Federal Court  Cour fédérale

Date: 20210311

Docket: T-4-20

Citation: 2021 FC 218

Ottawa, Ontario, March 11, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

4053893 CANADA INC.

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Voluntary Disclosures Program (VDP) encourages taxpayers to come forward and disclose inaccurate or incomplete information previously filed with the Canada Revenue Agency (CRA). If a taxpayer meets the requirements of the VDP, the Minister may waive penalties and reduce interest payable. A central condition of the VDP is that the disclosure be "voluntary." Under the Information Circular applicable at the time, disclosure was not considered "voluntary"

if the CRA had started enforcement action relating to the disclosure against the same or a related taxpayer, and the action was likely to have uncovered the disclosed information. At issue in this case is whether 4053893 Canada Inc's [405 Canada] disclosure of unfiled returns was voluntary given the CRA's prior enforcement actions against Brent Harris, 405 Canada's sole owner and director.

[2] Both 405 Canada and Mr. Harris failed to file tax returns for about a decade. In August 2016, the CRA wrote and spoke to Mr. Harris about his missing personal income tax returns. In January 2017, 405 Canada sought relief under the VDP in respect of its unfiled returns from 2006 to 2015. This VDP request was denied in 2018, but that denial was quashed by Justice Gleeson of this Court since the Minister had not addressed how the enforcement action against Mr. Harris would likely have uncovered the disclosed information: *4053893 Canada Inc v Canada (National Revenue)*, 2019 FC 51 at paras 17–19.

[3] On redetermination, a delegate of the Minister (who I will simply refer to as the Minister) again denied the requested relief because the disclosure was not voluntary. In a decision letter dated December 3, 2019, the Minister concluded the disclosure would likely have been uncovered through the CRA's prior enforcement action since Mr. Harris confirmed 405 Canada was active, he was told he had to file returns for 405 Canada, and there were links between Mr. Harris's filings and those of 405 Canada. Mr. Harris again challenges this determination, arguing that the Minister's determination that the disclosure was not voluntary was unreasonable.

[4] Having reviewed the Minister's decision and 405 Canada's arguments, I conclude the decision was reasonable. The decision sets out the enforcement steps taken against Mr. Harris and the information those enforcement steps revealed, including information in Mr. Harris's returns connected to 405 Canada. This was a reasonable basis to conclude the enforcement steps were likely to have revealed the disclosed information. Unlike the prior decision that was quashed, the Minister's decision adequately explains their basis for this conclusion. I agree with 405 Canada that the decision letter does refer to less relevant matters, including enforcement steps taken after the VDP application and Mr. Harris's general history of non-compliance. However, these references do not undermine the overall reasonableness of the decision.

[5] The application for judicial review is therefore dismissed, with costs.

II. Standard of Review and Issues

[6] The parties agree, as do I, that the Minister's decision is reviewable on the reasonableness standard: *Worsfold v Canada (National Revenue)*, 2012 FC 644 at para 104; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. The reasonableness standard requires the Court to review the reasons given for the decision in their administrative context to understand the reasoning process and assess whether they meet the requirements of justification, intelligibility, and transparency: *Vavilov* at paras 81–85, 90–96. A reasonable decision is internally coherent and justified in light of the legal and factual constraints that bear on the decision: *Vavilov* at paras 99–101.

[7] The sole issue on this application is therefore whether the Minister's decision that 405 Canada's disclosure was not voluntary was reasonable.

III. Analysis

A. *The Statutory Scheme*

[8] The *Income Tax Act* and *Excise Tax Act* each provide for the payment of interest on outstanding tax liabilities and penalties for failure to file returns: *Income Tax Act*, RSC 1985, c 1 (5th Supp), ss 161, 162; *Excise Tax Act*, RSC 1985, c E-15, ss 280, 280.1. Subsection 220(3.1) of the *Income Tax Act* and section 281.1 of the *Excise Tax Act*, known as "taxpayer relief provisions," give the Minister a discretion to waive some or all of the interest and penalties that would otherwise be payable for the preceding ten years. The VDP is a program established under these provisions and similar provisions of other statutes to set out circumstances in which the Minister may exercise this discretion.

[9] 405 Canada filed its initial "no-names" disclosure under the VDP in January 2017 and ultimately completed its disclosure in June 2017. At the time, the applicable program document was Information Circular IC00-1R5, *Voluntary Disclosures Program*, dated January 2017. While a subsequent Information Circular (IC00-1R6) was issued in December 2017, the Minister based their decision on the IC00-1R5 Information Circular. The parties agree this is the operative document.

[10] The Information Circular includes the following discussion of when a VDP application will be considered voluntary:

> ***Conditions of a Valid Disclosure***
>
> 31. A disclosure must meet the following four conditions in order to qualify as a valid disclosure:

i) Voluntary

32. A disclosure will not qualify as a valid disclosure, subject to the exceptions in paragraph 34, under the "voluntary" condition if the CRA determines:

- the taxpayer was aware of, or had knowledge of an audit, investigation or other enforcement action set to be conducted by the CRA or any other authority or administration, with respect to the information being disclosed to the CRA, or
- enforcement action relating to the disclosure was initiated by the CRA or any other authority or administration on the taxpayer, or on a person associated with, or related to the taxpayer (this includes, but is not restricted to, corporation, shareholders, spouses and partners), or on a third party, where the purpose and impact of the enforcement action against the third party is sufficiently related to the present disclosure, and
- the enforcement action is likely to have uncovered the information being disclosed.

[11] The foregoing paragraph describes two instances in which a disclosure will not be considered voluntary: (1) the taxpayer was aware of an enforcement action set to be conducted with respect to the disclosed information; *or* (2) enforcement action sufficiently related to the disclosure was initiated on the taxpayer, a related person, or a third party *and* the enforcement action is likely to have uncovered the information being disclosed. The Minister based their decision in this case on the second of these instances. This requires the Minister to conclude that the enforcement action was sufficiently related to the disclosure, and that it was likely to have uncovered the disclosed information. This conclusion must be based on evidence and not mere conjecture: *Amour International Mines d'Or Ltée v Canada (Attorney General)*, 2010 FC 1070 at paras 26–27.

[12] To give further context to the voluntariness assessment, paragraph 34 of the Information Circular noted that "[n]ot all CRA initiated enforcement action may be cause for a disclosure to be denied by the CRA." It gives two examples in which a voluntary disclosure may not be precluded by a CRA audit, either because the audit relates to a different issue, or because the information is not part of the audit protocol.

B. *The Minister's Decision*

[13] The Minister gave notice of their decision in a letter to Mr. Harris dated December 3, 2019. After setting out the language of the Information Circular, the Minister itemized a list of 10 enforcement letters sent to Mr. Harris in the period from 2013 to 2017, the last two of which post-dated 405 Canada's VDP filing. They also noted similar letters were sent to Mr. Harris between 1993 and 2002, "demonstrating that he has a history of non-compliance with the CRA."

[14] The Minister then referred to a further letter sent to Mr. Harris on August 18, 2016, which asked him to file his T1 returns for the 2006 to 2015 period, failing which they "may issue assessments under subsection 152(7) of the Income Tax Act" (known as an "arbitrary assessment"). On the same date, a CRA officer called Mr. Harris. He returned the call the next day, August 19, 2016. The officer's notes of that call, as recorded in the CRA's electronic enforcement history records, include the following:

> TP [taxpayer] quoted 4053893 Canada Inc. This is BN […]. Date of INC 2002. Also outstanding T2 returns. TP claimed it is active. TP was informed of all tax filing obligations for T1 & T2. TP claimed he was not aware of P&I. I advised TP a letter was sent to file by Nov 30/2016 for his T1. But the T2 returns need to be filed first. TP does not have a REP [representative] and must find one.

> He agreed to call me next week with info on progress. POA: This account is still not assigned to me as of yet and I will request CORP too.
>
> [Emphasis added.]

[15] The Minister's decision on the VDP request summarized the three points from the telephone call that I have underlined above. It then provided the following analysis of whether the disclosure was voluntary:

> The CRA was able to establish a direct link between Mr. Harris and his corporation 4053893 Canada Inc. since he was the sole owner. The CRA has been able to link the employment income reported on the T1 returns (line 101) to the amount shown on the related T4 slips in addition to the dividend income on the T1 returns (line 120), the dividend income shown on T2 returns (Schedule 100/125) and related T5 slips. We also linked the information reported on the T2 returns with the information reported on the CT23 returns and the GST returns. At the time 405893 [*sic*] Canada Inc. initiated its voluntary disclosure application, Mr. Harris' personal tax returns were still not filed.
>
> In addition, all these returns were part of the original application. The CRA concluded that, in part by virtue of this information, that the information and the amounts involved in the disclosure would have been uncovered.
>
> [Emphasis added.]

[16] The Minister's decision was based on a Voluntary Disclosures Program Report prepared by a Voluntary Disclosures Officer and approved by a Team Leader who was a delegated authority of the Minister. The Report sets out the same grounds for the decision that are set out in the decision letter, although it provides some additional detail. As this Court has held, the contents of the Report helps serve as justification and may constitute part of the reasons for the

decision: *Lambert v Canada (Attorney General)*, 2015 FC 1236 at para 35; *Vavilov* at paras 94–98.

C. *The Minister's Decision is Reasonable*

[17] 405 Canada challenges several aspects of the Minister's decision. It first argues the CRA's numerous prior enforcement letters to Mr. Harris did not result in him filing returns that revealed the disclosed information. Nor did it result in any enforcement steps by the CRA against 405 Canada. This, it asserts, should have led the Minister to conclude that the 2016 enforcement steps would likely have had the same result, rather than uncovering new information.
405 Canada argues the Minister gave no reason to expect the August 2016 letter would result in a different outcome than the prior letters.

[18] I cannot accept this submission, for three reasons. First, the August 18, 2016 letter cannot be taken in isolation. The CRA also called Mr. Harris directly on the same day, which resulted in him returning the call and the discussion noted above. These calls fall within the broad definition of "enforcement action" in the Information Circular, which includes "direct contact by a CRA employee for any reason relating to non-compliance." The discussion, as recorded, included the identification of 405 Canada as a related taxpayer, the information that 405 Canada was in default of its T2 filing obligations, and the CRA advising Mr. Harris that the company's T2s had to be filed. This goes well beyond the contents of the earlier letters.

[19] Second, the enforcement action did result in Mr. Harris filing his returns, which included the information regarding employment income and dividend income from 405 Canada. Although

the returns were not filed until after the VDP application was filed, this does not change the fact that the information in question was in fact uncovered through the enforcement action. It would be incongruous for a disclosure to be considered voluntary simply because a related taxpayer did not file the returns that would reveal the same information until after filing a VDP application. While the relevant analysis under the VDP is whether the enforcement action was *likely* to uncover the information, rather than whether it *did*, the fact that it did uncover the information is relevant in the assessment.

[20] Third, 405 Canada's reliance on its principal's past history of non-compliance is misplaced. I question whether a corporate taxpayer can rely on its principal's own non-compliance to justify an argument that successful enforcement was unlikely. Even if it could, the CRA took additional enforcement steps in 2016 beyond the letters that had previously not triggered returns. The history of the enforcement steps from 2012 to 2015 is therefore of limited relevance in assessing the likelihood of the 2016 enforcement steps uncovering the information. It was therefore not unreasonable for the Minister to reach their conclusion despite the history of non-compliance following the issuance of enforcement letters. Nor was it necessary for the Minister to explain or reconcile why there had been no prior enforcement action against the company after the earlier letters had been sent.

[21] I also note that the Report underlying the decision indicates that the CRA was aware that 405 Canada had outstanding returns, having previously sent enforcement letters in respect of the 2002 to 2006 tax years. The last of these overlapped with the years for which the VDP request was filed. The Report states that no further enforcement action was taken by the CRA since it

had no information available to file the returns arbitrarily. The CRA is not obliged to take any particular enforcement steps, and their "enthusiasm" for collection activity does not dictate the exercise of discretion: *Bontje v Canada*, 2011 FC 165 at para 28, aff'd 2012 FCA 53. Nonetheless, the statement regarding the reason no further steps were taken provides some additional explanation in response to 405 Canada's argument that the lack of enforcement against it suggests the disclosure was voluntary.

[22] 405 Canada next argues that the likelihood assessment should be made based on the specific enforcement action in issue and the likely results if it were carried out. The letter of August 18, 2016 warned that the CRA may conduct an arbitrary assessment of Mr. Harris if he did not file his returns. Since an arbitrary assessment of Mr. Harris would not disclose any information regarding 405 Canada, it argues the disclosure should not be considered involuntary. I disagree. While the enforcement letter referred to an arbitrary assessment, it did not limit the CRA's enforcement options to this. The letter was evidently designed to encourage Mr. Harris to file his returns. It was also sent the same day as a call to Mr. Harris, which resulted in the CRA directly advising him of the need to file returns, including those of the company. I agree that the assessment of the likelihood of uncovering the disclosed information should be linked to the practical realities of the CRA's enforcement steps and protocols: *Matthew Boadi Professional Corporation v Canada (Attorney General)*, 2018 FC 53 at paras 27–28. However, it need not be limited to one particular step referenced in correspondence, particularly when the facts show that other enforcement steps were being taken.

[23] 405 Canada asserts that the Minister's decision suffers from the same flaw as the earlier decision that was quashed by Justice Gleeson, namely that the Minister did not adequately explain how enforcement against Mr. Harris would "likely" uncover information regarding 405 Canada: *4053893 Canada Inc* at paras 17–19. However, unlike the prior decision, the Minister did not simply rely on the connection between the two taxpayers to establish either that the enforcement action was sufficiently related or that it would likely have uncovered the information. Rather, the Minister set out specific information from Mr. Harris's returns that disclosed information regarding 405 Canada. In particular, Mr. Harris's T1 returns since 2006 set out employment and dividend income from 405 Canada, and showed the same amounts that were on the T4 and T5 slips and corporate T2, CT23, and GST returns filed by 405 Canada. Mr. Harris's returns therefore allowed the Minister to link the source of the reported income directly to 405 Canada. While the Minister's reasons are brief, they are informed by the underlying Report, and I am satisfied that in their administrative context they are sufficient to meet the requirements of justification, transparency, and intelligibility: *Vavilov* at paras 89–96.

[24] 405 Canada also contends that the Minister's decision is unreasonable because it refers to two matters irrelevant to the question of voluntariness: the two letters sent to Mr. Harris after the VDP application was filed, and the observation that Mr. Harris had a "history of non-compliance." The determination for the Minister to make was whether enforcement action that "was initiated by the CRA" against a related taxpayer was sufficiently related to the disclosure and was likely to have uncovered the information being disclosed. I agree with 405 Canada that the letters that post-date the VDP application were not relevant to that determination. Nor was Mr. Harris's prior history of non-compliance, of itself, directly relevant to the question.

However, while the reasons list these matters in describing past enforcement efforts, the Minister neither referred to nor relied on them in reaching their conclusion that the disclosure was not voluntary. Rather, the Minister's reasoning was based on the August 18, 2016 letter, the August 19, 2016 telephone conversation, and the contents of Mr. Harris's returns. In the circumstances, I cannot conclude that reference to either the two later enforcement letters or the history of non-compliance is unreasonable, let alone creates a "sufficiently serious shortcoming" as to invalidate the decision: *Vavilov* at para 100.

[25] Lastly, 405 Canada takes issue with two aspects of the evidence before this Court. First, it notes that the certified tribunal record (CTR) prepared by the CRA did not include the tax returns filed by Mr. Harris or 405 Canada. It contends that the Court was therefore unable to test the veracity or reliability of the Minister's statements about correlating the personal returns with the disclosed information. This argument is untenable. Rule 317 of the *Federal Courts Rules*, SOR/98-106 provides that a party may request that the tribunal transmit material that is in the possession of the tribunal and *not* in the possession of the party. The applicant is then responsible for setting out in its application record the necessary evidentiary record for the judicial review application, which may include both documents from the CTR and documents that were before the tribunal but are not in the CTR: *Federal Courts Rules*, Rule 309(2); *Canada (Attorney General) v Canadian North Inc*, 2007 FCA 42 at paras 7–12; *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268 at paras 13–18. 405 Canada followed this approach, filing in its application record both the CTR documents and additional documents in its possession that were not in the CTR, including the August 18, 2016 enforcement letter to Mr. Harris.

[26] There is no indication that 405 Canada did not have access to its own returns or those of its principal. Having not included those documents, it cannot now complain that the record on this application is deficient. In any event, as the Minister correctly notes, the onus was on 405 Canada to demonstrate that the decision was unreasonable. 405 Canada filed no evidence to show the Minister's statements that they could correlate the returns were unreasonable. It cannot now point to the contents of the CTR, or to the Minister not filing responding affidavits, to try to put the onus on the Minister to establish the reasonableness of their decision.

[27] Second, 405 Canada argues that the evidence of the August 19, 2016 telephone conversation was insufficient. Relying on this Court's decision in *Chou*, it argues the electronic diary notes in the CRA's record system are not admissible evidence of the contents of the conversations: *Chou v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 14890 at paras 4–14, aff'd 2001 FCA 299.

[28] The primary reason for rejecting this argument is that it was already rejected by Justice Gleeson. At paragraph 21 of his decision on 405 Canada's first application for judicial review, Justice Gleeson held as follows:

> There is no doubt that the notes form part of the record in this case and were available to the Delegate to consider. In *Chou*, the Court was asked to consider the substance of a visa officer's notes regarding what took place at an interview. In this case, the respondent submits that the notes, regardless of content, were properly before the Delegate and the Delegate did not err by relying upon them. I agree. This situation can be distinguished from *Chou*: in that case, the Court itself was being asked to consider the content of an officer's notes, whereas in this case, I am reviewing the Delegate's decision based on the record before her, which included notes by a CRA officer.
>
> [Emphasis added.]

[29] 405 Canada accepts this determination and agrees that the notes form part of the record. However, it still argues that additional evidence of the substance or content of the telephone call, such as an affidavit from the CRA officer, is necessary to allow it to cross-examine on the contents of the call and to allow this Court to assess the reasonableness of the CRA's decision. I cannot agree that this creates a point of distinction from this Court's earlier decision. Justice Gleeson was also assessing the reasonableness of the CRA's decision. He nevertheless dismissed the argument that further evidence attesting to the contents of the call was necessary.

[30] In any event, I agree with Justice Gleeson's analysis. I would add the following comments to his on this issue. The evidentiary rules applicable to an administrative decision maker are not necessarily those of a Court: *Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24 at para 25. In the administration of Canada's taxation statutes, including in particular in the application of the taxpayer relief provisions, the Minister and their delegates must be able to receive and rely on evidence, such as unsworn or hearsay evidence, that might not satisfy the rules of evidence in a Court proceeding. In particular, given the number of officers involved in the administration and enforcement of the *Income Tax Act* and the *Excise Tax Act*, the Minister must be able to rely on notations regarding communications with taxpayers that are set out in the electronic record system. This is particularly so where there is no conflicting information put forward by the taxpayer suggesting the notes do not reflect the conversation. I therefore cannot conclude it was unreasonable for the Minister to rely on the officer's notes as reflecting the contents of the call without independently confirming the notes with the officer.

[31] This being so, no further evidence regarding the contents of the notes needs to be filed in this Court to allow it to assess the reasonableness of the decision. Indeed, had the Minister filed an affidavit on this application going to the contents or substance of the call, as 405 Canada suggests, it would have been new evidence that was not before the decision maker. Such new evidence going to the merits is generally impermissible on a judicial review application: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 18–20. If 405 Canada questioned the contents of the call summary found in the notes it could have, and should have, submitted evidence to this effect to the Minister.

[32] To the extent the Minister relied on the notes of the call without 405 Canada knowing about them or having any chance to challenge them, this might potentially raise the fairness issue identified by Justice Gleeson: *4053893 Canada Inc* at para 21. Evidence speaking to such a procedural defect and its impact might be admissible before this Court even if it was not before the decision maker: *Access Copyright (2012)* at para 20(b). However, in the current circumstances, 405 Canada knew of the notes and could have raised with the CRA any concerns about their contents or any contrary evidence. It did not, and raised no fairness argument based on the notes of the call on this application.

IV. Conclusion

[33] 405 Canada has not established that the Minister's decision is unreasonable. The application for judicial review is therefore dismissed.

[34] The parties advised at the hearing of the application that they had reached agreement on the issue of costs. I order that costs be payable in accordance with that agreement.

JUDGMENT IN T-4-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. Costs are payable in accordance with the agreement reached between the parties.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-4-20
STYLE OF CAUSE:	4053893 CANADA INC v THE MINISTER OF NATIONAL REVENUE

HEARING HELD BY VIDEOCONFERENCE ON NOVEMBER 24, 2020 FROM OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	MARCH 11, 2021

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