

Date: 20070727

Docket: T-84-06

Citation: 2007 FC 784

Ottawa, Ontario, July 27, 2007

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

PPSC ENTERPRISES LIMITED

Applicant(s)

and

MINISTER OF NATIONAL REVENUE

Respondent(s)

REASONS FOR ORDER AND ORDER

[1] The Applicant seeks judicial review of the December 15, 2005 decision of the Minister of National Revenue (the Minister) denying the Applicant's request for the cancellation or waiver of interest and penalties pursuant to subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the ITA). Late filing penalties and interest were charged on the Applicant's failure to remit outstanding Canada Pension Plan (CPP) contributions.

1. Facts

[2] The Applicant, an Alberta corporation, provides management and supervisory consulting services to the oil and gas industry, and pays consulting fees to Brian Boulton as officer and director of the corporation who is also the representative of the Applicant in this application.

[3] The Applicant failed to remit outstanding CPP contributions assessed and owing for the 2001, 2002 and 2003 taxation years. The Applicant was assessed as follows:

Taxation Year	CPP Contributions Assessed
2001	\$2,992.80
2002	\$3,346.40
2003	\$3,603.60

[4] The Applicant was assessed interest and penalties as a result of its failure to pay the aforementioned outstanding CPP amounts.

[5] The Notices of Assessment for the years in question, all dated February 11, 2005, were sent to the Applicant shortly thereafter. The Applicant paid the assessments in full on February 22, 2005.

[6] The Respondent issued further assessments with late payment penalties and interest, dated February 23, 2005, February 25, 2005 and March 3, 2005 against the Applicant. The Applicant paid these additional penalties and interest on March 15, 2005. Further interest of \$5.05 was assessed against the Applicant on the March 15, 2005 statement. This amount was also paid by the Applicant on March 22, 2005.

[7] The consultant Brian Boulton, an officer and director of the Applicant, had in his personal tax return declared the moneys paid by the Applicant as self employment revenue and remitted the above-noted CPP contributions for the taxation years at issue on a timely basis. By notice of assessment dated March 14, 2005, the Respondent reassessed Mr. Boulton's 2001, 2002 and 2003 personal tax returns and as a result credited the full amounts of the CPP payments made plus \$700.79 in interest. A cheque reimbursing Mr. Boulton was attached to the notice of assessment.

[8] The Applicant acknowledges that it had expensed the sums paid to Mr. Boulton as salary and wages and did not submit the CPP source deductions required for employees. The Applicant claims that its annual tax returns were prepared by a third party and it alleges that it was advised that unless the Company had employees it was not required to issue T-4s and that directors were not considered employees.

[9] On June 20, 2005, the Applicant submitted its first-level fairness request to the Canada Revenue Agency (CRA). In it, the Applicant sought relief from penalties and

interest on the basis that Brian Boulton, a director and employee of the Applicant, had paid the CPP contributions personally. The request was denied on September 19, 2005.

[10] The Applicant submitted a second-level fairness request on November 8, 2005. A different CRA Officer considered this request. The second-level request was denied on December 20, 2005. The decision denying this second-level request is the subject of the within judicial review application.

2. The Decision

[11] The CRA Officer's notes to file indicate that the following facts were considered in assessing the second-level fairness request:

- 1) the Applicant's tax returns for the years 2001 through 2004;
- 2) there is no record that a representative of the Applicant had spoken with the Calgary TSO regarding the issuance of T-4s for employees and whether directors are considered employees;
- 3) there is no indication on CRA's records that it had delayed providing any information to the Applicant regarding the appropriate filing procedures;
- 4) the Applicant's representative, Brian Boulton, reported income from the Applicant on his personal income tax returns;
- 5) the Applicant did not expense director's fees for the years in question;
- 6) the Applicant expensed salaries and wages on its business income tax returns for the years in question;

- 7) the Applicant did not report the salary and wage expenses for the purposes of remitting CPP contributions for the years in question. The Applicant neither withheld the appropriate deductions nor remitted them by the due date;
- 8) the Applicant did not have a payroll account before February 2005;
- 9) in 2004 the Applicant only remitted CPP and did not remit any income tax;
- 10) the Applicant did not remit the CPP deductions and failed to file its T-4 Returns by the due dates although it always reported the income;
- 11) the Applicant does pay its assessments in a timely manner.

[12] The CRA Officer concluded that the Applicant's situation was "a result of ignorance of the law or third party errors", and "that the Applicant did not have a history of compliance with its tax obligations and had not exercised reasonable care in conducting its affairs." The CRA Officer guided by a policy "memo from head office" found that ignorance of the law and third party error were insufficient to warrant granting the request. The CRA Officer recommended that the request be denied.

[13] The Fairness Committee comprised, in this case of a Director, agreed with the CRA Officer's recommendation with the following comments:

While the "memo from head office" is not in itself justification to uphold, the facts of the case do not suggest cancellation is warranted. The client relates no attempt other than being "advised by the Calgary TSO" to clarify the reporting. If there had been incorrect handling of the issue this could be considered sufficient however the client did not report the earnings as T4 income on the T1 return while expensing the cost to the corporation as

‘salaries and wages’. It would be reasonable to expect this inconsistency to be investigated if there was due diligence in handling of this matter. This is not evident to me. No information included as to any other professional advice he may/may not have sought. The delays are not an issue since all actions were taken within timeframe outlined in the *Income Tax Act* & related legislation. While his T1 record is in fact good, this by itself is not sufficient to support cancellation.

3. Issue

[14] Did the Minister err in denying the Applicant’s request for relief under Subsection 220(3.1) of the ITA?

4. Standard of Review

[15] The Federal Court of Appeal in *Lanno v. Canada (Customs & Revenue Agency)*, 2005 FCA 153 (paragraphs 3-7) conducted a pragmatic and functional analysis with the view of determining the applicable standard of review of a decision of a tax officer exercising discretion under subsection 152(4.2) of the ITA. The Court found the applicable standard to be reasonableness *simpliciter*. In *Comeau v. Canada (Customs and Revenue Agency)*, 2005 FCA 271 (paragraphs 15-17), the Federal Court of Appeal adopted the same reasoning and found that the standard of review applicable to a discretionary decision pursuant to subsection 220(3.1) of the ITA was also reasonableness *simpliciter*. I will adopt and apply this standard in reviewing the Minister’s decision in this application.

5. Preliminary Issue

[16] As a preliminary issue, the Respondent argues that only the evidence that was before the decision-maker should be considered in this application. In particular, information contained in paragraph 2 of the Applicant's Affidavit, which describes the Applicant's shareholders and lists its shareholders, officers and directors, was not before the CRA Officer. It is well accepted that only the information that was before the decision-maker can be considered by a reviewing court on judicial review. I therefore accept the Respondent's argument and will disregard the information contained in paragraph 2 of the Applicant's affidavit. I note, however, that the CRA Officer did review materials from Mr. Brian Boulton indicating that he had incorporated the Applicant and which suggest that he was a director of the Applicant.

6. The Law

[17] Subsection 220(3.1) of the ITA confers discretion upon the Minister, through his delegates, to waive penalties or interest otherwise payable under the ITA. The section provides as follows:

220. (3.1) The Minister may at any time waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by a taxpayer or partnership and, notwithstanding subsections 152(4) to 152(5), such assessment of the interest and penalties payable by the taxpayer or partnership shall be made as is necessary to take into account the

220. (3.1) Le ministre peut, à tout moment, renoncer à tout ou partie de quelque pénalité ou intérêt payable par ailleurs par un contribuable ou une société de personnes en application de la présente loi, 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

cancellation of the penalty or interest.

personnes pour tenir compte de pareille annulation.

[18] The ITA is silent as to what criteria are to be used by the Minister in exercising discretion, but policy guidelines set out in Information Circular 92-2 are provided to assist Revenue officers having to determine fairness applications in respect to the waiving of interest and penalties in extraordinary circumstances. I reproduce these guidelines in Appendix 1.

[19] A policy letter from the CRA, also referred to in the reasons for decision as the “memo from head office” addressed to all Revenue Collection Officers, stresses the need for a uniform application of the policy, and states that “[n]either ignorance of the legislation nor third party errors are acceptable reasons for the waiver/cancellation of penalty and interest under the Fairness provisions, and do not constitute extraordinary circumstances which warrant granting fairness relief.”

7. Analysis

[20] It is well accepted that reviewing courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion differently had it been charged with that responsibility. The Supreme Court of Canada in *Maple Lodge Farms* [1982] 2 S.C.R. 2 at page 4, held:

Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

[21] Here, the parties agree that the Minister's discretion was exercised in good faith and in accordance with the principles of procedural fairness.

[22] The purpose of the fairness package enacted by Parliament was to provide relief from certain provisions of the ITA that can result in undue hardship because of the complexity of the tax laws and the procedural issues entailed in challenging tax assessments. The granting of relief is discretionary and cannot be claimed as of right.

[23] The error, which is acknowledged by the Applicant and Mr. Boulton, is not the result of circumstances beyond their control. Nor does the evidence support a finding that the error arose by reason of actions of the Department. Further, there is no evidence of hardship let alone undue hardship or extraordinary circumstances that may have prevented the Applicant from making the payments when due, or otherwise complying with the ITA. Ignorance of the legislative requirements or third party error do not constitute extraordinary circumstances which would warrant granting the request for relief as described in the Respondent's policy guidelines.

[24] I note that the CPP contributions were made in a timely manner by Brian Boulton and that the Minister at no time was out of pocket. There is no evidence of bad faith on behalf of the Applicant or Mr. Boulton, nonetheless, the contributions were not remitted by the Applicant on a timely basis as required under the Act.

[25] Here, the CRA Officer was well aware of the relationship that existed between the Applicant and Mr. Brian Boulton. It cannot be said that the Officer's decision was based on an erroneous finding of fact or made without regard to the evidence. Nor can it be said that the CRA Officer based the decision on considerations that are extraneous to the statutory purpose.

[26] In the circumstances, I may not have exercised my discretion in the same manner as did the CRA Officer. However, my function here is not to substitute my decision for that of the CRA Officer, but rather to determine whether the Officer's decision is reviewable on the applicable standard of review.

[27] I find that the CRA Officer's decision is not unreasonable. The assessments were proper and, in the circumstances, the Court's intervention is not warranted.

[28] For the above reasons, the application for judicial review will be dismissed.

[29] In circumstances where the Minister was at all times in receipt of the sums due as a result of an erroneous third party payment and where there is no question of bad faith on behalf of the Applicant, in the exercise of my discretion, no costs will be awarded on the application.

ORDER

THIS COURT ORDERS that

1. The application for judicial review is dismissed without costs.

“Edmond P. Blanchard”

Judge

APPENDIX 1

Guidelines for the cancellation and waiver of interest and penalties

Introduction

1. This circular provides information and guidelines to taxpayers and employers regarding certain legislation contained in Bill C-18, enacted December 17, 1991. The legislation gives discretion to cancel or waive all or a portion of any interest or penalties payable, and it applies to taxation years back to 1985.
2. This circular outlines the guidelines that Revenue Canada, Taxation will follow when applying the legislation. It also explains how taxpayers or employers can make a request to cancel or waive interest and penalties for years dating back to 1985, and describes the information required for such requests to be considered.
3. These are only guidelines. They are not intended to be exhaustive, and are not meant to restrict the spirit or intent of the legislation. As the Department gains experience in applying the legislation, these guidelines may be adjusted, as necessary.

The law

4. The new legislation provides for the cancelling or waiving of all or a portion of any interest or penalties. The appendices to this circular list the more common provisions of the *Income Tax Act* concerning interest and penalties that can be cancelled or waived. This measure took effect on December 17, 1991, and applies to 1985 and subsequent taxation years. The term "normal reassessment period" is relevant in paragraph 13. The "normal reassessment period" is the period that ends three years after the day of mailing of a notice of an original assessment.
5. Penalties and interest may be waived or cancelled in whole or in part where they result in circumstances beyond a taxpayer's or employer's control. For example, one of the following extraordinary circumstances may have prevented a taxpayer, a taxpayer's agent, the executor of an estate, or an employer from making a payment when due, or otherwise complying with the *Income Tax Act*.
 - (a) natural or human-made disasters such as, flood or fire;
 - (b) civil disturbances or disruptions in services such as, a postal strike;
 - (c) a serious illness or accident; or
 - (d) serious emotional or mental distress such as, death in the immediate family.

6. Cancelling or waiving interest or penalties may also be appropriate if the interest or penalty arose primarily because of actions of the Department, such as:

- (a) processing delays which result in the taxpayer not being informed, within a reasonable time, that an amount was owing;
- (b) material available to the public contained errors which led taxpayers to file returns or make payments based on incorrect information;
- (c) a taxpayer or employer receives incorrect advice such as in the case when the Department wrongly advises a taxpayer that no instalment payments will be required for the current year;
- (d) errors in processing; or
- (e) delays in providing information such as the case where the taxpayer could not make the appropriate instalment or arrears payments because the necessary information was not available.

7. It may be appropriate, in circumstances where there is an inability to pay amounts owing, to consider waiving or cancelling interest in all or in part to facilitate collection. For example,

- (a) When collection has been suspended due to an inability to pay.
- (b) When a taxpayer is unable to conclude a reasonable payment arrangement because the interest charges absorb a significant portion of the payments. In such a case, consideration may be given to waiving interest in all or in part for the period from when payments commence until the amounts owing are paid provided the agreed payments are made on time.

Requests for cancelling or waiving interest and penalties

8. Taxpayers and employers, or their authorized representatives, can make their requests by writing to the taxation centre where they file their returns, or by sending their requests to the district office serving their area.

9. To support a request, the following information is required:

- (a) the name, address, social insurance number or account number of the taxpayer or employer;
- (b) the taxation years involved;

(c) the facts and reasons why the interest or penalties levied, or to be levied, were primarily caused by factors beyond the taxpayer's control;

(d) any relevant documents or correspondence including receipts of payment.

10. The following factors will be considered when determining whether or not the Department will or waive interest or penalties:

(a) whether or not the taxpayer or employer has a history of compliance with tax obligations;

(b) whether or not the taxpayer or employer has knowingly allowed a balance to exist upon which arrears interest has accrued;

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

(d) whether or not the taxpayer or employer has acted quickly to remedy any delay or omission.

Unemployment Insurance premiums and Canada Pension Plan contribution

11. The new measures also apply to interest and penalties provided for in the *Unemployment Insurance Act* and Canada Pension Plan regarding premiums and contributions required to be made.

Refund Interest

12. Refund interest will be paid on any reassessment that cancels all or a portion of any interest and penalty previously paid.

Objections and appeals

13. A taxpayer cannot file an objection or appeal where the request to waive or cancel interest or penalties has not or has only been partially granted except for taxation years within the normal reassessment period (see 4 above).

Exercise of the discretion

14. If taxpayers or employers believe that the Department has not exercised its discretion in a fair and reasonable manner, then they may request, in writing that the director of a district office or taxation centre review the situation.

15. If you have any comments about this circular, please write to:

Revenue Canada Taxation
Taxation Programs Branch
875 Heron Road
Ottawa, Ontario
K1A 0L8

Appendix A

Interest which may be cancelled or waived

***Income Tax Act* reference**

Subsection 161 (1) Interest on the balance of taxes owing under Part 1 to a taxation year.

Subsection 161 (2) Interest on instalments required under Part 1.

Subsection 161 (11) Interest on penalties.

Subsection 227 (8.3) Interest on amounts not deducted or withheld.

Subsection 227 (9.2) Interest on amounts deducted or withheld but not remitted.

Note: This is not a complete list of interest provisions in the Income Tax Act. Other types of interest may be cancelled or waived.

**Penalties which may be
cancelled or waived**

Income Tax Act reference

- Subsection 162 (1) Penalty for failing to file a return of income.
- Subsection 162 (2) Penalty for repeatedly failing to file a return of income.
- Subsection 162 (3) Penalty for failing to file a return of income as required under
subsubsection 150(3) (e.g., trustees, agents).
- Subsection 162 (4) Penalty for failing to complete an ownership certificate (section 234),
or for failing to deliver an ownership certificate as required, or for
cashing a coupon or warrant without completing an ownership
certificate.
- Subsection 162 (7) Penalty for failing to make an information return or failing to comply
with a duty or obligation.
- Section 163.1 Penalty for failing to pay all or part of an instalment on the day it is
required.
- Subsection 227 (8) Penalty for failing to deduct or
 (8.5) withhold.
- Subsection 227 (9) Penalty for failing to remit or
 (9.5) pay amounts deducted or with-held.

Note: This is not a complete list of penalty provisions in the Income Tax Act. Other penalties may be cancelled or waived.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-84-06

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