

Federal Court



Cour fédérale

Date: 20180913

Docket: T-1831-17

Citation: 2018 FC 912

Ottawa, Ontario, September 13, 2018

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**SUBHASH PARMAR,
CANPAR DEVELOPMENTS INC.**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Canpar Developments Inc., [Canpar] seeks judicial review of a decision of the Minister of National Revenue, dated November 8, 2017, refusing to exercise the discretion pursuant to subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*Income Tax Act*] to cancel or waive the gross negligence penalty previously assessed against Canpar. The Minister's Decision was made by the Minister's Delegate, a Canada Revenue Agency [CRA] officer.

[2] For the reasons that follow, the Application is dismissed.

I. Background

[3] The Applicant, Canpar, is a corporation, which at the relevant time, was involved in building residential properties. Canpar's two shareholders, Mr. Subhash Parmar and Mr. Terry Canning, are the directors of the corporation. Mr. Parmar was granted leave to represent Canpar by Order of Prothonotary Aalto, dated December 21, 2017.

[4] Canpar owned a residential lot and had borrowed money to finance the construction of a house on this lot. In 2005, its lenders demanded repayment. A new lender provided financing for the property on the condition that it was held by Mr. Parmar and Mr. Canning personally, rather than by Canpar. On or about September 9, 2005, Canpar transferred the property to Mr. Parmar and Mr. Canning as tenants in common.

[5] The transfer constituted a disposition of property which triggered tax obligations for Canpar under both the *Income Tax Act* and the *Excise Tax Act*, RSC 1985, c E15 [*Excise Tax Act*]. Canpar did not report this in its tax returns. Following an audit, the CRA assessed Canpar on the basis that it had transferred the property and owed both income tax and goods and services tax [GST]. The CRA also imposed gross negligence penalties under subsection 163(2) of the *Income Tax Act* and section 285 of the *Excise Tax Act* due to Canpar's omissions.

[6] Canpar filed objections to the gross negligence penalties with CRA. It took the position that it only transferred the legal title of the property while retaining the beneficial title, thereby creating a bare trust that did not give rise to tax obligations.

[7] The CRA Appeals Division considered Canpar's objections. In two separate letters to Canpar, dated May 29, 2009, the CRA noted its intention to uphold the initial determinations under the *Income Tax Act* and the *Excise Tax Act*, respectively. The CRA provided the same reason to uphold the gross negligence penalties for both, noting that Mr. Parmar and Mr. Canning were not "ignorant or new to matters of taxation", and that they should have known their obligations. The May 29, 2009 letters noted that Canpar would have 30 days to provide additional information before the two decisions were confirmed.

[8] According to the Respondent, the CRA confirmed the penalties under the *Income Tax Act* and *Excise Tax Act* in two separate Notices of Confirmation, dated August 25, 2009. These Notices are not included in Canpar's Record or in the Respondent's Record. However, the Report of the Income Tax Auditor, dated October 20, 2017 and approved by an Independent Third Party Reviewer on November 1, 2017, provides a chronology of the assessment and the objection process. This Report indicates that letters of confirmation were sent on August 25, 2009 and that both indicated that Canpar had a right of appeal to the Tax Court of Canada [TCC].

[9] Canpar appealed the decision regarding the *Excise Tax Act* to the TCC but did not appeal the decision regarding the *Income Tax Act*.

A. *The Decision of the Tax Court of Canada*

[10] In *Canpar Developments Inc v Her Majesty the Queen*, 2011 TCC 353 [*Canpar 2011*], the TCC considered the appeal regarding the GST assessment and gross negligence penalty under the *Excise Tax Act*. The TCC found that Canpar could not establish that the property was the subject of a bare trust rather than a transfer for which GST was owed. Canpar was found liable to pay GST under the *Excise Tax Act*. However, the TCC found that the Government had not met the high standard required to justify the imposition of the gross negligence penalty, explaining at paras 21-22:

In the circumstances of this case, I am not satisfied that the [Applicant's] conduct regarding the failure to collect and remit GST on the transfer of the property in issue amounted to gross negligence on its part. I accept that Mr. Parmar and Mr. Canning believed that GST would not become payable until the property was disposed of to a non-arm's length party. I also accept that they believed that the [Applicant] maintained some interest in the property given that it continued to pay the expenses related to it...

In my view, the tax consequences of a transfer between non-arm's length parties is often a complex matter and one that experienced business people may misunderstand. Again, this alone while amounting to negligence would not constitute gross negligence as that term has been defined in the case law.

[11] The CRA subsequently sent a revised GST assessment to Canpar without the gross negligence penalty pursuant to section 285 of the *Excise Tax Act*. Canpar settled this tax debt promptly.

B. *Income Tax Assessment and Gross Negligence Penalty*

[12] As noted, Canpar did not appeal the decision regarding the *Income Tax Act* to the TCC, nor did it pay the tax and the gross negligence penalty under the *Income Tax Act*. The CRA made no attempt to collect the outstanding amount until 2015. The CRA cites an administrative oversight as the reason for its five year delay in pursuing collection.

[13] On March 3, 2015, the CRA contacted Canpar about its outstanding debt under the *Income Tax Act*, which amounted to \$22,000 (most of which represents the gross negligence penalty). The CRA advised Canpar that it would cancel any interest which had accrued on that amount as a result of its delay in pursuing collection.

[14] In November 2015, Canpar requested taxpayer relief from the gross negligence penalty pursuant to subsection 220(3.1) of the *Income Tax Act*. Canpar argued that because the TCC had found that the transfer of title by Canpar was not subject to the gross negligence penalty under the *Excise Tax Act*, the penalty could not be imposed under *Income Tax Act* based on the same transfer of title.

[15] Canpar's request for taxpayer relief was supported by a letter from its accountant explaining that Canpar had intended to appeal both CRA decisions and had instructed its agent, Howard Golfman, to do so. However, Mr. Golfman only appealed the *Excise Tax Act* decision. The accountant further noted that Canpar regarded the entire matter as settled based on the TCC decision until it received the CRA's March 3, 2015 letter, which noted that the TCC decision

only applied to the *Excise Tax Act*. The accountant suggested that it would be a miscarriage of justice to demand payment of the gross negligence penalty under the *Income Tax Act* given the TCC decision.

C. *CRA First Level Review*

[16] The CRA's decision is set out in its letter dated November 25, 2016. The letter explains that taxpayer relief was denied because Canpar had not appealed the *Income Tax Act* decision to the TCC, which signalled that it was content with the decision. The CRA noted that the "taxpayer relief provisions are not intended to override or bypass the appeal process."

D. *CRA Second Level Review*

[17] The CRA conducted a second level review, also referred to as an administrative review, of Canpar's request for taxpayer relief in response to a letter of inquiry dated June 26, 2017, from Member of Parliament Mark Holland, on behalf of Mr. Parmar and Canpar. An administrative review of a request for taxpayer relief is an entirely new determination conducted by different CRA officers than those involved in the first level review.

[18] An Income Tax Auditor [the Auditor] re-examined Canpar's file, set out the chronology dating back to 2005-06, and recommended that the request for taxpayer relief be denied. The Minister's Delegate adopted the recommendation of the Auditor and advised Canpar by letter, dated November 8, 2017, that its request for taxpayer relief was denied. This is the decision under review.

II. The Decision Under Review

[19] The Minister's Delegate relied on the recommendation of the Auditor. The reasons of the Auditor, therefore, also constitute the reasons for the decision (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37, [2006] 3 FCR 392).

[20] The Auditor set out the relevant facts, the chronology of the objection and CRA appeals process, the TCC decision, and the reasons cited by Canpar for taxpayer relief. The Auditor also cited the CRA's Information Circular IC07-1R1 (IC07), which guides decision-makers when reviewing requests for taxpayer relief. The Circular provides that penalties may be waived where they resulted from "extraordinary circumstances beyond the person's control", and offers some examples of such circumstances.

[21] The Auditor noted that taxpayers are responsible for ensuring the accuracy of their tax returns. The Auditor excused the CRA's delay in informing Canpar of its outstanding tax debt under the *Income Tax Act*, noting that the CRA had waived the interest on the penalty caused by its "administrative oversight".

[22] The Auditor found that if Canpar disagreed with the imposition of the gross negligence penalty, it should have appealed the decision to the TCC, as it had with respect to the penalty imposed under the *Excise Tax Act*. The Auditor noted that the taxpayer relief provisions should not be used to "override or bypass the appeals process."

[23] The Auditor also cited paragraph 87 of IC07, which states that:

Generally, the CRA will not reassess a statute-barred return if a request is made because of a court decision. Where a taxpayer has chosen not to take advantage of his or her right of objection or appeal for a tax year, request made to reassess a statute-barred return based only on the result of an appeal by another taxpayer or by the same taxpayer will not be granted under subsection 152(4.2)

[24] After reviewing all the circumstances, the Auditor concluded that there were no extraordinary circumstances beyond Canpar's control and recommended that the initial decision to refuse the request for relief be upheld.

[25] The Minister's Delegate's letter to Canpar, dated November 8, 2017 (the decision), provided a brief summary of the background and acknowledged Canpar's position: that Canpar should not be subject to the gross negligence penalty under the *Income Tax Act* given the TCC decision regarding the gross negligence penalty under the *Excise Tax Act*.

[26] The Minister's Delegate's letter reiterated the Auditor's reasons: Canpar had been advised of its right to appeal to the TCC, but did not do so, which implies that it believed the gross negligence penalties were correctly applied; the taxpayer relief provisions were not meant to override or bypass the appeals process; and paragraph 87 of IC07 states that the CRA will "generally" not revisit statute-barred returns based on Court decisions.

[27] The Minister's Delegate stated that the TCC "cancelled the gross negligent [*sic*] penalty applied on Canpar's GST account because Justice B. Paris accepted that Mr. Parmar and Mr. Canning believed that GST would not be payable until the property was disposed of to an

arm's length party. For income tax purposes, gross negligence penalty was applied by audit because you and your representative were unable to successfully demonstrate that a bare trust existed at the time of the transfer.”

III. The Issue

[28] The key issue is whether the decision of the Minister's Delegate which refused to exercise the discretion to grant relief against the penalty imposed for gross negligence under the *Income Tax Act*, is reasonable.

IV. The Standard of Review

[29] The standard of review for discretionary decisions to grant or deny relief pursuant to subsection 220(3.1) of the *Income Tax Act* and section 281.1 of the *Excise Tax Act* is reasonableness (*Canada Revenue Agency v Telfer*, 2009 FCA 23 at para 24, [2009] FCJ No 71 (QL) [*Telfer*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30, [2011] 3 SCR 654; *ConocoPhillips Canada Resources Corp v Canada (National Revenue)*, 2016 FC 98 at para 24, [2016] FCJ No 68 (QL); *Takenaka v Canada (Attorney General)*, 2018 FC 347 at paras at 24-25, [2018] FCJ No 453 (QL) [*Takenaka*]).

[30] To determine whether a decision is reasonable, the Court looks for “the existence of justification, transparency and intelligibility within the decision-making process” and considers “whether the decision falls within a range of possible, acceptable outcomes which are defensible

in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]). The role of the Court is not to re-weigh the evidence considered by the decision-maker or to re-make the decision.

[31] The assessment of the reasonableness of the decision is based on the record before the decision-maker, in this case, the Minister’s Delegate, at the time of the decision and not on any information that may now be available or that may have been available but was not part of the record (*Coley v Canada (National Revenue)*, 2017 FC 210 at para 11, [2017] FCJ No 220 (QL)). Canpar’s 2015 financial statements, which it included in its Application Record, were not before the Minister’s Delegate, and cannot be considered.

V. Is the Decision of the Minister’s Delegate Reasonable?

A. *Canpar’s Submissions*

[32] Canpar submits that the Minister’s refusal to grant taxpayer relief against the gross negligence penalty imposed with respect to the *Income Tax Act* does not reflect an accurate and fair assessment of all the circumstances, nor does it reflect the purposes of the taxpayer relief provisions. Canpar appears to acknowledge that the decision to impose the gross negligence penalty is beyond the scope of this judicial review, but suggests that the validity of the imposition of the penalty is important context. More generally, Canpar notes that it has exhausted all of its remedies and seeks relief against an unfair and inconsistent decision.

[33] Canpar points to *Canada v Guindon*, 2013 FCA 153, [2014] 4 FCR 786, where the Court of Appeal noted that the discretion to waive the penalties pursuant to subsection 220(3.1) requires the Minister to consider all the relevant circumstances.

[34] Canpar notes that the letter with respect to the *Excise Tax Act* set out an amount owing, but the letter with respect to the *Income Tax Act* did not. Canpar now argues that it regarded the letter with respect to the *Income Tax Act* as a “nil” assessment that cannot be appealed (*The Queen v Consumers’ Gas Co.*, [1987] 2 FC 60 at 9, 8 FTR 321 (FCA)). Canpar further submits that it was not notified that it could appeal the decision with respect to the *Income Tax Act*. Canpar now submits that if CRA had advised it of the amounts owing with respect to the *Income Tax Act* in May 2009, and advised it of the right to appeal, it would have had one year to appeal and would have done so.

[35] Canpar does not acknowledge that it received further correspondence, dated August 25, 2009, from the CRA confirming the imposition of the penalties. Canpar notes that these letters are not in the Respondent’s Record. However, in its written submissions, Canpar does acknowledge that the CRA imposed gross negligence penalties under both the *Income Tax Act* and the *Excise Tax Act*.

[36] Canpar submits that because the TCC found that Canpar did not have the requisite intent required for a gross negligence penalty under the *Excise Tax Act*, it should not be liable for the same penalty under the *Income Tax Act*. Canpar argues that it would be unjust to permit the

penalty under the *Income Tax Act* to continue to apply given that it arises from the same transfer of property.

[37] Canpar notes a decision of the TCC, which the Court assumes to be *897366 Ontario Ltd v The Queen*, [2000] GSTC 13, [2000] TCJ No 117 (QL) (TCC) [Informal Procedure] [897366], in support of its position that the *Income Tax Act* and *Excise Tax Act* have the same purpose, which is to raise revenue, and that the penalties imposed under both Acts are to sanction a person for failing to carry out their statutory duty. In other words, the penalties target the same mischief, which Canpar submits is the transfer of title of the residential lot. As a result, Canpar suggests that the result under the *Income Tax Act* should be consistent with the TCC determination in *Canpar 2011*; that the *Excise Tax Act* gross negligence penalties were unjustified.

[38] Canpar also argues that the imposition of the penalty should be barred by the doctrine of *res judicata* based on the TCC decision. Canpar submits that the TCC addressed the same issue between the same two parties and, therefore, the CRA cannot take a different position with respect to the penalty imposed pursuant to the *Income Tax Act* (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 20, [2001] 2 SCR 460 [*Danyluk*]).

[39] Canpar disputes the CRA's suggestion that the gross negligence penalties under the *Excise Tax Act* and the *Income Tax Act* were applied for different reasons, noting that in the CRA's letters dated May 29, 2009, in response to Canpar's objections to both penalties, the CRA provided the same reasons for the imposition of the penalties under the *Income Tax Act* and the *Excise Tax Act*.

[40] Canpar also disputes that it accepted the imposition of the penalty under the *Income Tax Act*. In its written submissions, Canpar argues that it was under the impression that the TCC judgment applied to the gross negligence penalties under both the *Income Tax Act* and *Excise Tax Act*. Canpar adds that once it was advised by the CRA, five years later, that it remained liable for the penalties under the *Income Tax Act*, it was too late to appeal to the TCC.

[41] Canpar further submits that the gross negligence penalty should be waived due to CRA's delay. Canpar points to paragraph 26 of IC07, which provides that "penalties and interest may also be waived or cancelled if the penalty and interest arose primarily because of actions of the CRA, such as: processing delays that result in the taxpayer not being informed, within a reasonable time, that an amount was owing."

B. *The Respondent's Submissions*

[42] The Respondent submits that the CRA's decision is reasonable. The Minister's Delegate considered all the circumstances in determining whether to exercise the discretion to grant relief against the gross negligence penalty imposed under the *Income Tax Act*.

[43] The Respondent also points to IC07, which provides a non-exhaustive list of factors to be considered in determining whether relief should be granted, including extraordinary circumstances beyond the taxpayer's control, financial hardship, and departmental error or delay on the part of the CRA. The Respondent submits that Canpar did not assert any of these factors nor provide supporting evidence. Moreover, none of these factors apply to the present circumstances.

[44] The Respondent submits that the taxpayer relief provision under the *Income Tax Act* is not a vehicle to challenge the validity of the assessment of a penalty. The Respondent adds that Canpar is also asking the CRA to reassess a statute-barred return based on the TCC decision that only addressed the *Excise Tax Act*. The Respondent submits that the Minister's Delegate could have dismissed Canpar's request on this basis alone.

[45] The Respondent emphasizes that Canpar should have appealed the decision to impose the gross negligence penalty under the *Income Tax Act* to the TCC. The Respondent disputes Canpar's current argument that it was not aware of the amount it owed pursuant to the *Income Tax Act* and was not aware that it had a right to appeal. Canpar was clearly aware of its rights of appeal to the TCC given that it appealed the penalty pursuant to the *Excise Tax Act*.

[46] The Respondent further disputes Canpar's assertion that it regarded the May 29, 2009 letter as a "nil" assessment of income tax owing because no amount was set out. The Respondent points to the report of the Auditor which provides a description of the background, the notices that were sent, the objections, the response from CRA, and the confirmations of the penalties. The May 29, 2009 letter was a confirmation of previous assessments and was part of a line of correspondence which included a further letter of confirmation, dated August 25, 2009, which also noted the right of appeal.

[47] The Respondent submits that the TCC decision is not relevant to the determination of whether Canpar was grossly negligent under the *Income Tax Act*. The Respondent reiterates the Minister's Delegate's position that the TCC found that the gross negligence penalties should not

be imposed pursuant to the *Excise Tax Act* upon being satisfied that Canpar was not aware it had to pay GST. However, the gross negligence penalties under the *Income Tax Act* were also imposed because Canpar could not demonstrate the existence of a bare trust. The Respondent points to the Auditor's Report which recounts the chronology and the basis for the imposition of the penalties.

[48] The Respondent submits that the Auditor's report and recommendation, which the Minister's Delegate accepted, and the Minister's Delegate's decision demonstrate that Canpar's position was fully understood and that all the relevant circumstances were considered. The Minister's Delegate reasonably found that Canpar could have appealed the *Income Tax Act* decision to the TCC, but it did not do so. Its failure to do so cannot be attributed to ignorance of the amount owed or of its appeal rights. The circumstances were not beyond its control.

VI. The Decision is Reasonable

[49] The decision of the Minister's Delegate to refuse to grant relief against the imposition of the gross negligence penalty may appear harsh given the overall circumstances which gave rise to its imposition. It may also appear to be inconsistent with the TCC decision regarding the gross negligence penalty imposed under the *Excise Tax Act* given that the same transfer of property resulted in the assessment and penalty under both Acts. However, the decision under review cannot be found to be unreasonable.

[50] It is important to note that this judicial review focuses on the decision of the Minister's Delegate, on behalf of the Minister, to refuse to exercise the discretion to grant relief against the

gross negligence penalty imposed under the *Income Tax Act*. This Court is not tasked, nor does it have the jurisdiction, to determine whether the gross negligence penalty was correctly or reasonably imposed pursuant to the *Income Tax Act*.

[51] In the present case, Canpar desires and expects fairness. The result of this judicial review will not meet this expectation. The role of this Court is not to determine what is fair, but to determine whether the decision of the Minister's Delegate pursuant to subsection 220(3.1) of the *Income Tax Act* to refuse taxpayer relief is *reasonable* as this term is understood in the realm of administrative law. As noted by the Court in *Takenaka* at para 37:

The task of this Court on judicial review is not to determine what is fair in the circumstances but whether the Delegate's decision is reasonable in the legal sense of the standard described above. It covers a broad range of outcomes which may subjectively appear to be unfair...

[52] Canpar relied on 897366 to argue that penalties under both Acts target the same mischief and therefore, if one penalty is not justified, the other is also not justified. 897366 must be put in its proper context; it was an appeal to the TCC from an assessment and penalties under the *Excise Tax Act*. The TCC found that the onus was on the Minister to establish the facts to justify the imposition of the penalty pursuant to section 285 of the *Excise Tax Act*. The Court stated at para 14, citing *Alex Excavating Inc. v Canada*, [1995] GSTC 57, [1995] TCJ No. 1080 (QL) at para 63:

Both the *Excise Tax Act* and the *Income Tax Act* were enacted to raise revenue for the Government of Canada. They are not strictly speaking different statutes *in pari materia* since the taxes are different. However, s. 285 of the Act and subsec. 163(2) of the ITA both touch on the same subject, that is, penalizing a person who knowingly, or under circumstances amounting to gross negligence, in the carrying out of a statutory duty, makes a false statement in a

return from which a tax is calculated. The language of s. 285 and subsec. 163(2) of the ITA are similar and they target the same mischief. I cannot imagine that in this situation Parliament intended that the Minister have the burden of establishing the facts justifying a penalty assessed by the Income Tax Act and shift the burden of establishing the facts vacating the penalty on the taxpayer in the *Excise Tax Act*. It is implicit in s. 285 that the burden of establishing the facts justifying the assessment of the penalty issued pursuant to that section is on the Minister.

[Footnotes omitted]

[53] If Canpar had appealed the gross negligence penalty imposed pursuant to the *Income Tax Act* to the TCC, the TCC would have had the opportunity to consider Canpar's argument that it did not have the requisite intent to justify its imposition. Canpar did not pursue an appeal. While the penalties imposed under both Acts may target the same mischief — i.e., gross negligence in fulfilling the statutory duty to report certain transactions — the issue on this judicial review is not whether Canpar's conduct met the threshold for gross negligence.

[54] Canpar's submission that *res judicata* should apply to ensure the same outcome does not assist Canpar. The doctrine or principle of *res judicata*, or the related concept of issue estoppel (which may be more appropriate in the context of administrative decisions) may prevent parties from revisiting issues that have been decided in prior proceedings (*Toronto (City) v CUPE, Local 79*), 2003 SCC 63 at para 23, [2003] 3 SCR 77 [*CUPE*]. Three conditions must be met: the same issue must have already been decided in an earlier proceeding; the previous decision must have been final; and the parties in both proceedings must be the same (*Danyluk* at para 25).

[55] The same issue was not decided in the earlier proceeding. *Canpar 2011* was the appeal of the CRA decision pursuant to the *Excise Tax Act* regarding the assessment of GST and the gross

negligence penalty. The issue before the TCC was whether the assessment and penalty were justified. The TCC found that Canpar did not meet the high threshold to justify the imposition of the gross negligence penalty. However, in the decision under review, the Minister's Delegate addressed a different issue; whether a request for tax payer relief should be granted (i.e., whether the gross negligence penalties imposed under the *Income Tax Act* should be waived). Although the underlying triggering event which gave rise to the taxes and the penalties, the transfer of the property, was the same, the issue for the Minister's Delegate was quite different than the issue determined by the TCC in *Canpar 2011*. The legal issue to be determined by this Court is also quite different as this is a judicial review to determine whether the decision of the Minister's Delegate is reasonable.

[56] Canpar may have pursued an argument about *res judicata* or issue estoppel if it had appealed the gross negligence penalty under the *Income Tax Act* to the TCC. The record supports Canpar's submission that the gross negligence penalties were initially imposed for the same reason under both Acts: that Mr. Parmar and Mr. Canning should have known better because they were in business and were aware of their tax obligations. The TCC found that this reason was not sufficient to justify the imposition of a gross negligence penalty under the *Excise Tax Act*. However, what Canpar might have argued if it had appealed, and whether the TCC would have reached the same finding with respect to the *Excise Tax Act*, is speculation and is not relevant to this judicial review of the Minister decision.

[57] The Respondent's submission that the reasons for the penalties differed appears to be based on the comment by the Minister's Delegate that the penalty under the *Income Tax Act* was

imposed due to Canpar's failure to establish a bare trust. Although this issue need not be addressed, earlier references to the failure to establish a bare trust appear to relate only to the imposition of the tax and not the penalty. The reasons for the imposition of the gross negligence penalty under the *Income Tax Act* and *Excise Tax Act* stated by the CRA in the first level review were identical: that Mr. Canning and Mr. Parmar should have known their obligations.

[58] As noted above, the Court's role in this judicial review is to determine whether the Minister's Delegate's decision to refuse to waive the penalty is reasonable, not whether the penalty should have been imposed in the first place (*Martineau v Canada Revenue Agency*, 2018 FC 595 at para 17, [2018] FCJ No 652 (QL) [*Martineau*]; *Taylor v Canada (Minister of National Revenue)*, 2012 FC 994 at paras 22-23, 417 FTR 41).

[59] In *Guindon*, relied on by Canpar to argue that the Minister must take into account all the relevant considerations in determining whether to grant taxpayer relief, Justice Stratas commented on the differences between the role of the Minister in imposing a penalty and in exercising the discretion to grant relief and to forgive such penalties. Justice Stratas explained that a taxpayer could appeal the assessment of a tax or imposition of a penalty to the TCC, and in some circumstances could seek relief against a harsh penalty, but through a different process, noting at para 55-56:

[55] As is well-known, an appeal ultimately lies to the Tax Court from the assessment of penalties. In that appeal, pursuant to subsection 163(3) of the Act, the burden lies on the Minister to demonstrate the facts justifying the imposition of the penalty. A number of procedural rules – including the right to adduce evidence, to test the Minister's evidence, and to obtain disclosure of relevant documents – give the appellant a meaningful opportunity to challenge the assessment.

[56] Undoubtedly, in certain individual circumstances, penalties set by formulae or in fixed amounts – while administrative in nature and not triggering section 11 of the Charter – can be harsh. However, relief against harsh penalties can potentially be had under a different provision of the Act, subsection 220(3.1). Under that subsection, those subject to a section 163.2 penalty can ask the Minister to exercise her discretion to cancel all or part of the penalty. Before us, the Crown conceded the availability of this remedy.

[60] With respect to the scope of the Minister’s discretion in granting taxpayer relief and the Court’s role on judicial review, the Court of Appeal explained at paras 58-59:

[58] The Minister’s discretion on an application for relief must be based on the purposes of the Act, the fairness purposes that lie behind subsection 220(3.1) of the Act, and a rational assessment of all the relevant circumstances of the case. Her discretion must be genuinely exercised and must not be fettered or dictated by policy statements such as Information Circular 07-1: *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at paragraph 27.

[59] On an application for judicial review from a subsection 220(3.1) decision, the Federal Court may quash unreasonable exercises of discretion by the Minister – i.e., exercises of discretion that fall outside the range of the acceptable and defensible on the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Depending on the circumstances, the range available to the Minister can be quite narrow: *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paragraphs 37-50; and in a different context, see *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13 and 14.

[61] As noted in *Guindon*, the discretion to grant taxpayer relief must take into account all the relevant circumstances. In the present case, the Auditor’s Report and the Minister’s Delegate’s decision reflects that all the submissions of Canpar and all the relevant circumstances were considered and understood in the determining whether to grant relief.

[62] The Minister's Delegate was also guided by IC07 which plays a "useful and important role" in guiding the exercise of discretion under subsection 220(3.1) but cannot be relied on exclusively so as to fetter or limit the considerations (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 27, 58-60, 341 DLR (4th) 710).

[63] IC07 states that taxpayer relief may be granted "where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation": extraordinary circumstances, actions of the CRA, and inability to pay or financial hardship. IC07 defines "extraordinary circumstances" as "circumstances beyond a taxpayer's control", including (but not limited to) natural disasters, civil disturbances, serious illness, or serious emotional or mental distress (IC07 at para 25).

[64] The Minister's Delegate was also guided by para 87 of the IC07, which addresses statute barred requests for reassessment and provides:

Generally, the CRA will not reassess a statute-barred return if a request is made because of a court decision... Where a taxpayer has chosen not to take advantage of his or her right of objection or appeal for a tax year, requests made to reassess a statute-barred return based only on the result of an appeal by another taxpayer or by the same taxpayer will not be granted under subsection 152(4.2).

[65] The Minister's Delegate more generally noted that a taxpayer should not use the taxpayer relief provisions to seek reconsideration of reassessments that have been confirmed by the CRA Appeals Division and that the taxpayer relief provisions are not intended to override or bypass the Appeal process.

[66] Canpar's claim that the circumstances were beyond its control because it was not aware of the outstanding income tax penalties until March 2015, at which time it was too late to appeal to the TCC, is not supported by the evidence on the record. The penalties under the *Income Tax Act* and *Excise Tax Act* were treated separately by the CRA. Canpar fully pursued the objection process with the CRA with respect to both the *Income Tax Act* and *Excise Tax Act* assessments and penalties, but only pursued an appeal to the TCC with respect to the assessment and penalty under the *Excise Tax Act*. As a result, the TCC decision deals only with the *Excise Tax Act*.

Canpar's current claim that it was unaware of the amount it owed pursuant to the *Income Tax Act* and regarded the May 29, 2009 letter as a "nil" assessment and not appealable is inconsistent with Canpar's written submissions which state that Canpar had instructed its agent to appeal both decisions, but for some unknown reason, only the *Excise Tax Act* decision was appealed.

[67] Moreover, if Canpar had intended to appeal both decisions, upon receipt of the TCC decision, Canpar would have readily been made aware that the decision focussed only on the *Excise Tax Act* and that the penalties under the *Income Tax Act* had not yet been appealed or addressed. At that time, Canpar may have still been within the time period to pursue an appeal of the imposition of the gross negligence penalty under the *Income Tax Act* to the TCC pursuant to sections 167 and 169 of the *Income Tax Act* or to seek an extension of time to do so.

[68] The Minister's Delegate's determination that the circumstances were not beyond Canpar's control and did not justify the exercise of discretion to waive the penalty is reasonable. Canpar could have pursued an appeal under the *Income Tax Act* at the relevant time, as it had appealed the determination with respect to the *Excise Tax Act*. The CRA is not obliged to notify

a taxpayer of the right to appeal, but according to the Auditor's Report, it did so in the August 25, 2009 letters of confirmation.

[69] With respect to Canpar's reliance on IC07 to argue that taxpayer relief should be granted due to CRA's delay in collection, Canpar may have misinterpreted the provision at issue, which states that: "penalties and interest may also be waived or cancelled if the penalty and interest arose primarily because of actions of the CRA, such as: processing delays that result in the taxpayer not being informed, within a reasonable time, that an amount was owing." In this case, the penalty did not *arise* because of CRA's actions but because of Canpar's actions. CRA waived the interest that had accrued, which did arise from CRA's delay in seeking payment.

[70] The Minister's Delegate considered all the circumstances and did not fetter his discretion by considering only IC07. Rather, the Minister's Delegate considered the whole audit history of Canpar arising from the transfer of the property at issue in 2005, which is referred to in the Auditor's Report.

[71] In conclusion, the Minister's Delegate reasonably exercised his discretion on behalf of the Minister, taking into account all the circumstances together with the factors which provide guidance in IC07, to find, among other things, that Canpar's circumstances were not beyond its control, as it could have appealed, but did not do so, and that overall, taxpayer relief was not warranted. The decision bears the hallmarks of a reasonable decision; the Minister's Delegate provided justification for his refusal to exercise his discretion to grant relief from the gross negligence penalty and this decision is supported by the facts and the law.

JUDGMENT in T-1831-17

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.
2. There is no order with respect to costs.

"Catherine M. Kane"

Judge

Annex “A”

Excise Tax Act, RSC 1985, c E15

285 Every person who knowingly, or under circumstances amounting to gross negligence, makes or participates in, assents to or acquiesces in the making of a false statement or omission in a return, application, form, certificate, statement, invoice or answer (each of which is in this section referred to as a “return”) made in respect of a reporting period or transaction is liable to a penalty of the greater of \$250 and 25% of the total of...

285 Toute personne qui, sciemment ou dans des circonstances équivalant à faute lourde, fait un faux énoncé ou une omission dans une déclaration, une demande, un formulaire, un certificat, un état, une facture ou une réponse — appelés « déclaration » au présent article — établi pour une période de déclaration ou une opération, ou y participe, y consent ou y acquiesce, est passible d’une pénalité de 250 \$ ou, s’il est plus élevé, d’un montant égal à 25 % de la somme des montants suivants. . .

[...]

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

152(4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining — at any time after the end of the normal reassessment period, of a taxpayer who is an individual (other than a trust) or a graduated rate estate, in respect of a taxation year — the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is 10 calendar years after the end of that taxation

152(4.2) Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable — particulier (sauf une fiducie) ou succession assujettie à l’imposition à taux progressifs — pour une année d’imposition, le remboursement auquel le contribuable a droit à ce moment pour l’année ou la réduction d’un montant payable par le contribuable pour l’année en vertu de la présente partie, le ministre peut, si le contribuable

year,

demande pareille
détermination au plus tard le
jour qui suit de dix années
civiles la fin de cette année
d'imposition, à la fois :

(a) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; and

a) établir de nouvelles cotisations concernant l'impôt, les intérêts ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie;

(b) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 122.9(2), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.

b) déterminer de nouveau l'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 122.9(2), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année ou qui est réputé, par le paragraphe 122.61(1), être un paiement en trop au titre des sommes dont le contribuable est redevable en vertu de la présente partie pour l'année.

[...]

163(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the

163(2) Toute personne qui, sciemment ou dans des circonstances équivalant à faute lourde, fait un faux énoncé ou une omission dans une déclaration, un formulaire, un certificat, un état ou une réponse (appelé « déclaration » au présent article) rempli, produit ou présenté, selon le cas, pour une année d'imposition pour l'application de la présente loi, ou y participe, y consent ou y

greater of \$100 and 50% of the total of

acquiesce est passible d'une pénalité égale, sans être inférieure à 100 \$, à 50 % du total des montants suivants :

[...]

167 (1) Where an appeal to the Tax Court of Canada has not been instituted by a taxpayer under section 169 within the time limited by that section for doing so, the taxpayer may make an application to the Court for an order extending the time within which the appeal may be instituted and the Court may make an order extending the time for appealing and may impose such terms as it deems just.

167 (1) Le contribuable qui n'a pas interjeté appel en application de l'article 169 dans le délai imparti peut présenter à la Cour canadienne de l'impôt une demande de prorogation du délai pour interjeter appel. La Cour peut faire droit à la demande et imposer les conditions qu'elle estime justes.

[...]

...

(5) No order shall be made under this section unless

(5) Il n'est fait droit à la demande que si les conditions suivantes sont réunies :

(a) the application is made within one year after the expiration of the time limited by section 169 for appealing; and

a) la demande a été présentée dans l'année suivant l'expiration du délai imparti en vertu de l'article 169 pour interjeter appel;

[...]

169 (1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

169 (1) Lorsqu'un contribuable a signifié un avis d'opposition à une cotisation, prévu à l'article 165, il peut interjeter appel auprès de la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation :

(a) the Minister has confirmed

a) après que le ministre a

the assessment or reassessed,
or

(b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.

[...]

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 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

ratifié la cotisation ou procédé à une nouvelle cotisation;

b) après l'expiration des 90 jours qui suivent la signification de l'avis d'opposition sans que le ministre ait notifié au contribuable le fait qu'il a annulé ou ratifié la cotisation ou procédé à une nouvelle cotisation;

toutefois, nul appel prévu au présent article ne peut être interjeté après l'expiration des 90 jours qui suivent la date où avis a été envoyé au contribuable, en vertu de l'article 165, portant que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation.

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 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

account the cancellation of the
penalty or interest.

contribuable ou la société de
personnes pour tenir compte de
pareille annulation.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1831-17

STYLE OF CAUSE: SUBHASH PARMAR,, CANPAR DEVELOPMENTS
INC. v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 28, 2018

JUDGMENT AND REASONS: KANE J.

DATED: SEPTEMBER 13, 2018

APPEARANCES:

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Mr. Hasan Junaid FOR THE RESPONDENT

SOLICITORS OF RECORD:

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