Federal Court  Cour fédérale

Date: 20120628

Docket: T-1374-11

Citation: 2012 FC 823

Ottawa, Ontario, June 28, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

TWENTIETH CENTURY FOX HOME ENTERTAINMENT CANADA LIMITED

Applicant

and

THE ATTORNEY GENERAL OF CANADA, THE MINISTER OF NATIONAL REVENUE AND THE ASSISTANT COMMISSIONER, LEGISLATIVE POLICY AND REGULATORY AFFAIRS BRANCH OF THE CANADA REVENUE AGENCY

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. OVERVIEW

[1] This judicial review is in respect of a decision by an Assistant Commissioner [A/Commissioner] of the Canada Revenue Agency [CRA] refusing to recommend to the Minister of National Revenue [Minister] that the Applicant's request for remission of Goods and Services Tax [GST] be granted. That decision effectively ended the request for remission of GST.

[2] The A/Commissioner's decision is part of a process which can lead to remission of GST if ultimately granted by the Governor-in-Council in accordance with s. 23(2) of the *Financial Administration Act*, RSC 1985, c F-11 [FAA].

23. (2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.	**23.** (2) Sur recommandation du ministre compétent, le gouverneur en conseil peut faire remise de toutes taxes ou pénalités, ainsi que des intérêts afférents, s'il estime que leur perception ou leur exécution forcée est déraisonnable ou injuste ou que, d'une façon générale, l'intérêt public justifie la remise.

II. BACKGROUND

[3] The Applicant is a subsidiary of Fox Entertainment Group Inc [Fox] and part of the large US corporation, The News Corporation. The Applicant's business is to manufacture or purchase videos and to sell them to retailers for re-sale to the public.

[4] The Applicant pays GST when it manufactures or purchases videos and collects GST when it re-sells them. Monthly, the Applicant pays the CRA the net difference between what it collects as GST and what it pays out in GST.

[5] Due to a computer error that over-counted the amount of GST it had collected, between 2000 and 2005, the Applicant overpaid approximately $12.5 million of GST to the CRA. The computer error was discovered and fixed by 2005.

[6] In May 2005 the Applicant filed for a rebate of the GST under s 261 of the *Excise Tax Act*, RSC 1985, c E-15 [ETA] which legislation applies to GST. The rebate application was for approximately $11.5 million of the $12.5 million overpaid.

[7] Section 261(3) provided for a two-year period from the date the GST was paid in which to seek a rebate.

261. (3) A rebate in respect of an amount shall not be paid under subsection (1) to a person unless the person files an application for the rebate within two years after the day the amount was paid or remitted by the person.	**261.** (3) Le remboursement n'est versé que si la personne en fait la demande dans les deux ans suivant le paiement ou le versement du montant.

[8] Therefore, the Applicant was outside the rebate application period in respect to GST overpaid before May 2003.

[9] In July 2005, the CRA paid the Applicant $11,424,627.86 out of the $11.5 million rebate claimed. There is no issue in this proceeding with respect to the $53,290 differential.

[10] As the Applicant was out of time in regards to rebate for the pre-2003 period, it filed, on July 24, 2005, for remission [Remission Application] under the FAA for the balance of overpayment in the amount of $1,060,556 (subsequently revised to $1,004,916.38 [the Overpayment]).

[11] Prior to addressing the Remission Application, the CRA audited the Applicant including the amount of GST that the Applicant had overpaid and for which it had claimed and received a rebate. Three years later the CRA confirmed the computer error, and the amount leading to the rebate (less $23,290).

[12] Subsequent to completion of the audit, the CRA dealt with the Remission Application. There followed a series of internal memos (to which reference is made later) as the CRA officials worked the file up to the CRA's Remission Committee and then to the A/Commissioner who made the decision pursuant to delegated powers.

[13] The A/Commissioner held powers delegated to him by the Commissioner who held delegated power from the Minister. The Minister had delegated all the Minister's powers under any statute to the Commissioner who had in turn sub-delegated that authority to the A/Commissioner.

[14] In making his decision, the A/Commissioner reviewed the following documents:

- A synopsis of the reasons for denying the Remission Application.
- The Remission Application itself.
- An internal memo of March 1, 2011 recommending against remission. That memo also contained reference to remission policy that "circumstances beyond a person's control" did not include internal computer error; reference to the parent company's (News Corporation) revenues, assets and equity of $107 billion and the Applicant's assets of $75 to $194 million and gross revenues of $156 to $247 million in four non-consecutive years. The conclusion was that $1 million in overpayment was not a

situation involving limited resources or the further payment of taxes (as opposed to moneys foregone).

- A further memo of May 16, 2011 explaining that there was no responsibility on the CRA to explain to the Applicant, a sophisticated company with tax professionals, that a waiver request to keep the audit period open might have been available to permit the recovery of a portion of the requested remission.

[15] In the A/Commissioner's decision, he reiterated the rationale expressed in the March 1, 2011 memo that a computer error was not a matter beyond a person's control and that the Applicant was not in a situation of limited financial resources or of being required to pay additional taxes.

[16] The Applicant's complaint about the A/Commissioner's decision includes not reviewing or considering:

- A memo comparing the Overpayment to the Applicant's net revenues.
- A tax report which showed that a CRA official had made an error in the Applicant's 2004 net revenues.
- The Applicant's 2010 or 2011 net revenues.
- The CRA's Remission Guidelines.
- The rationale for changing a comparison of the Overpayment to net revenues to a comparison of Overpayment to gross revenues (gross revenues show the company's size).

III. ISSUES

[17] The Applicant has raised the following issues:

a) That an affidavit of a CRA official, McGlynn, should be struck because portions of it are on information and belief.

b) That the A/Commissioner did not have the authority to make the decision; such authority rested in the Minister personally.

c) That the discretion under the FAA is to be exercised reasonably which, on the facts, was not done.

IV. ANALYSIS

A. *Standard of Review*

[18] As to the review of the decision not to recommend remission, the parties agree that the standard of review is reasonableness. The Court agrees. The discretion in this case is wide and policy based. It is a decision to which considerable deference is owed (see *Axa Canada Inc v Canada (Minister of National Revenue - MNR)*, 2006 FC 17, 296 FTR 46 and *Waycobah First Nation v Canada (Attorney General)*, 2011 FCA 191, 421 NR 193 [*Waycobah (FCA*)]).

[19] The Applicant's issues of striking portions of an affidavit involve the Court's Rules and the exercise of the Court's discretion. The Applicant's issue of the scope of delegation of authority is a matter of law which goes to the root of the jurisdiction to make the decision. The applicable standard of review is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 50).

B. *Striking Portions of Affidavit*

[20] The Applicant objects to portions of the affidavit of a CRA official, McGlynn, because it contains hearsay in breach of Rule 81(1) of the *Federal Courts Rules*.

[21] The objection is that the affiant should have been Sterling who reports to McGlynn. There is no suggestion of any prejudice to the Applicant, no refusal to make Sterling available nor any real challenge to the evidence said to be on information and belief. The Applicant has not advanced any argument on prejudice, utility, weight or anything other than form.

[22] Rule 81(1) must be considered in light of the Supreme Court's acceptance of hearsay on a principled basis (see *Ethier v Canada (Royal Canadian Mounted Police)* (1995), 95 FTR 181, aff'd 66 ACWS (3d) 476 (CA)). This Court has accepted evidence on information and belief; indeed the Rule contemplates such event by imposing the sanction that the Court may draw an adverse inference on the failure to provide evidence of personal knowledge. There is no basis upon which to draw an adverse inference in this case.

[23] McGlynn's evidence is in the nature of "corporate" evidence in that he acted in a supervisory capacity and was responsible for his subordinates, including Sterling. He was in a position to know if the facts were true.

[24] An additional affidavit on the points of information and belief would serve no purpose particularly as full cross-examination has occurred.

[25] If there was merit in the Applicant's complaint, it should have brought a motion to strike at an earlier date.

[26] For all of the above reasons and to the extent required, this Court exercises its discretion under Rule 55 to permit the acceptance of those parts of McGlynn's affidavit that are based on information and belief.

C. *Authority to make the Decision*

[27] The Applicant challenges the authority of the A/Commissioner on two grounds. The first is that s 23(2) of the FAA specifies that the Minister is to make or deny a recommendation for remission and this function cannot be delegated. The second grounds is that there was no delegation in fact.

[28] The basis of the Applicant's first ground is that s 8(2) of the *Canada Revenue Agency Act*, SC 1999, c 17 [CRAA] takes away the Minister's power to delegate under s 8(1) in the circumstances of the FAA because it is "an Act of Parliament, other than this Act …". The relevant provisions are:

8. (1) The Minister may authorize the Commissioner or any other person employed or engaged by the Agency or who occupies a position of responsibility in the Agency, subject to any terms and conditions that the Minister may specify, to exercise or perform on the Minister's behalf any power, duty or function of the Minister under	**8.** (1) Le ministre peut autoriser le commissaire ou toute autre personne employée ou engagée par l'Agence ou occupant une fonction de responsabilité au sein de celle-ci, selon les modalités et dans les limites qu'il fixe, à exercer en son nom les attributions qu'il exerce sous le régime de toute loi fédérale ou provinciale.

any Act of Parliament or of a province.	
(2) Subsection (1) does not apply where an Act of Parliament, other than this Act, or an Act of a province authorizes the Minister to delegate the power, duty or function to any person or authorizes any person to exercise or perform it.	(2) Le paragraphe (1) ne s'applique pas dans le cas où la loi fédérale, à l'exception de la présente loi, ou la loi provinciale autorise soit le ministre à déléguer les attributions en question, soit une autre personne à les exercer.
(3) Subsection (1) does not include	(3) Sont exclus des attributions visées au paragraphe (1) :
(a) a power to make regulations; or	*a)* le pouvoir de prendre des règlements;
(b) a power, duty or function of the Minister under this Act, other than those referred to in subsection 6(1) or section 7.	*b)* les attributions que confie au ministre la présente loi, à l'exception de celles qui sont prévues au paragraphe 6(1) et à l'article 7.
(4) The Commissioner may authorize any person employed or engaged by the Agency or who occupies a position of responsibility in the Agency to exercise or perform on the Minister's behalf any power, duty or function that the Commissioner is authorized to exercise or perform under subsection (1).	(4) Le commissaire peut autoriser une personne employée ou engagée par l'Agence ou occupant une fonction de responsabilité au sein de celle-ci à exercer au nom du ministre les attributions qu'il est lui-même autorisé à exercer au titre du paragraphe (1).

[29] In my view, s 8(2) does not operate to preclude delegation under s 8(1) unless the other federal statute or a provincial statute authorizes the Minister to delegate under that other statute. The intent of the provision is to prevent conflict or inconsistency between powers delegated under s 8(1) and the delegation powers under other federal statutes or under provincial statues. There is no such

delegation under the FAA that brings about a conflict or inconsistency to which s 8(2) of the CRAA would apply.

[30] In a modern democracy, delegation of Ministerial powers is expected unless the words of the statute clearly express or imply that a specific minister of the Crown must personally decide or act (*Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at p 22 (available on QL)).

[31] The Applicant's reliance on this Court's decision in *Murphy v Canada (Minister of National Revenue – MNR)*, 2009 FC 1226, 358 FTR 215, is misplaced. In *Murphy*, the instrument of delegation was specifically limited to people at least one level further up the command chain than the official who made the decision at issue.

[32] In the present circumstances, the Minister's delegation to the Commissioner was compliant with s 8(1) and the further delegation from the Commissioner to the A/Commissioner was in accord with s 8(4).

[33] The Applicant objects to the nature of the delegation whereby the Minister retained the power to make an affirmative recommendation but had delegated the power to make a negative decision. I see nothing in the delegation power or in the facts of this case that raise the issue of the non-delegation of an affirmative power.

[34] The Respondent argued that in any event the issue of delegation, not having been raised in the Notice of Application, cannot be raised in the Memorandum of Argument.

[35] The Notice of Application often arises before an applicant has a full appreciation of all of the facts. It is therefore not surprising that issues may arise after an applicant has a more complete disclosure. If the Applicant can be faulted, it is only on a technical matter of not amending the Notice of Application. The Respondent was not caught by surprise, unable to address the issue or otherwise prejudiced in any manner. Therefore, this was an issue which the Court should deal with on its merits.

D. *Reasonableness of Decision*

[36] The Applicant has cited a number of arguments in support of its position that the decision is unreasonable. However, in assessing unreasonableness, the Court must take account of the highly discretionary nature of the scheme for the remission of tax – an exceptional remedy to which an applicant is not entitled (see *Waycobah First Nation v Canada (Attorney General)*, 2010 FC 1188, 378 FTR 262 [*Waycobah (FC)*] at paras 29-30).

[37] The Applicant suggests that there is a fundamental unfairness in the government retaining as taxes monies that it was not entitled to. It can do so because the Applicant missed limitation periods.

[38] Limitation periods cut both ways. There are times where, absent fraud or similar misconduct, the Crown is precluded from collecting taxes which would otherwise be payable except for a limitation period. There are other times, such as this, where the limitation period disadvantages

a taxpayer. This state of affairs does not make the A/Commissioner's decision arbitrary, unfair or unreasonable.

[39] While the Applicant says that the computer error was not "within its control", there is no evidence that such was the case other than that statement by the Applicant's principal witness. The A/Commissioner's conclusion was not unreasonable.

[40] The Applicant focuses on the debate concerning whether the A/Commissioner should have used net revenues rather than gross revenues in considering the impact on the Applicant of not obtaining the $1 million remission. While others may have put more emphasis on net revenues, this is an issue upon which reasonable people may disagree.

[41] More importantly, the A/Commissioner looked more broadly at the overall impact of the proposed remission. It is an error to engage in microscopic examination. It was entirely reasonable to have regard for the size of the corporation, its assets, revenues and its inter-corporate structure.

[42] The A/Commissioner did not take into account irrelevant matters or proceed unreasonably or in bad faith. The Applicant's real argument is as to the weight that various matters received.

[43] The Applicant has argued that the decision lacks consistency with other remission decisions. The Applicant relied on the Remission Orders issued in respect of the Jim Pattison Group and VF Imagewear's cases where there was overpayment. CRA officials considered nine other cases where internal accounting or computer errors led to the overpayment of GST/PST.

[44] There are a number of problems with the Applicant's position, not the least of which is that there is little or no evidence that the two cases were sufficiently similar to the Applicant's. The Applicant did not cross-examine on the facts of these specific cases or on the reasons that the Minister had for granting those two remission applications.

[45] Each remission application turns on its own facts. There is no evidence that the Minister was being arbitrary in denying the Applicant especially as there had been nine other cases where remission was denied on at least some grounds similar to those of the Applicant.

[46] The Applicant complains that the CRA erred in not noticing that its GST return reported $179 million more in gross revenues than did its income tax returns for a four-year period. However, the Applicant never raised the matter in its Remission Application. The responsibility for noticing the error and bringing it forward to the CRA rests with the Applicant.

[47] Lastly, and as referred to earlier, the Applicant complains that it is unreasonable, unjust and "against good conscience" for the CRA to keep the money. I adopt the reasoning of Justice de Montigny in *Waycobah (FC)*, above, at para 31:

> **31** I agree with the Respondent that the concept of "public interest" cannot be viewed merely in terms of the interests of any one group of taxpayers, but rather must also take into consideration the concerns of society generally. Through a remission order, the Applicant is asking for exemption from the application of legislation to which the rest of Canadian society is subject. The granting of a remission order necessarily involves a departure, in the particular case of a taxpayer, not only from the ordinary rules of taxation, but from the principle of equality of treatment. The phrase "public interest" must therefore be viewed in the context of the broad regulatory scheme governing the

> operation of taxation statutes and with an eye towards the principles animating the *Excise Tax Act* as a whole.

[48] Importantly, the Minister's decision must be looked at as a whole. Arguments can be advanced on a number of points but both individually and cumulatively they do not establish that the decision falls outside the parameters of reasonableness set forth in *Dunsmuir*, above.

V. CONCLUSION

[49] Therefore, this application for judicial review will be dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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