Federal Court Cour fédérale

Date: 20131211

Docket:T-1832-12

Citation: 2013 FC 1238

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 11, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

COGESCO SERVICES LIMITED

Applicant

and

ATTORNEY GENERAL OF CANADA
(Representing the Canada Revenue Agency)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] **CONSIDERING** the application for judicial review made by the applicant regarding the decision made by the Canada Revenue Agency (CRA) who refused on August 24, 2012, a request for relief made under subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th suppl.) (the Act);

[2] **CONSIDERING** the arguments that were presented by both parties;

[3] **GIVEN** both arguments presented by the applicant that the answer given in English to its request for relief submitted in French is a breach of the decision-maker's duty of procedural fairness and that the said decision to refuse the relief requested is an unreasonable decision that must be reversed;

[4] For the following reasons, the application for judicial review must be allowed.

[5] In regard to the first argument, the applicant discontinued it at the hearing and, therefore, that it became moot.

[6] The second question deals with the unreasonableness of the decision to refuse the relief.

[7] This case is very simple. The taxpayer was assessed a penalty of $2,500 per taxation year where the tax return was not completed and produced, the whole under subsection 162(2.1) of the Act. In a first request for relief, the relief was for $15,000 (i.e. six taxation years: 2005-2010) and nearly $3,000 in interest. The applicant stated in the request that it was a non-resident corporation that claimed that it did not have to file tax returns. It added that it never intended to avoid its tax obligations and, believing that the fact that it had losses was sufficient to not have to make tax returns, it requested that the penalties not be imposed on it. The CRA answered on February 7, 2012, that it did not qualify for relief since it is only possible in cases where circumstances out of the taxpayer's control prevent it from fulfilling its tax obligations.

[8] A second request was made in March 2012 for $12,500 and nearly $3,000 in interest. The amount in penalties for which relief was requested was reduced for the fact that the taxpayer agreed to payer a penalty for the year 2010.

[9] The taxpayer argued that in 2009, the Tax Court of Canada had found in favour of another taxpayer in identical circumstances (*Goar, Allison & Associates Inc. v Canada*, 2009 TCC 174 (*Goar*)). It was only in 2010 that the Federal Court of Appeal made a determination finding that even if no tax is payable, subsection 162(7) of the Act applies in lieu of subsection 162(2.1), the writing of which is deficient (*Exida.com Limited Liability Co. v Canada*, 2010 FCA 159, [2011] 4 FCR 408 (*Exida.com*)).

[10] The taxpayer reiterates that it never intended to avoid its tax obligations. However, it raises the vacillations in case law to request that its penalties and interest be levied. While *Goar* did not have precedential value (*Exida.com*, above, paragraph 3), it was a decision that applied well to the applicant's circumstances. In addition, the question that it was asking was not simple. The Tax Court of Canada judge had decided in *Goar* that no penalty under subsection 162(2.1) of the Act could be imposed on a non-resident corporation if there are no taxes payable.

[11] The judge of the same Court as in *Exida.com* rather found that subsection 162(2.1) allowed the penalty to be imposed in the same circumstances. The Federal Court of Appeal found that subsection 162(2.1) does not apply, but that the conditions of subsection 162(7) have been fulfilled and that a penalty is due.

[12] The letter in reply, for which judicial review is requested, is particularly terse. It states that no new information was offered and that the facts are the same. Then, the author wrote:

> The Federal Court of Appeals' (*sic*) decision in the case of *Exida* LLC DTC 5105 was to uphold Canada Revenue Agency's assessment. They stated that although 162(2.1) had no application, the penalty under 162(7) was applicable and the amount levied was identical to the sum levied under 162(2.1).

[13] It would be difficult to blame the taxpayer for being confused since that was not the question. The taxpayer's argument is that case law favoured its point of view until the Federal Court of Appeal decision that the CRA refers to put an end to the debate. These are new facts that, according to the taxpayer, would warrant the granting of relief.

[14] The CRA did not deal with this claim in any way.

[15] With respect, the reply given by the CRA does not answer the applicant's argument. Indeed, the reply given on August 24, 2012, corresponds much more to the reference made in the job slips submitted by the respondent. It reads: "[a]ll similar or identical cases are to be processed in accordance with the FCA decision." The CRA no longer had to worry about the faulty writing of subsection 162(2.1). Subsection 162(7) could be a supplement under the Federal Court of Appeal. The problem is that the applicant does not dispute that the decision of the Federal Court of Appeal deals with the question. Rather, it claims that for the previous years, it could avail itself of some case law. It stated that the law is a situation out of its control. In any case, the text of

subsection 220(3.1) does not have the limits that the respondent can impose on it, in the applicant's view.

[16] All agree in this case that judicial review must be based on a standard of reasonableness (*Telfer v Canada Revenue Agency*, 2009 FCA 23). It is also agreed that the standard of reasonableness was stated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 (*Dunsmuir*).

[17] In my view, this is indeed where the problem lies for the respondent. Its decision does not seem to me to satisfy the criteria that the Supreme Court of Canada introduced in *Dunsmuir*:

> [47] ... 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.

[18] On reading the decision letter of August 24, 2012, or on reading the job slips, I do not see how the respondent dealt with the argument presented by the applicant. He seems to have missed the question.

[19] I am aware that the reasons given in support of a decision do not have to be perfect or particularly elaborate. The inadequacy of reasons is not a stand-alone basis. However, the reviewing court must also discern the reasons that led to the decision. Otherwise, the decision cannot be said to

be reasonable. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador* (*Treasury Board*), 2011 SCC 62, [2011] 3 SCR 708, the Supreme Court of Canada seems to unequivocally stress the point:

> [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 ... 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).

The conclusion at the end of paragraph 16 seems to deal with the question:

> . . . 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.

[20] The respondent never answered the question asked. The applicant does not dispute that a penalty is payable for the year where the Federal Court of Appeal dealt with the question. Rather, it asks whether it should not benefit from being given relief since two Tax Court of Canada decisions differed on the question of the application of subsection 162(2.1) and the Federal Court of Appeal determined that this subsection could not apply, but that subsection 162(7) supplemented it.

[21] There is no question here of substituting one point of view for another. Simply, the reasons given for refusing the request for relief do not correspond in any way to the argument advanced by the applicant.

[22] Therefore, I find that the application for judicial review must be allowed, with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review filed by the applicant regarding the decision made by the Canada Revenue Agency that denied, on August 24, 2012, a request for relief made under subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th suppl.), is allowed, with costs.

"Yvan Roy"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1832-12
STYLE OF CAUSE:	COGESCO SERVICES LIMITED v THE ATTORNEY GENERAL OF CANADA (Representing the Canada Revenue Agency)
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	DECEMBER 4, 2013

REASONS FOR JUDGMENT AND JUDGMENT: ROY J.

DATED:	DECEMBER 11, 2013

APPEARANCES:

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