Federal Court Cour fédérale

Date: 20121105

Docket: T-964-11

Citation: 2012 FC 1290

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, November 5, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

3563537 CANADA INC

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review made by 3563537 Canada Inc. (the applicant) of a decision made by a delegate of the Minister of National Revenue (the delegate) on May 12, 2011, under subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA].

[2] For the following reasons, the Court allows the applicant's application for judicial review.

II. Facts

[3] The applicant is a holding company held by its president, Peter Ouimet (Mr. Ouimet), who owns a majority of the voting shares.

[4] The applicant's assets were managed by Dundee Securities Corporation, a Canadian brokerage firm (Dundee), under a brokerage contract.

[5] The applicant, through Mr. Ouimet, dealt directly with Patrick David O'Neill (Mr. O'Neill), a registered representative at Dundee's Pointe-Claire branch who traded securities and provided investment advice for the applicant.

[6] Mr. Ouimet has known Mr. O'Neill for many years. He trusted him completely because they were good friends.

[7] From 2006 to 2008, the applicant was the victim of a major act of fraud committed by Mr. O'Neill, who had convinced the applicant to open a special account. This gave him complete control over the applicant's assets.

[8] Mr. O'Neill also took charge of hiring resource persons for filling out and submitting the financial statements and tax returns for Mr. Ouimet and the applicant. Mr. Ouimet therefore gave Mr. O'Neill all the documents not related to investments with Dundee, which are indispensable for preparing the applicant's financial statements and tax returns.

[9] In February 2008, Mr. O'Neill himself retained the services of the firm Andrews & Ass. (Andrews) to prepare the applicant's financial statements and tax returns for the year 2007 (T2-2007). At that time, Mr. O'Neill did not provide Andrews with any information or documentation.

[10] Despite Andrews' constant requests, Mr. O'Neill evaded providing indispensable information in his possession that was needed to complete the applicant's financial statements. These financial statements were essential for filing the tax returns.

[11] In the years 2007 and 2008, the applicant periodically received Excel spreadsheets prepared by Mr. O'Neill; these spreadsheets misrepresented the applicant's true financial situation and the transactions made on its behalf.

[12] The applicant was therefore unable to file its T2-2007 return before the deadline of June 30, 2008.

[13] Andrews persisted in demanding that Mr. O'Neill provide the documents needed to file the tax returns.

[14] On September 22, 2008, Mr. Ouimet made a telephone call to Andrews, asking for an account statement for the work carried out to date. During this telephone conversation, Weilu Yu informed Mr. Ouimet that his file was incomplete and that Andrews still had yet to receive the necessary information from Mr. O'Neill.

[15] Richard W. Kennish, C.A. (Mr. Kennish), an employee of Andrews, discovered Mr. O'Neill's fraud in December 2008.

[16] On December 18, 2008, Mr. Ouimet and Mr. Kennish met for the first time at a meeting at the offices of Andrews. It was at this time that Mr. Kennish told Mr. Ouimet about the fraud and scams in which Mr. O'Neill was suspected of engaging. They compared the financial statements they had respectively received from Mr. O'Neill and noticed major discrepancies.

[17] Mr. Ouimet immediately took steps with Dundee to obtain the necessary information and documents for preparing the financial statements and tax returns, including the T2-2007, for the applicant.

[18] On December 27, 2008, Mr. Ouimet asked Andrews to cease all work on his file until he received directly from Dundee the necessary information and documents for the 2006 and 2007 taxation years.

[19] On January 30, 2009, Andrews received the necessary documents from Dundee.

[20] On February 4, 2009, the respondent, the Canada Revenue Agency [CRA], sent the applicant a formal demand to produce the T2-2007 no later than March 6, 2009. The CRA subsequently granted an extension to April 30, 2009.

[21] The CRA's demand letter dated February 4, 2009, stated that the applicant faced having a penalty imposed against it under section 162 of the ITA (see Respondent's Record, Exhibit B, page 26).

[22] On March 31, 2009, the applicant received its financial statements and reconfirmed with Andrews the details of its mandate to prepare the tax returns for the fiscal year ending December 31, 2007.

[23] On April 30, 2009, Mr. Kennish submitted the applicant's T2-2007 to the CRA.

[24] On May 20, 2009, the CRA assessed the applicant and imposed a penalty of $73,689.56 plus $27,094.15 in interest for failing to file the T2-2007 within the required time for the fiscal year ending December 31, 2007, as provided in subsection 162(2) of the ITA.

[25] On June 5, 2009, Mr. Ouimet paid the full amount owed by the applicant, including the penalty and interest.

[26] On October 15, 2009, September 16, 2010, and January 7, 2011, the applicant filed requests for taxpayer relief under subsection 220(3.1) of the ITA.

[27] On July 22, 2010, the CRA agreed to cancel the interest accrued between February 29, 2009, and January 30, 2009, the date the applicant received the documentation from Dundee.

[28] In its decisions dated July 22, 2010, November 24, 2010, and May 12, 2011, the CRA refused to cancel the interest accrued from January 30, 2009, to April 30, 2009, and the $73,689.56 late-filing penalty.

[29] On November 11, 2010, the Investment Industry Regulatory Organization of Canada [IIROC] rendered its decision on the fraud committed by Mr. O'Neill (see: O'Neill (Re), 2010 IIROC 51). IIROC ruled that Mr. O'Neill had committed fraud against the applicant and Mr. Ouimet, for which Dundee paid $7,000,000.00 in compensation.

III. Legislation

[30] The applicable provisions of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], and Income Tax Information Circular IC07-1 are reproduced in an appendix to this decision.

IV. Issue and standard of review

A. Issue

[31] This application for judicial review raises one issue:

Is the delegate's decision to refuse the request for taxpayer relief reasonable?

B. Standard of review

[32] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 62 [*Dunsmuir*], the Supreme Court of Canada describes the two steps to follow to determine the applicable standard of review in an application for judicial review:

> [62] In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[33] The standard of review applicable to a decision of the Minister of National Revenue under subsection 220(3.1) of the ITA is already well-established by the case law. In *Leonard Asper Holdings Inc v Canada (Attorney General)*, 2010 FC 894 at paragraph 20, Justice Mandamin refers to *Lanno v Canada (Customs and Revenue Agency)*, 2005 FCA 153, which states that the standard of review that normally applies to the Minister of National Revenue's exercise of discretion is reasonableness (see also *Telfer v Canada Revenue Agency*,

2009 FCA 23 at paragraph 2, and *Hoffman v Canada (Attorney General)*, 2010 FCA 310 at paragraph 5).

V. Positions of the parties

A. Position of the applicant

[34] The applicant submits that the decision of the CRA dated May 12, 2011, is unreasonable. It raises three errors made by the Minister's delegate that should, in its view, lead the Court to conclude that (1) the Minister's delegate made an error of law; (2) the Minister's delegate breached her duty to comply with one of the principles of natural justice, since the decision did not set out sufficient reasons; and (3) the Minister's delegate based her decision on erroneous findings of fact, without taking into account evidence presented by the applicant.

[35] The applicant notes the following passage in the CRA's decision dated November 24, 2010, and more specifically the decision dated May 12, 2011 (see Applicant's Record, Tab Q and Respondent's Record, Exhibit L, page 92):

> Your account has been thoroughly reviewed and your submission carefully considered in relation to the applicable legislation.

[36] The applicant argues that the Minister's delegate made an error in her decision dated May 12, 2011, when she claimed to have considered the applicant's arguments and "the applicable legislation". The phrase "the applicable legislation" may imply that the delegate considered the contents of Information Circular IC07-1 to be "binding" whereas they are merely

a set of guidelines. The applicant relies on paragraph 23 of the decision of Justice O'Keefe in *Spence v Canada Revenue Agency*, 2010 FC 52 at paragraph 23 [*Spence*], which analyzes a decision in which the Minister's delegate had used the same phrase:

> [23] . . . The nature of the error is the decision maker's apparent opinion that the taxpayer relief provisions, contained in Income Tax Information Circular No. IC07-1, were binding law. The ministerial representative's reference to them as "Taxpayer Relief Legislation" is also indicative of her apparent belief that the guidelines were law.

[37] The applicant notes that Justice O'Keefe allowed the application for judicial review on the basis that the delegate had made an error of law by equating the guidelines with a piece of legislation. The applicant submits that the Minister's delegate, Ms. Dessureault, made the same error in her decision dated May 12, 2011.

[38] The applicant argues that the decision of the Minister's delegate gives no reasons and makes no reference whatsoever to the arguments made by the applicant. Consequently, the decision breaches one of the fundamental principles of natural justice, namely, the duty to give reasons.

[39] The applicant cites the decision in *Robertson v Canada (Minister of National Revenue)*, 2003 FCT 16, [2002] FCJ No 1828 at paragraph 15 [*Robertson*], in which the Honourable Mr. Justice Layden-Stevenson found that the decision of the Minister's delegate was "patently unreasonable" because it did not adequately explain the director's position, particularly with regard to the late filing of the returns. Here is the relevant excerpt from the decision of the Minister's delegate:

> "I have fully considered all the information submitted in your letter. I have also reviewed the information contained in the original request. The Canada Customs and Revenue Agency, CCRA, has the discretion to cancel or waive all or part of properly assessed penalty and interest. Discretion will generally be exercised if the client has not complied with the *Income Tax Act* due to extraordinary circumstances beyond his control. Extraordinary circumstances include natural or human made disasters, civil disturbances or disruptions in service, serious illness or accident or serious emotional or mental distress due to errors or delays by the CCRA or when there is an inability to pay amounts owing. As your correspondence does not indicate that you were prevented from filing the returns on time, I regret to inform you that this is not a case in which it would be appropriate to cancel the late filing penalties. In addition, our records indicate that you had accumulated additional consumer debt in December, 2000. In such situations, the cancellation of interest charges is not usually granted." (see *Robertson* at paragraph 1)

[40] The applicant also relies on this passage from *Leonard Asper Holdings Inc v Canada (Attorney General)*, 2010 FC 894 at paragraph 37, where Justice Mandamin states as follows:

> [37] The Minister's discretion in section 220(3.1) must lead to a reasonable outcome, the reasons for which must be justified, transparent and intelligible and ". . . within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" as provided in *Dunsmuir*.

[41] The applicant is of the view that the delegate either did not understand or ignored the particular circumstances that prevailed when it filed its T2-2007. Accordingly, the decision is not reasonable.

[42] The applicant refers in particular to the following passage in the initial decision dated July 22, 2010:

> . . . You should have filed the 2007 Tax Return with the available information and then should have requested an adjustment once the information from "Dundee Securities" had been received . . . .

[43] The applicant argues that this remark clearly shows that the delegate did not understand the facts that the applicant presented to her in its letter dated October 15, 2009.

[44] On June 30, 2008, all the information required to complete the applicant's return was in Mr. O'Neill's possession. The delegate was therefore unaware of the basic facts of the case. The applicant is of the view that the delegate's finding is patently unreasonable because it is based on a certain lack of understanding of the factual evidence.

[45] The applicant notes that the statement to the effect that the applicant should have filed its returns on the basis of incomplete documents is repeated in the three decisions made by the Minister's delegates and, more specifically, in the decision dated May 12, 2011. The applicant submits that it is unreasonable for the CRA to require this despite a detailed description of Mr. O'Neill's acts of fraud and the resulting impact on the applicant, particularly in terms of its ability to file its tax returns within the time prescribed by the Act.

[46] The applicant further submits that this requirement to file amounts to an invitation to knowingly make a false statement or omission, an act that is prohibited by the ITA and subject to a penalty under subsection 163(2) of that Act. The applicant also quotes the Honourable Mr. Justice Zinn, who, in *Nedza Enterprises Ltd v Canada (Revenue Agency)*, 2010 FC 435 at paragraph 27 [*Nedza*], states as follows:

> The Minister's mention of the applicant's failure to file an uncertified estimated return raises a question as there appears to be no statutory authority for such a procedure . . . .

[47] Regarding the final decision dated May 12, 2011, the applicant raises two errors made by the CRA. The first concerns the passage in which the Minister's delegate states as follows:

> [A]ll facts included in the fax received were already considered in our decision dated November 24, 2010 further to the second request for taxpayer relief.

[48] The applicant is of the view that the delegate could not possibly have read the IIROC decision for her second review (November 24, 2010), since the report of the facts was not completed until November 10, 2010, contrary to what she wrote (Applicant's Memorandum of Fact and Law, page 136).

[49] The second error, according to the applicant, stems from the delegate's failure to analyze the situation as it was on the statutory filing date (June 30, 2008) to determine whether or not the applicant failed to file its T2-2007 for reasons [TRANSLATION] "beyond its control". It argues that the delegate is placing too much importance on facts that arose after the filing deadline. She criticizes the applicant for failing to act more diligently after September 22, when the applicant learned of the problems Andrews was having in obtaining the information from Mr. O'Neill.

[50] Finally, the applicant alleges that the delegate based her findings on erroneous facts and that it has no way of verifying whether all of the evidence presented by its two representatives was indeed considered. Citing *Elwell v Canada (Minister of National Revenue)*, 2004 FC 943 at paragraph 13, it notes that the Honourable Mr. Justice Rouleau held that such a lack of transparency is a breach of procedural fairness:

> . . . I cannot ascertain from the decision of Ms. Shields, who reconsidered the request and upheld the previous fairness decision, that she took any of the applicant's explanations into account. Her

> decision of November 14, 2003, simply reiterates and relies upon the applicant's compliance history as grounds for denying her relief.

B. Position of the CRA

[51] The CRA argues that its decision complies with the principles of natural justice. It relies on *Kindler v Canada (Minister of Justice)*, [1987] 2 FC 145 at paragraph 24, in which the Honourable Mr. Justice Rouleau writes as follows:

> [24] In this case the petitioner complains about the reasons given by the respondent because they did not delve into the evidence in sufficiently exhaustive detail. However, I am satisfied that the Minister's reasons demonstrate a grasp of the pertinent issues and of the relevant evidence. It is not necessary for the reasons to list every conceivable factor which may have influenced the decision and I am not persuaded by the petitioner's argument that the lack of reference to the psychiatric reports or the letters of the petitioner's parents means that they were ignored. The Minister's decision, in my view, represented a fair and accurate assessment of the situation; it demonstrated a consideration of the relevant facts including the petitioner's age, family circumstances, his behavioural, educational and employment background as well as the personal representations of the petitioner in his letter to the respondent, including his allegations of innocence for the crimes with which he was convicted. . . .

[52] The CRA states that its decision of May 12, 2011, takes into account all of the facts raised by the applicant. Moreover, the CRA notes that the delegate's letter is based on an internal report she herself completed. This report clearly shows that the delegate considered all of the relevant facts and that her decision meets the applicable criteria in such cases.

[53] In the alternative, the CRA submits that if the Court finds that the delegate's decision of May 12, 2011, does not contain sufficient reasons and breaches a principle of natural justice, the

Court should not refer the decision back to the Minister. The CRA relies on *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 [*Stemijon*], in which Justice Stratas, writing on behalf of the Federal Court of Appeal, points to the discretionary nature of the decision to grant a remedy in an application for judicial review. At paragraph 46, he states:

> [46] In this case, there would be no practical end served in setting aside the Minister's decision and returning the matter to him for redetermination. The excuses and justifications offered by the appellants for the delay in filing and the grounds offered in support of relief have no merit. The Minister could not reasonably accept them and grant relief under subsection 230(3.1) of the Act. Returning the matter back to the Minister would be an exercise in futility.

[54] Since the Minister's delegate based her decision on the appropriate facts and criteria, the CRA argues that referring it back to the Minister would be an exercise in futility.

[55] The CRA then addressed the reasonableness of its decision, first by raising the principle to the effect that the reviewing court applying the reasonableness standard must treat the decisions of administrative decision-makers with deference. It cites *Dunsmuir* at paragraph 47. In that paragraph, the Supreme Court states as follows:

> [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.

[56] The CRA further submits that, in light of the facts presented by the applicant, its decision to refuse to cancel the penalties imposed in 2007 is reasonable. It notes that the applicant received documents periodically from its financial adviser, Mr. O'Neill, regarding its financial situation. It then concludes that on June 30, 2008, the applicant could have prepared its T2-2007 on the basis of that information.

[57] According to the CRA, the applicant could have filed a return using the documents in its possession and then filed amended returns later. In support of this argument, it cites *Tedford v Canada (Attorney General)*, 2006 FC 1334 at paragraph 27:

> [27] Further, while it might be technically inaccurate to say that submissions for relief did ". . . not identify a reason why the returns for the years 1997, 1998 and 1999 were not filed on a timely basis", the events advanced to justify the late filing for those years were relatively remote. The Applicant acknowledged at hearing that he could have filed returns for those years on a timely basis, based on the documentation and information then available to him and, when full and complete documentation and information became available, he could have filed amended returns, if appropriate. The Applicant made a conscious choice not to proceed in that manner. It has proved to be a costly choice, but perhaps the one that seemed most reasonable to him at the time and in the then prevailing circumstances. It was, in the end, his choice and has proved to be a substantially expensive choice.

[58] Moreover, according to the CRA, the following facts show that the applicant did not exercise due diligence and remedy the delay as soon as possible:

(a) The applicant learned on September 22, 2008, that its T2-2007 had not been filed on time;

(b) Untroubled by the situation, the applicant did nothing to remedy its failure to file;

(c) On December 18, 2008, the applicant instructed Dundee to send Andrews its financial information;

(d) On December 27, 2008, the applicant ordered Andrews to stop all work related to filing its tax return until it received the information from Dundee;

(e) On February 4, 2009, the CRA sent the applicant a formal demand to file its T2-2007 no later than March 6, 2009;

(f) On March 31, 2009, the applicant finally instructed Andrews to resume work and to file its T2-2007;

(g) On April 4, 2009, the CRA gave the applicant an extension until April 30, 2009, to file its tax return.

[59] The CRA concludes that the decision of May 12, 2011, is clearly within a range of possible, acceptable outcomes that the CRA could have arrived at after considering the evidence and facts in this case.

VI. Analysis

Is the delegate's decision to refuse the request for tax relief reasonable?

[60] For the reasons that follow, the Court finds that the delegate's decision to refuse the request for tax relief is not reasonable.

[61] The applicant submits that the Minister's delegate made an error of law in her decision of May 12, 2011, in using the following expression: "Your account has been thoroughly reviewed and your submission carefully considered in relation to the applicable legislation".

[62] Indeed, in exercising her discretion under subsection 220(3.1) of the ITA, the Minister's delegate could take into account the guidelines in Information Circular IC07-1. The delegate does not have to follow these guidelines since they are not binding law. The applicant submits that the passage above implies that the delegate thought that these guidelines were binding.

[63] The applicant relies on paragraph 21 of the decision of Justice O'Keefe in *Spence*, above, in which the Minister's delegate had used the same phrase. However, in *Spence*, the phrase "applicable legislation" is used very differently from how it is used in the matter before this Court, since it concerned the delegate's statement to the effect that "the taxpayer relief provisions do not allow for the cancellation of penalties in these types of situations".

[64] That passage clearly shows that the delegate in *Spence*, above, thought that the provisions of Information Circular IC07-1 were binding. No such passage is found anywhere in the decision of the delegate in the case before this Court.

[65] Upon reading the phrase "applicable legislation" in its context, it may readily be inferred that the delegate did indeed understand the nature and scope of her discretion. She therefore did not make an error of law.

[66] Upon reading the record and the evidence it contains, the Court does note, however, that the Minister's delegate did not understand certain facts presented by the applicant. The Court must consider whether this error is so critical as to invalidate the decision to refuse the request for taxpayer relief under subsection 220(3.1) of the ITA.

[67] The delegate erred in finding that the applicant knew its T2-2007 was late before the statutory date of June 30, 2008. The delegate relied on the response she received to the following question:

> 1) Why did you not advise the 3 shareholders before the deadline on 2008-06-30 that you had a lack of co-operation with the broker to get [*sic*] the information to prepare the T2-2007 return? (Respondent's Record, Exhibit D)
>
> 1) The active shareholder Mr. Peter Ouimet was aware that the 2006 financial statements and tax returns were still outstanding so that it followed that he also new [*sic*] the 2007 ones were not prepared. (Respondent's Record, Exhibit E)

[68] The finding to the effect that Mr. Ouimet knew that his T2-2007 was late since the 2006 return was also late is an assumption that is not necessarily supported by the facts.

[69] On the basis of this finding, the delegate imposed the following duty on the applicant: "[Y]ou should have filed the 2007 Tax Return with the available information" (Respondent's Record, Exhibit L). The delegate did not consider the fact that Mr. Ouimet did not know that his T2-2007 had not been filed since his friend, Mr. O'Neill, was supposed to file it.

[70] Even if the Court found some errors, they would have to be determinative ones. A decision does not have to be perfect to withstand an application for judicial review. As Justice Zinn notes in *Nedza*, above, at paragraph 27:

> [27] The Minister's mention of the applicant's failure to file an uncertified estimated return raises a question as there appears to be no statutory authority for such a procedure. Nonetheless, even if this statement was made in error, I am not satisfied that it renders the entire decision unreasonable. This factor was one of many on which the decision-maker relied. Central to the decision-maker's reasoning was that the extraordinary circumstances advanced by the taxpayer did not explain why the other directors ought not to be held to their duties and responsibilities to Nedza as directors. In my view, this finding was reasonable and determinative of the request for relief.

[71] A reasonable decision must give reasons. The decision made by the Minister's delegate, in response to the applicant's three requests for taxpayer relief, is set out in the following letter:

> May 12, 2011
>
> Account Number
> 87855 1027 RC0001
>
> ANNE CHAUSSEGROS DE LERY
> 2020-500 PLACE D'ARMES
> MONTRÉAL QC H2Y 2W2
>
> Madam:
>
> Re: Second request for taxpayer relief for the taxation
> Year ending December 31, 2007 ref: 3563537
>
> I am replying to a correspondence dated January 7, 2011 received by fax from your representative Mrs Anne Chaussegros de Léry, asking under the taxpayer relief provisions of the "Income Tax Act" for a second review of your account for the above-mentioned taxation year.
>
> We wish to inform you that all facts included in the fax received, were already considered in our decision dated November 24, 2010 further to the second request for taxpayer relief.
>
> Your account has been thoroughly reviewed and your submission carefully considered in relation to the applicable legislation. However, I have noted any information that would change the original decision.

> Therefore, I have decided that the late-filing penalty were [*sic*] properly charged. If you do not agree with this decision, you can ask for judicial review, within 30 days of the date you receive this letter. You may obtain more details by consulting our web site at the following address:
>
> http://www.fct-cf.gc.ca/index_f.html
>
> If you have questions about this matter, you can contact Micheline Gilbert, Taxpayer Relief Officer, she is familiar with this account and can be reached at 1-866-779-2165 ext 3359 or by fax at 1-819-536-4486
>
> Yours sincerely,
>
> "France Dessureault"
> France Dessureault
> Manager
> Corporation Returns Processing
>
> c.c.: 3563537 CANADA INC.
> (Respondent's Record, Exhibit L, pages 92 and 93)

[72] Upon reading this decision, the Court notes that it does not give adequate reasons. It makes no reference to the applicant's evidence of Mr. O'Neill's fraud, apart from the remark that the Minister "empathize[s] with you about the problems incurred" (Applicant's Record, Tab O).

[73] As justification for refusing to grant the request for taxpayer relief, the applicant was told in this decision that "[you] should have filed the 2007 Tax return with the available information and then should have requested an adjustment once the information from 'Dundee Securities' had been received". This completely disregards the context and the evidence presented by the applicant to justify its inability to act. The major fraud committed against the applicant over the years in question appears to have been ignored. The applicant raises extraordinary circumstances,

namely, Mr. O'Neill's fraud, under paragraph 23(a) of Information Circular IC07-1. The letter dated May 12, 2011, does not allow us determine whether or not the delegate took into account the evidence the applicant presented to show extraordinary circumstances.

[74] The respondent argues that the delegate's recommendation report gives the reasons for the decision made in this case and makes adequate reference to the evidence filed by the applicant. In *Société Angelo Colatosti Inc v Canada (Attorney General)*, 2012 FC 124 at paragraph 31 [*Colatosti*], Justice Bédard notes, referring to *Stemijon*, above, at paragraph 37, that "it is sometimes useful to review the record to understand the reasons and assess the reasonableness of the decision". At paragraph 31 of her decision, recalling the statement of the Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, she writes:

> [31] . . . that the reasons for a decision must be analyzed together with the outcome and that it was possible to review the record to assess the qualities that make a decision reasonable. . . .

[75] The inadequacy of the delegate's reasons is therefore not, in and of itself, enough to invalidate her decision. The report that accompanied the decision of May 12, 2011, has a better analysis of the facts and contains several grounds for refusal that do not appear in the decision letter. The applicant is mainly criticized for (1) its lack of diligence after its telephone call on September 22, 2008, with Ms. Wu from Andrews; and (2) its liability for the actions of third parties.

[76] In the report supporting the decision of May 12, 2011, the delegate refers to paragraph 35 of Information Circular IC07-1, which addresses third-party actions. The paragraph states as follows:

> 35. Taxpayers are generally considered to be responsible for errors made by third parties acting on their behalf for income tax matters. A third party who receives a fee and gives incorrect advice, or makes arithmetic or accounting errors, is usually regarded as being responsible to their client for any penalty and interest charges that the client has because of the party's action. However, there may be exceptional situations, where it may be appropriate to provide relief to taxpayers because of third-party errors or delays.

The delegate found that Mr. Ouimet had wilfully decided to retain Mr. O'Neill. He therefore could be held liable under paragraph 35 of Information Circular IC07-1. She also mentions the following fact:

> Dundee Securities has recognized their responsibility (see settlement) between Mr. Peter [*sic*] Ouimet/34563537 Canada and Dundee

[77] In *Colatosti*, above, at paragraph 35, Justice Bédard, faced with a similar passage, wrote as follows:

> [35] . . . Her recommendation nevertheless suggests that she felt that the actions of a third party, in this case the applicant's accountant, simply could not be relied on as an extraordinary circumstance, regardless of the circumstances surrounding this action. I understand from her report that she objected to a *fin de non-recevoir* on the grounds raised by the applicant—its accountant's error—without it being necessary to review the circumstances surrounding this error. Therefore, she seems to not have reviewed whether the circumstances relied on by the applicant could have been extraordinary circumstances warranting a request for relief.

She therefore concludes as follows, at paragraph 37:

> [37] . . . I therefore find that the recommendation report does not add anything new to the matter and, as previous [*sic*] indicated, I

> find that the Assistant Director's decision was unreasonable because it is impossible to know the extent of his review of the circumstances relied on by the applicant.

[78] In the present case, the Court cannot know whether or not the delegate found that Mr. O'Neill's fraud could constitute "extraordinary circumstances" since there is no analysis of this subject, even though the applicant based its request on this very fraud and Mr. O'Neill's schemes. In such circumstances, the delegate's decision is unreasonable because it lacks transparency for not addressing the central issue raised in the request, that is, whether or not Mr. O'Neill's fraud constitutes extraordinary circumstances.

[79] Paragraph 33 of Information Circular IC07-1 deals with, among other things, the failure to act quickly. It states that this may be considered when determining whether relief will be granted, particularly "[w]here circumstances beyond a taxpayer's control . . . [have] prevented the taxpayer from complying with the Act". The CRA criticizes the applicant for failing to act quickly on two occasions. The first period extends from September 22, 2008, to December 18, 2008, and the second, from December 18, 2008, to April 30, 2009. Let us begin with the second.

[80] A reading of the delegate's report dated May 12, 2011, reveals no mention of any failure to act quickly on the part of the applicant during this period.

[81] Regarding the period from September 18 to December 18, 2008, the evidence shows that on September 22, 2008, Mr. Ouimet contacted Andrews and asked for a statement of account for the work performed to date. Weilu Yu informed him at that time that his file was incomplete and that Andrews still had not received the necessary information from Mr. O'Neill. Mr. Ouimet

asked Andrews to try to reach Mr. O'Neill again. Mr. Ouimet took no further action until December 18, 2008, when he discovered Mr. O'Neill's fraud. The delegate criticizes Mr. Ouimet for his inaction. Is this reasonable in the circumstances?

[82] First, the Court notes that the delegate, by relying on paragraph 33(d) of Information Circular IC07-1, implicitly agrees that the delay in filing the applicant's return was due to circumstances beyond the taxpayer's control (i.e. Mr. O'Neill's fraud). The Court further notes that Mr. Ouimet was as yet unaware of Mr. O'Neill's fraud on September 22 and was still being victimized by this scam. Despite this, the delegate found that Mr. Ouimet did not act diligently in suggesting that Andrews contact Mr. O'Neill again to obtain the necessary information. The Court cannot agree with such a finding which, once again, ignores essential pieces of evidence: Mr. O'Neill's fraud and his interest in shirking his duties to avoid being unmasked.

[83] The CRA submits that, on the other hand, should the Court conclude that the decision of May 12, 2011, is unreasonable, it should nevertheless refuse to quash the decision because it would be futile to do so. The CRA relies on paragraph 46 of *Stemijon*, above:

> [46] In this case, there would be no practical end served in setting aside the Minister's decision and returning the matter to him for redetermination. The excuses and justifications offered by the appellants for the delay in filing and the grounds offered in support of relief have no merit. The Minister could not reasonably accept them and grant relief under subsection 230(3.1) of the Act. Returning the matter back to the Minister would be an exercise in futility.

[84] The Court rejects this argument, as it is not disposed to conclude that the circumstances and reasons on which the applicant relies have no merit and that it would be futile to return the

matter back to the Minister for redetermination. This is why the Court is quashing the delegate's decision and remitting the matter for reconsideration.

JUDGMENT

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

"André F.J. Scott"
Judge

Certified true translation
Michael Palles

APPENDIX

Income Tax Act **R.S.C., 1985, c. 1 (5th Supp.)**	*Loi de l'impôt sur le revenu*, **LRC 1985, c 1 (5e suppl)**
Penalties	**Pénalités**
Failure to file return of income	Défaut de déclaration de revenu
162. (1) Every person who fails to file a return of income for a taxation year as and when required by subsection 150(1) is liable to a penalty equal to the total of	162. (1) Toute personne qui ne produit pas de déclaration de revenu pour une année d'imposition selon les modalités et dans le délai prévus au paragraphe 150(1) est passible d'une pénalité égale au total des montants suivants :
(*a*) an amount equal to 5% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed, and	*a*) 5 % de l'impôt payable pour l'année en vertu de la présente partie qui était impayé à la date où, au plus tard, la déclaration devait être produite;
(*b*) the product obtained when 1% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed is multiplied by the number of complete months, not exceeding 12, from the date on which the return was required to be filed to the date on which the return was filed.	*b*) le produit de 1 % de cet impôt impayé par le nombre de mois entiers, jusqu'à concurrence de 12, compris dans la période commençant à la date où, au plus tard, la déclaration devait être produite et se terminant le jour où la déclaration est effectivement produite.
PART XV	**PARTIE XV**
ADMINISTRATION AND ENFORCEMENT	**APPLICATION ET EXÉCUTION**
ADMINISTRATION	**APPLICATION**
Waiver of penalty or interest	Renonciation aux pénalités et aux intérêts
(3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or	(3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là,

cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.

renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (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.

Income Tax Information Circular, IC07-1

Circulaire d'information en matière d'impôt sur le revenu, IC07-1

Taxpayer Relief Provisions

Dispositions d'allègement pour les contribuables

Circumstances Where Relief From Penalty and Interest May Be Warranted

Situations dans lesquelles un allègement des pénalités et des intérêts peut être justifié

23. The Minister may grant relief from the application of penalty and interest where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation or requirement at issue:

23. Le ministre peut accorder un allègement de l'application des pénalités et des intérêts lorsque les situations suivantes sont présentes et qu'elles justifient l'incapacité du contribuable à s'acquitter de l'obligation ou de l'exigence fiscale en cause :

a. extraordinary circumstances
b. actions of the CRA
c. inability to pay or financial hardship

a. circonstances exceptionnelles;
b. actions de l'ARC;
c. incapacité de payer ou difficultés financières.

24. The Minister may also grant relief if a taxpayer's circumstances do not fall within the situations stated in 23.

24. Le ministre peut également accorder un allègement même si la situation du contribuable ne se trouve pas parmi les situations mentionnées au paragraphe 23.

Extraordinary Circumstances

Circonstances exceptionnelles

25. Penalties and interest may be waived or cancelled in whole or in part where they result from circumstances beyond a

25. Les pénalités et les intérêts peuvent faire l'objet d'une renonciation ou d'une annulation, en tout ou en partie, lorsqu'ils

taxpayer's control. Extraordinary circumstances that may have prevented a taxpayer from making a payment when due, filing a return on time, or otherwise complying with an obligation under the Act include, but are not limited to, the following examples:

découlent de circonstances indépendantes de la volonté du contribuable. Les circonstances exceptionnelles qui peuvent avoir empêché un contribuable d'effectuer un paiement lorsqu'il était dû, de produire une déclaration à temps ou de s'acquitter de toute autre obligation que lui impose la Loi sont les suivantes, sans être exhaustives :

a. natural or man-made disasters such as, flood or fire;

a. une catastrophe naturelle ou causée par l'homme, telle qu'une inondation ou un incendie;

b. civil disturbances or disruptions in services, such as a postal strike;

b. des troubles publics ou l'interruption de services, tels qu'une grève des postes;

c. a serious illness or accident; or

c. une maladie grave ou un accident grave;

d. serious emotional or mental distress, such as death in the immediate family.

d. des troubles émotifs sévères ou une souffrance morale grave, tels qu'un décès dans la famille immédiate.

Factors Used in Arriving at the Decision

Facteurs utilisés pour arriver à la décision

33. Where circumstances beyond a taxpayer's control, actions of the CRA, or inability to pay or financial hardship has prevented the taxpayer from complying with the Act, the following factors will be considered when determining whether or not the CRA will cancel or waive penalties and interest:

33. Lorsque des circonstances indépendantes de la volonté du contribuable, des actions de l'ARC, ou l'incapacité de payer ou les difficultés financières ont empêché le contribuable de respecter la Loi, les facteurs suivants seront considérés pour déterminer si l'ARC annulera ou renoncera aux pénalités et aux intérêts, ou non :

a. whether or not the taxpayer has a history of compliance with tax obligations;

a. le contribuable a respecté, par le passé, ses obligations fiscales;

b. whether or not the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued;

b. le contribuable a, en connaissance de cause, laissé subsister un solde en souffrance qui a engendré des intérêts sur arriérés;

c. whether or not the taxpayer has

c. le contribuable a fait des efforts

exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system; and

raisonnables et n'a pas été négligent dans la conduite de ses affaires en vertu du régime d'autocotisation;

d. whether or not the taxpayer has acted quickly to remedy any delay or omission.

d. le contribuable a agi avec diligence pour remédier à tout retard ou à toute omission.

Third-Party Actions

Actions de tiers

35. Taxpayers are generally considered to be responsible for errors made by third parties acting on their behalf for income tax matters. A third party who receives a fee and gives incorrect advice, or makes arithmetic or accounting errors, is usually regarded as being responsible to their client for any penalty and interest charges that the client has because of the party's action. However, there may be exceptional situations, where it may be appropriate to provide relief to taxpayers because of third-party errors or delays.

35. Les contribuables sont généralement considérés comme responsables des erreurs faites par des tiers qui agissent en leur nom pour leurs affaires fiscales. Les tiers qui perçoivent des honoraires et qui fournissent des conseils inexacts ou qui font des erreurs de calcul ou de comptabilité sont généralement considérés comme responsables face à leur client si le contribuable s'est vu imposer des pénalités et des intérêts en raison des actions de ce tiers. Cependant, il peut exister des situations exceptionnelles dans lesquelles il pourrait être approprié d'accorder un allègement au contribuable en raison d'erreurs ou de retards dus à un tiers.

36. It may be appropriate to consider granting relief from penalties and interest, in whole or in part, where an extraordinary circumstance beyond the control of a taxpayer's representative or actions of the CRA (as described in 25 and 26) have prevented the taxpayer from complying with an obligation or requirement under the Act.

36. Il peut être approprié de considérer d'accorder un allègement des pénalités et des intérêts, en tout ou en partie, lorsqu'une circonstance exceptionnelle indépendante de la volonté du représentant d'un contribuable ou que des actions de l'ARC (telles que décrites aux paragraphes 25 et 26) ont empêché le contribuable de s'acquitter d'une obligation ou de respecter une exigence de la Loi.

FEDERAL COURT

SOLICITORS OF RECORD

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