Federal Court Cour fédérale

Date: 20220128

Docket: T-966-20

Citation: 2022 FC 103

Ottawa, Ontario, January 28, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

BONNYBROOK PARK INDUSTRIAL DEVELOPMENT CO LTD

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Bonnybrook Park Industrial Development Co Ltd ("Bonnybrook"), is a private corporation that earns rental income. Bonnybrook was refused a dividend refund for the 2003-2011 taxation years because it had not filed its corporate tax returns within three years of each of the years for which it was claiming the refund ("Three-year Filing Condition").

Bonnybrook asked for relief from the Three-year Filing Condition because its sole director, Ms. Armbrust, had faced several medical issues.

[2] The Manager of the Business Returns Directorate at the Canada Revenue Agency [CRA] ("Minister's Delegate") agreed to consider Bonnybrook's request for relief. The Minister's Delegate determined, after reviewing the circumstances of Ms. Armbrust and Bonnybrook, that it would have been reasonable to expect Bonnybrook to have put measures in place to ensure its compliance with the filing requirements, and refused the request for relief.

[3] For the reasons below, I do not see a basis for the Court to interfere with the Minister's Delegate's decision. The decision follows a rational chain of analysis and is transparent, justified and intelligible.

II. Background Facts

[4] Bonnybrook did not file its corporate tax returns for the 2003-2012 taxation years by the deadline required, as set out in s 150 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*]. In 2015, Bonnybrook made an Application for Taxpayer Relief under the Voluntary Disclosure Program ("VDP") to file its corporate tax returns late for the 2003-2012 taxation years, as well as a request for relief against late filing penalties and interest.

[5] The CRA accepted the late-filed returns and provided some relief by partially waiving interest for the 2005-2012 taxation years. The CRA disallowed the dividend refunds for the 2003-2011 taxation years because Bonnybrook's corporate tax returns were not filed within three

years after the end of the relevant taxation years as is required by s 129(1) of the *ITA*; in other words, it failed to meet the Three-year Filing Condition. The dividend refund for the 2012 taxation year was allowed because the corporate tax return had been filed within the three-year period.

[6] In May 2016, Bonnybrook made a request to the CRA, asking that they exercise their discretion under ss 220(2.1) or 220(3) of the *ITA* to either extend or waive the Three-year Filing Condition in s 129(1) in order for the corporation to receive dividend refunds for those years. The CRA refused the request, asserting that it did not have the discretion, under the general relief provision that allows the Minister to extend a filing requirement (s 220(3) of the *ITA*), to consider relief from the Three-year Filing Condition. The CRA did not address the request to waive the Three-year Filing Condition under s 220(2.1) of the *ITA*.

[7] Bonnybrook brought an application to judicially review this decision. At that time, the Minister took the position that this Court did not have the jurisdiction to decide the issue of whether the provisions in ss 220(2.1) and 220(3) of the *ITA* could be used to relieve an applicant from the Three-year Filing Condition in s 129(1), and that this issue ought to be decided by the Tax Court of Canada. This Court agreed and found it did not have the jurisdiction to decide the issue (*Binder Capital Corp v Canada (National Revenue)*, 2017 FC 642).

[8] Bonnybrook appealed the Federal Court's decision. At the Federal Court of Appeal, the Minister argued that the Federal Court did, in fact, have jurisdiction to decide the issue of the applicability of the ss 220(2.1) and 220(3) relief provisions in relation to the s 129(1) dividend

refund requirements. The Federal Court of Appeal overturned this Court's decision and found that the Federal Court had the jurisdiction to decide the applicability of the relief provisions (*Bonnybrook Park Industrial Development Co Ltd v Canada (National Revenue)*, 2018 FCA 136 [*Bonnybrook*]).

[9] The Federal Court of Appeal considered the CRA's position that the general relief provisions, and in particular s 220(3) (the power to extend a filing requirement), could not apply with respect to the Three-year Filing Condition to obtain a dividend refund. The majority of the Federal Court of Appeal found that this position was inconsistent with the proper interpretation of the provisions and directed the CRA to re-determine this issue in accordance with its reasons. Due to the CRA's failure to address the s 220(2.1) (the power to waive a requirement) request in any way, the Federal Court of Appeal did not specifically address its interpretation, except to send that request back to be re-determined according to the general principles set out in its decision.

[10] The file was sent back to the CRA to be re-determined. On February 28, 2019, the Minister's Delegate requested medical documentation to support Bonnybrook's request for relief from the requirement in s 129(1) of the *ITA*.

[11] Bonnybrook provided further submissions outlining the various medical conditions faced by Ms. Armbrust between the 2003-2012 taxation years and supporting documentation from hospital visits over those years. The medical conditions and treatments varied over the years, and

included: anemia and blood transfusions, hip replacement surgery, breast cancer and chemotherapy, radiation, and cognitive impairment.

[12] On July 24, 2020, the Minister's Delegate refused Bonnybrook's request for relief under ss 220(3), 220(2.1) and 220(3.1) of the *ITA*.

III. Issues and Standard of Review

[13] At issue is the Minister's Delegate's decision to refuse to extend or waive the filing requirement so that Bonnybrook could have received the dividend refund in years where it had not complied with the three-year filing requirement in s 129(1) of the *ITA*. Also at issue is the Minister's Delegate's decision to refuse Bonnybrook's request for relief from late penalties.

[14] Both parties agree that the Minister's Delegate's decision is to be reviewed on a reasonableness standard. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

IV. Analysis

A. *Legislative and policy framework*

[15] Bonnybrook can qualify for a partial refund of tax, through a dividend refund, when its income is distributed to shareholders as a dividend. One of the requirements in s 129(1) of the

ITA, the provision dealing with dividend refunds, is that the corporation file their tax returns within three years after the end of the relevant period. There is no dispute between the parties that Bonnybrook failed to meet the Three-year Filing Condition for the 2003-2011 taxation years. At issue is Bonnybrook's request for relief from this requirement, which asked either that the Minister extend the filing deadline of their returns (*ITA*, s 220(3)) or waive the requirement to file their return in the three-year period (*ITA*, s 220(2.1)) and to waive or cancel late penalties (*ITA*, s 220(3.1)).

[16] There are several provisions in the *ITA* that allow the Minister to relieve a taxpayer from the effects of a strict application of requirements in the *ITA*. The inclusion of these provisions is an acknowledgment that "strict filing requirements may result in unfairness in certain circumstances" (*Bonnybrook* at para 58).

[17] The decision to provide taxpayer relief against a strict application of a requirement is a highly discretionary decision. There are no specific criteria in the *ITA* or the *Income Tax Regulations*, CRC, c 945, guiding the exercise of this discretion. The Minister's Delegate noted that the guidelines (CRA Information Circular 07-1R1) had been taken into account in their decision; these guidelines do not specifically deal with the power to extend a filing deadline under s 220(3) or the power to waive a requirement under s 220(2.1) but do address relief to cancel or waive late penalties under s 220(3.1), which Bonnybrook had also requested.

B. *Treatment of the medical evidence and submissions is reasonable*

[18] Bonnybrook's central submission was that the medical condition of its sole director from 2003-2012 justified its failure to file its corporate tax returns on time or within the three-year period required in order to obtain a dividend refund. Bonnybrook argued that the Minister's Delegate gave "scant consideration" to the medical evidence and submissions that had been filed. Yet, Bonnybrook does not point to anything specific in the medical evidence that was not properly considered by the Minister's Delegate or any piece of evidence that, had it been considered, would have changed the Minister's Delegate's principal justification for refusing the request.

[19] The Minister's Delegate accepted that Ms. Armbrust "was dealing with multiple, at times severe, medical issues" but found that she had not shown that she was unable to "seek assistance to get the T2 returns filed on time, even if she was not capable of preparing the returns herself." Bonnybrook has not pointed to any three-year time period where the Minister's Delegate's determination that Ms. Armbrust could have sought assistance is inconsistent with the medical evidence provided.

[20] The Minister's Delegate noted that until recently, Ms. Armbrust had been the sole director of a corporation that involves multiple rental properties. The Minister's Delegate took into account the particular context of corporations and the responsibilities of directors where ongoing medical circumstances arise, noting:

> It is the responsibility of the directors of a corporation to manage the financial affairs of the company. There is an ongoing

> obligation to ensure various legal and financial obligations are met. The position of a director is a choice, and it is expected that a high level of attention and care be given to the corporate tax responsibilities. When ongoing medical circumstances exist, it is reasonable to expect that measures be put in place to ensure compliance.

[21] The Minister's Delegate also considered that Ms. Armbrust had filed her personal and trust tax returns on time during the same period and made "multiple payroll remittances and filed T4 slips and summaries for the 2003 to 2010 and 2012 years on time."

[22] Bonnybrook argued that consideration of Ms. Armbrust's personal tax filings was not relevant given corporate tax filings are much more complex, and moreover, the tax returns and the payroll remittances filed during this period contained numerous errors. But the Minister's Delegate did not rely on Ms. Armbrust's filing of payroll remittances and personal and trust tax returns as evidence that she could accurately do it herself; it was relied on, in part, to support their finding that there was nothing in the evidence to demonstrate that Ms. Armbrust was not, at least, capable of seeking assistance to ensure the returns were filed, particularly given her responsibility of being a sole director.

[23] The Minister's Delegate considered Bonnybrook's evidence and submissions, as well as the general responsibilities of a director of a corporation to manage the affairs of a company. The Minister's Delegate was ultimately not satisfied that Ms. Armbrust's various medical conditions of varying severity would have meant that she could not have arranged to seek assistance to file the corporate tax returns, even if she could not prepare them on her own.

[24] Upon reviewing the record and the reasons, I am "able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic" and am satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (*Vavilov* at para 102, citing *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 55 and *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748 at para 56). There is no basis for the Court to interfere with the Minister's Delegate's assessment of the medical evidence and submissions filed by Bonnybrook.

C. *Failure to engage in statutory interpretation*

[25] Bonnybrook argued that the "Minister has flouted the Federal Court of Appeal's Judgement and Reasons for Judgement on the Appeal." The basis for this assertion is Bonnybrook's view that the Minister's Delegate failed to "consider the relevant provisions, interpret them, and decide upon their meaning" and that the failure to do so made it impossible for the decision-maker to "appreciate the particular context" of Bonnybrook's request. There are two issues that arise from this submission. First, whether the Minister's Delegate failed to follow the instructions of the Federal Court of Appeal. And, second, even if the decision is not inconsistent with the Federal Court of Appeal's decision, whether the Minister's Delegate's reasons fail to sufficiently address the relevant legislative provisions.

(1) Decision is consistent with instructions of the FCA

[26] The main issue decided by the Federal Court of Appeal was the interpretation of s 220(3) in relation to the Three-year Filing Condition in s 129(1). In other words, the Court decided that nothing in these provisions precluded the Minister from granting relief under s 220(3) with respect to the failure to comply with the Three-year Filing Condition. The Court, however, did not pronounce on the manner in which the Minister's discretionary power should be exercised. In fact, it returned the matter to the Minister. Unlike the first decision, the Minister's Delegate in this decision accepted that they have the authority to apply the general relief provisions in ss 220(2.1) and 220(3) against the Three-year Filing Condition in s 129(1). In so doing, the Minister's Delegate acted in conformity with the Federal Court of Appeal's decision (*Bonnybrook* at paras 41-48).

[27] Though the Federal Court of Appeal did not offer its own interpretation of s 220(2.1) (the waiver provision) and its application to s 129(1), the Court explained that both "Subsections 220(2.1) and (3) are examples of relief measures which have broad application and give the Minister the authority to provide relief from filing requirements throughout the Act" (*Bonnybrook* at para 48). Further, the Federal Court of Appeal noted there were other examples in the *ITA* of a waiver being available to set aside the operation of a strict condition (*Bonnybrook* at paras 45, 47).

[28] Moreover, no party is challenging the Minister's Delegate's position that they have the authority to use both the power to extend the filing deadline and the power to waive a

requirement with respect to Bonnybrook's failure to comply with the Three-year Filing Condition. Unlike the situation before the Federal Court of Appeal, the Minister's Delegate's interpretation of its authority was not contested.

[29] Accordingly, I do not find that the Minister's Delegate's decision is inconsistent with the Federal Court of Appeal's decision.

(2) Extensive statutory interpretation exercise not required

[30] As set out above, there remains no controversy with respect to the meaning of the relevant provisions, and therefore no need to engage in a formal process of statutory interpretation. Even so, I do not accept Bonnybrook's assertion that decision "contained no consideration of the relevant provisions, no attempt to interpret them, and no effort to decide upon their meaning."

[31] In their decision, the Minister's Delegate set out the relevant relief provisions and explained what was being requested with respect to the Three-year Filing Condition in s 129(1). The Minister's Delegate also considered any limitations on the relief they could consider. For example, the Minister's Delegate interpreted the scope of their authority under ss 220(3) and 220(2.1) as including the power to extend or waive the requirement that relief against late filing penalties under s 220(3.1) be only in relation to the 10 years prior to the request. This meant that the Minister's Delegate also considered the request for relief against late penalties for the 2003 and 2004 taxation years, despite it being longer than 10 years prior to the request being made. Bonnybrook did not contest this interpretation.

[32] The Minister's Delegate considered whether the health conditions of Ms. Armbrust, over the years Bonnybrook was requesting relief, justified its failure to file corporate tax returns within the period required in order to obtain the dividend refund. This was the central basis on which Bonnybrook was seeking relief from the strict requirement in s 129(1).

[33] Bonnybrook has not explained what the Minister's Delegate got wrong in their interpretation of the provisions. It has not explained how the interpretation was not consistent with the text, context or purpose of the provisions at issue or whether the Minister's Delegate's interpretation omitted from consideration a central aspect of a proper statutory interpretation exercise (*Vavilov* at para 120). Instead, Bonnybrook argued in a general fashion that the failure to engage in a formal statutory interpretation exercise is what rendered the decision unreasonable. However, the Supreme Court of Canada in *Vavilov* explained that "[a]dministrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case" (at para 119).

[34] I am satisfied that the Minister's Delegate "engaged in an adequate […] inquiry in light of its governing legislation and […] offered sufficient justification in support of its decision" (*Canada (Attorney General) v Kattenburg,* 2020 FCA 164 at para 16). I do not see any basis to find the decision unreasonable for its failure to engage in a more extensive statutory interpretation exercise, particularly where there has been no argument put forward as to how the Minister's Delegate erred in their statutory interpretation of the relevant provisions.

D. *Decision is responsive to central submissions*

[35] A decision-maker's reasons must be responsive to the parties' submissions. This requirement does not mean that a decision-maker has to refer to every line of argument. However, where a submission or argument relates to a central issue or concern, the failure to address it will compromise the transparency and justification of the decision (*Vavilov* at paras 127, 128).

[36] Bonnybrook made three arguments related to its view that the Minister's Delegate narrowly considered its request as being only based on Ms. Armbrust's medical condition. In so doing, Bonnybrook argued, the Minister's Delegate failed to respond to three of its central submissions: i) the unfairness of being subjected to a punitive double tax; ii) that there may have been a policy pre-2011 where the Three-year Filing Condition for dividend refunds was not enforced by the CRA; and iii) the aggravation caused by a series of CRA missteps.

[37] I do not agree that these were central submissions made by Bonnybrook that required a response from the Minister's Delegate.

(1) Punitive double tax

[38] Bonnybrook argued that denying a dividend refund in these circumstances resulted in a "punitive double tax on transactions that lack any tax deferral motive and would otherwise be taxed only in the shareholders' hands."

[39] The problem with this submission is that by operation of the legislation, anyone who fails to meet the Three-year Filing Condition, but otherwise is qualified for the dividend refund, would also be subject to a "punitive double tax." In oral submissions, counsel for Bonnybrook agreed that this would apply to anyone who did not meet the filing requirement, but emphasized that the difference here is that Bonnybrook would be subject to it where the only reason for its late-filing was the medical circumstances of Ms. Armbrust. This is a circular argument. Bonnybrook argued that the Respondent and the CRA erred by focusing only on the medical condition of Ms. Armbrust and not on its other submissions in relation to "unfairness" but, in essence, its submission is about the unfairness of insisting on a strict application of the filing deadline *because of* Ms. Armbrust's medical condition.

[40] The goal of taxpayer relief provisions is to provide relief from the strict application of requirements in tax legislation—to "blunt the harsh effects of strict filing requirements of the Act" (*Bonnybrook* at para 47). The very determination the decision-maker has to make is whether there is a reason to exercise their discretion in order to "blunt the harsh effects" of a requirement.

[41] Accordingly, I cannot see how this submission, which in effect is just describing the impact of applying the legislation, could be characterized as a central argument made by Bonnybrook. I do not find the Minister's Delegate's failure to specifically address this submission on "punitive double tax" rendered their decision unreasonable.

(2) Pre-2011 CRA policy

[42] It is difficult to follow Bonnybrook's argument about the potential existence of a pre-2011 informal policy that relieved taxpayers from the application of the Three-year Filing Condition ("Pre-2011 Policy"). In its submission to the CRA, the submissions on this issue are limited to the following:

> Bonnybrook did not expect to be affected by the time limit in subsection 129(1) of the *Income Tax Act*. An unfairness was created when the CRA appeared to change its approach to the administration of the dividend refund regime. This may have first been made publicly known by the CRA in mid-2011 (See CRA, Interpretation – internal 2011-0405701I7 – The 3-year limitation period in 129(1), dated May 23, 2011. See also *Presidential MSH Corporation v Marr, Foster & Co LLP*, 2016 ONSC 4387). It caught a number of taxpayers off guard, as they launched a series of appeals in an effort to overcome the exceptionally costly surprise (See *Tawa Development Inc v Canada*, 2011 TCC 440; *1057513 Ontario Inc v Canada*, 2014 TCC 272; *Presidential MSH Corporation v Canada*, 2015 TCC 61; and *Nanica Holdings Ltd v Canada*, 2015 TCC 85).

[43] There is a CRA interpretation number referenced as a footnote but no other evidence of a policy nor any interpretation of the policy was provided by either party. Counsel for the Respondent argued that there was no Pre-2011 Policy as described by Bonnybrook, and in fact there was evidence to the contrary, in CRA interpretation documents, that the CRA was applying the Three-year Filing Condition at the relevant time.

[44] When asked at the hearing about the Pre-2011 Policy, counsel for Bonnybrook explained that they only became aware about the possible existence of this policy when they were researching case law and noticed some reference to an informal policy. There was no evidence

before the CRA that Bonnybrook had relied on its knowledge of such a policy in deciding not to file on time.

[45] I do not accept that the potential existence of the Pre-2011 Policy was a central submission made by Bonnybrook. While it would have been preferable for the Minister's Delegate to specifically address the submission, given the limited nature of the submission and that it was based on speculation of some sort of change in policy, I cannot conclude that the decision was unreasonable for failing to respond to it.

(3) CRA actions

[46] Bonnybrook also claimed that since participating in the VDP program in 2015, "Bonnybrook and Ms. Armbrust had to fight the CRA every step of the way to correct the numerous errors that they have caused in processing the returns." Bonnybrook argued that its references to these challenges should have been considered by the Minister's Delegate. In its submissions to the CRA, Bonnybrook made reference to one court file number that is specific to Ms. Armbrust's personal taxes, not Bonnybrook's, and then otherwise made reference to the steps taken in this proceeding. Again, this could not be characterised as a central argument being made by Bonnybrook. As explained by the Supreme Court of Canada in *Vavilov,* to require findings on each element in a submission, however minor, "would have a paralyzing effect on the proper functioning of administrative bodies…" (at para 128).

E. *Other cursory arguments*

[47] Bonnybrook claimed that the Minister's Delegate made its decision "in bad faith at Bonnybrook and Ms. Armbrust's expense." Bonnybrook presented no factual foundation or argument to underpin this claim. As such, it need not be addressed.

[48] Bonnybrook also raised in a cursory way that it had been prejudiced by the alleged delay in the Minister asking for medical documentation to support Bonnybrook's request for relief based on Ms. Armbrust's medical condition. Bonnybrook did not file medical documentation to support its request when it first filed it in 2016. At that time, the Minister understood that they did not have the discretion to grant the relief Bonnybrook was seeking. Following the Federal Court of Appeal's decision, on re-determination, the Minister's Delegate requested medical documentation from Bonnybrook to support the claims it was making. This should have not come to any surprise to Bonnybrook given the very basis for its request was the medical condition of its sole director during the relevant period. Bonnybrook has failed to provide an evidentiary foundation to their claim they were prejudiced by this alleged delay or any detailed arguments to support this claim. Moreover, as noted above, the Minister's Delegate accepted that Ms. Armbrust "was dealing with multiple, at times severe, medical issues."

F. *Disposition and Costs*

[49] Overall, I do not find any of the flaws relied on by Bonnybrook, considered together or separately, are "sufficiently central or significant to render the decision unreasonable" (*Vavilov*

at para 100). The Minister's Delegate's reasoning follows a rational chain of analysis that is transparent, intelligible and justified. Accordingly, the judicial review is dismissed.

[50] Both parties sought the cost of this application. I do not see a reason to alter the usual practice of ordering the unsuccessful party to pay the costs of the application. I award costs of this judicial review to the Respondent, the Minister of National Revenue.

JUDGMENT IN T-966-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. Costs of this application are awarded to the Respondent.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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