Federal Court  Cour fédérale

Date: 20190110

Docket: T-2077-17

Citation: 2019 FC 31

Ottawa, Ontario, January 10, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ESCAPE TRAILER INDUSTRIES LTD.

Applicant

and

ATTORNEY GENERAL OF CANADA
(THE MINISTER OF NATIONAL REVENUE)

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision by an Assistant Commissioner of the Canada Revenue Agency [the CRA], dated November 22, 2017, refusing to recommend that a remission order be granted under subsection 23(2) of the *Financial Administration Act*, RSC 1985, c F-11 [the FAA] in respect of harmonized sales tax plus arrears interest totalling $273,183.39 [the Tax Amount].

II. Background

[2] The Applicant, Escape Trailer Industries Ltd., is a private Canadian corporation that manufactures and sells fibreglass travel trailers [RV Trailers].

[3] Reace Harmatuik and Tammy Harmatuik are the sole shareholders and directors of the Applicant.

[4] Between October 1, 2010 and September 30, 2012 [the Relevant Period], the Applicant sold RV Trailers to customers residing in the United States [the US] in the following manner:

a. The customer would pay for the RV Trailer in advance.
b. On the day of delivery, the Applicant would drive the RV Trailer to the Huntingdon Canada-US Border Crossing south of Abbotsford, British Columbia.
c. The Applicant would park the RV Trailer in a parking lot on the Canadian side of the border.
d. The customer would cross the border through Canadian customs, and meet the Applicant in the parking lot on the Canadian side of the border.
e. The Applicant would transfer the RV Trailer to the customer.
f. The customer would then transport the RV Trailer back through US customs. The customer would be recorded as the importer of record of the RV Trailer.

[the Transaction Procedure]

[5] The Applicant did not collect harmonized sales tax [HST] from the US customers, based on a mistaken understanding that the supply of those RV Trailers was made outside of Canada and therefore not taxable under section 142 of the *Excise Tax Act,* RSC 1985, c E-15 [the ETA].

[6] The effect of section 142 of the ETA is that goods delivered or made available in Canada are taxable (paragraph 142(1)(a)), while goods delivered or made available outside Canada are not taxable (paragraph 142(2)(a)):

> 142 (1) For the purposes of this Part, subject to sections 143, 144 and 179, a supply shall be deemed to be made in Canada if
>
> > (a) in the case of a supply by way of sale of tangible personal property, the property is, or is to be, delivered or made available in Canada to the recipient of the supply;
>
> …
>
> (2) For the purposes of this Part, a supply shall be deemed to be made outside Canada if
>
> > (a) in the case of a supply by way of sale of tangible personal property, the property is, or is to be, delivered or made available outside Canada to the recipient of the supply;

[7] The CRA audited the Applicant's HST credit return for the Relevant Period, and issued an assessment dated February 12, 2013, indicating that the Applicant owed $375,780.10 in net HST, as well as $23,546.28 in interest.

[8] The Applicant sought a reassessment, and the Minister of National Revenue [the Minister] reduced the net HST payable by $89,571.47 plus related interest by way of a reassessment issued February 10, 2014 [the Reassessment].

[9] The Applicant did not appeal the Reassessment to the Tax Court of Canada. The Applicant paid the remaining amount owing in February of 2014.

[10] On November 24, 2014, the Applicant wrote to the CRA requesting that the Minister recommend to the Governor in Council that a remission order be granted under subsection 23(2) of the FAA for the Tax Amount, which was assessed in relation to the RV Trailers sold to US customers using the Transaction Procedure [the Application].

[11] Subsection 23(2) of the FAA gives the Minister the discretion to recommend to the Governor in Council that a remission order be granted to a taxpayer in circumstances where the collection of a tax or the enforcement of a penalty would be unreasonable or unjust, or when it is otherwise in the public interest to remit the tax or penalty:

> 23 (2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.

[12] The FAA does not specify when it would be unreasonable or unjust to collect a tax debt, or when it would be in the public interest to remit a tax debt; this determination is left to the discretion of the Minister.

[13] The CRA Remission Guide dated October 2014 [the Guide] offers guidance to delegates of the Minister tasked with exercising the Minister's discretion. The Guide outlines that, while

each remission request should be considered on its own merits, the following criteria may justify recommending a remission order:

a. Extreme hardship;

b. Financial setback coupled with extenuating factors;

c. Incorrect action or advice on the part of CRA officials; and

d. Unintended results of the legislation.

[14] The Applicant raised the latter three criteria in the Application.

[15] On November 22, 2017, the Assistant Commissioner of the Legislative Policy and Regulatory Affairs Branch of the CRA [the Officer] denied the Application [the Decision]. The Decision stated that, having considered all relevant factors, including the criteria outlined in the Guide, the Minister was not willing to recommend that a remission order be granted.

III. Issues

[16] The issues are:

A. Is the Minister's Decision reasonable?

B. Is the Decision contrary to the principles of natural justice and procedural fairness?

C. Did the Minister err in law in interpreting the intent of section 142 of the ETA?

IV. Standard of Review

[17] The parties agree that substantive review of the Decision should be conducted using the reasonableness standard. Given the discretionary nature of a decision made under subsection 23(2) of the FAA, considerable deference is owed (*Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General)*, 2012 FC 823 at para 18, aff'd 2013 FCA 25; *Axa Canada Inc v Canada (Minister of National Revenue)*, 2006 FC 17 at paras 23, 24 [*Axa*]).

[18] The standard of review for procedural fairness is correctness.

[19] The Applicant argues that the Officer's characterization of the intent of section 142 of the ETA is an error of law reviewable on the correctness standard, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 51 [*Dunsmuir*]. While I agree that the Officer's characterization raises a question of law, *Dunsmuir* goes on at paragraphs 54-55 to list factors which indicate that a question of law may attract the reasonableness standard. Given that the Minister is granted broad discretion under subsection 23(2) of the FAA, and the Minister has a special expertise in interpreting the applicable legislation, I find that the reasonableness standard applies.

V. Analysis

A. *Is the Minister's Decision reasonable?*

[20] The Applicant challenges the reasonableness of the Decision on two grounds:

a. Financial setback coupled with extenuating factors;

b. Incorrect action or advice on the part of CRA officials.

(a) *Financial setback coupled with extenuating factors*

[21] The Applicant argued in the Application that they had experienced a financial setback, as:

a. The Applicant had not collected any HST from the customers who had purchased RV Trailers through the Transaction Procedure, and as a result the Applicant was out-of-pocket the Tax Amount;

b. The Reassessment adversely affected the Applicant's credit rating, causing suppliers to request payment up front rather than 30 days after shipment; and

c. The Tax Amount represented approximately 90 percent of the Applicant's after tax net income.

[22] The Officer concluded that the Applicant was not currently experiencing financial hardship and that there were no applicable extenuating factors:

> Finally, the remission submission submits the Harmatiuks [*sic*] have experienced a significant financial setback, given that they could not recover the HST from their American customers, and that plans to expand the business have been hindered as a result.
>
> Although the repayment of the HST liability might have constituted a financial setback to Escape Trailers, the debt was

> acquitted by March 2014 and the company's website indicates that in 2012, the Harmatiuks [*sic*] purchased the property they formerly leased, and have built a third building on site to house a new fibreglass shop. Sales and revenues for 2014, 2015 and 2016, as indicated on the company's GST/HST returns, have averaged $7.1 million per year. Therefore, Escape Trailers is not currently experiencing financial hardship as a result of the former tax liability. As well, there were no extenuating factors beyond the Harmatiuks' [*sic*] control that would have prevented them from determining the correct manner in which to export the RV trailers from Canada on a zero-rated basis.

[23] The Applicant challenges the Officer's positions on two grounds:

a. That the Officer relied on irrelevant facts, namely a 2012 purchase that occurred before the CRA audit was released in February of 2013, annual revenue numbers which do not take into account the Applicant's expenses, and that the Applicant had paid the Tax Amount in February of 2014; and
b. That the Officer unreasonably ignored the Applicant's submission that the Tax Amount represented approximately 90 percent of the Applicant's annual after tax income.

[24] The Guide states that a financial setback is "less severe than "extreme hardship", and involves determining the significance of the amount of tax involved for a particular person". "Extreme hardship" is also defined, and refers to situations where an entity's current and anticipated financial resources are not sufficient to resolve the tax liability.

[25] The Applicant argues the Officer viewed the financial impact through the wrong lens temporally – he or she should have considered that impact at the time the debt was paid, not thereafter. I disagree.

[26] The Officer reasonably concluded that for a business with average annual revenues in excess of $7 million over the years 2014 to 2016, a tax debt of less than $300,000, which had already been paid, did not constitute a financial setback which justified recommending a remission order. The Applicant acknowledged an ongoing, expanding business during those years, and it was reasonable for the Officer to consider that as a factor. The Applicant is attempting to dispute the weight that the Officer assigned to the evidence.

[27] In determining whether the Tax Amount constituted a financial setback, while it may have been preferable for the Officer to consider business expenses and conduct a proper analysis of the financial records, the failure to do so does not render the Decision unreasonable. Similarly, the Officer's failure to explicitly acknowledge the Applicant's contention that the Tax Amount represented roughly 90 percent of their annual after tax income does not, as merely one factor to be considered, make the Decision unreasonable.

[28] The Officer did mention a property purchase that occurred prior to the initial CRA audit, but in the same sentence also mentioned that the Applicant had built a new building. The Officer appears to have recognized that the Applicant had continued to expand its operations despite the Tax Amount. In any event, the property purchase was just one factor considered by the Officer and was not determinative of the Officer's reasoning.

[29] The Applicant also challenges the Officer's analysis of extenuating factors. In considering whether extenuating factors existed, the Officer stated:

> As well, there were no extenuating factors beyond the Harmatiuks' [*sic*] control that would have prevented them from determining the

> correct manner in which to export the RV trailers from Canada on a zero-rated basis.

[30] The Applicant argues that the Officer employed a much narrower definition of extenuating factors than what is listed in the Guide. The Guide lists two potential extenuating factors - circumstances beyond a person's control and taxpayer error – but leaves room for additional factors to be considered.

[31] As the Guide notes, to recommend a remission order on this ground the Officer must find both that a financial setback had occurred as well as an extenuating factor. The Officer had already reasonably concluded that there was no financial setback, so any commentary regarding extenuating factors was not determinative. Despite this, the Officer turned his mind to the potential existence of extenuating factors, and concluded that none existed. That the Officer did not mention in the Decision the Applicant's error in not collecting HST, or the surrounding circumstances of the Applicant's business, does not make this conclusion unreasonable.

(b) *Incorrect action or advice on the part of CRA officials*

[32] In the Application, the Applicant argued that CRA officials had provided inaccurate advice to the Applicant which resulted in the Applicant's adoption of the Transaction Procedure. The Officer concluded that there was insufficient evidence to justify recommending a remission order on this basis:

> The remission request is made primarily on the basis of misleading advice Mr. Harmatiuk [*sic*] claims to have received from CRA Business Enquiries agents in both 2007 and 2009, to the effect that his procedures for delivering RV trailers to American customers at

the Canada-United States border were sufficient to ensure that the GST/HST would not apply.

The impetus of Mr. Harmatiuk's [*sic*] 2007 call was the cancellation of the Visitor Rebate Program and his desire to "eliminate" the GST on RV trailer sales to American customers, since they could no longer recover the tax. He states that he was advised to retain proof of non-provincial residency and a stamped copy of the American customers' export documents. I note that, despite this advice, Mr. Harmatiuk [*sic*] did not retain any paperwork with respect to the export of the RV trailers. This documentation was only obtained by him once the file was under review at the objection stage.

I cannot recommend remission on the basis of inaccurate verbal advice on the part of CRA officials without concrete corroborating evidence regarding the contract particulars, such as names, dates and written records of the issues discussed. The accuracy of CRA verbal advice is predicated upon the accuracy and completeness of information provided by the taxpayer requesting CRA clarification of a tax matter, and for this reason undocumented verbal advice is not binding on the CRA. According to the remission submission, Mr. Harmatiuk [*sic*] did not keep notes with respect to his 2007 or 2009 conversations, nor did he document the names of the CRA officials he spoke with. There is also no record of his conversations in the CRA's electronic databases.

Contact with Business Enquiries agents notwithstanding, information in the CRA guide RC4022, *General Information for GST/HST Registrants,* which would have been readily accessible to the Harmatiuks [*sic*], was updated in February 2007 to clearly indicate that the only manner in which to zero-rate non-commercial goods exported by non-resident consumers was to deliver them outside of Canada. Notes in the audit file indicate that Mr. Harmatiuk [*sic*] was aware that if the RV trailers were delivered to the United States, the HST would not apply, and several of the RV trailer sales to American customers during the audit period were transacted in this manner.

[33] The Applicant challenges the reasonableness of this portion of the decision on several fronts, including:

a. The Officer's comment regarding the Applicant's failure to retain paperwork, as there is no evidence that the Applicant did not have copies of these records at all times. While this comment is unfortunate, it is not central to the Officer's analysis, and does not render the Decision unreasonable.
b. The Officer's reliance on the availability of "RC4022, General Information for GST/HST Registrants" [RC4022], despite the fact that RC4022 does not address the specific circumstances of the Applicant.

[34] However, as the Officer noted, the RC4022 states that the only manner in which to zero-rate non-commercial goods is to deliver them outside of Canada, and this information was available to the Applicant at the relevant time. The Officer was reasonable to consider that information available to the Applicant throughout the Relevant Period implied that the Transaction Procedure would result in a tax liability.

B. *Is the Decision contrary to the principles of natural justice and procedural fairness?*

[35] The Applicant takes issue with the Officer's unwillingness to accept that Mr. Harmatuik relied on incorrect advice from CRA employees when transferring RV Trailers using the Transaction Procedure. In the Application, Mr. Harmatuik offered to provide a sworn statutory declaration deposing to his recollection of his conversations with the CRA.

[36] The Guide outlines four conditions that must be present before remission will be considered on the basis of incorrect action or advice on the part of CRA officials:

> • there is no evidence of bad faith on the part of the person requesting the remission;
>
> • the person could not reasonably have been expected to initiate timely actions to avoid or minimize the tax (or collect and remit the tax, or claim a rebate for GST/HST cases);
>
> • the person requests a remission within a reasonable time period to enable CRA officials to properly investigate the matter; and
>
> • there is written evidence to substantiate the fact that CRA officials have taken incorrect action or given incorrect advice to the person. In the absence of written evidence, the facts may be verified by other acceptable means.

[37] Addressing the fourth condition, the Officer noted that there was no written evidence to substantiate the Applicant's claim that Mr. Harmatuik had received incorrect advice, and therefore concluded that he would not recommend remission:

> I cannot recommend remission on the basis of inaccurate verbal advice on the part of CRA officials without concrete corroborating evidence regarding the contract particulars, such as names, dates and written records of the issues discussed. The accuracy of CRA verbal advice is predicated upon the accuracy and completeness of information provided by the taxpayer requesting CRA clarification of a tax matter, and for this reason undocumented verbal advice is not binding on the CRA. According to the remission submission, Mr. Harmatiuk [*sic*] did not keep notes with respect to his 2007 or 2009 conversations, nor did he document the names of the CRA officials he spoke with. There is also no record of his conversations in the CRA's electronic databases.

[38] The Applicant suggests that the Officer erred by (1) failing to pursue the offer of a sworn statutory declaration, or (2) generally failing to attempt to verify by other means that the incorrect advice had been given, as is contemplated by the Guide. The Applicant also suggests

that the Officer erred by overlooking favourable credibility findings made by an auditor at the assessment stage; the auditor's notes accept that the Harmatuiks "had tried to do things correctly and went to great lengths to figure out what they needed to do".

[39] The duty of procedural fairness owed by the Minister under subsection 23(2) of the FAA has been found to be minimal (*Desgagnés Transarctik Inc v Canada (Attorney General),* 2014 FCA 14 at paras 25, 35).

[40] When one purposively interprets the language of section 142 and the applicable sections of the Guide, I find that the procedural rights owed to the Applicant were provided.

[41] The Officer recognized that Mr. Harmatuik kept no notes of the advice he allegedly received, and that there was no record of the alleged conversations in the CRA's electronic databases. While the Officer could have chosen to pursue the offer of a sworn statutory declaration, and this may have resulted in a preferable outcome, the failure to pursue this offer does not result in a procedural fairness violation. Moreover, acting imprudently, without obtaining legal advice, a written opinion from the CRA, or making efforts to document verbal advice received from the CRA, does not in this scenario result in any procedural unfairness.

C. *Did the Minister err in law in interpreting the intent of section 142 of the ETA?*

[42] The effect of section 142 of the ETA is that goods delivered or made available in Canada are taxable, while goods delivered or made available outside Canada are not taxable. Goods that are delivered in Canada to a common carrier, and then shipped outside Canada to the final

consumer, are taxable but are then zero-rated (ETA, Schedule VI, Part V, section 12); the effect is that there is no tax liability on such goods.

[43] In their Application, the Applicant argued that as the HST is intended to tax consumption of goods within Canada, paragraph 142(1)(a) creates an unintended result by taxing the RV Trailers despite the fact that they were never registered in Canada and were to be used, and were used, exclusively in the United States. The Applicant also noted that if they had engaged a common carrier to transport the RV Trailers across the border, the RV Trailers would not have been subject to the HST.

[44] The Minister rejected the Applicant's position. The relevant portion of the Decision reads:

> You comment that the operation of paragraph 142(1)(a) of the *Excise Tax Act* has created an unintended result of the legislation, insofar as it has led in this case to the taxation of RV trailers that were directly exported to the United States. However, the elimination of the Visitor Rebate Program supports the legislative intent that only purchasers who are not customers can take possession of goods in Canada for export on a zero-rated basis. Goods purchased by non-resident consumers are only intended to be zero-rated if they are shipped to a destination outside Canada, or they are sent by mail or courier to an address outside Canada. Effective April 1, 2007, the intent of the legislation is that non-resident consumers purchasing and taking possession of goods in Canada are taxed for GST/HST purposes, and Escape Trailers was correctly assessed in this regard.
>
> [Emphasis added]

[45] The Applicant argues that the Minister erred by:

a. Failing to consider the legislative purpose of section 142 of the ETA at the time it was enacted or at all, and instead placing too much weight on a government decision to eliminate the Visitor Rebate Program; and
b. Failing to consider the broader purpose of the ETA, which is that the HST should only apply to goods and services consumed in Canada.

[46] The Applicant's argument points to a tension in the law, between a broader purpose of the ETA and the specific language of section 142.

[47] The Respondent argues that the foundation for section 142 resides in the determination of the nature of the property and where the transaction occurs – here, tangible personal property was delivered in Canada, and that results in HST being applicable.

[48] A consumption tax such as the HST is intended to be paid by the final consumers of goods and services in Canada: *CIBC World Markets Inc v Canada*, 2011 FCA 270 at para 6; *Évasion Hors Piste Inc v The Queen*, 2006 TCC 477 at para 21; *Club Intrawest v R*, 2016 TCC 149 at para 201, rev'd on other grounds, 2017 FCA 151.

[49] The text of section 142 is clear; it draws a distinction between goods and services received by the final consumer in Canada (subject to tax), and those received outside of Canada (not subject to tax). While this distinction may generally be consistent with the purpose of the

ETA to tax the consumption of goods or services in Canada, in the particular circumstances of this case the language of section 142 creates an outcome that is inconsistent with this purpose.

[50] In characterizing the legislative intent of section 142, the Officer chose to follow the express language of section 142 over the broader purpose of the ETA to tax the consumption of goods or services in Canada, and therefore concluded that the RV Trailers should be subject to HST.

[51] I find this interpretation to be reasonable. It is also consistent with past jurisprudence of this Court which has preferred the strict language of the ETA over its broader purpose, in circumstances where a textual interpretation produces a result that is contrary to the spirit of the ETA: *Axa*, above at paras 47-51.

[52] However, if I had applied the correctness standard to this issue, I may have come to the opposite conclusion.

[53] It has long been established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 11. The Officer confined his analysis to a literal interpretation of section 142, and did not consider the scheme and object of the ETA, as well as the intention of Parliament at the time of enactment. The Officer's literal interpretation tends to frustrate both a purposive construction of section 142 and the intent of the

ETA to tax consumption of goods in Canada. In my view, the result of applying such a “strict liability” approach appears to be contrary to the scheme and objects of the ETA.

[54] Additionally, subsection 23(2) of the FAA allows for tax to be remitted in circumstances where the collection of the tax would be unreasonable or unjust. The Officer’s literal application of section 142 of the ETA appears to lead to a result which is at odds with the equitable underpinnings of subsection 23(2) of the FAA.

[55] For both of these reasons, I am sympathetic to the plight of the Applicant.

[56] Nonetheless, I am unable to conclude that the Officer’s interpretation was unreasonable. As a result, this application for judicial review is dismissed.

JUDGMENT in T-2077-17

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;

2. Costs to the Respondent in the amount of $1500.00, as agreed to by the parties at the hearing.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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