Federal Court  Cour fédérale

Date: 20130430

Docket: T-1704-12

Citation: 2013 FC 449

Ottawa, Ontario, this 30th day of April 2013

Present: The Honourable Mr. Justice Roy

BETWEEN:

APL PROPERTIES LIMITED

Applicant

and

ATTORNEY GENERAL OF CANADA,
on behalf of the MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in respect of a decision rendered on August 13, 2012 by K. Boudreau, Chief of Appeals, Taxpayer Relief Program, Appeals Division, Canada Revenue Agency (the "decision-maker"). The decision-maker denied the relief sought by ALP Properties Limited (the "applicant") for the cancellation, or further reduction, of interest pursuant to subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp.) (the "Act").

Facts

[2] The applicant sought a remedy from the Minister of National Revenue (the "respondent") in the form of a cancellation of the interest payable following a reassessment conducted by the respondent.

[3] The applicant was audited by the Canada Revenue Agency (the "CRA") in 2007 with respect to the 2005 taxation year. An audit report signed on March 5, 2009 recommended the application of the General Anti-Avoidance Rule [GAAR], pursuant to section 245 of the Act, to a transaction during the said taxation year which had the effect of disallowing a capital loss of $14,248,233.00 incurred during the taxation year.

[4] It is only on February 26, 2009 that the CRA had sent a Notice of Reassessment to the applicant. The Notice of Reassessment was two days shy of the statutory limitation period for reassessment. Disallowing the transaction in 2005 produced arrears in the amount of $3,564,549.57, of which $848,722.88 was interest.

[5] The applicant filed its Notice of Objection to the reassessment on May 29, 2009, exactly three months after the said reassessment had been sent.

[6] Following the Notice of Objection, the Canada Revenue Agency advised the applicant in June 2009 that it would contact it within two to four months. It is not contested that CRA did not make further contact with the applicant until a letter, dated February 2, 2010, advised that an appeals officer had been assigned to assess the objection. The appeals officer advised the applicant

in subsequent phone conversations that its objection would be forwarded to the appeals headquarters in Ottawa "the following week". The appeals officer explained that he had to set out the respective positions for review and that the appeals headquarters could take a few months, providing estimates that varied from between two and five months.

[7] On February 8, 2010, the applicant requested a copy of the auditor's report (signed on March 5, 2009) along with any correspondence with the GAAR committee. A copy of the audit report was transmitted to the applicant by CRA on February 24, 2010.

[8] The applicant chose to file a Notice of Appeal to the Tax Court of Canada on April 29, 2010. The applicant claimed that the capital losses during taxation year 2005 that were disallowed by the respondent, pursuant to subsection 245(2) of the Act, should have been granted. The CRA replied to the Notice of Appeal on July 15, 2010.

[9] The other process involving the Notice of Reassessment continued. On June 3, 2010, a report on objection was signed by the appeals officer. That report stated that the applicant's objection was to be referred to the appeals headquarters once an appeals officer reviewed the matter.

[10] It appears that from February 2011 onwards, the applicant and CRA engaged in negotiations with respect to the appeal to the Tax Court of Canada. However, in view of the fact that three cases which were similar to the applicant's case were being considered by the Tax Court, the parties agreed to hold the applicant's appeal in abeyance.

[11] The parties resumed negotiations following the decision of the Tax Court in the case of *Triad Gestco Ltd v R*, 2011 TCC 259, on July 12, 2011.

[12] By letter of October 6, 2011, the applicant's representative wrote to the CRA in order to request the arrears interest and penalties imposed be cancelled pursuant to subsection 220(3.1) of the Act. It appears that the request was intended as an element in a possible settlement of the appeal. The Taxpayer Relief Committee of the Tax and Charities Appeals Directorate wrote to the applicant's solicitor advising of the relief. In its Memorandum, one can read the following:

> . . . at a meeting of the TCAD Taxpayer Relief Committee held on October 20th, 2011, it was the decision of the Committee that interest relief would be granted for the period January 13th 2008 to January 13th 2009 for "CRA Delay" at the Audit stage. It was the opinion of the committee, that it would have been reasonable, due to the complexity of the issue involved that the auditor would have taken 3 or 4 months to the (*sic*) review the information provided by the taxpayer and issue the proposal letter. Therefore, three months and 12 days was deducted from the original request period of October 1, 2007 to January 13th 2009.

[13] The applicant requested a second review by letter of May 17, 2012. It is that decision with respect to the May 17, 2012 letter which is the subject of the present judicial review.

Impugned decision

[14] In a four-page letter, dated August 13, 2012, the Minister's representative, the decision-maker, reviewed the matter and made some decisions. The decision-maker reviewed the applicant's contentions and confirmed some relief while denying some other. The question before the Court is whether, on judicial review, more relief should have been granted.

[15] Given the nature of the issue, it is perhaps useful to review the letter in some detail.

[16] After having identified the issues raised by the applicant, the decision-maker proceeded to examine them and make determinations. First, with respect to the time it took to reassess the applicant, the decision-maker noted that it had until February 28, 2009 to complete the reassessment. Relief for the period of January 13, 2008 to January 13, 2009 had already been granted and the decision-maker confirms that such relief is reasonable on account of CRA delay.

[17] Second, the decision-maker then addresses a second period of time, between May 26, 2009, the date on which the Notice of Objection was filed, and February 2, 2010 the date on which the taxpayer was notified that the file had been assigned to a particular auditor. The decision-maker indicates that expectations were raised by CRA, as of June 24, 2009, in that the applicant received a letter indicating that contact would be made with the applicant within a period of two to four months. Given that the four-month period would have expired on October 24, 2009, the applicant was granted relief for the period of October 25, 2009 to February 1, 2010 as the first contact took place on February 2, 2010.

[18] Third, the decision-maker then considers the period of February 2, 2010 to April 29, 2010, the date on which the applicant filed its Notice of Appeal to the Tax Court of Canada. The decision-maker indicates that

> … George Armoyan was advised of the corporation's right to go to the Tax Court right away or if the appeal was not resolved in 90 days, to which he responded that this was not the route he wished to take at that time because he understood that these things take time and are dependant on workload.

Mr. Armoyan held 100 % of the common shares of the applicant. The decision-maker concludes that no relief is warranted because the delay was anticipated and normal in the circumstances.

[19] Fourth, the decision-maker considers the period beginning in February 2011 during which negotiations had been ongoing in order to settle the matter out of court. In order to explain why relief is not warranted, the decision-maker states that there was the option of paying the outstanding balance in order to avoid having to pay interest. As is well-known, the taxpayer will be refunded with interest if successful in its litigation. In support of that decision, the decision-maker refers to a brochure as well as to a circular issued by CRA. Furthermore, with respect to the agreement reached between CRA and the applicant to keep in abeyance its appeal while a similar matter was to be decided by the Tax Court of Canada (*Triad Gestco*), the decision-maker concludes that there was never any agreement to suspend interest. To quote from the decision-maker's decision, "[a] choice made by the taxpayer to wait is not a delay caused by CRA, therefore no relief will be granted for this period."

Standard of review

[20] Where the jurisprudence has already determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 57 [*Dunsmuir*]). Questions pertaining to the merits of discretionary decisions of the Minister under subsection 220(3.1) of the Act are subject to a standard of reasonableness (*Phillips v Canada (Attorney General)*, 2011 FC 448; *Telfer v Canada (Revenue Agency)*, 2009 FCA 23 at para 2, and *Hoffman v Canada (Attorney General)*, 2010 FCA 310 at para 5). In the present case, both parties also agreed on the applicable standard of review.

[21] Accordingly, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47).

[22] The applicant further argued in writing that, on the basis of *Via Rail Canada Inc v National Transportation Agency*, [2001] 2 FC 25, the adequacy of reasons is a matter of procedural fairness which calls for a standard of correctness.

[23] It was agreed at the hearing that the case of *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 controls. The adequacy of reasons is to be considered as part of the assessment of the reasonableness of the decision under review. Paragraph 14 reads as follows:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses - one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at ss.12: 5330 and 12: 5510). It is a more organic exercise - the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

[24] I will therefore examine the adequacy of the reasons given by the decision-maker as part of my analysis of the reasonableness of the decision.

Arguments of the parties

[25] The applicant takes issue with the decision of August 13, 2012. The decision is not generous enough and is not reasonable, especially because the reasons given are argued to be inadequate. They provide little analysis. They do not enlighten as to why only these two periods were chosen by the decision-maker to grant relief.

[26] Examining the periods of time between events, the applicant contends that the decision is neither transparent nor justified. The applicant challenges the decision on the basis that it rejects arguments which fall outside cases where CRA is itself responsible for raising expectations. While relief is granted for an audit that took too long and for a period that goes beyond the four months indicated as being needed in order to come in contact with the applicant in the CRA letter of June 24, 2009, no other period is deemed as justifying relief, in spite of how unreasonable the period is. The period after February 1, 2010 is not worthy of relief, yet nothing meaningful occurred after that date.

[27] The respondent's argument that it was available to the applicant the option to pay the amount owed (according to CRA), with interest being repaid to the applicant if successful in its challenge of the assessment, is met by the contention that, if taken to its logical conclusion, that argument leads to denying relief in every case. CRA's discretion becomes nugatory.

[28] Finally, the applicant complains that the respondent never contemplated the period as a whole, with the attendant consequence that periods of time were never considered for possible relief. The applicant faults CRA for not having addressed specifically the factors listed in Income

Tax Information Circular IC07-1 – Taxpayer Relief Provisions [Circular IC07-1] which is said to provide guidance on the exercise of discretion under subsection 220(3.1) of the Act.

[29] The respondent argues that the decision is reasonable and supported by adequate reasons. Consideration was given to the request for relief and the matter was analyzed by periods, depending on the events which took place over time.

[30] It is for the respondent to exercise the discretion provided by statute and the Court must show deference to the choices that were made by the decision-maker. The decision-maker was aware of the whole period, but did not agree with the applicant's view of the expediency which was needed in the circumstances.

Analysis

[31] The starting point is of course the provision which allows the respondent to exercise discretion. Subsection 220(3.1) of the Act reads:

220. (3.1) The Minister may, on or before the days 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.

[32] For the purpose of this case, there is no need to examine the tax avoidance provisions of the Act. Whether or not there has been tax avoidance as contemplated by section 245 of the Act is not relevant to these proceedings.

[33] On the other hand, what is relevant is an understanding of the proper role of the Court. As indicated above, the *Newfoundland and Labrador Nurses' Union* case controls. A measure of deference is owed to decision-makers. It is not for the Court to substitute its view of how discretion is to be exercised. Rather, the Court's role is to ascertain whether, in the words of *Dunsmuir*, "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (at paragraph 47).

[34] Paragraph 15 of *Newfoundland and Labrador Nurses' Union* is an enlightening articulation of the standard:

> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[35] The burden on the applicant is not to convince the Court that it should disagree with the decision-maker. It must rather show in a convincing way that the decision does not fall within a range of acceptable and rational outcomes.

[36] The reasons given for the decision will be considered in light of the outcome to assess the reasonableness of the decision.

[37] The applicant contends that the respondent has not addressed every point raised, including considering the period as a whole. However, such is not the requirement on the decision-maker. Again, *Newfoundland and Labrador Nurses' Union* is instructive:

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[38] It suffices for reasons to allow the Court to perform its task of ascertaining whether they adequately explain why the decision falls in the realm of acceptable solutions. "Perfection is not the standard," to quote the Federal Court of Appeal in *Canada Post Corp v Public Service Alliance of Canada*, 2010 FCA 56, at paragraph 164, and quoted with approval by the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union*.

[39] In the case at bar, it is clear that the applicant wanted much more. Actually, the applicant sought relief for the whole period. It is unclear how such request could be legitimate in the circumstances. Similarly, granting no relief whatsoever would also seem to be inadequate in the

circumstances, to the point of being unreasonable. It cannot be that a tax matter can be dragged on at the expense of a taxpayer. But relief has been granted. The question is rather whether the outcome is reasonable in the sense that decision-makers must "have a margin of appreciation within the range of acceptable and rational solutions" (*Dunsmuir*, at paragraph 47).

[40] In spite of the able submissions of applicant's counsel, the Court is not convinced that the decision under consideration falls outside of the realm of acceptable outcomes.

[41] The *Income Tax Act* provides no guidance as to how discretion should be applied. Guidance is offered in Circular IC07-1. The applicant complains that the respondent did not address specifically the contents of the Circular. In particular the applicant points to paragraph 33, which reads:

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:

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

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

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

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

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

c. le contribuable a fait des efforts 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.

[42] Not only isn't it needed to refer to all arguments, but in this case it is unclear how a specific reference to those factors could have assisted the applicant. The decision-maker referred to those factors in the decision letter of August 13, 2012, but the decision was considering tax avoidance (in the view of CRA) of some significance, upwards of $14,000,000, which generated taxes owed at the level of more than $2,700,000. Clearly factors c. and d. are not favorable to the applicant and, at best, factors a. and b. are neutral.

[43] Instead, the decision-maker reviewed carefully the history of this case and concluded that where CRA was responsible for undue delay, relief was warranted. For the period ending on February 2, 2010, relief was granted for a full year (January 13, 2008 to January 13, 2009) on account of CRA delay at the audit stage in addition to three months (October 25, 2009 to February 1, 2010) on account of failing by CRA to meet its self-imposed deadline to contact the taxpayer. The Court fails to see how this part of the decision falls outside of acceptable outcomes.

[44] As for the period starting on February 2, 2010, no relief was granted. However, the decision-maker explains itself fully, or at least enough to satisfy the *Newfoundland and Labrador Nurses' Union* standard. Not only were the principals of the applicant in contact with CRA, but the applicant took the matter to the Tax Court of Canada through a notice of appeal on April 29, 2010 with the full understanding, according to the decision, "that these things take time and are dependant on workload." Actually, the decision notes that the applicant agreed to wait for the outcome of a test

case already before the Tax Court. It is not alleged that an agreement had been reached that interest would not continue to run in the meantime.

[45] What is more is that the decision-maker made the point forcefully that it is well-known that interest continues to run during disputes with CRA (reference was made to Brochure P148, Resolving Your Dispute: Objection and Appeal Rights Under the *Income Tax Act*) and that the taxpayer has the option of paying the sums owed. In case of a decision favorable to the taxpayer, refund with interest will follow. The decision-maker asserts that the applicant was knowledgeable about interest paying and concludes that relief is not warranted.

[46] Some may think that the decision-maker could have been more generous. But such is not the test. Did the decision meet the requirements of the law in that the reasons explain how an acceptable outcome, out of a range of reasonable outcomes, was reached? It seems that relief was granted where the delay was beyond the taxpayer's control, including because of action of CRA. It was the burden of the applicant to show that, beyond its disagreement with the outcome, it was unreasonable for the decision-maker to refuse to grant relief in circumstances other than the Revenue Agency bearing the responsibility for the delay incurred, or that the assessment of the circumstances where CRA acknowledged bearing responsibility was unreasonable. The applicant has not been successful in discharging its burden. As a result, the application for judicial review must fail.

JUDGMENT

The application for judicial review of the decision rendered on August 13, 2012 by K. Boudreau, Chief of Appeals, Taxpayer Relief Program, Appeals Division, Canada Revenue Agency refusing the applicant's requested relief for the cancellation of interest pursuant to subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp.), is dismissed.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1704-12
STYLE OF CAUSE:	APL PROPERTIES LIMITED v. ATTORNEY GENERAL OF CANADA, on behalf of the MINISTER OF NATIONAL REVENUE
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