Federal Court  Cour fédérale

Date: 20101101

Docket: T-1302-09

Unrevised certified translation **Citation: 2010 FC 1070**

Ottawa, Ontario, November 1, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

AMOUR INTERNATIONAL MINES D'OR LTÉE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Voluntary reporting by taxpayers and payment of income tax by every individual are the very basis of Canada's taxation system. The law can be very severe for taxpayers who fail to report income or for those who do not pay amounts owed within the prescribed time limits. High interest rates are imposed and recalcitrant taxpayers can be subject to severe penalties. That said, subsection 220(3.1) of the *Income Tax Act* (ITA) provides that the Minister may waive all or any portion of any penalty or interest otherwise payable. In this regard, the Canada Revenue Agency (CRA) publishes

a number of income tax information circulars that describe in detail the circumstances under which the Minister, through one of his delegates, may exercise this discretion. For example, one of these programs, the “fairness package”, allows the Minister to waive interest and penalties on humanitarian grounds.

[2] This case involves Information Circular IC00-1R2, entitled *Voluntary Disclosures Program*, which, to use its own terms, describes the circumstances under which “[t]axpayers can make disclosures to correct inaccurate or incomplete information, or to disclose information not previously reported”. In so doing, taxpayers would not avoid paying interest on late payments, but would not be subject to a penalty. However, if enforcement action has already been undertaken to investigate the activities of the taxpayer or a third party, the penalty will not be waived.

[3] Amour International Mines d’Or Ltée (AIMO) paid dividends to two foreign shareholders. The company was to withhold part of that amount and, within 15 days, remit the amounts withheld to the Receiver General for Canada. The company did withhold the amount but did not make the remittance, as it was required to do. When alerted to this omission by one of their accountants, the company undertook the voluntary disclosure process with the CRA and paid the amounts that were owing, as well as the interest that had accrued. However, the CRA refused to allow the voluntary disclosure or waive the penalty, arguing that this disclosure was not voluntary and that it had been made too late, because an enforcement action was already in place. The initial decision was upheld by the Acting Assistant Director, Enforcement Division at the Montréal Tax Services Office, who

was authorized to review the first instance decision. That decision is the subject of this judicial review.

CHRONOLOGY OF EVENTS

[4] The following dates are important and should be kept in mind in the analysis of this case.

[5] In December 2006, AIMO paid a dividend of C$245,000 to one of its shareholders who was domiciled in the Bahamas. Pursuant to subsection 212(2) of the ITA and due to the lack of a tax treaty between Canada and the Bahamas, AIMO made a source deduction of 25 percent, namely, C$61,250, an amount which should have been remitted to the Receiver General for Canada within 15 days, as provided in the *Income Tax Regulations*.

[6] On or about October 15, 2007, an audit screen was created for Greymount Associates Limited in the CRA's electronic registry. It is indicated in the registry that the CRA would look into the matter of whether payments of [TRANSLATION] "winding-up dividend[s] [were made] in 2006 and 2007 to [non-residents]" by AIMO.

[7] On October 29, 2007, the CRA sent a letter to an accountant at Greymount regarding the disposition of shares in Orex Gold Mines Limited by two companies and one individual. Greymount is a shareholder in Orex, which itself is a shareholder in AIMO, holding 44 percent of shares.

[8] The following is an excerpt from the letter of October 29, 2007:

> [TRANSLATION]
>
> In order to complete the review of the matter at hand, we ask that you submit the following documents to us:
>
> Orex Gold Mines Ltd:
> The share ledger from the time shares were acquired until they were disposed of.
> All the classes of shares issued by the company and those the company bought back (i.e. the number and amount).
>
> Vendors:
> The original purchase agreement (supporting documentation of purchase price)
> The sales agreement (shares and amount)

[9] In November 2007, AIMO paid a previously declared dividend of C$1,172,153.30 to another shareholder, a company whose head office was located in the Netherlands. Pursuant to Article 10 of the *Canada-Netherlands Tax Treaty*, AIMO made a source deduction of 15 percent, namely, C$175,822.99, an amount which, as in the previous case, should have been remitted to the Receiver General for Canada within 15 days.

[10] In February and March 2008, due to discoveries made by accountants assisting in its voluntary legal winding-up, AIMO disclosed to the CRA its failure to remit the amounts withheld from the dividend payments.

[11] On November 4, 2008, after AIMO was warned that the voluntary disclosure might not be accepted, the request was rejected by the Team Leader of the Voluntary Disclosures Program at the Montréal Tax Services Office. The following are the reasons for his decision:

> [TRANSLATION]
>
> Unfortunately, your request cannot be considered to be voluntary as it follows enforcement actions taken by the Canada Revenue Agency with regard to the taxpayer's shareholders.

[12] On July 10, 2009, the initial decision was upheld at the second level by the Acting Assistant Director, Enforcement Division, who stated that:

> [TRANSLATION]
>
> The review of the facts and evidence in the record does not allow me to accept your voluntary disclosure. In fact, in order to be considered voluntary, a disclosure cannot be linked to an audit or enforcement action taken by the Canada Revenue Agency (CRA). Your disclosure will not be considered as voluntary since enforcement action relating to the disclosure were taken by the CRA with regard to persons associated with AIMO. This enforcement action was likely to have uncovered the information disclosed.

As was previously stated, that decision is the subject of this judicial review.

VOLUNTARY DISCLOSURES PROGRAM

[13] As Justice Phelan confirmed in *Livaditis v. Canada Revenue Agency*, 2010 FC 950, at paragraphs 3 and 4, Information Circular IC00-1R2, which is not a statute, sets out four conditions to be met for a disclosure to be valid:

1) that the disclosure be voluntary,

2) that the disclosure be complete,

3) that the disclosure involve the application, or potential application, of a penalty; and

4) that the disclosure include information that is at least one year past due.

[14] In the case at bar, only the first condition needs to be taken into consideration. In fact, the CRA clearly indicated that it refused the voluntary disclosure by AIMO because it was of the view that the disclosure was not voluntary within the meaning of paragraphs 32 to 34 of the Information Circular.

[15] Paragraph 32, as well as pertinent excerpts from paragraphs 33 and 34, state that:

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:	32. Une divulgation ne sera pas considérée comme une divulgation valide, sous réserve des exceptions du paragraphe 34, en vertu de la condition « volontaire » si l'ARC détermine ce qui suit :
• 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**	• le contribuable était au courant d'une vérification, d'une enquête ou d'autres mesures d'exécution que devait entreprendre l'ARC ou toute autre autorité ou administration, en ce qui concerne les renseignements divulgués à l'ARC; **ou**
• enforcement action relating to the disclosure	• les mesures d'exécution relatives à la divulgation ont

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, corporations, 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**

été prises par l'ARC ou toute autre autorité ou administration, à l'égard du contribuable ou d'une personne associée ou apparentée avec le contribuable (y compris, sans toutefois s'y limiter, des sociétés, des actionnaires, des conjoints et des associés) ou contre n'importe quel autre tiers où le but et l'impact de l'action applicable contre le tiers est suffisamment lié à la divulgation actuelle; **et**

• the enforcement action is likely to have uncovered the information being disclosed.

• les mesures d'exécution sont susceptibles d'avoir révélé les renseignements divulgués.

33. For purposes of the VDP, an "enforcement action" may include, but is not limited to:

33. Dans le cadre du PDV, une « mesure d'exécution » peut comprendre, sans toutefois s'y limiter, ce qui suit :

• requests, demands or requirements issued by the CRA, relating to unfiled returns, unremitted taxes/ instalments, deductions required at source or non-registrants; (although the aforementioned actions may only pertain to one specific year or reporting period, the procedure will be considered to be an enforcement action, for purposes of the VDP, for all taxation years or reporting periods).

• les demandes, les mises en demeure ou les demandes péremptoires, envoyées par l'ARC, concernant des déclarations non produites, des impôts ou des acomptes provisionnels non remis, des retenues à la source requises ou des non-inscrits (bien que ces mesures puissent seulement se rapporter à une année ou à une période de déclaration particulière, la procédure sera considérée comme une mesure d'exécution dans le cadre du PDV pour toutes les années

d’imposition ou les périodes de déclaration);

[…]

34. Not all CRA initiated enforcement action may be cause for a disclosure to be denied by the CRA. Examples of this include:

¶ 34. Ce ne sont pas toutes les mesures d’exécution que l’ARC prend qui peuvent entraîner le refus d’une divulgation par cette dernière. En voici des exemples :

- a recent audit of a taxpayer was related to a source deductions (payroll) issue. The same taxpayer is submitting a disclosure for an amount of GST/HST, which was collected but not remitted to the CRA as required. There may be no correlation between these two taxation issues and as such, the enforcement action on the payroll account may not be cause to deny the GST/HST disclosure.

- une vérification récente auprès d’un contribuable était liée à une question relative aux retenues à la source (paie). Le même contribuable soumet une divulgation relative à un montant de TPS/TVH qui a été perçu, mais qui n’a pas été remis à l’ARC tel que cela est exigé. Il peut n’y avoir aucune corrélation entre ces deux questions fiscales et, ainsi, la mesure d’exécution prise à l’égard du compte de paie peut ne pas constituer une raison pour refuser la divulgation de TPS/TVH.

ISSUES

[16] AIMO is raising three main issues. First, AIMO argues that the principles of procedural fairness were not observed, given that they were unaware of the enforcement action initiated before their voluntary disclosure. Second, AIMO maintains that the letter of October 29, 2007, which will be analyzed in greater detail in these reasons, was in no way an enforcement action, but rather a simple request for information. Lastly, even if the letter was an enforcement action, there is no link between this letter and the voluntary disclosure.

ANALYSIS

[17] I cannot accept the argument that there was a breach of the principles of procedural fairness. Between the first and second decision, the CRA informed Jean-Pierre Desmarais that their investigations centred on Greymount. In a letter to the CRA, dated December 5, 2008, Mr. Desmarais himself refers to Greymount as being the subject of these investigations.

[18] Mr. Desmarais is the sole director and secretary of AIMO's Canadian corporation, the sole director of Orex and, through a holding company, is also a shareholder in that company. Although he has no formal ties to Greymount, he has acted on its behalf in the past and helped the accountants respond to the letter of October 29, 2007.

[19] It is useful to return to basic principles from time to time, even if such principles were raised in an altogether different context. In *Lennard's Carrying Company, Limited v. Asiatic Petroleum Company, Limited*, [1915] A.C. 705, Viscount Haldane stated, on page 713, that:

> [A] corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

Given that Mr. Desmarais is the executive officer of AIMO, his knowledge therefore represents that of the company itself. Consequently, even if it was necessary that AIMO be informed about the situation, that condition is met.

[20] Let us now address the other two questions in issue. It is clear that the first criterion of paragraph 32 does not apply here. AIMO was audited, but only after it had undertaken the voluntary disclosure process. Accordingly, in my mind the issue is not whether AIMO, through Mr. Desmarais, had been informed that Greymount was being investigated, but whether the letter of October 29, 2007, and ensuing correspondence before AIMO's voluntary disclosure were enforcement actions and, if that was in fact the case, if the information collected from Greymount was sufficiently linked to the information in the disclosure. If an enforcement action against a person associated with or related to the taxpayer or any third party uncovers the omission, the penalty cannot be waived, regardless of whether the omission was voluntary or not.

[21] As mentioned above, the letter of October 29, 2007, addressed to the accountants acting on behalf of the three vendors of Orex shares, is in regard to the disposition of shares in Orex, a Canadian company, by Greymount, a company not resident in Canada. In this regard, section 116 of the ITA stipulates that a non-resident person who proposes to dispose of any taxable Canadian

property must send a notice to the Minister who, after receiving the amounts owed or an acceptable security, will then issue a certificate to that person.

[22] It appears that the communication between the CRA and Greymount centred on the issuing of certificates of compliance in relation to payments made by Greymount for the purchase of Orex shares. AIMO argues that the letter of October 29, 2007, cannot be considered as an enforcement action, either against AIMO, or against Greymount, given that it was a simple request for information. AIMO also maintains that, to quote from paragraph 33 of the Information Circular, the CRA's request does not fall under "requests, demands or requirements issued by the CRA, relating to unfiled returns, unremitted taxes/instalments, deductions required at source or non-registrants" or other request of this nature.

[23] There is no need for me to consider this question. However, if we were to assume, for the sake of argument, that the letter of October 29, 2007, constituted an enforcement action against Greymount and that Greymount was associated with or at least had links to AIMO, paragraph 32 provides that "the enforcement action is likely to have uncovered the information being disclosed". AIMO asserts that the letter of October 29, 2007, and the subsequent communications would not have led the CRA to uncover the information the company had disclosed voluntarily.

[24] During the oral arguments, I asked the Minister's counsel to explain to me how it was possible that information regarding the sale of Orex shares by Greymount revealed that AIMO had failed to remit to the Receiver General for Canada the amounts withheld at the time dividends were

paid to the two foreign corporations. She responded that we mere mortals would find it difficult to understand the thought process of a tax collector. In the present case, internal reports indicate that well before the letter of October 29, 2007, the CRA had intended to audit AIMO's payments of dividends to foreign shareholders. While this may well have been the case, I fail to see any link between the CRA's intention to audit AIMO's dividend payments to foreign shareholders and the information collected from Greymount. In fact, Greymount's letter in response to the CRA contains no information about AIMO's failure to remit the amounts withheld from the dividends to the Receiver General for Canada.

[25] It is clear that the standard of review in the case at bar is reasonableness. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, Justices Bastarache and Lebel state the following at paragraph 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [Emphasis added.]

[26] In the case at bar, I am invited to speculate on the simple fact that an entry was made in the CRA's electronic registry prior to the letter of October 29, 2007, which, according to the Minister, would indicate that an enforcement action had already been undertaken. In *Minister of Employment and Immigration v. Satiacum* (1989), 99 N.R. 171 (F.C.A.), at paragraphs 34 and 35, Justice MacGuigan wrote:

> The common law has long recognized the difference between reasonable inference and pure conjecture. Lord Macmillan put the distinction this way in Jones v. Great Western Railway Co. (1930), 47 T.L.R. 39, at 45, 144 L.T. 194, at 202 (H.L.):
>
> > The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.
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> In R. v. Fuller (1971), 1 N.R. 112, at 114, Hall J.A. held for the Manitoba Court of Appeal that, "[t]he tribunal of fact cannot resort to speculative and conjectural conclusions." Subsequently a unanimous Supreme Court of Canada expressed itself as in complete agreement with his reasons: [1975] 2 S.C.R. 121 at 123; 1 N.R. 110, at 112.

There is no evidence in this case to support the proposition that the actions taken against Greymount, even if they were enforcement actions, would have led to the discovery that AIMO had failed to remit the amounts withheld from the dividends paid to foreign shareholders.

[27] The decision of the Acting Assistant Director, Enforcement Division at the Montréal Tax Services Office, is based on pure conjecture. Therefore I cannot find that it was reasonable. In fact,

while the Information Circular is not a statute, the Minister refused to exercise his discretion only because he concluded, by way of his delegates, that the disclosure was not voluntary. Consequently, particular attention must be paid to the wording in the Information Circular, which is written for taxpayers. In my opinion, an internal accounting memo entry the CRA's intention to audit AIMO's activities does not represent an enforcement action in and of itself. The only possible enforcement action is the one against Greymount. In this regard, the conclusion that the CRA would nonetheless still have uncovered the information disclosed by AIMO while it was investigating Greymount is unfounded.

[28] In conclusion, this application for judicial review is allowed. However, the remedies sought by AIMO exceed the jurisdiction given to the Court under section 18.1 of the *Federal Courts Act*. It is not for this Court to accept [TRANSLATION] "the disclosure as being voluntary and to order the Minister to pay back the amount of C$25,209 collected in penalties." I will, however, state that the decision was based on an erroneous finding of fact, made in a perverse or capricious manner or without regard for the material before the decision-maker.

ORDER

FOR THE FOREGOING REASONS,

THE COURT ORDERS that:

1. The application for judicial review is allowed.
2. It is declared that the decision was based on a finding of fact that was unreasonable.
3. The matter is referred back to a different delegate authorized by the Minister for redetermination in accordance with these reasons.
4. With costs.

"Sean Harrington"
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1302-09
STYLE OF CAUSE:	AMOUR INTERNATIONAL MINES D'OR LTÉE v. AGC
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DATE OF HEARING:	October 18, 2010
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DATED:	November 1, 2010

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