Federal Court  Cour fédérale

Date: 20210114

Docket: T-2196-18

Citation: 2021 FC 52

Ottawa, Ontario, January 14, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ALLSTAFF INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application for judicial review concerns the decision of the Minister of National Revenue (the "Minister") to deny the Applicant's request for relief from debts, interest, and penalties pursuant to subsections 153(1.1) and 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) ("*ITA*").

[2] The Applicant submits that the Minister's decision is unreasonable, as the Applicant acquired the debts in question due to the Canada Revenue Agency's ("CRA") failure to consider subsection 152(1) and misinterpretation of subsection 168(1) of the *Excise Tax Act*, RSC 1985, c E-15 ("*ETA*").

[3] In my view, the Minister's decision is reasonable. The Minister reasonably held that the CRA had not misinterpreted subsections 152(1) and 168(1) of the *ETA*, and that the Applicant's circumstances did not warrant relief under subsections 153(1.1) or 220(3.1) of the *ITA*. This application for judicial review is therefore dismissed.

II. Facts

A. *The Applicant*

[4] The Applicant is a temporary employment agency that employs its own workers and contracts them out to clients on an as-needed basis. As an employer, the Applicant is responsible for deducting and remitting employee deductions and paying the employer's share of those deductions to the CRA. The Applicant is also responsible for charging and remitting goods and services tax / harmonized sales tax ("GST/HST") on the labour that it supplies to its clients.

[5] As of October 27, 2020, the Applicant owes approximately $1,745,126 in GST/HST and payroll remittance arrears, including interest and penalties, of which it recently paid $739,895. According to the Applicant, it consistently submitted its payroll remittance payments late (and

thus incurred interest and penalties) because it instead prioritized paying its GST/HST remittances.

[6] The Applicant alleges that the CRA has erroneously taken the position that GST/HST remittances are due when a client invoice is issued. This arrangement requires the Applicant to pay the GST/HST it charges to clients before it receives their payments, as clients are often not required to pay the employment agency until 30 to 120 days after the invoice for the provision of temporary workers is issued. Accordingly, the Applicant submits that its GST/HST should be collected once the payments from its clients are received, not when invoices are issued. The Applicant asserts that such an arrangement would allow the Applicant to pay its payroll remittances on time, as it would no longer have to pay GST/HST upfront.

[7] The Applicant has made numerous requests for relief based on the above, some of which rely on the *ETA* (relating to its GST/HST account) and others on the *ITA* (relating to its payroll account). Below is a summary of the Applicant's requests; however, only the Reconsideration of the Second Relief Request is before this Court.

B. *The First Relief Request*

[8] On April 14, 2014, the Applicant applied for relief from all accumulated penalties and arrears interest with respect to its GST/HST account for all taxation periods ending December 31, 2011 to December 31, 2014 pursuant to subsection 281.1 of the *ETA* (the "First Relief Request").

[9] On March 10, 2015, a Team Leader with the CRA's Taxpayer Relief Centre of Expertise, Appeals Division ("CRA Appeals Division"), Summerside, Prince Edward Island Office ("PEI Team Leader") denied the First Relief Request. Paraphrasing subsections 152(1) and 168(1) of the ETA, the PEI Team Leader explained that the Applicant is liable for the GST/HST it charges on goods and services on the earlier of either: (i) the day that the Applicant receives payment for its supply; or (ii) the day that the payment is due, with the latter interpreted as the earlier of either the date an invoice is issued or the date specified in an agreement. The PEI Team Leader acknowledged that while the Applicant may not have received payment for services by the date that the GST/HST payment is due, it nonetheless remained liable for GST/HST when it invoiced its clients for such.

[10] The PEI Team Leader then explained that the CRA typically exercises discretion to waive or cancel interest or penalties under subsection 281.1(1) of the *ETA* where penalties and/or interest resulted from: (i) circumstances beyond the taxpayer's control; (ii) actions of the CRA; (iii) the taxpayer's confirmed inability to pay; (iv) financial hardship; or (v) other circumstances. The PEI Team Leader explained that the CRA also considers whether a corporate taxpayer has a history of voluntary compliance with its tax obligations, knowingly allowed a balance to exist, exercised a reasonable amount of care, and has acted quickly to remedy any delays or omissions. The PEI Team Leader concluded that the Applicant did not favourably meet any of these latter discretionary factors.

[11] The PEI Team Leader found that the Applicant did not meet the definition of financial hardship for a corporation, which the CRA defines as existing where the continuity of business

operations and the continued employment of a firm's employees is jeopardized. The PEI Team Leader noted that between 2008 and 2013, the Applicant's expenses, wages, and salaries had stayed relatively the same, with notable differences in the 2012 tax year (a decrease attributed to operational needs) and the 2011 tax year (a higher total payable, which the PEI Team Leader attributed to the Applicant preferring other debts over the CRA). Additionally, the PEI Team Leader found that the Applicant had not been prevented from meeting its filing obligations due to circumstances beyond its control. Accordingly, the PEI Team Leader denied the relief application.

C. *Reconsideration of the First Relief Request*

[12] On March 4, 2015, the Applicant submitted a further request for relief. Although this request was submitted slightly before the decision for the First Relief Request was rendered, the Minister treated this request as a reconsideration of the First Relief Request.

[13] In an accompanying letter, the Applicant asserted that industry competition prevented it from changing its business structure and that, as a result, it was financially impossible for the Applicant to pay its GST/HST and payroll remittances before receiving payment from its clients. The Applicant's concerns are effectively summarized in two paragraphs from its submissions:

> As you can appreciate, it is impossible to pay $510,069.54 [direct wages] plus overhead expenses, WSIB, source deductions and HST from $266,953.80 [amount actually received from invoices totalling $670,061.52]. The *Income Tax Act* and the *Excise Tax Act* are clearly unfair in requiring AllStaff to pay 100% of the HST and payroll remittances billed in a quarter, when only a portion of the HST and payroll deductions have been collected.

> It is my submission that common sense and fairness "a principle of Canadian taxation" would lead to the conclusion that this taxpayer should have some taxation relief.

[14] The Applicant referenced the following extenuating circumstances which it alleged also compounded its inability to submit all of its GST/HST and payroll remittances on a timely basis, including:

a. $68,000 in legal fees to oppose a unionization (2011);

b. Annual factoring fees payments used to finance the accounts receivable, allow the corporation to pay its payroll deductions on an accelerated basis, and pay uncollected HST and uncollected payroll deductions (2010: $214,000; 2011: $213,000; 2012: $107,000; 2013: $65,000);

c. $40,000 to organize corporate accounting books after the Applicant's former Chief Financial Officer left the accounting records from 2009-2012 in a state of disarray (2012-2013);

d. $70,000 to move offices (2012); and

e. $8,000 payment to terminate an employee (no date).

[15] The Applicant noted that to assist in payments, its owner reduced her salary by 60%, withdrew money from her Registered Retirement Savings Plans, and refinanced her home. The Applicant further noted that it was unsuccessful in obtaining financing from the Federal Development Business Bank and TD Bank.

[16] Finally, the Applicant requested that the CRA consider its own *Taxpayer Bill of Rights* and "Commitment to Small Business," citing the Applicant's right to have the costs of compliance be taken into account and for the CRA to minimize these costs.

[17] On January 4, 2016, the PEI Team Leader denied the Applicant's request to reconsider the First Relief Request decision. The PEI Team Leader again summarized the CRA's approach to exercising discretion under section 281.1(1) of the *ETA* and explained that "[i]t is the responsibility of businesses to determine their potential and existing filing and payment obligations." The PEI Team Leader concluded that the Applicant failed to establish that it was prevented from complying with its filing and remittance obligations due to an inability to pay or undue hardship. Accordingly, the PEI Team Leader again denied the Applicant's request for relief.

D. *The Second Relief Request*

[18] On June 13, 2017, the Applicant filed an objection to its 2016 and 2017 notices of assessment for the payroll account under the *ITA*. This request was determined to be a true taxpayer relief request and was remitted to the CRA Appeals Division for determination.

[19] In an accompanying letter, the Applicant reiterated its position that its business model is not conducive to the current payment structure and requested the CRA to consider and apply its interpretation of the *Taxpayer Bill of Rights*. Referencing sections 10 and 12 of the *Taxpayer Bill of Rights*, the Applicant submitted that the CRA knew it was impossible for the Applicant to comply with the CRA's requirements and legislation, and asserted that it had spent over $1,000,000 on factoring fees attempting to do so.

[20] The Applicant again alleged that the CRA had breached its "Commitment to Small Business" by, among other things, requiring the Applicant to remit payroll deductions on particular days despite the fact that the Applicant does not receive remittance monies on that schedule; continuously imposing high penalties and interest charges; not providing the Applicant with relief pursuant to subsection 153(1) of the *ITA*; and retaining the ability to impose super-liens, thus precluding the Applicant from obtaining a loan from traditional lenders.

[21] On February 14, 2018, a Team Leader with the CRA Appeals Division, Winnipeg, Manitoba Office (the "Winnipeg Team Leader") denied the Second Relief Request. With respect to the Applicant's business model, the Winnipeg Team Leader explained that the Applicant, as an incorporated business, was expected to have arrangements in place to ensure remittances and returns are received by their respective due dates as required under the *ITA*.

[22] The Winnipeg Team Leader found that liens were placed on the Applicant's assets in accordance with the applicable legislation due to late payments. Regarding the Applicant's alleged financial hardship, the Winnipeg Team Leader found that the Applicant failed to

substantiate this claim. The Winnipeg Team Leader concluded that the Applicant had net profits for the tax years 2013 to 2016, positive shareholder equity after considering year-end liabilities for the 2016 year, as well as consistent revenues and a consistent number of employees from 2012 to 2016. Finally, the Winnipeg Team Leader noted that the CRA expects taxpayers to borrow against assets or sell non-essential assets to pay their tax debts.

E. *Reconsideration of the Second Relief Request*

[23] On May 4, 2018, the Applicant requested a reconsideration of the Second Relief Request decision. The Applicant submitted that relief was warranted due to the CRA's misinterpretation of subsection 168(1) of the *ETA*, a provision that it claimed the CRA should have brought to its attention earlier.

[24] The Applicant submitted that, similar to how subsection 21.32(1) of the *ETA* draws a distinction between "collected" and "collectible," there is a distinction between the meaning of "paid" versus "becomes due" under subsection 168(1) of the *ETA*, with the former referencing payment already received and the latter referencing payment owed but not yet received. If no GST/HST had yet been paid or was not yet due, the Applicant asserted that it had no obligation to remit GST/HST under subsection 168(1) of the *ETA*. Accordingly, the Applicant claimed that the CRA's interpretation that a payment is considered to be due on the day the invoice is issued, rather than the day the invoice is payable, was therefore incorrect and that the actions taken as a result of this interpretation — namely, imposing penalties and interest — were erroneous.

[25] The Applicant submitted that its circumstances warranted the Minister to make an Order retroactive to June 1, 2013, confirming that the Applicant's preferred interpretation applied and that interest and penalties ought to be vacated. The Applicant, stating "[o]ften the jobs are not lost until CRA puts the taxpayer out of business," argued the fact that it had employed a consistent number of employees and reported consistent revenues had no bearing on its ability to remit payroll deductions.

[26] The Applicant concluded by reiterating its reliance on sections 10 and 12 and the "Commitment to Small Business" under the *Taxpayers Bill of Rights*, and providing a schedule listing all accrued interest and penalty charges.

[27] On November 15, 2018, an officer with the CRA's Winnipeg MB Tax Centre (the "Officer") recommended denying the Second Relief Request. The Officer conducted a substantial analysis of all relevant factors, including:

i. The Applicant's history of (non-)compliance since 2013;

ii. The Applicant's knowledge that it allowed a balance to exist, upon which arrears interest accrued;

iii. The Applicant's failure to exercise reasonable care under the self-assessment system annually since 2013 (the Officer noted that remittances taken at source from employees are to be held in trust, not used for business operations, and that a "Due Diligence Defence" letter was issued to the Applicant in 2014 warning of such);

iv. The Applicant's failure to act quickly to remedy its errors;

v. A lack of circumstances beyond the Applicant's control that prevented it from meeting its tax obligations (the Officer noted that remittances are due after pay periods, not when invoices are paid);

vi. That this is an ongoing issue;

vii. The Applicant's submission that the CRA has misinterpreted the applicable legislation, including the *Taxpayer's Bill of Rights*; and

viii. The Applicant's lack of substantiated financial hardship (the Officer noted that the Applicant's gross revenue increased by over $3 million in the last 2 years, that the Applicant had made a net profit in each of the four years reviewed after amortization is added back in, and that the owners continued to collect wages in excess of $200,000 annually — all of which indicated that the Applicant could restructure to comply).

[28] Accordingly, the Officer concluded:

> The payroll account follows legislation under the Income Tax Act and the due dates for these trust funds are precise. As a threshold 1 remitter, paydays from the 1st to the 15th day of the month are due by the 25th of the same month; paydays from the 16th to the end of the month are due by the 10th of the following month. The taxpayer is taking deductions from employees and not ensuring the tax obligations are met.

> […] The corporation has been advised on more than one occasion by the collection section of the CRA of their requirements and legislation to be followed. […] The issue has been ongoing since 2004 and has now impacted the compliance of the RP account since 2013. The corporation has had sufficient time to restructure and reorganize their obligations over this period of time to ensure all tax obligations have been met by the required due dates.
>
> Cancellations of the penalties in this review and arrears interest charges is not warranted. There was no CRA error and there was no situation that prevented the corporation from meeting their obligations to the CRA.

[29] The Officer further found that there was no economic jeopardy to the Applicant's employees given the Applicant's increased revenue, and noted that the Applicant had not indicated that the closure of its operations would impact the local community where it is located. Accordingly, the Officer recommended denying the request.

F. *Decision Under Review*

[30] In a decision dated November 23, 2018, a CRA Team Leader with the Taxpayer Relief Centre of Expertise, Appeals Branch (the "CRA Appeals Team Leader") confirmed the Officer's assessment and denied the Applicant's request for relief. The CRA Appeals Team Leader holds delegated authority from the Minister to make such decisions independently.

[31] Reiterating portions of the Officer's analysis, the CRA Appeals Team Leader confirmed that as of October 4, 2018, the Applicant owed $773,802 in remittances and $176,476 in associated penalties, and that these outstanding amounts demonstrated that the Applicant did not exercise reasonable care of its trust account. Noting that a payroll account is regulated under the

ITA, the CRA Appeals Team Leader confirmed that the CRA properly interpreted the payroll deduction legislation, emphasizing:

> Amounts remitted to your payroll deduction account are considered to be funds held by the employer for the employees in trust for the Receiver General. As such, the deductions taken from employee wages are not to be used to fund the day to day operation of the business.

[32] The CRA Appeals Team Leader also confirmed that the Applicant did not fit the CRA's definition of financial hardship, as the Applicant's increased sales did not indicate any jeopardy to business operations or to the employees' positions. Finally, the CRA Appeals Team Leader confirmed that the CRA did not err in its interpretation of subsection 168(1) of the *ETA*, and invited the Applicant to contact a separate section of the CRA if it needed further clarification on the appropriate interpretation of such provisions.

III. Legislative Provisions

***Excise Tax Act*, RSC 1985, c. E-15**	***Loi sur la taxe d'accise*, LRC (1985), ch. E-15**
123 (1) taxable supply means a supply that is made in the course of a commercial activity; (fourniture taxable)	123 (1) fourniture taxable Fourniture effectuée dans le cadre d'une activité commerciale. (taxable supply)
152 (1) For the purposes of this Part, the consideration, or a part thereof, for a taxable supply shall be deemed to become due on the earliest of	152 (1) Pour l'application de la présente partie, tout ou partie de la contrepartie d'une fourniture taxable est réputée devenir due le premier en date des jours suivants:
(a) the earlier of the day the supplier first issues an invoice in respect of	a) le premier en date du jour où le fournisseur délivre, pour la première fois, une facture pour tout ou partie

the supply for that consideration or part and the date of that invoice,

(b) the day the supplier would have, but for an undue delay, issued an invoice in respect of the supply for that consideration or part, and

(c) the day the recipient is required to pay that consideration or part to the supplier pursuant to an agreement in writing.

de la contrepartie et du jour apparaissant sur la facture;

b) le jour où le fournisseur aurait délivré une facture pour tout ou partie de la contrepartie, n'eût été un retard injustifié;

c) le jour où l'acquéreur est tenu de payer tout ou partie de la contrepartie au fournisseur conformément à une convention écrite.

168 (1) Tax under this Division in respect of a taxable supply is payable by the recipient on the earlier of the day the consideration for the supply is paid and the day the consideration for the supply becomes due.

168 (1) La taxe prévue à la présente section est payable par l'acquéreur au premier en date du jour où la contrepartie de la fourniture taxable est payée et du jour où cette contrepartie devient due.

168 (2) Notwithstanding subsection (1), where consideration for a taxable supply is paid or becomes due on more than one day,

(a) tax under this Division in respect of the supply is payable on each day that is the earlier of the day a part of the consideration is paid and the day that part becomes due; and

(b) the tax that is payable on each such day shall be calculated on the value of the part of the consideration that is paid or becomes due, as the case may be, on that day.

168 (2) Par dérogation au paragraphe (1), la taxe prévue à la présente section relativement à une fourniture taxable dont la contrepartie est payée ou devient due plus d'une fois est payable à chacun des jours qui est le premier en date du jour où une partie de la contrepartie est payée et du jour où cette partie devient due et est calculée sur la valeur de la partie de la contrepartie qui est payée ou qui devient due ce jour-là.

280 (1) Subject to this section and section 281, if a person fails to remit or pay an amount to the Receiver General when required under this Part, the person shall pay interest at the prescribed rate on the amount, computed for the period beginning on the first day following the day on or before which the amount was required to be remitted or paid and ending on the day the amount is remitted or paid.

280 (1) Sous réserve du présent article et de l'article 281, la personne qui ne verse pas ou ne paie pas un montant au receveur général dans le délai prévu par la présente partie est tenue de payer des intérêts sur ce montant, calculés au taux réglementaire pour la période commençant le lendemain de l'expiration du délai et se terminant le jour du versement ou du paiement.

281.1 (1) The Minister may, on or before the day that is 10 calendar years after the end of a reporting period of a person, or on application by the person on or before that day, waive or cancel interest payable by the person under section 280 on an amount that is required to be remitted or paid by the person under this Part in respect of the reporting period.

281.1 (1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin d'une période de déclaration d'une personne ou sur demande de la personne présentée au plus tard ce jour-là, annuler les intérêts payables par la personne en application de l'article 280 sur tout montant qu'elle est tenue de verser ou de payer en vertu de la présente partie relativement à la période de déclaration, ou y renoncer.

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

153 (1) Every person paying at any time in a taxation year

(a) salary, wages or other remuneration, other than

(i) amounts described in subsection 212(5.1), and

(ii) amounts paid at any time by an employer to an employee if, at that time, the employer is a qualifying non-resident employer and the employee is a qualifying non-resident employee,

…

shall deduct or withhold from the payment the amount determined in accordance with prescribed rules and shall, at the prescribed time, remit that amount to the Receiver General on account of the payee's tax for the year under this Part or Part XI.3, as the case may be, and, where at that prescribed time the person is a prescribed person, the remittance shall be made to the account of the Receiver General at a designated financial institution.

***Loi de l'impôt sur le revenu*, LRC (1985), ch 1 (5e suppl.)**

153 (1) Toute personne qui verse au cours d'une année d'imposition l'un des montants suivants:

a) un traitement, un salaire ou autre rémunération, à l'exception des sommes suivantes:

(i) une somme visée au paragraphe 212(5.1),

(ii) une somme qu'un employeur verse à un employé à un moment où l'employeur est un employeur non-résident admissible et l'employé est un employé non-résident admissible;

…

doit en déduire ou en retenir la somme fixée selon les modalités réglementaires et doit, au moment fixé par règlement, remettre cette somme au receveur général au titre de l'impôt du bénéficiaire ou du dépositaire pour l'année en vertu de la présente partie ou de la partie XI.3. Toutefois, lorsque la personne est visée par règlement à ce moment, la somme est versée au compte du receveur général dans une institution financière désignée.

153 (1.1) Where the Minister is satisfied that the deducting or withholding of the amount otherwise required to be deducted or withheld under subsection 153(1) from a payment would cause undue hardship, the Minister may determine a lesser amount and that amount shall be deemed to be the amount determined under that subsection as the amount to be deducted or withheld from that payment.	153 (1.1) Lorsque le ministre est convaincu que la déduction ou la retenue de la somme qui devrait par ailleurs, en vertu du paragraphe (1), être déduite d'un paiement ou retenue sur un tel paiement porterait indûment préjudice, il peut fixer une somme inférieure et cette dernière est réputée être la somme déterminée en vertu de ce paragraphe à titre de somme à déduire ou à retenir sur ce paiement.
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 account the cancellation of the penalty or interest.	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 contribuable ou la société de personnes pour tenir compte de pareille annulation.

IV. Issues & Standard of Review

[33] The sole issue on this application for judicial review is whether the Minister's decision is reasonable.

[34] I note that the Applicant argues in its written submissions that the penalties imposed pursuant to the *ITA* constitute cruel and unusual treatment or punishment contrary to section 12 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the

"*Charter*"). The Applicant, however, failed to serve the Respondent with a notice of a constitutional question as required by section 57 of the *Federal Courts Act*, RSC 1985, c F-7, and provided no oral submissions on its *Charter* claim. I will therefore disregard these arguments and focus solely upon the reasonableness of the impugned decision.

[35] It is common ground between the parties that the standard of review for the Minister's decision to grant relief under the *ITA* is reasonableness. I agree *(Building Products of Canada Corp v Canada (Attorney General)*, 2020 FC 784 at para 16, citing *Canada Revenue Agency v Telfer*, 2009 FCA 23 [*Telfer*] at paras 24-25; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

[36] Reasonableness review focuses both on the outcome of a decision and the reasoning process that led to that outcome (*Vavilov* at para 87). A reasonable decision is one that is justified, transparent, and intelligible — it must be based on an internally coherent and rational chain of analysis that is justified in relation to the relevant facts and law (*Vavilov* at paras 85, 99). A decision will generally be unreasonable if a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record (*Vavilov* at para 98).

[37] That being said, reasonableness review is not a "line-by-line treasure hunt for error" (*Vavilov* at para 102). The party challenging a decision must establish that the decision contains flaws that are more than superficial or peripheral to its merits; a decision's flaws must be sufficiently central or significant to render it unreasonable (*Vavilov* at para 100). A reviewing

court should refrain from reweighing or reassessing evidence before the decision maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

V. Analysis

A. *Applicant's Submissions*

[38] The Applicant's submissions before this Court largely reflect those it made pursuant to the Second Relief Request and subsequent reconsideration, as described above.

[39] In addition, the Applicant notes the CRA's *Information Circular* 07-1R1 (the "*Information Circular*"), which stipulates that the Minister may cancel or waive penalties and interest under subsection 220(3.1) of the *ITA* where relief is warranted due to: (a) extraordinary circumstances; (b) actions of the CRA; or (c) the employer's inability to pay or financial hardship. The Applicant submits that it meets all three of these criteria or, in the alternative, that its extraordinary circumstances alone justify relief.

[40] The Applicant asserts that the CRA misinterpreted subsection 168(1) of the *ETA* and failed to consider subsection 152(1) of that statute. Reiterating its business model, the Applicant submits that it is unfair for the CRA to require the Applicant to pay remittances when client invoices are issued. In the Applicant's view, a plain reading of subsection 152(1) of the *ETA* suggests that GST/HST payments are due only on the date that the Applicant's client is required to pay the consideration or part to the supplier, pursuant to an agreement in writing. As a consequence of the CRA's misinterpretation of that provision, the Applicant asserts it has

incurred hundreds of thousands of dollars in factoring fees and was forced to assign its accounts receivable to a factoring company, as traditional lenders will not provide it with loans due to the CRA's super-liens.

[41] The Applicant further submits that it faces financial hardship deserving of the Minister's discretion. Relying on the paragraphs 27 and 28 of the *Information Circular*, the Applicant emphasizes it cannot remit monies that are not yet due from monies that it has not yet collected, and that the CRA's requirement of this remittance alongside penalties and interest levied upon its failure to make remittances has made it impossible for the Applicant to comply with its tax obligations. The Applicant asserts that the CRA knows the Applicant does not have the financial means to satisfy its demands, and notes that the Applicant's principal had to remortgage her home and personally pay $128,000. The Applicant submits that it is unable to restructure itself to comply with the *ITA*, and that the CRA is obligated to inform the Applicant how to do so.

B. *Respondent's Submissions*

[42] The Respondent reiterates that the appropriate legislation for the applicable issue is the *ITA*, not the *ETA*, as the Second Relief Request pertained to the Applicant's payroll account. The Respondent agrees that subsection 220(3.1) of the *ITA* grants the Minister discretion to waive interest and penalties otherwise payable under the *ITA* in the circumstances set out in the *Information Circular*. However, the Respondent notes that subsection 220(3.1) of the *ITA* "is not to be used as a way of arbitrarily reducing or settling the tax debts of individual taxpayers," as is stipulated in the *Information Circular*.

[43] The Respondent submits that the Minister's decision to adopt the Officer's recommendations and deny the Applicant's relief request is reasonable. The Respondent asserts that the Officer thoroughly considered the Applicant's submissions and reviewed its supporting documentation for all relevant factors prior to upholding the Second Relief Request decision. Similarly, the Officer reviewed the *Information Circular* and found that none of the circumstances warranting relief applied: the Applicant has a poor history of compliance (including 5 trust examinations); it knowingly allowed an arrears balance to exist; it failed to exercise reasonable care; and it failed to take steps to remedy the delays and omissions. The Respondent submits that the CRA Appeals Team Leader, who was empowered to act on behalf of the Minister, reasonably adopted these findings.

[44] The Respondent submits that the CRA has no obligation to advise the Applicant how to restructure itself — the CRA is a government agency and it would be improper for it to instruct companies on how to structure themselves.

C. *Discussion*

[45] The decision at issue in this application for judicial review is the CRA Appeals Team Leader's, who on behalf of the Minister, independently considered the Applicant's request for reconsideration of the Second Relief Request (which pertained to the June 13, 2017 request for relief from payments, interest, and penalties associated with its two notices of assessment dated April 5, 2017). As these notices of assessment pertained to late/non-existent payroll remittances and not GST/HST sales, I agree that the Minister's discretionary decision falls within the scope of the *ITA*, not the *ETA*.

[46] In short, the Applicant's argument appears to be that it has not paid employee remittances from the payroll account in a timely fashion because it has instead used this money to prioritize paying its outstanding GST/HST payments, which it alleges the CRA prematurely collected as a result of misinterpreting the *ETA*. The Applicant asserts that this constitutes undue hardship justifying relief under subsection 153(1.1) of the *ITA*, and further brings it within the ambit of the circumstances described in the *Information Circular* and subsection 220(3.1) of the *ITA*. The Respondent disagrees, and asks this Court to uphold the Minister's refusal to grant relief.

[47] Subsection 153(1.1) of the *ITA* permits the Minister to lower the amount of employee remittances owed where such payments would cause undue hardship to the employer. As of October 27, 2020, the Applicant owes $589,677 in unpaid payroll remittances. In confirming that no undue hardship existed and that such relief was not warranted, the CRA Appeals Team Leader noted that the Applicant reported over $3 million in increased sales between taxation years 2016 and 2017, and explained that such revenue was reasonably sufficient to restructure business operations to ensure compliance.

[48] What constitutes undue hardship in this context is not statutorily defined and has not previously been judicially considered. This ambiguity suggests that this Court should grant deference to the Minister's determination, who is statutorily empowered to make such a decision (*Vavilov* at para 30).

[49] Aside from references to its competition also following a similar model, the Applicant never explained why it could not restructure its business operations to be compliant, and instead

relied on its choice to prioritize GST/HST payments as justification for its non-compliance. I note that the CRA Appeals Team Leader rejected this explanation, concluding that as an incorporated business, the Applicant was nonetheless responsible for holding payroll deductions in trust for the Receiver General, and that using these deductions to fund the business' daily operations was inappropriate. I agree that the Applicant's use of funds for an alternative and unrelated purpose, *i.e.*, the prioritization of its GST/HST payments, does not justify non-compliance. Accordingly, the CRA Appeals Team Leader's denial of relief under subsection 153(1.1) of the *ITA* is reasonable. This conclusion is compounded by the CRA Appeals Team Leader's confirmation that the CRA did not misinterpret subsection 168(1) of the *ETA*, as discussed below.

[50] The Applicant also requested relief under subsection 220(3.1) of the *ITA*, which permits the Minister to waive or cancel any or all portions of penalty or interest otherwise payable. As of October 27, 2020, the Applicant owes $371,884 in penalties and interest resulting from its outstanding payroll remittances. While there are no statutory limitations on the Minister's discretion under subsection 220(3.1) of the *ITA*, the CRA has developed administrative guidelines under the *Information Circular*, which states that discretionary relief under that provision may be warranted due to (a) extraordinary circumstances, (b) the actions of the CRA, and/or (c) the employer's inability to pay or financial hardship.

[51] The CRA Appeals Team Leader reasonably determined that the Applicant did not fall within these parameters, and found there were no other relevant factors that justified an exercise of discretion. First, the CRA Appeals Team Leader rejected the notion that the Applicant's

situation amounted to an “extraordinary circumstance,” noting that colleagues within the CRA in other instances (specifically, in the First Relief Request and its reconsideration) had not misinterpreted subsection 168(1) of the *ETA*, and that GST/HST remittances were due at the time of the invoice issuance (rather than at time of payment). Accordingly, the CRA Appeals Team Leader found that the Applicant could restructure its business to be able to pay both payroll and GST/HST remittances in a timely manner. Second, the CRA Appeals Team Leader confirmed that the CRA’s actions (such as imposing liens) were all properly justified by the applicable statutes. Third, the CRA Appeals Team Leader reiterated that the Applicant’s increasing sales revenues and the cumulative wages of the owner and spouse amounting to over $200,000 suggested that the company could financially comply. The CRA Appeals Team Leader also found that there was insufficient evidence to conclude that compliance would jeopardize the Applicant’s ongoing ability to conduct business or negatively impact the employees’ employment.

[52] In my view, the CRA Appeals Team Leader’s above conclusions are justified, transparent and intelligible (*Vavilov* at para 99). Both the Officer and the CRA Appeals Team Leader examined all the relevant factors, as evidenced by the Officer’s Taxpayer Relief Fact Sheet.

[53] The CRA Appeals Team Leader also directly addressed the Applicant’s explanation on why it could not comply. As the GST/HST payments were not the subject of the Second Relief Request, the applicable question in this context is whether it was reasonable for the CRA Appeals Team Leader: (i) to rely on the CRA’s conclusions from the First Relief Request that subsection 168(1) of the *ETA* was properly interpreted, in that GST/HST remittances were due

when the Applicant issued invoices for its clients; and (ii) to find that prioritizing GST/HST payments was an insufficient justification for not complying with the *ITA*.

[54] In my view, it was reasonable for the CRA Appeals Team Leader to do so. Contrary to the Applicant's submission, subsections 152(1)(a) and 168(1) of the *ETA* clearly indicate that the Applicant's GST/HST payments are due on the date in which the Applicant issues its invoices. The CRA Appeals Team Leader's finding to this effect therefore follows an internally coherent and rational chain of analysis that is justified in relation to the relevant facts and law (*Vavilov* at para 85). Accordingly, I find that it was reasonable for the CRA Appeals Team Leader to find that the Applicant has no justifiable excuse not to remit GST/HST upon issuing an invoice, or to use payroll remittances to offset those payments.

[55] While I accept that the CRA Appeals Team Leader did not directly address the Applicant's submission that the temporary labour industry could not support such a model, in my view, this omission does not warrant judicial intervention. By emphasizing the Applicant's ability to restructure, I can infer that the CRA Appeals Team Leader reasonably rejected industry practice as a sufficient justification for legal non-compliance (*Vavilov* at para 98).

[56] Finally, I reject the Applicant's argument that the CRA was obligated to provide advice on how to restructure itself. Contrary to the Applicant's submissions, the CRA is not required to instruct companies on how to arrange their business structures to ensure compliance with their tax obligations.

VI. Costs

[57] In exercising my discretion, I find that a reasonable amount of costs is $1,500, inclusive of disbursements. I therefore award costs to the Respondent payable forthwith by the Applicant in the amount of $1,500.

VII. Conclusion

[58] I find that the Minister's decision is reasonable. This application for judicial review is therefore dismissed with costs.

JUDGMENT IN T-2196-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Costs are awarded to the Respondent.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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