

Federal Court



Cour fédérale

Date: 20160609

Docket: T-656-14

Citation: 2016 FC 643

Ottawa, Ontario, June 9, 2016

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

RUSSELL J. GORDON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Russell Gordon seeks judicial review of a decision of a Minister's Delegate cancelling some, but not all of the interest he owed under the *Excise Tax Act*.

[2] Mr. Gordon accrued the interest in question as a result of an error he and an associated business, Coastal Collision, made as to which of them was properly responsible for collecting and remitting GST/HST on the sales of a number of vehicles they sold together. Based on advice from each of their accountants, Mr. Gordon and Coastal Collision operated under the mistaken

belief that Coastal Collision was responsible for remitting the tax. Mr. Gordon was consequently reassessed and charged interest on the GST/HST remittances that he was assessed as owing.

[3] Mr. Gordon then applied to the Minister to have the interest resulting from his reassessment cancelled. Mr. Gordon argued that it was unfair to charge him interest on GST/HST payments that were in the Canada Revenue Agency's possession, having been made on time and in full, but simply remitted by the wrong party.

[4] The Minister's Delegate did not agree. She determined that she could not grant Mr. Gordon the full relief he requested, as the relevant CRA guidelines only permitted her to consider cancelling the portion of the interest owing that exceeded 4% of the value of the tax not properly collected. As a result, the Minister's Delegate granted Mr. Gordon only partial relief.

[5] For the reasons that follow, I have concluded that the Minister's Delegate fettered her discretion by holding that she could only consider cancelling a portion of the interest Mr. Gordon owed. Mr. Gordon's application for judicial review will therefore be granted.

I. Background

[6] Starting in 2008, Mr. Gordon began to buy and import a number of vehicles using the dealer licence of Coastal Collision, a local auto dealership. Mr. Gordon would refurbish the vehicles, which would then be sold at Coastal Collision's dealership.

[7] During the course of this arrangement, Mr. Gordon and Coastal Collision each consulted their accountants regarding who should be responsible for collecting and remitting the GST/HST on the sales of these vehicles. Both sets of accountants provided the same answer: it was Coastal Collision's responsibility to pay the GST/HST. As a result, from January 1, 2008 to June 30,

2010, Coastal Collision collected and remitted the GST/HST on all the vehicles it sold in association with Mr. Gordon.

[8] In 2010, Mr. Gordon was audited by the CRA. The CRA determined that it was Mr. Gordon, and not Coastal Collision, who was properly responsible for remitting the GST/HST on these vehicle sales. Mr. Gordon was consequently reassessed in April of 2011 in the amount of \$46,650.84.

[9] On October 27, 2011, Coastal Collision was refunded the GST/HST payments it had remitted. It then proceeded to issue Mr. Gordon a cheque for the same amount the following day. Mr. Gordon made a partial payment for the GST/HST he owed that same day and paid the remainder three days later, on October 31, 2011.

II. Mr. Gordon's request for relief

[10] In December of 2012, Mr. Gordon applied to the Minister to cancel the interest he owed as a result of his reassessment, pursuant to subsection 281.1(1) of the *Excise Tax Act*, R.S.C. 1985, c. E.-15. This request for relief was denied on July 17, 2013.

[11] Mr. Gordon made a second application for relief in November of 2013. In this request, Mr. Gordon sought to have the Minister cancel all of the interest that he owed except for the portion that accrued from October 27 to 31, 2011, as that was the only period in which the tax owing was not in the CRA's possession.

[12] Mr. Gordon argued that his request for relief should be granted because the interest was incurred as a result of a "wash transaction". A "wash transaction" is defined in *GST/HST Memoranda Series 16.3.1: Reduction of Penalty and Interest in Wash Transaction Situations*

[Guideline 16.3.1] as being a transaction in which a supplier fails to charge and remit GST/HST from a party that is also a GST/HST registrant and is entitled to a full input tax credit on the transaction, or a transaction in which the GST/HST is collected and remitted by the wrong entity within a closely related group of commercial entities or associated persons.

[13] On February 12, 2014, a Minister's Delegate determined that Mr. Gordon's circumstances qualified as a wash transaction. She further determined that, in accordance with Guideline 16.3.1, that portion of the interest owed by Mr. Gordon that was in excess of 4% of the value of the tax not properly collected should be cancelled. She held, however, that she could not cancel all of the interest that Mr. Gordon owed, as he had requested, as "the wash transaction rules do not allow or provide" for her to cancel that portion of the interest owed by Mr. Gordon that was less than 4% of the value of the tax not properly collected.

III. The Legislative Scheme and the Relevant Guidelines

[14] Subsection 280(1) of the *Excise Tax Act* imposes liability for penalties and interest on amounts owing to the Receiver General in accordance with the Act. However, subsection 281.1(1) of the Act provides the Minister and his Delegates with a broad discretionary power to waive or cancel interest owed by a taxpayer: *Guerra v. Canada Revenue Agency*, 2009 FC 459 at para. 17, 348 F.T.R. 1.

[15] The Act is silent, however, regarding the manner in which the Minister should make this decision, as well as the appropriate criteria the Minister should apply in doing so. As a result, the CRA has developed a number of guidelines to assist the Minister when considering a taxpayer's request for relief.

[16] The first such guideline is *GST/HST Memoranda Series 16.3: Cancellation or Waiver of Penalties and/or Interest* [Guideline 16.3], which provides general guidance for all applications under subsection 281.1(1).

[17] Of particular note are the circumstances in which Guideline 16.3 states that the Minister may waive or cancel interest owed by a taxpayer. These include where:

1. The interest accrued is the result of extraordinary circumstances beyond a person's control;
2. The interest owing is primarily the result of the actions of the CRA; or
3. The tax-payer has demonstrated an inability to pay, and the waiver or cancellation of the interest owing will facilitate collection.

[18] The second relevant guideline is Guideline 16.3.1, which provides additional guidance where relief is sought for interest that accrued as a result of a wash transaction.

[19] In addition to defining the term "wash transaction", Guideline 16.3.1 also outlines the criteria that must be met for the Minister to consider waiving or canceling a taxpayer's interest:

1. A wash transaction must have occurred;
2. The person must not have been previously assessed for the same mistake, and must have a satisfactory history of voluntary compliance with the Act;
3. The person must have remedied the situation to ensure compliance going forward; and
4. The person must not have been negligent or careless in the conduct of his or her affairs.

[20] Where the Minister determines that relief is warranted, Guideline 16.3.1 states that the Minister will consider waiving or cancelling the portion of the interest owing that is in excess of 4% of the value of the tax not properly collected. This is the provision at issue in this case.

IV. Analysis

[21] Mr. Gordon challenges the decision of the Minister's Delegate on the basis that it was unfair to charge him interest on GST/HST payments that were already in the CRA's possession. As a result, he argues that the Minister's Delegate erred by refusing to grant him all of the relief he had requested – namely, cancelling all of the interest he owed, less three days' interest representing the period that the money was out of the CRA's hands.

[22] The respondent submits that Mr. Gordon has not identified any reviewable error in the decision under review, and that, moreover, the decision is reasonable. The Minister's Delegate considered all the relevant factors and provided Mr. Gordon with the relief that was appropriate in the circumstances, as set out in Guideline 16.3.1.

[23] At the hearing, I raised the question of whether Guideline 16.3.1 fetters the discretion of the Minister's Delegate by limiting her to considering the cancellation of only that portion of the interest owed by Mr. Gordon that exceeded 4% of the value of the tax not properly collected. The parties were then invited to make submissions on this question.

[24] In my view, this is the determinative issue of this application. As such, it is unnecessary for me to determine whether the decision under review is reasonable.

A. *The Standard of Review*

[25] Some confusion exists regarding the appropriate standard of review where the fettering of discretion is at issue.

[26] Traditionally, the fettering of discretion has been reviewable on the correctness standard: *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198 at para. 33, 366 N.R. 301.

[27] However, the Federal Court of Appeal has recently posited that post-*Dunsmuir*, the fettering of discretion should be reviewed on the reasonableness standard, as it is a kind of substantive error. The Federal Court of Appeal has, however, also been careful to say that the fettering of discretion is always outside the range of possible, acceptable outcomes, and is therefore *per se* unreasonable: *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at paras. 23-25, 425 N.R. 341.

[28] It is sufficient to state in this case that the fettering of discretion is a reviewable error under either standard of review, and will result in the decision being quashed: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250 at paras. 71-73, 450 N.R. 91; see also *Stemijon Investments*, above, at para. 23. Simply put, if the Minister's Delegate fettered her discretion, her decision should be set aside regardless of the standard of review applied.

B. *Did the Minister's Delegate Fetter her Discretion?*

[29] While decision-makers are permitted to consider, and indeed, base their decisions on administrative guidelines, a decision-maker will fetter their discretion if they treat a guideline as binding: *Waycobah First Nation v. Canada (Attorney General)*, 2011 FCA 191 at para. 28, 421 N.R. 193. Administrative guidelines do not have the force of law. They therefore cannot be relied on in a way that limits the discretion conferred on a decision-maker by statute: *Stemijon Investments*, above, at para. 60.

[30] Upon reviewing Minister's Delegate's reasons, it is clear that she believed that she was bound by Guideline 16.3.1 regarding the amount of relief she could consider granting Mr. Gordon. The Minister's Delegate held that where a wash transaction is found to exist, "the CRA will cap the portion of the interest payable that is in excess of 4% of the GST/HST that was not properly collected." She further held that the "wash transaction rules *do not allow or provide*" for her to consider granting the specific relief Mr. Gordon requested [my emphasis].

[31] Counsel for the respondent conceded that there is no statutory basis to support the Minister's Delegate's conclusion that she could only consider cancelling the portion of Mr. Gordon's interest that exceeded 4% of the value of the tax not properly remitted. Counsel agreed, moreover, that the discretionary power granted by subsection 281.1(1) is broad enough to allow the Minister to grant Mr. Gordon all of the relief that he had requested if it was determined to be appropriate to do so.

[32] Thus, it is apparent that the Minister's Delegate based her decision to limit the amount of relief she could grant Mr. Gordon solely on Guideline 16.3.1, or, as she called it, "the wash transaction rules". In so doing, the Delegate fettered the discretion conferred on her by subsection 281.1(1) of the Act. This is a reviewable error.

[33] The respondent argues that the Minister's Delegate did not fetter her discretion because the relief identified in Guideline 16.3.1 – namely, waiving or cancelling that portion of the interest owing that exceeds 4% of the tax not properly collected – is only applicable if the taxpayer cannot establish another basis for relief apart from the existence of a wash transaction, such as those set out in Guideline 16.3. The respondent submits that Guideline 16.3.1 cannot therefore be seen as limiting the amount of relief the Minister may consider granting for wash

transactions, as the Minister may always decide to provide further relief if the taxpayer can demonstrate additional circumstances that warrant it.

[34] I do not accept this argument for several reasons.

[35] First, while this argument may establish that Guideline 16.3.1 does not preclude the Minister from considering granting additional relief where there are other grounds for doing so, apart from the existence of a wash transaction, it does not address those cases like this one where the only basis for relief is the fact that the taxpayer's interest accrued as a result of a wash transaction. Indeed, where that is the case, the respondent's argument suggests that the Minister *is* limited to only considering granting the relief set out in Guideline 16.3.1, and will not consider waiving or cancelling any additional amount of interest beyond that portion that exceeds 4% of the tax not properly collected.

[36] Not only is there no statutory foundation for this position, but it also runs counter to this Court's jurisprudence, which holds that the Minister cannot apply a uniform rule to all taxpayers, but must consider each request for relief individually and on its own merits: *Guerra*, above at para. 26; *Kaiser v. Minister of National Revenue* (1995), 93 F.T.R. 66 at para. 11, [1995] F.C.J. No. 349.

[37] In this case, the Minister's Delegate failed to give any consideration to Mr. Gordon's individual circumstances, including his history of compliance with the Act, the fact that the GST/HST was remitted promptly – first by Coastal Collision and then by Mr. Gordon – and that the error was not the result of any negligence on Mr. Gordon's part, but rather his reliance on professional advice. All of these factors may have led the Minister's Delegate to grant

Mr. Gordon the full amount of relief that he requested if she had turned her mind to them.

Instead she concluded that Guideline 16.3.1 only permitted her to consider cancelling the portion of the interest owing that exceeded 4% of the value of the tax not properly collected.

[38] Finally, I cannot accept the respondent's argument because it implies that the only grounds for the Minister or his delegate to consider granting relief to a taxpayer are those set out in the relevant guidelines.

[39] Once again, there is no statutory authority that supports such a limitation on the Minister's discretion. Subsection 281.1(1) provides the Minister with an unfettered discretion to grant taxpayers relief from interest owing under the Act, free of any restrictions on either the circumstances in which the Minister may grant a taxpayer relief or the quantum of relief the Minister may provide. The establishment of various criteria in Guidelines 16.3 and 16.3.1 for when the Minister will exercise his discretion does not change this. Thus, contrary to the respondent's submission, it is simply not the case that Guideline 16.3 and Guideline 16.3.1 exhaust all of the circumstances in which the Minister may consider granting a taxpayer relief.

[40] This is not to say that the Minister cannot utilize administrative guidelines when deciding whether or not to grant relief under subsection 281.1(1). Indeed, it is clearly beneficial for the Minister to consider these guidelines when making his decision, as they provide consistency, transparency, and fairness to the decision-making process: *Guerra*, above, at paras. 18-19.

[41] Administrative guidelines, however, are not law. They are advisory only, and therefore cannot be relied on in a manner that limits the discretion conferred on the Minister by statute.

[42] In this case, the Minister's Delegate considered Guideline 16.3.1 to be binding on her decision, concluding that she could not grant Mr. Gordon the relief he requested because "the wash transaction rules do not allow or provide" for her to do so. Instead, the Minister's Delegate determined that she was limited to considering only whether to cancel the portion of Mr. Gordon's interest that was in excess of 4% of the value of the tax not properly collected. As a result, the Minister's Delegate fettered the discretion conferred on her by subsection 281.1(1) of the Act. Accordingly, the Minister's Delegate's decision will be quashed.

V. Conclusion

[43] For these reasons, Mr. Gordon's application for judicial review is granted. The decision of the Minister's Delegate is set aside, and the matter shall be returned to the Minister for redetermination in accordance with these reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted.

The decision of the Minister's Delegate is set aside and the matter is returned to the Minister for redetermination in accordance with these reasons.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-656-14

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