual. In the day-to-day business affairs of a corporation, that way of proceeding may create no difficulty. The same cannot be said, however, as a matter of strict law. The individual and the corporation are separate and distinct legal persons (Salomon v. Salomon & Co., [1897] A.C. 22 (H.L.)), and any failure to appreciate that distinction can only lead to confusion and to unforeseen legal consequences.
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> [Excerpted in *Caine* at para 68]

[31] Although in *Caine* the Court reviewed a CRA decision made under different taxpayer relief provisions (under the *Income Tax Act*, RSC, 1985, c 1 (5th Supp)), I find that Justice Russell's reasoning applies equally to the arguments made by the Applicant in this Application:

> 70 In the instant case, the Applicant established a corporation for the benefits it would provide him. Later, when the burdens outweighed the benefits, he chose to disregard the corporate structure, believing that, given the economic realities of his dilemma, his actions were justified. He asks this Court to recognize these economic realities and find in his favour. […] The Applicant has provided no authority for doing so. He must take the burdens with the benefits. Based on my review of the jurisprudence, the CRA Decision falls within the acceptable range as defined by *Dunsmuir*.

[32] I am also unpersuaded by the Applicant's argument that the Decision unreasonably assessed the Applicant's financial circumstances by the same criteria as a large corporation. The Minister's delegates reasonably found that the Applicant was continuing to operate throughout and after a period of financial difficulty, and even when the "requirement to pay" was put in place. From this, the Minister's delegates reasonably inferred that the Applicant was not experiencing the type of "financial hardship" that would justify taxpayer relief. Indeed, the

Applicant's initial request to CRA merely sought "whatever relief [was] possible", stating that the Applicant would "continue working to clear" any remaining amounts owed.

[33] As was made clear to the Applicant in its correspondence with the Minister's delegates, the CRA considers "financial hardship" to be a state where business operations will be jeopardized without taxpayer relief. The Applicant continued to operate through the period in question and to the time of the Decision, during which it whittled down its debt. It was thus reasonable for the Minister's delegates to conclude that a state of "financial hardship", in the legally relevant sense, did not exist, either between 2004 and 2011 or at the time of the Decision.

[34] The Minister's delegates' refusal to grant relief with respect to penalties arising from the Applicant's late returns is also reasonable. There was nothing before the Minister's delegates explaining why the returns were not filed on time. It is one thing not to remit payments with returns. It is quite another to fail to file returns on time. Mr. Bichan deposed that the Applicant's issues with compliance were more directly related to his emotional and psychological distresses than to the Applicant's financial troubles. But as that evidence is not properly before me, Mr. Bichan's alleged psychological state does not assist the Applicant on this point either.

V. Conclusion

[35] Despite the difficult financial situation that the Applicant evidently endured, and despite Mr. Bichan's admirable efforts to advocate on behalf of the Applicant, I nonetheless find the Decision to be reasonable. The Application is therefore dismissed.

[36] The Respondent seeks costs. Having considered Mr. Bichan's submissions on costs, I will, on this occasion, and taking into account all the circumstances, make no order as to costs. However, as I explained to Mr. Bichan during the hearing, this does not mean that costs will not be ordered against the Applicant in any future court proceedings.

[37] Finally, I grant the Respondent's request made pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106, and on which the Applicant takes no position, to change the style of cause such that the Respondent is the Attorney General of Canada.

JUDGMENT in T-2049-16

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No costs are awarded; and

3. The style of cause is hereby amended, with immediate effect, to name the "Attorney General of Canada" as the Respondent.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2049-16
STYLE OF CAUSE:	DOUGAL & CO INC v ATTORNEY GENERAL OF CANADA
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APPEARANCES:

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