

Date: 20070710

Docket: T-650-06

Citation: 2007 FC 736

Ottawa, Ontario, July 10, 2007

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

TOMASZ JAHOLKOWSKI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of a March 14, 2006 decision by a tax official on behalf of the Minister of National Revenue (the Minister), dismissing the Applicant's request for a waiver of interest and penalties associated with arrears relating to Goods and Services Tax (GST) payments.

FACTS

[2] In the early 1990's, Tomasz Jaholkowski (the Applicant) formed a partnership with Greg Palamarz, calling the partnership "Manhattan Railings". They registered their partnership with the Minister for GST purposes, and accordingly, it was responsible for remitting GST on a quarterly basis. The partnership failed to remit GST to the Minister for the period from June 1, 1992 to February 24, 1994. The Applicant left the partnership at the end of February 1994.

[3] On June 22, 2003, the Applicant applied to the Minister for waiver of interest and penalties (also known as a "fairness request") with respect to the partnership's GST debt for the period in question. The Minister was not prepared to consider the fairness request until the Applicant committed to an acceptable repayment plan with regard to the principal debt.

[4] On August 21, 2005, the Applicant proposed such a plan, and repeated his fairness request to the Minister, maintaining that he had not been responsible for the financial side of the partnership. The Minister treated this as the Applicant's first level fairness request. On December 6, 2005, finding no basis to warrant granting the request, the Minister decided against waiving any of the amount owing.

[5] On December 27, 2005, the Applicant made a second level fairness request asking the Minister to reconsider her decision, and reiterating that Mr. Palamarz was responsible for the failure to make the GST remittances. He also stated that he was unable to pay the entire debt, due to the accrued interest and penalties. After considering the circumstances of the matter, the Minister

decided that there was no basis for waiving the interest and penalties, and so informed the Applicant on March 14, 2006.

[6] In arriving at this decision, the Minister found, among other things, that the Applicant had not exercised reasonable care in conducting his affairs as one of two partners in *Manhattan Railings*. The Minister also found him jointly and severally liable under the *Excise Tax Act*, R.S.C. 1985, c. E-15 for *Manhattan Railings*' debt, and concluded that the Applicant had not satisfied her that the payment of the entire debt would result in financial hardship.

ISSUE

[7] This application raises the following issue:

Whether the Minister erred in exercising her discretion to deny the Applicant's request for a waiver of interest and penalties in relation to a GST debt?

ANALYSIS

[8] The relevant statutory provisions demonstrate that the Minister has broad discretion to waive interest and penalties (see also, *Vitellaro et al. v. Canada (Customs and Revenue Agency)*, 2005 FCA 166, 2005 DTC 5275 at para. 3) (*Vitellaro* FCA):

Income Tax Act, R.S.C. 1985, chap. 1 (5th Supp.) (the *ITA*)

220(3.1) The Minister may at any time waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by a taxpayer or partnership and, notwithstanding subsections 152(4) to 152(5), such assessment of the interest and penalties payable by the taxpayer or

partnership shall be made as is necessary to take into account the cancellation of the penalty or interest.

220(3.1) Le ministre peut, a tout moment, renoncer a tout ou partie de quelque pénalité ou intérêt payable par ailleurs par un contribuable ou une société de personnes en application de la présente loi, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) a (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.

Excise Tax Act, R.S.C. 1985, c. E-15 (the ETA)

281.1 (1) The Minister may waive or cancel interest payable by a person under section 280.

(2) The Minister may waive or cancel penalties payable by a person under section 280.

281.1 (1) Le ministre peut annuler les intérêts payables par une personne en application de l'article 280, ou y renoncer.

(2) Le ministre peut annuler la pénalité payable par une personne en application de l'article 280, ou y renoncer.

[9] These sections are part of the "fairness" provisions in the above legislation, and are silent with regard to criteria to be used by the Minister in exercising her discretion. The Minister has issued guidelines describing a non-exhaustive list of factors that will be considered in the exercise of the statutory discretion, including whether it would cause undue financial hardship to require the taxpayer to pay, and the taxpayer's compliance record (*Vitellaro FCA*, above, at para. 4; see also,

Vitellaro et al. v. Canada (Customs and Revenue Agency), 2004 FC 561, 2004 DTC 6362 at para. 3).

[10] A pragmatic and functional analysis reveals that the appropriate standard of review of a discretionary decision such as the one at issue is that of reasonableness *simpliciter* (*Vitellaro* FCA at para. 5; *Lanno v. Canada Customs and Revenue Agency*, 2005 FCA 153, 2005 DTC 5245 at paras. 3-7).

[11] The applicant submits that the partnership in question was never made legally official, and that Customs and Revenue Canada (CRA) based its conclusion of the partnership's existence solely on a jointly controlled bank account. He also contends that the fact that this account was closed in March 1994, and a new account opened by Mr. Palamarz for *Manhattan Group/Manhattan Railings*, demonstrates that the Applicant's involvement with the partnership ceased at that time.

[12] He further submits that the Respondent is at fault for allowing the debt at issue to increase to the point where it became unmanageable for him, by virtue of the Minister's failure to inform him of *Manhattan Railings'* debts for a period of three years and four months.

[13] The Respondent submits that the Minister's decision is reasonable in view of her broad discretion, considering that the Applicant was a partner during the entire relevant period, given his history of repayment, and other factors. Pursuant to subsection 272.1(5) of the *ETA*, he is jointly and severally liable for the debt of the partnership.

[14] Firstly, it is not necessary to decide at what point the partnership actually ceased, as it is uncontested that the Applicant was a partner of *Manhattan Railings* at the time relevant to the present decision (i.e., June 1, 1992 until February 24, 1994).

[15] With regard to the Applicant's contention that the partnership was not "legally official", I find it without basis. The Respondent's evidence demonstrates that the Applicant and Mr. Palamarz registered their partnership with the Minister for the purposes of the GST and were issued an account number. In addition to his failure to provide any evidence to the contrary, the Applicant's submissions generally support that he was one of two partners of *Manhattan Railings* in the period relevant to this application.

[16] I find that it was reasonable for the Minister to consider the Applicant's history of voluntary compliance with his GST obligations. She considered that he had only made 8 payments totalling \$3,410 toward a total debt of \$43,292, of which 5 were involuntary payments. Similarly, though she recognized that he promptly filed a "fairness request" in July 1997, she concluded that he had not acted quickly to remedy any omission or delay, as he had essentially avoided payment for ten years. This was not an unreasonable conclusion.

[17] In my view, neither was it unreasonable for her to express concern that the Applicant had not presented his financial situation accurately, as he had failed to support his allegation that his bank had declined to loan him funds. Similarly, it was not unreasonable for the Minister to conclude

that as a partner, the Applicant should have been aware of all of the aspects of the business, including the finances.

[18] In view of the evidence before the Minister, I find that it was not unreasonable for her to conclude that the Applicant had not demonstrated that payment of the entire debt would result in financial hardship. The Applicant has not shown that the Minister failed to consider evidence, or failed to follow her own guidelines, in arriving at the contested decision.

[19] Finally, subsection 272.1(5) of the *ETA* provides that each member of a partnership is jointly and severally liable for the payment or remittance of all amounts that become payable or remittable by a partnership before or during the period during which the individual is a member of the partnership. In the present case, the applicant was a member of *Manhattan Railings* during the entire period pertaining to the GST debt. Consequently, he is jointly and severally liable for the debt, as well as the accrued interest and associated penalties.

[20] Therefore, I conclude that the Minister was not unreasonable in exercising her discretion by refusing the applicant's request to waive the interest and penalties accrued on the GST debt.

[21] For these reasons, this application for judicial review is dismissed.

JUDGMENT

This application for judicial review is dismissed.

“Danièle Tremblay-Lamer”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-650-06

STYLE OF CAUSE:
TOMASZ JAHOLKOWSKI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

PLACE OF HEARING: Vancouver

DATE OF HEARING: July 5, 2007

REASONS FOR JUDGMENT: TREMBLAY-LAMER J.

DATED: July 10, 2007

APPEARANCES:

Tomasz Jaholkowski

FOR THE APPLICANT

Attorney General of Canada
Per: Susan Wong

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Self-represented
9228 Bodner Terrace
Mission, British Columbia

FOR THE APPLICANT

Attorney General of Canada
Per: Susan Wong
Suite 900, 840 Howe Street
Vancouver, British Columbia

FOR THE RESPONDENT