Federal Court  Cour fédérale

Date: 20130227

Docket: T-56-08

Citation: 2013 FC 200

Ottawa, Ontario, February 27, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

NRT TECHNOLOGY CORP

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in respect of the decision of M. Thompson, Assistant Director, Toronto East Tax Services Office, Canada Revenue Agency (the "Director"), dated December 14, 2007 to deny the Applicant's request for the cancellation of a penalty under the Taxpayer Relief Provisions as permitted by subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp.) (*ITA*).

[2] For reasons that follow, I find the decision to be unreasonable and will grant the application for judicial review.

Facts

[3] The Applicant, NRT Technology Corp. (NRT) is a corporation providing cash handling solutions and products with headquarters in Toronto, Ontario. John Dominelli is the President of NRT and has held this position for over 17 years.

[4] On February 28, 2006, NRT paid Mr. Dominelli a management bonus of $7,093,000 (the "Bonus"). On March 14, 2006, NRT remitted withholding payroll taxes of $2,848,548.80 on account of the payment of the Bonus.

[5] On March 23, 2006, the Canada Revenue Agency (CRA) assessed the Applicant a $284,805 late remitting penalty. NRT was a "tier 2" or "accelerated" remitter and had been notified by CRA in writing of its tier 2 remitter status in November of 2005. As a "tier 2" remitter, NRT was required to remit its source deductions in this instance by the third working day after the end of the period from the 22nd through the last day of the month.

[6] CRA determined that the Applicant ought to have remitted the $2,848,548.80 on March 3, 2006 and NRT's failure to remit the proper amount on this date warranted the assessment of the penalty.

[7] The Applicant states that at the time of the payment of the Bonus, NRT outsourced all of its payroll requirements to an independent payroll company, Ceridian. The Bonus was not handled in

the normal course and did not go through Ceridian but rather was handled internally due to the implementation of tax advice by Ms. Vaknin. She had been delegated by Charger Consulting Corporation (Charger) and HS & Partners LLP (HS) which was retained by NRT to provide legal, accounting, tax and financial planning advice to NRT. This included advice in relation to the payment of the Bonus especially given the significant size of the Bonus.

[8] As part of the advice from Ms. Vaknin, Mr. Dominelli was advised to purchase flow-though shares to reduce the tax liability on the payment of the Bonus by approximately 50%. Mr. Dominelli accepted the advice and purchased the flow-through shares beginning in December, 2005.

[9] In February, 2006, NRT and Mr. Dominelli had several discussions with Ms. Vaknin regarding the payment of the Bonus and the obligations of NRT with respect to the withholding and remittance of tax on the payment of the Bonus. Ms. Vaknin advised NRT to pay the bonus on or before February 28, 2006 but not to make any payroll remittances to the CRA until she provided additional instructions.

[10] On March 13, 2006, Ms. Vaknin made an urgent call to Mr. Dominelli and informed him that she had heard back from a person at the CRA and that she had been advised that NRT was obliged to withhold and remit the full amount of the tax due on the payment of the Bonus on or before March 15, 2006. As a result, on March 14, 2006, Mr. Dominelli immediately arranged for NRT to remit the payroll taxes of $2,848,548.80 on account of the payment of the Bonus.

[11] As a result of the tax planning advice involving the flow-through shares, on March 23, 2006, Ms. Vaknin requested, in writing, for a reduction of tax withholdings for the taxation year ending December 31, 2006. By letters dated July 4, 2006 and August 15, 2006, the CRA accepted NRT's request to reduce the withholding required on the portion of the Bonus related to the flow-through shares. Consequently, withholding was not required on the payment of $3,338,066 of the $7,093,000 Bonus. The required withholding was lowered from $2,848,548 to $1,507,481.50. Accordingly, the CRA reduced the 10% penalty at issue from $284,804.88 to $150,748.15 (the "Penalty"). The CRA ultimately offset the Penalty with GST refunds owed to NRT and the Penalty was paid in full in November, 2006.

[12] On September 13, 2006, Mrs. Dominelli, the Human Resources Manager of NRT at the time, filed for a request for the cancellation of the Penalty under the taxpayer relief provisions in subsection 220(3.1) of the *ITA*. The basis for the request was that NRT had exercised a reasonable amount of care with respect to the remittance of payroll taxes on the payment of the Bonus and that NRT had relied on professional advice and on information provided by the CRA.

[13] On November 9, 2006, the CRA responded by letter to the taxpayer relief request of September 13, 2006. The CRA stated that a "review of the account history and the circumstances outlined in [NRT's] letter [had] failed to substantiate that [NRT was] prevented from complying with the [CRA's] requirements". Further, the CRA took the position that NRT failed to demonstrate that the lateness was the result of extenuating circumstances or the result of CRA departmental error. As a result, the CRA took the view that the directors of NRT did not exercise reasonable care with respect to the remittance. The NRT's taxpayer relief request was accordingly denied.

[14] On July 18, 2007, NRT filed a second administrative review in relation to the taxpayer relief request. The NRT took the position that it exercised a reasonable amount of care and was not negligent or careless when it relied on professional and CRA advice with respect to the remittance.

[15] In a letter dated December 14, 2007, the Director denied the second administrative review.

Decision Under Review

[16] If a taxpayer requests a second level review, an officer will review the applicant's second level review submissions and prepare a report that recommends that taxpayer relief be denied or granted in whole or in part. The ultimate decision maker for the second level review will review the report prepared by the designated officer and decide whether to grant the relief sought. In this case, the Director reviewed the second level review report provided by the designated officer, John Collins. Both the second level review report and the Director's decision letter dated December 14, 2007 form the decision at issue in this application.

Second Level Review Report

[17] The second level review report (the "Report") begins with a brief background of the file. Included in the background is the fact that NRT previously requested and received full relief from late filing penalties assessed for August and September 2001 due to extraordinary circumstances. The Report also notes NRT's overall record of compliance was very good.

[18] The Report then goes on to provide a summary of the requests made by NRT for taxpayer relief. The Report takes note of the first level request letter, then discusses NRT's second level request letter dated July 18, 2007. The Report notes NRT cited paragraph 33 of Information Circular 07-1 and asserted that NRT acted in accordance with the four basis factors listed. The Report then lists the additional arguments submitted in support of NRT's request for relief as well as a list of supporting documents included with NRT's second level submissions.

[19] The Report concludes with the officer stating although the CRA appreciates the magnitude of the penalty under review and acknowledges the role of discretion in the process, the CRA is unable to arrive at a favourable decision in this case. The Report states that the evidence suggests that the company exhibited a degree of carelessness in its handling of the Bonus. This, together with the NRT's failure to act quickly to remedy the error, would suggest that the condition for allowing an adjustment had not been met.

Decision Letter

[20] In the Decision Letter, the Director states taxpayers are responsible for meeting their obligations under the legislation. As a result, taxpayers are generally considered to be responsible for errors made by third parties.

[21] The Director states in the absence of extraordinary circumstances, errors/omissions committed by the company's duly authorized representative(s) must ultimately be attributed to the

company. The Director notes that the CRA issued written notification to the company in November 2005 and November 2006 indicating the company's payroll remitter status.

[22] The Decision Letter states that the CRA was unable to conclude that the CRA erred with respect to the due date for the remittance in question. The Decision Letter notes the CRA does not suggest NRT acted knowingly to avoid complying with its obligations. However, the Director states that the CRA was not in receipt of any evidence to support the assertion that the company was misdirected by the CRA or that the CRA failed to provide information to the company in a timely manner.

[23] The Decision Letter acknowledges NRT's history of good compliance and points out that compliance history alone does not form the basis for a favourable decision. The Director writes:

> While we acknowledge the company's history of complying with its obligations, we would point out that compliance history alone does not form the basis for a favourable decision. The record suggests that the company exhibited a degree of carelessness in its handling of the management bonus in question. This, together with the company's failure to quickly remedy the error, suggests that the conditions for allowing an adjustment have not been satisfied and that, accordingly, relief should not be granted.

[24] The Director informs the NRT that cancellation of the late remitting penalty would not be appropriate in this case.

Legislation

[25] The *Income Tax Act*, RSC 1985, c 1 (5th Supp.) provides:

220 (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 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.	220 (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, 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.

Issues

[26] Two issues are raised in this application:

a. Was the CRA's decision to deny the Applicant's request for taxpayer relief unreasonable?

b. Did the CRA fetter its discretion in denying the Applicant's request for taxpayer relief?

[27] In my view the determinative issue is whether the impugned decision is reasonable.

Standard of Review

[28] The Supreme Court of Canada held in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. *Dunsmuir* at paras 50 and 53.The Supreme Court also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated. *Dunsmuir* at para 62

[29] Both the Applicant and the Respondent agree, correctly in my view, that the applicable standard of review for discretionary decisions of the Minister is reasonableness. *Lanno v Canada (Customs and Revenue Agency)*, 2005 FCA 153, 31 Admin LR (4th) 85

Analysis

[30] The Applicant begins by citing from decisions by the Federal Court and the Federal Court of Appeal regarding the purpose and guidance on the interpretation of subsection 220(3.1) of the *ITA*. Essentially, the Applicant argues that s. 220(3.1) bestows a wide discretion on the Minister to waive or cancel interest and penalties in order to grant relief from provisions of the *ITA* that can resulting undue hardship because of the complexity of the tax laws and which arise through no fault of their own. The Applicant submits that given the broad authority available to the Minister to grant relief

under s. 220(3.1) and the extraordinary circumstances of the Applicant, the Minister's decision to deny the relief sought was unreasonable.

[31] Amongst other submissions, the Applicant specifically notes that in the Report, one of the reasons the CRA decided not to provide relief was due to NRT's "failure to act quickly to remedy the error" without providing reasons as to how the Applicant failed to act quickly to remedy any delay or omission. The Applicant submits that it is unclear how the NRT did not act quickly to remedy the error as once Ms. Vaknin made the urgent call that NRT was obliged to withhold and remit the full amount of the tax due on the payment of the Bonus, NRT to remit the payroll taxes of $2,848,548.80 on account of the payment of the Bonus.

[32] The Respondent submits that in situations where the reasonableness standard applies, the Court should deter to the CRA and not reweigh the factors to substitute its judgment for that of the decision maker.

[33] The Respondent notes the CRA rejected the Applicant's request on several grounds including that the Applicant failed to act quickly to remedy its error. The Respondent submits the CRA concluded that the Applicant had not moved swiftly to remedy its error and cites from the Report where the officer stated:

> We are unable to conclude that the company acted quickly to address the balance due. Jacqueline Dominelli states in her letter of September 12, 2006 letter [*sic*] that the company did not make any payments toward the penalty because it had received assurance from CRA Payroll Headquarters that the penalty would be waived. We can

> find no evidence to indicate that the CRA provided such assurance to the company.
>
> The [CRA] ultimately retired the debt by applying several of the company's GST refunds against the balance due.

[34] The excerpt in paragraph 23 above clearly indicates that the Director considered the company's failure to quickly remedy the error to be one of the primary reasons for denying taxpayer relief. However, the Director's reasons do not indicate how the company failed to remedy the error. The error at issue was the company's failure to remit the $2,848,548.80 on account of the payment of the Bonus by the due date of March 3, 2006. This error led to the Penalty from which the Applicant sought relief.

[35] Since the Director held that the company's failure to quickly remedy the error was a reason for denying relief, one must look at how the error was remedied. The evidence is that the NRT was not aware that the remittance was due on March 3, 2006 and instead believed that it was due on March 15, 2006. The Applicant submits that once Ms. Vaknin made the urgent call to Mr. Dominelli that NRT was obliged to withhold and remit the full amount of the tax due on the payment of the Bonus, Mr. Dominelli immediately arranged for NRT to remit the full $2,848,548.80. The remittance was made on March 14, 2006, the day after Ms. Vaknin's call, but 11 days past the due date.

[36] The evidence is clear that the error was remedied by the Applicant 11 days after the error was made. It is also clear that the error was remedied without intervention from the CRA. In fact, no communication was received from the CRA regarding the error until early April 2006.

[37] The CRA was not aware that an error had been made until early April 2006. By that time, the full $2,848,548.80 had already been remitted. The Decision Letter makes no indication why the company's correction of the error was not "quick" enough to satisfy the Director, nor does the Decision Letter state how the company could have remedied the error any quicker than it did.

[38] The cite in paragraph 33 above seems to indicate that the error considered in the Report was not the NRT's failure to remit the taxes when due, but timing of the payment of the penalty assessed. There are two issues with this. First, the Report states that the CRA was unable to conclude that the company had acted quickly to address the "balance" due. It is not clear whether the "error" referred to in the Decision Letter referred to the company's error in remitting the amount due or whether it referred to the balance due on the Penalty.

[39] Second, while the NRT may not have made any payments toward the penalty as of September 12, 2006, the NRT had addressed and taken steps to have the Penalty amount reduced via the flow-through shares plan. This reduced the total amount of tax that was required to be withheld which in turn reduced the balance of the penalty. This process was started in late March 2006 and the amount owed by the NRT was reduced by the CRA in July and August, 2006. The Applicant would not have known the correct and final amount owed on the Penalty until after the deduction was made. It is also important to note that the CRA ultimately offset the Penalty with GST refunds owed to NRT and the Penalty was paid in full in November, 2006. There is no indication whether this was done at the behest of the NRT or on the CRA's own behalf.

[40] It is not clear which "error" the Director was referring to in his decision, nor how the Applicant failed to remedy the error, regardless of whether the error was the failure to remit or to address payment of the final penalty amount. The evidence supports the Applicant's claim that it quickly remedied its failure to remit the amount due and that it took steps to address the penalty owed as a result of the assessment.

[41] As a result, I find that the Decision Letter's conclusion that "This, together with the company's failure to quickly remedy the error, suggests that the conditions for allowing an adjustment have not been satisfied and that, accordingly, relief should not be granted" to be equivocal and, in either case, inconsistent with the evidence before the Director.

Conclusion

[42] I find the Director's decision that NRT failed to quickly remedy the error to be unreasonable as it fails the requirements of being justified, transparent and intelligible as required under *Dunsmuir*.

[43] The application for judicial review succeeds and I would send the matter back for re-determination.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The decision under review is quashed and the matter is returned to be re-determined by a different decision maker.

2. Costs in favour of the Applicant.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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