Date: 20060628

Docket: T-1404-05

Citation: 2006 FC 825

Ottawa, Ontario, June 28, 2006

PRESENT: The Honourable Madam Justice Hansen

BETWEEN:

K-BEL HOLDINGS

Applicant

and

CANADA CUSTOMS AND REVENUE AGENCY

Respondent

REASONS FOR ORDER AND ORDER

Introduction

[1] On July 15, 2005, the Canada Customs and Revenue Agency (CCRA or Respondent) refused the Applicant's request pursuant to subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985

c.1 (5th Supp.) (Act or the fairness legislation) for relief from a late remittance penalty of $25,334.75. The Applicant asks the Court to set aside this decision.

Facts

[2] On November 8, 2004, CCRA notified the Applicant that it would be a Threshold 2 remitter for the 2005 calendar year. As such, the Applicant was required to remit source deductions of $362,425.00 from management bonuses by February 3, 2005. On February 8, 2005, the Applicant remitted this amount with a cheque dated February 10, 2005. As a result of the late remittance, CCRA assessed the penalty at issue in these proceedings.

[3] On March 9, 2005, the Applicant's accountant wrote to the Respondent requesting that the penalty be reversed pursuant to the fairness legislation (the first request) for the following reasons:

- the Applicant's part-time bookkeeper missed the remittance date due to maternity leave, Christmas season and the sporadic nature of her involvement in the file;
- remittance was made only 3 working days after the required payment date;
- this was the first remittance after the Respondent's letter and it was for a very large bonus and thus, subject to an extreme penalty; and
- the Applicant had not been late with remittances in the past and makes all attempts to conform to the remittance requirements.

[4] On May 5, 2005, Mr. J.D. Barr advised the Applicant that its first request was denied. In particular, Mr. Barr stated that the Applicant's situation did not fall under the scope of "extraordinary circumstances beyond the employer's control" as defined by the fairness legislation.

[5] On May 11, 2005, the Applicant's accountant wrote to the Respondent requesting a second level review of the penalty (the second request). In his letter, he essentially reiterated the facts presented in his first request. He added that the amount of the penalty appeared to be excessive having regard to the fact that the remittance was only three days overdue, the company's exemplary compliance history, and the change in circumstances experienced by the company for the first time.

[6] Ms. G. Antaya, a Second Level Fairness Coordinator, reviewed the Applicant's second request and prepared a recommendation report for Ms. S. Nixon, the Acting Director of the Vancouver Island Tax Services Office. In her report, Ms. Antaya stated that the Applicant's fairness "request was reviewed in light of recent changes to penalties for payroll remittances." In her review, she looked at the following:

- the pilot "graduated penalty system" introduced in July 2003, however, it did not benefit the Applicant because the remittance was seven days late;

- the Applicant would have benefited from the administrative tolerance of "one free" late in place prior to July 2003; and

- the Applicant could have benefited from the application of Directive 92-25 that was eliminated shortly after the fairness legislation came into force.

[7] She also states in her report that having regard to the above review and the harshness of the penalty for the short period the payment was overdue, she contacted a senior officer in Ottawa to ascertain whether any partial relief from the penalty could be considered. She reports being informed that where the circumstances are not beyond the employer's control, both IC 92-2 and the FPRG direct that the penalty be upheld and that compliance history is not a factor.

[8] After noting that even though compliance history is not a factor when no extraordinary circumstance beyond the employer's control exists, she reviewed the file to ascertain what had made the Applicant a Threshold 2 remitter. She observes that the Applicant would have been in this category from the time they opened their account in 2002 but it had failed to inform the Respondent about an associated company.

[9] Ms. Antaya also considered the various professionals involved with the Applicant and its associated company and their contact with the Respondent. She concluded that it was reasonable to expect that one of these individuals would have realized that the Applicant should have been contributing on an accelerated basis.

[10] Finally, she noted that she was unable to confirm whether the cheque tendered to the Respondent on February 8, 2005 was post dated to February 10, 2005. She asked the Applicant's accountant to contact her if the cheque was in fact dated on the 8th as that would result in a reduction of about $7,000.00 to the penalty. Based on these considerations she recommended the following:

> It is clear that the lateness resulted from an employee error and not an extraordinary circumstance beyond the employer's control. K-Bel could have made other

> arrangements to have their books and records and remittances looked after while their bookkeeper was away on maternity leave, either through their associated corporation, their external accountant or elsewhere.
>
> Prior to July 2003 this penalty would not have been assessed (due to the "one-free" late). Even if it had, up to June 2004 Directive 92-25 would have allowed some administrative leeway in cancelling the penalty under the fairness provisions. With the elimination of the "one-free" late and the cancellation of Directive 92-25, there is no option but to deny cancellation of the penalty. The fairness policies currently in place do not allow relief under the circumstances of this case.

[11] On July 15, 2005, Ms. Antaya forwarded the report to Ms. Nixon. On the same day, Ms. Nixon concurred with Ms. Antaya's recommendation and denied the Applicant's second request. Specifically, Ms. Nixon advised the Applicant's accountant as follows:

> As requested, I have reconsidered the circumstances leading to the assessment of the late remitting penalty and have reviewed the company's overall compliance history…
>
> After careful thought, I have concluded that while I agree that K-Bel Holdings Inc. has a limited, but otherwise good compliance history, I must concur with the first level decision to deny relief. The company was not prevented from timely remitting due to extraordinary circumstances outside their control. As stated in your letter, the lateness in making the remittance was due to an employee oversight and as other arrangements regarding the upkeep of your clients books, records and remittances could have been made while the bookkeeper was away on maternity leave, I find that the circumstances of this case do not fall within the parameters of the fairness provisions as outlined in IC 92-2.
>
> I understand that Gwen Antaya, 2nd level fairness coordinator of our Victoria office, has contacted you in regard to this case. Prior to finalizing this decision she conferred with CRA representatives in Ottawa to confirm CRA's position with respect to this type of situation.

Issues

[12] The Applicant raises the following issues:

1. Did the Respondent err in law by considering irrelevant factors?

2. Did the Respondent err in law by fettering its discretion by automatically following policies, rules or guidelines?

3. Did the Respondent violate the principles of procedural fairness by delegating its decision-making power to a subordinate?

Standard of Review

[13] Relying on the Federal Court of Appeal's decisions in *Lanno v. Canada Customs and Revenue Agency,* 2005 DTC 5245 (F.C.A.) at para. 7 and *Vitellaro et al. v. Canada Customs and Revenue Agency*, 2005 DTC 5275 (F.C.A.) at para. 5, the Respondent submits that the appropriate standard of review of the Minister's exercise of discretion under the fairness legislation is reasonableness.

[14] The Applicant submits that the appropriate standard of review is correctness. In *Dorothea Knitting Mills Ltd. v. Canada (Minister of National Revenue - M.N.R.*), 2005 FC 318, the Court held that where a question involves a consideration of the parameters of the discretion conferred by the relevant sections of the Act, it is a question of law and thus, the appropriate standard of review is correctness. The Applicant submits that just as in *Dorothea* the issues in the present case concern whether the Minister's delegate fettered her discretion. Therefore, the standard of review is correctness. I agree with the Applicant's submissions that the issues raised are all questions of law and reviewable on a standard of correctness.

Consideration of Irrelevant Factors

[15] The Applicant submits that Ms. Antaya and, in turn, Ms. Nixon erred by considering irrelevant factors, namely, the changes to penalties for payroll remittances including the graduated penalty system, the elimination of a "one free late" policy and Directive 92-25. The Applicant argues that these factors, such as the fact that the Applicant could have benefited from the application of Directive 92-25, are completely irrelevant to the issue of whether the waiver of penalties should be granted.

[16] The Applicant relies on *Courchesne v. Canada (Revenue)*, [1996] F.C.J. No. 1469 (FCTD) where Justice Noël set aside a refusal to waive penalties under the fairness provisions because the decision of the officer appeared to be based on the validity of the penalty assessment and not whether the taxpayer's failure was excusable. Justice Noël found that the duty to act fairly had not been discharged.

[17] While I agree with the Applicant that a consideration of the historical practices and policies in relation to penalties for late payroll remittances would have constituted an error of law, there is no evidence before the Court that Ms. Nixon focused on this historical information or that she took this background information into account in reaching her decision.

Delegation to a Subordinate

[18] The Applicant contends that Ms. Nixon breached the principles of procedural fairness when she delegated her decision-making authority to her subordinate, Ms. Antaya. The Applicant points out that Ms. Nixon acknowledged during the cross-examination on her affidavit that she did not

discuss any substantive matters with Ms. Antaya and that she simply concurred with her decision and signed the July 15, 2005 letter Ms. Antaya had drafted.

[19] In my opinion, this assertion is not supported by the evidence when Ms. Nixon's affidavit and the cross-examination on the affidavit are considered in their entirety. On my reading of the record, it is clear that the decision was made by Ms. Nixon on the basis of the factors enumerated in her affidavit. As well, I note the following from the cross-examination:

> Q: Okay. In paragraph 22 of your affidavit, you list a number of considerations. And you say: "I considered the following" in reaching the decision to deny waiver of penalty. And this is your decision, not anyone else's decision; is that correct?
>
> A: That is correct.
>
> (Transcript of cross-examination of Ms. Nixon at page 59

Fettering of discretion

[20] The Applicant submits that Ms. Nixon fettered her discretion by treating the guidelines and policy as binding and by excluding other valid or relevant factors in the exercise of her discretion. As well, the Applicant submits that Ms. Nixon's discretion was fettered in that Ms. Antaya was instructed to deny the request on the basis that a new internal policy no longer allowed a waiver of the penalty in the Applicant's particular circumstances.

[21] In particular, the Applicant points to the report of Ms. Antaya and the email correspondence between her and the senior officer in Ottawa where Ms. Antaya indicates that she considers the penalty harsh under the circumstances and that her "hands are tied". In reply,

the senior officer reviews what was done in the past, prior to the elimination of the "one free late" policy and states:

> If we cancel a penalty based on compliance history, we are, in fact, allowing the "one free late" and this runs contrary to Finance's direction.
>
> This situation has become a "black" and "white" issue. Where the circumstances are beyond an employer's control, we can cancel the penalty and we might look at the compliance history of the account. Where the circumstances are not beyond the employer's control, both the IC 92-2 and the FPRG direct us to uphold the penalty and compliance history is not a factor. To ensure consistency in the application of the fairness provisions, everyone who is handling fairness requests must rely on these two sources. (Applicant's Record p. 275)

[22] This argument is grounded on the Applicant's contention that Ms. Nixon's adoption of Ms. Antaya's report results in a decision that is tainted with the same errors as those of Ms. Antaya. In this regard, the Applicant submits that the facts of the present case are similar to the facts in Courchesne where the Court found that the Minister's delegate had essentially reproduced the report given to him by the reviewing officer and, accordingly, his decision was tainted with the same errors as those of the reviewing officer.

[23] While I accept the Applicant's submission that Ms. Antaya appears to have considered herself constrained by the guidelines and policies, I am satisfied on the evidence, pages 30 to 33 of the transcript of the cross-examination of Ms. Nixon, that she did not consider herself bound by these guidelines, policies or instructions from the senior officer. As well, I note, in particular, the excerpt from the transcript cited above where Ms. Nixon states that the decision was hers alone and not that of anyone else.

[24] Finally, the Applicant argues that Ms. Nixon erred by improperly imposing limits on the factors that she would consider as potentially justifying a waiver of the penalty when the fairness provisions contain no language that limits the discretion. The Applicant states that the basis for the refusal was that it was "not prevented from timely remitting due to extraordinary circumstances outside their control." As this criteria is not found in the legislation it was not open to the Ms. Nixon to deny the request on this conclusion alone.

[25] The Applicant relies on *Dorothea* where the Court found that the Minister's delegate had erred by limiting his consideration of the request to whether the circumstances fell within three particular criteria.

[26] In my opinion, that case is distinguishable on its facts. In *Dorothea*, the decision-maker specifically identified three criteria within which the taxpayer had to fall in order to be granted the relief sought. In the present case, I am unable to find any evidence that Ms. Nixon considered that she could only waive the penalty if there were exceptional circumstances for the failure to remit in a timely fashion. In fact, her evidence is to the contrary.

Conclusion

[27] For these reasons, the application for judicial review is dismissed with costs to the Respondent.

ORDER

THIS COURT ORDERS that: the application for judicial review is dismissed with costs to the Respondent.

"Dolores M. Hansen"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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