Federal Court  Cour fédérale

Date: 20190503

Docket: T-752-17

Citation: 2019 FC 574

Toronto, Ontario, May 3, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

INTERNORTH LTD

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by the Minister's Delegate, at the Canada Revenue Agency, who refused to recommend the remission of the Applicant's tax liability to the Governor in Council. The Minister's Delegate based this decision on, amongst other reasons, the Applicant's failure to appeal when it could have done so, that remedy was long foreclosed when the Applicant filed the remission request. For the reasons that follow, I find that

the decision under review is reasonable. As a result, this application for judicial review will be dismissed.

II. Background

[2] Internorth Construction Company [ICC] was incorporated in January 1998. Its principal business was building medium and large sized facilities offering architectural, engineering, construction and development services. The Applicant Internorth Ltd [Internorth], a related corporation, was incorporated in June 2003 to manage and administer ICC's construction projects. By this time, ICC had encountered significant financial difficulties and had not remitted all of its source deductions as required. Marvin Marshall was the sole shareholder and director of Internorth, as well as the majority shareholder and director of ICC.

[3] In the spring of 2004, Internorth and ICC were audited by a Canada Revenue Agency [CRA] trust examiner for unremitted source deductions, pertaining to the period June 7, 2003 to December 31, 2004. As a result of this audit, the Minister cancelled notices of assessment on the payroll accounts of ICC for the period after June 6, 2003, but issued notices of assessment to Internorth for failure to remit source deductions. The assessment amounted to $472,610.44 of unremitted source deductions inclusive of penalty and interest, imposed under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA].

[4] Internorth, in response, filed a notice of objection in June 2004. However, a year and a half later, on November 6, 2005, the CRA confirmed the source deduction assessment, which Internorth did not appeal to the Tax Court of Canada [TCC]. Internorth had 90 days to appeal as

of right to do so (until February 6, 2006), with the possibility of another one-year discretionary extension. However, all limitation periods expired as of February 6, 2007 (ITA, paragraph 167(5)(a)).

[5] In April 2007 (after the expiry of all appeal deadlines), the Minister issued a notice of assessment against Mr. Marshall personally, as the director of Internorth [Director's Liability Assessment], for $296,094.96 under subsection 227.1(1) of the ITA, again on account of the unremitted source deductions related to Internorth. In October 2007, Mr. Marshall filed a notice of objection. The CRA subsequently confirmed the Director's Liability Assessment.
Mr. Marshall, unlike Internorth, appealed his Director's Liability Assessment, which was heard by the TCC in July 2008. He argued that Internorth did not have any employees and therefore he should not, as its director, have been assessed under subsection 153(1) of the ITA.

[6] Mr. Marshall succeeded in these arguments: in January 2012, Justice Webb of the TCC (as he then was) vacated the Director's Liability Assessment in *Marshall v The Queen*, 2012 TCC 21 on the basis that Internorth (a) did not have employees; (b) did not pay ICC's employees based on the evidence; and (c) even if Internorth did indeed pay ICC's employees, it only "routed" the funds as an agent of ICC.

[7] In June 2014, Internorth submitted an application for remission of source deductions. In May 2016, a policy analyst in the Remission & Delegations Section, Legislative Policy Directorate, Legislative Policy and Regulatory Affairs Branch of the CRA [Ms. R], emailed several questions to a colleague following her review of the trust examination audit. Her

questions were answered by Mr. P, the Trust Accounts Section Manager of Revenue Collections [names intentionally redacted].

[8] Ms. R prepared a memorandum dated January 13, 2017, addressing the Remission Committee with respect to Internorth's application. The Remission Committee recommended that application be denied.

[9] The Minister's Delegate, the Assistant Commissioner of the Legislative Policy and Regulatory Affairs Branch, CRA, concurred with the Remission Committee's recommendation, and denied remission of the unremitted source deductions. That denial is the subject of this judicial review [Decision].

III. Issues and Parties' Positions

[10] This case raises one issue: whether the Decision was reasonable. Given the discretionary nature of a decision made under subsection 23(2) of the *Financial Administration Act*, RSC 1985, c F-11 [FAA], considerable deference is owed to the remission decision of the Minister's Delegate (*Escape Trailer Industries Ltd v Canada (Attorney General)*, 2019 FC 31 at para 17; see also *Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General)*, 2013 FCA 25, aff'g 2012 FC 823).

A. *Parties' Positions*

[11] The Applicant argues several bases upon which this Court should find the Decision to be unreasonable. The Applicant submits that certain factual findings communicated from Mr. P to Ms. R were unreasonable because they were not supported by the material provided, and in particular, the TCC's finding in *Marshall* (regarding Mr. Marshall's successful appeal with respect to the Director's Liability Assessment). The Applicant also relies on *Barry v The Queen*, 2009 TCC 508 for the proposition that it was reasonable for Mr. Marshall to believe his TCC appeal successfully overturning the Director's Liability Assessment would necessarily apply to Internorth.

[12] The Applicant further asserts that the character of the funds, namely unremitted source deductions, were unreasonably used to justify the denial of the remission application despite the fact that the Applicant did not have any employees at the time, nor any obligation to collect or remit source deductions pursuant to subsection 153(1) of the ITA. Regarding the application of subsection 23(2) of the FAA to the facts, the Applicant contends that allowing the remission application would be in the public interest to ensure the Minister observes the necessary checks and balances before putting taxpayers out of business, eliminating jobs, and similar practical consequences. The Applicant states that indeed, it ceased operations due to its inability to operate in the face of the Minister's collection actions taken for the unremitted source deductions. The Applicant argues that it was not in a position to file an appeal given the end of its operations. Therefore, there is a heightened public interest to decide the remission application in its favour.

[13] The Respondent counters that Internorth is using the remission procedure to extend the usual statutory appeals' deadlines for tax disputes, and that the discretionary provisions in the FAA cannot be used to extend the statutory deadlines for appeals (*Parmar v Canada (Attorney General)*, 2018 FC 912 at paras 66–68). Rather, tax assessments must be appealed through the statutory tax appeals process (*Pay Audio Services Limited Partnership v Canada (National Revenue)*, 2018 FC 494 at para 33).

[14] As for the Decision itself, the Respondent notes that remission decisions are highly discretionary, attracting a significant degree of deference on judicial review. There is simply no basis on which the Court can conduct a correctness review of the Decision, which is in effect what is being requested by the Applicant. Rather, the Court must consider "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).

[15] Regarding the contention that the Minister misapplied subsection 23(2) of the FAA to the facts, the Respondent counters that the findings in *Marshall* were based on the evidence and argument before the TCC, which were not before the Minister's Delegate in his Decision. The *Marshall* decision is therefore distinct and is not applicable to the source deduction assessment, and/or remission assessment. The Respondent further submits that the Minister reasonably found that there was no incorrect action on the part of the CRA and no financial setback with extenuating circumstances warranting remission.

[16] The Respondent, however, does not contend that the Decision is perfect, but concedes that the Minister's Delegate erred in one discreet finding within its Decision regarding the characterization of the amounts deemed to be held "in trust". Rather, the Respondent acknowledges that the TCC found in *Marshall* that Internorth did not itself pay the employees and did not have a liability for source deductions, and therefore the funds applied to that debt could not be characterized as deemed trust funds. While describing the funds as being held "in trust" was not an accurate description, this did not undermine the reasonableness of the Decision, and in particular, the Minister's Delegate's justification for refusing remission.

[17] Finally, the Respondent contends that Internorth is taking inconsistent, untenable positions in this litigation. First, with respect to the judicial review, it raised new grounds not raised in its remission application, namely extreme financial hardship, financial setback and unintended results of the tax legislation. Second, the Applicant contradicts itself: on the one hand claiming extreme financial hardship on the basis that the CRA's collection action caused it to cease operations and caused job losses, but on the other, predicates its claim on the fact that it never had any employees and therefore does not owe the source deduction debt.

IV. Analysis

[18] After reviewing the record in light of the parties' positions, I see no reason to intervene. The Decision was reasonable.

[19] I will begin the analysis with a brief overview of the legislative and policy context for this case.

[20] A remission order is an extraordinary measure which allows the Governor in Council, on recommendation of the appropriate Minister, to provide full or partial relief from tax, interest, penalty, or other debt, in those rare instances where relief would be justified but cannot be granted under existing laws (*Fink v Canada (Attorney General)*, 2018 FC 936 at para 12). The legal authority to grant a remission order is set out in subsection 23(2) of the FAA:

Remission of taxes and penalties	**Remise de taxes ou de pénalités**
(2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.	**(2)** Sur recommandation du ministre compétent, le gouverneur en conseil peut faire remise de toutes taxes ou pénalités, ainsi que des intérêts afférents, s'il estime que leur perception ou leur exécution forcée est déraisonnable ou injuste ou que, d'une façon générale, l'intérêt public justifie la remise.

[21] In *Waycobah First Nation v Canada (Attorney General)*, 2011 FCA 191, the Federal Court of Appeal commented on the open ended terms "unreasonable or unjust" and "otherwise in the public interest" of subsection 23(2) of the FAA:

> [18 […] These are open-ended terms that enable the Minister to take into account the wider impact of recommending remission, including, for example, the public interest in the integrity of the tax system and its proper administration, and fairness to other taxpayers. The decision-maker must balance the competing interests to determine whether, in light of the particular facts, collection of the tax would be unreasonable, unjust or otherwise not in the public interest.

[22] While subsection 23(2) of the FAA provides a broad, open-ended framework that the legislators clearly intended to afford the Minister, there are policy guidelines that, in addition to the jurisprudence, assist officials in determining when the collection of tax or the enforcement of penalties might be unreasonable, unjust, or contrary to the public interest. Specifically, the *CRA Remission Guide* [Guidelines] assists CRA officials in making these decisions. The Guidelines describe a remission order as being:

> […] an extraordinary measure that allows the federal government to provide relief to a person when the desired result cannot be achieved within the applicable legislation, through assessing or other action. Generally, all means available within the legislation should be exhausted before remission relief is considered, i.e. filing a notice of objection, and/or a court appeal, or requesting any recourse under a tax convention (at p 5).

[23] Each remission request is to be considered on its own merits. The Guidelines assist the CRA officials in their assessment, based upon characteristics common to past cases which provide a framework within which remission might be supported: (1) extreme hardship; (2) financial setback coupled with extenuating factors; (3) incorrect action or advice on the part of CRA officials; and (4) unintended results of the tax legislation. The Guidelines do not purport to cover every circumstance. Good judgment must be exercised and all relevant factors of a case should be taken into consideration (Guidelines at p 9).

[24] Here, Internorth applied for remission on the basis of incorrect action or advice on the part of the CRA officials. The Guidelines indicate at page 12 that remission on this basis will be considered if the taxpayer "could not reasonably have been expected to initiate timely actions to avoid or minimize tax (or collect and remit the tax…)" and "if CRA officials made an error in assessing tax, the error must have been recognizable as such at the time of the assessment (on the

assumption that all relevant facts were known), and not in light of subsequent events, such as a court decision that reverses the standard interpretation upon which the assessment is based".

[25] Here, the crux of the Applicant's argument with respect to certain communications between Ms. R and Mr. P, the CRA officials, is that Mr. P, in responding to Ms. R's questions, ignored the TCC's findings in *Marshall* and *Barry*.

[26] I disagree. First, in *Barry*, while the TCC found that the "appellant has the right to challenge the correctness of the underlying assessments issued", this was in the context of a motion by counsel for an order to compel the respondent's nominee to answer questions and produce documents at the examination for discovery, which was subsequently granted. Thus, *Barry* involved an entirely different context than this case.

[27] As per *Marshall*, Justice Webb relied on *Barry* for the proposition that the appellant could raise the issue of the correctness of Internorth's assessment to challenge the Director's Liability Assessment for unremitted source deductions. The TCC based its analysis on whether Internorth paid the employees of ICC. The TCC found as follows:

> [52] In my opinion the Appellant has raised a prima facie case that the assumption that IL [Internorth] paid the employees of ICC is incorrect. The onus would then shift to the Respondent to introduce evidence to support this assumption that IL paid the employees of ICC. The Respondent has not submitted satisfactory evidence to rebut this prima facie case.
>
> [53] As a result, the Appellant will succeed in relation to the question of whether IL paid the employees of ICC and I find that IL did not pay the employees of ICC. As a result, since IL did not pay any salaries or wages, IL would not have any liability for source deductions and the assessment of the Appellant as a director of IL is vacated.

[28] The findings in *Marshall* were based on the evidence and argument before the trial judge in that case. There, the TCC found that the Respondent had "not submitted satisfactory evidence to rebut this prima facie case". However, Internorth's situation fundamentally differs from *Marshall's*, which concerned an individual taxpayer. Internorth, unlike its director Mr. Marshall, did not appeal within the statutory timeframe. Given that approximately 12 years have passed since all limitation periods on the appeal have expired, it is not known what evidence and argument could have been presented by the Applicant, or whether the TCC would have come to the same conclusion, had Internorth challenged its liability at the appropriate time. The correctness of the tax assessments that caused the tax debt is beyond the jurisdiction of this Court. Rather, the Tax Court of Canada has exclusive jurisdiction to review the correctness of an assessment (*Matthew v Canada (Attorney General)*, 2017 FC 538 at para 16).

[29] I also note that while the TCC in *Marshall* indicated that Internorth would not have any liability for source deductions and explicitly stated that the assessment of Mr. Marshall as a director of Internorth was vacated, it did not state that the underlying assessment against the Applicant (i.e. Internorth Ltd) was also vacated (*Marshall* at para 53). That liability remained outstanding against the Applicant and was not altered in any way by the trial judge's ruling in favour of Mr. Marshall, a separate person under the ITA. Indeed, subsection 152(8) of the ITA makes it clear that assessments are deemed valid and binding, unless they are varied or vacated through challenges allowed under the ITA, including through an objection, or a *de novo* TCC appeal that every taxpayer may file within 90 days of the Minister's confirmation of the assessment as of right (subsection 169(1), ITA), plus an additional year by Court order allowing an extension of time (paragraph 167(5)(a), ITA).

[30] The jurisprudence makes it clear that the remission process should neither be used to "override or bypass" the appeals process nor as a mechanism by which to challenge a tax assessment. In *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paragraph 81, the Federal Court of Appeal underscored the preservation of the integrity and efficacy of the system of tax assessments and appeals:

> […] Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.

[31] The Minister's Delegate, in line with *JP Morgan*, noted that "[i]t is the CRA's longstanding position that the remission order process should not be used as an additional or parallel step to the appeal process already in place under the Income Tax Act (ITA) to establish the accuracy of an assessment or a reassessment". In the Decision, the Minister's Delegate emphasised four key factors: (i) the CRA issued Internorth notices of assessment and subsequent requirements to pay for failure to remit source deductions in 2004; (ii) the Applicant filed a notice of objection; (iii) the source deduction assessment was confirmed by the Minister in 2005; and, most importantly, (iv) an appeal to the TCC was never filed.

[32] The Minister's Delegate further noted that it was not until April 2007 that the CRA issued a Director's Liability Assessment against Mr. Marshall who filed an objection, and successfully appealed at the TCC. Mr. Marshall may have wrongly believed that appealing his personal Director's Liability Assessment also meant that Internorth's source deduction

assessment was properly before the TCC, although his timing calculation was flawed. This is because the timeline within which Internorth could have appealed had expired prior to the issuance of the Director's Liability Assessment – namely in February 2007, given the 90 day and 1 year limitation periods set out above (namely sections 169(1), 167(5)(a) of the ITA). In other words, Internorth did not even know of Mr. Marshall's Director's Liability Assessment when its appeal remedies for the source deduction assessment expired in February 2007.

[33] In my view, the Minister's Delegate reasonably found that no circumstances were presented that would have prevented Internorth from filing an appeal to the TCC disputing the underlying assessment within the statutory timelines. Rather, the Applicant simply makes the inference that a corporation that is no longer operating cannot appeal a tax assessment of an unsuccessful objection. However, I note that the Applicant neither articulates any reason nor cites any authority as to why this would be the case.

[34] Turning to the jurisprudence, *Parmar* is analogous to the case at bar, despite addressing a different discretionary provision of the ITA. In *Parmar*, the applicant, Canpar, applied to the Minister for a cancellation of a gross negligence penalty imposed on the basis that it successfully appealed the gross negligence penalty imposed under the *Excise Tax Act*, RSC 1985, c E-15 in relation to the same transaction. Canpar argued that it would be unjust for the penalty to remain under the ITA, given the TCC had previously vacated the *Excise Tax Act* penalty. However, Justice Kane found that it was reasonable for the Minister to deny relief where the applicant failed to demonstrate the inability to have objected or appealed the tax assessment

(at paras 65-68). In observing the role of the TCC in a tax appeal and that of the Federal Court in reviewing a discretionary decision, she held:

> [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.
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> …
>
> [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.
>
> [Citations omitted]

[35] Here, like in *Parmar*, the Applicant disputes the outcome after having failed to pursue an appeal. The Court's role on judicial review is to determine whether the Minister's Delegate's Decision is reasonable, not whether he correctly decided the remission request, or whether the liability should have been imposed in the first place.

[36] The Minister, in deciding whether to recommend remission, followed its Guidelines in assessing whether several factors warranted relief, including whether there was incorrect action on the part of CRA officials or a financial setback coupled with extenuating circumstances, and whether remission was in the public interest.

[37] While it is not unlawful for an administrative decision-maker to base a decision on valid, non-exhaustive guidelines, formulated as a decision-making framework to promote principled consistency in the exercise of discretion, the decision-maker cannot treat guidelines as if they were law, and exhaustive of the factors that may be considered in the exercise of a broader statutory discretion (*Waycobah* at para 28). Here, that did not occur.

[38] Rather, the Minister's Delegate considered whether the Applicant had demonstrated that it could not have reasonably been expected to take action within the required time limits to resolve the problem through the statutory path. The Minister's Delegate found that no circumstances were presented that would have prevented Internorth from filing an appeal to the TCC disputing the underlying assessment within the mandated timelines.

[39] Its finding was reasonable in light of the statute and Guidelines, (section 23(2) of the FAA). While the Minister found that payments applied to the Applicant's payroll debt would have caused financial setback to Internorth, it found that there were no extenuating circumstances that would support remission. This finding was also reasonable.

[40] While the Applicant's situation is certainly unfortunate, it was the Applicant's responsibility to appeal the unremitted source deductions within the statutory timeframe, even if the Applicant sees the outcome as unfair. Again, *Parmar* is on point:

> [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…
>
> [Emphasis in original]

[41] The discretionary decision of whether to recommend remission is an exceptional remedy where the Minister enjoys very broad discretion, and as such, is owed considerable deference by the reviewing court (*Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General)*, 2012 FC 823 at para 18). While sympathetic to the plight of the Applicant, I am unable to conclude that the Decision was unreasonable.

[42] Finally, the reference to "deemed trust amounts", acknowledged to be erroneous by the Respondent, is not fatal to the Decision, given the key fact that *Marshall* was decided in a different context, and non-applicable to the Internorth application many years later. Whether the amounts were deemed to be held "in trust" by the CRA, was peripheral to the main issue of whether the unremitted source deductions should be remitted. Minor errors that are peripheral to the key issue may be overlooked (*Bonnybrook Park industrial development co Ltd v Canada (National Revenue)*, 2018 FCA 136 at para 29).

V. Costs

[43] Both parties seek costs. Both parties agreed that an award under the middle column of Tariff B would be appropriate. These will be payable to the Respondent by the Applicant.

VI. Conclusion

[44] Given the highly discretionary nature of the remission Decision, and the considerable deference owed to the Minister's Delegate, I have not been persuaded that intervention is warranted. As a result, the application for judicial review is dismissed, with costs to the Respondent.

JUDGMENT in T-752-17

THIS COURT'S JUDGMEN-T is that:

1. This application for judicial review is dismissed.

2. Costs, calculated under the middle column of Tariff B, are payable by the Applicant to the Respondent.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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