Federal Court  Cour fédérale

Date: 20190108

Docket: T-328-18

Citation: 2019 FC 17

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 8, 2019

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

LES GESTIONS BUSSEY INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, Les Gestions Bussey Inc. (Gestions Bussey), has applied for judicial review from a decision issued by the Minister of National Revenue (the Minister) through Christine Lacerte (the Delegate) on January 17, 2018. In this decision (the Decision), the Minister refused to exercise the discretion under subsection 220(3.1) of the *Income Tax Act*, RSC 1985, ch 1 (5th Supp) [the ITA], to waive the interest payable by the applicant.

I. Facts

[2] In 2007, following an audit of Gestions Bussey's tax planning in 2003, the Minister found that Gestions Bussey was violating the general anti-avoidance rule. The Minister therefore issued a notice of assessment for corporate tax against Gestions Bussey showing a balance. Gestions Bussey objected to this notice of assessment.

[3] Since the Gestions Bussey case resembled a number of other files, the Minister proposed holding it in abeyance pending a hearing on the other similar files. In the alternative, the Minister would have upheld the notice of assessment and left Gestions Bussey to present its case before the Tax Court of Canada (TCC). Gestions Bussey agreed to its file being held in abeyance. In a letter confirming the abeyance, the Minister told Gestions Bussey that it would not have to pay the disputed amount immediately, but that interest would continue to accrue on the unpaid balance. The letter stated that the interest charges could be reduced by making a payment. Should Gestions Bussey succeed, any disputed amount would be reimbursed with interest.

[4] The abeyance lasted until 2013, after the decision in *Triad Gestco Ltd v Canada*, 2012 FCA 258, affirmed the Minister's position. Gestions Bussey filed an appeal before the TCC, but withdrew it in 2016 and paid the outstanding balance.

[5] Gestions Bussey also submitted an application for interest relief under subsection 220(3.1) of the ITA, which reads as follows:

Waiver of penalty or interest	**Renonciation aux pénalités et aux intérêts**
(3.1) The Minister may, on or	**(3.1)** Le ministre peut, au plus

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 account the cancellation of the penalty or interest.	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 contribuable ou la société de personnes pour tenir compte de pareille annulation.

[6] This application was denied, and Gestions Bussey then submitted a second application for relief. This second application was approved in part, but the Minister refused to completely waive all the interest that had accumulated during the period of abeyance from 2007 to 2013. The second decision noted that Gestions Bussey had agreed to its file being held in abeyance and that, at the beginning of the abeyance, Gestions Bussey had been informed that the interest would continue to accrue and that the interest charges could be reduced if Gestions Bussey made a payment. The Minister did not accept that Gestions Bussey was prevented from making such a payment.

[7] Gestions Bussey then submitted a third application for relief. It is the decision regarding this third application that is the subject of this application for judicial review. The Decision

granted a waiver for some other interest charges, but upheld the refusal of a full waiver of all the interest that had accumulated during the 2007 to 2013 abeyance period. The Minister's Delegate reiterated that Gestions Bussey had been informed that the interest would continue to accrue during the abeyance and that Gestions Bussey had chosen not to make a payment during this time. The Delegate also noted that Gestions Bussey had willingly agreed to its file being held in abeyance and that, at the time, it had had the option of appealing directly to the TCC.

II. Issues and standard of review

[8] Gestions Bussey raises the following issues:

(a) Did the Minister fetter his discretion in the matter at bar?

(b) Was the Minister's decision reasonable?

[9] The parties agree that the standard of review is that of reasonableness. The application of this standard is well supported by the case law of the Federal Court of Appeal: *Canada Revenue Agency v Telfer*, 2009 FCA 23 at paras 24–28 [*Telfer*]. At paragraph 25 of this decision, Evans J. holds as follows:

> When reviewing for unreasonableness, a court must examine the decision-making process (including the reasons given for the decision), in order to ensure that it contains a rational "justification" for the decision, and is transparent and intelligible. In addition, a reviewing court must determine whether the decision itself falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir* at para. 47.

[10] At the hearing of this application, counsel for Gestions Bussey clarified that Gestions Bussey is disputing the interest charges that accrued during the six years its file was held in abeyance and for which it had not yet been granted any relief.

III. Analysis

A. *Did the Minister fetter his discretion in the matter at bar?*

[11] Gestions Bussey refers to the decisions of the Federal Court of Appeal in *Canada v Guindon*, 2013 FCA 153 at paras 57 to 59, and of the Federal Court in *Gordon v Canada (Attorney General)*, 2016 FC 643 at para 29 [*Gordon*], to support its argument that the Minister should not fetter or limit his discretion under subsection 220(3.1) of the ITA through the strict application of administrative guidelines established by policy statements such as Information Circular 07-1 (the Circular), which deals with applications for relief. Such policy statements do not have force of law, and the Minister has to consider all the relevant circumstances of a case.

[12] I accept that the Minister should not restrict himself to the guidelines in the Circular, but I also note that the Minister did not err in referring to the Circular: *Gordon* at para 40.

[13] Gestions Bussey submits that the Minister's Delegate erred in requiring extraordinary circumstances for waiving the interest. Gestions Bussey argues that extraordinary circumstances are not required, referring to the Federal Court's decision in *3500772 Canada Inc v Canada (National Revenue)*, 2008 FC 554. At para 40 of this decision, the Court holds as follows:

> . . . I do not read the Guidelines to require that the circumstances to be both, "beyond the taxpayers control" and "extraordinary". Put differently, the circumstances warranting relief may well be characterized as "extraordinary"; however, it is because they are beyond the taxpayers control that relief may be granted under the Guidelines. The circumstances need not necessarily be "extraordinary".

[14] I accept that, to obtain interest relief, Gestions Bussey did not have to establish extraordinary circumstances, only "circumstances beyond [its] control". Gestions Bussey does not mention any statement in the Decision suggesting the contrary. It is also interesting to note that in *Telfer* at paragraph 34, the Federal Court of Appeal established that the Minister's discretion to waive interest is "extraordinary". Moreover, the evidence does not indicate that the failure to pay the balance while the file was held in abeyance was beyond Gestions Bussey's control.

[15] Gestions Bussey submits that the Minister erred in failing to recognize (i) the lack of clarity in the rules and the case law at the time Gestions Bussey was preparing and implementing its tax planning; and (ii) the fact that the abeyance lasted six years. Gestions Bussey maintains that these two factors are situations beyond its control.

[16] In my opinion, even though these factors may have been beyond Gestions Bussey's control, they nonetheless did not prevent it from paying the balance during the abeyance period so as to avoid accumulating interest charges. Gestions Bussey chose not to make any payments while its case was held in abeyance. Consequently, the failure to pay was not attributable to a situation beyond Gestions Bussey's control.

[17] It is my opinion that these factors do not reveal a fettering of discretion, but rather reasonable consideration of the relevant factors. I will deal with these items further in the next section.

[18] Gestions Bussey also argues that Andréanne Leblanc's notes, which were considered by the Delegate for her Decision, establish that the Minister fettered his discretion because they indicate the following, among other things: even though Gestions Bussey may hire representatives, it [TRANSLATION] "remains responsible if the advice received turns out to be erroneous". Gestions Bussey argues that this statement is wrong because it does not recognize that, in the circumstances described, a taxpayer is only generally responsible. According to Gestions Bussey, the failure to recognize the word "generally" fetters the Minister's discretion.

[19] I disagree with this argument. I do not accept that the Delegate misunderstood the applicable test or that this alleged error fetters the Minister's discretion. Yes, the word "generally" suggests that there might be exceptional situations where the Minister could grant relief if the taxpayer relied on erroneous advice. However, nothing suggests that there were such exceptional circumstances in this case. Consequently, the omission of the word "generally" is irrelevant: Gestions Bussey's case simply does not include the type of circumstance to warrant an exception to the general rule.

[20] Gestions Bussey refers to paragraph 37 of the decision in *Gordon* to argue that the responsibility of a taxpayer who followed professional advice should be limited. In this paragraph, the Court criticizes the fact that the Minister's Delegate failed to consider the fact that the taxpayer relied on professional advice. This decision is distinct from the matter at bar because the facts are different: contrary to this case, in *Gordon*, the Minister had already received the impugned amount. The Court did not have to determine whether the failure to pay

was valid and warranted; rather it had to determine whether the taxpayer had to pay the amount in question. This is not the case here.

[21] Moreover, the impugned decision here addresses Gestions Bussey's argument that Gestions Bussey followed professional advice, and I find that the Delegate's analysis of this argument was reasonable.

[22] Lastly, Gestions Bussey argues that the Minister fettered his discretion by considering the fact that Gestions Bussey had chosen not to make a payment at the beginning of the abeyance period. According to Gestions Bussey, it is unreasonable to refuse to waive the interest charges for this reason because, in the alternative, Gestions Bussey would have made the payment and would not be liable for the interest charges. Gestions Bussey submits that, if the relief is not applicable in the circumstances of this case, it would not be appropriate in any circumstances.

[23] In my opinion, there is nothing unreasonable about considering the failure to make a payment. Subsection 220(3.1) of the ITA is a provision of exceptional application. It is therefore not surprising that it applies only in limited circumstances, namely situations where the taxpayer did not make a payment for extraordinary reasons or reasons beyond the taxpayer's control.

[24] For the above reasons, I conclude that the Minister did not fetter his discretion.

B. *Was the Minister's decision reasonable?*

[25] Gestions Bussey's argument that the Minister's Decision was not reasonable is related to its case being held in abeyance. Gestions Bussey's argument is three-pronged:

(a) The Minister did not reasonably consider the fact that Gestions Bussey's case was held in abeyance for six years;

(b) The Minister did not reasonably consider whether Gestions Bussey should have to bear the risk of the lack of clarity in the case law and of the need to hold its case in abeyance pending the outcome of test cases;

(c) The Minister did not reasonably consider whether Gestions Bussey should have to bear all the risks related to the abeyance of Gestions Bussey's file pending the outcome of the test cases even though the test cases mainly benefitted the Minister.

(1) Six-year abeyance

[26] To support the argument that a six-year abeyance of its case was excessive, Gestions Bussey referred to the following decisions: *Dort (Estate) v Canada (Minister of National Revenue)*, 2005 FC 1201 [*Dort*], and *Hillier v Canada (Attorney General)*, 2001 FCA 197 [*Hillier*]. The Minister's Decision does not refer to these decisions except to state that they do not apply to the situation of Gestions Bussey. The latter therefore submits that this aspect of the Minister's analysis is insufficient because it lacks justification, transparency and intelligibility.

[27] In *Dort*, the Federal Court concluded that a decision of the Minister refusing to cancel the interest charges was unreasonable because the delay in processing the applicant's case violated her legitimate expectations and because the Minister had not followed its own procedures. In *Hillier*, the Court found the 31-month delay excessive because there was no contact from the

Minister for 27 months of this time, and the Minister's only explanation for this was that there had been staff changes in his office. The Federal Court of Appeal found this explanation to be insufficient.

[28] In my opinion, the Minister's conclusion that the decisions in *Dort* and *Hillier* do not apply to this case is reasonable and the fact that the details presented in the previous paragraph were not included in the reasons does not change this conclusion. The Decision thoroughly analyzes the reasons explaining the delays in Gestions Bussey's case and grants interest relief where the excessive delays were caused by the Minister. It is clear that the Delegate considered the issue of the excessive delay and that she distinguished the case from the decisions in *Dort* and *Hillier* on this basis.

(2) Bearing the risk of the lack of clarity in the case law

[29] Gestions Bussey submits that the Delegate did not recognize the lack of clarity in the rules and the case law at the time it prepared and implemented the tax planning in question or the fact that its file was held in abeyance for six years. This is incorrect.

[30] Regarding the lack of clarity, the Delegate noted Gestions Bussey's argument that when it did its tax planning, the case law was in its favour. However, the Delegate also found that there was no guarantee that this situation would remain unchanged. The Delegate further considered Gestions Bussey's argument that its intentions were honest and that this was the first time it found itself in such a situation.

[31] Regarding the six years in which Gestions Bussey's case was held in abeyance, it is clear that the Delegate considered it. Andréanne Leblanc's notes include a timeline and explicitly mention the abeyance. Moreover, the impugned decision provides a timeline of the events and refers to the challenges instituted by Gestions Bussey.

[32] Despite Gestions Bussey's arguments, I believe that the Delegate reasonably considered the lack of clarity in the law and the amount of time the case was held in abeyance. I disagree, among other things, with the argument that Gestions Bussey had no other choice but to accept that its case be held in abeyance. According to the evidence, Gestions Bussey could have refused the abeyance and insisted that the Minister deal with its case immediately and allow it to file an appeal before the TCC. However, it seems likely that this option would not have reduced the delay since, in such a case, Gestions Bussey's case would have probably become a test case.

[33] Gestions Bussey could have also made a payment of the balance owing at the beginning of the abeyance, and requested a reimbursement with interest if the tax planning was allowed. The evidence does not suggest that Gestions Bussey was unable to make such a payment. In that regard, paragraph 20 of the decision in *Comeau v Canada (Customs and Revenue Agency)*, 2005 FCA 271 [*Comeau*], is relevant:

> . . . Mr. Comeau could have paid the outstanding amount, which would have terminated the accumulation of interest, subject to being reimbursed if his objection succeeded. In other words, a taxpayer may benefit from the suspension of collection proceedings while his objection is being processed and wager on the outcome of his objection by not paying the amounts claimed by the Agency, so that interest accumulates, but if he loses his wager (when his objection is dismissed), he cannot complain that the rules of the game put him at a disadvantage. There is nothing unreasonable in the Agency's decision.

(3) Consideration of whether test cases benefit the Minister

[34] Gestions Bussey argues that the Court should distinguish this case from *Comeau* because the delay in this case was caused by the wait for the outcome of test cases, which was not the case in *Comeau*. In my opinion, it is not unreasonable to refuse interest relief when the delay is caused by waiting for the outcome of test cases. Indeed, the case law of the Federal Court of Appeal supports this finding, including in *Telfer*, where the Court held as follows:

> [35] Those who, like Ms Telfer, knowingly fail to pay a tax debt pending a decision in a related case normally cannot complain that they should not have to pay interest. If they had promptly paid the sum claimed to be due, and were later found not liable to pay it, the Minister would have had to repay the overpayment, with interest: see *Comeau v. Canada (Customs and Revenue Agency)*, 2005 FCA 271, 2005 D.T.C. 5489, at para. 20. The relatively high rate of interest charged to the taxpayer is no doubt intended, for the benefit of all taxpayers, to encourage the prompt payment of tax debts.

[35] Gestions Bussey submits that it was the Minister who wanted to wait for the test cases in this case in order to change the case law and that it was the Minister who benefitted from the delay. Gestions Bussey submits that since it was the Minister who had laid a wager, the Minister should have borne the risk of the interest charges accumulating. The decision in *Comeau* also makes a betting analogy. But there need to be at least two parties in a wager. In this case, both parties made a wager and as a result, ran a risk: the Minister won, and Gestions Bussey lost. In these circumstances, it is not unreasonable to conclude that the loser had to assume the interest charges.

IV. Conclusion

[36] I conclude that the Minister did not fetter his discretion under subsection 220(3.1) of the ITA, and that the Delegate's Decision is reasonable. Consequently, this application must be dismissed with costs.

JUDGMENT in docket T-328-18

THE COURT ORDERS AND ADJUDGES that this application for judicial review be dismissed with costs.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF COURT

DOCKET:	T-328-18
STYLE OF CAUSE:	LES GESTIONS BUSSEY INC. v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	DECEMBER 19, 2018
JUDGMENT AND REASONS:	LOCKE J.
DATED:	JANUARY 8, 2019

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