Date: 20080312

Docket: T-1506-06

Citation: 2008 FC 371

Ottawa, Ontario, March 12, 2008

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

GIOVANNI ZEN

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Zen seeks judicial review of the decision of the Minister of National Revenue denying his "fairness request" for relief under ss. 220(3.1) of the *Income Tax Act* ("the Act").

[2] This request is merely the latest chapter in a saga that started in the early 1980s and which will be described in the background.

[3] At the beginning of the hearing, and recognizing that leave had not been sought pursuant to Rule 302 of the *Federal Courts Rules* to seek relief in respect of more than a single order, the applicant, with the consent of the respondent, sought and obtained leave to amend the notice of application to restrict it to the decision referred to above.[1]

[4] Recognizing moreover that, at best, this decision was made or at least communicated to him in August 2005, the applicant also asked the Court to consider his oral motion for an extension of time to file his application in respect of this decision, the whole on the basis of the material already filed. The Court granted permission for the applicant to proceed with said motion on the understanding that the respondent would be at liberty to file additional written submissions after the hearing.

I. Background

[5] Mr. Zen became a director of Pacific Refineries Inc. (Pacific) in 1981[2]. In subsequent years the company failed to remit various payroll source deductions and received five different assessments in that respect (three notices of assessment were dated in 1982, one in 1983 and one in 1984).

[6] In 1986, the conditions set out at ss. 227.1(2) of the Act concerning directors' liability having been fulfilled, Revenue Canada issued to Mr. Zen an assessment dated

[1] See applicant's letter dated January 31, 2008.

[2] Prior to 1984, Pacific owned and operated a precious metals refinery in British Columbia.

December 8, 1986, in the amount of $103,463.32 being the amount of unpaid deductions, interest and penalties payable by Pacific for the above-mentioned notices of assessment.

[7] For various reasons, Mr. Zen's appeal of this 1986 assessment was before the Tax Court until 1996, when as part of a more global settlement involving other matters, Mr. Zen agreed to discontinue his appeal. The parties filed evidence relating to whether or not said settlement covered the future application of the fairness package to the 1986 assessment. It is not necessary for the Court to comment further on this, except to note that it is part of the background, and that the parties are now in agreement that there was effectively no settlement in that respect.

[8] According to the evidence filed by the applicant (the affidavit of Mr. Colin Moran), after 1986 Mr. Zen did not receive any communication from Revenue Canada in connection with the 1986 assessment until February 2, 1999, when he received a letter to which was attached a requirement to pay in the amount of $351,328.46 ($103,463.32 plus interest since 1986).[3] According to the affidavit of Lynn Sherman, a collections officer with the Canada Revenue Agency (CRA), other communications are on record: one in writing dated May 1996 (no copy provided), and two conversations between Mr. Zen's representatives and CRA agents in June 1996 and October 1998. In May 1996, Mr. Zen would have been advised that the CRA was seeking payment in full (presumably this

[3] Revenue Canada could not start collection until the assessment became final upon the filing of the discontinuance.

included interest) and later, that if he wished to start a "fairness request," with respect to the assessment, he would have to do so in writing.

[9] Following receipt of the assessment of February 2, 1999, and after retrieving his old files which were allegedly closed, Mr. Zen wrote back to the CRA on June 10, 1999, and copied the then Minister of Revenue, the Honourable Herb Dhaliwal. In that letter he expressed surprise and distress that the CRA was pursuing collection on a liability which he thought had been settled more than three years earlier. He affirmed that in his view, the Minister had committed to applying a fairness package to his liability, and he sought an immediate review in that respect. On July 19, 1999, Mr. Zen received a reply letter from the Honourable Herb Dhaliwal stating that he had asked senior officials at Revenue Canada to review the matter and provide him with a reply as soon as possible.

[10] In his affidavit, Mr. Moran notes that Mr. Zen did not receive a reply letter from a senior official of Revenue Canada or from anyone at Revenue Canada until August 3, 2005, when Ms. Sherman wrote to him claiming payment in the amount of $593,739.12. It appears from his affidavit that Mr. Moran had until then believed that the Zen assessment had been reviewed, and that because of its unusual history and the abnormal manner in which Mr. Zen had been treated, Revenue Canada had decided not to pursue its claim. No mention is made of the principal amount of $103,463.32 owed under the assessment, or why this amount was not remitted. (In fact, it was only in February of 2007 that the applicant actually paid this amount.)

[11] Mr. Moran also notes, however, that sometime after receiving the letter from the Minister, he received a call from a woman from the Minister's office. Mr. Moran's recollection of this call is as follows: "She said that the "fairness package" did not apply to the years 1985 and earlier. I said that Mr. Zen was not assessed until 1986. It was a brief conversation." Further, it appears from Ms. Sherman's affidavit that the person in question, Lois Willett, was the officer responsible for dealing with mail to the Minister in respect of accounts receivable. Ms. Sherman was informed by Ms. Willett that on July 29, 1999, prior to speaking to Mr. Moran, she had spoken with Mr. Zen himself in response to his letter of June 10. It is Mr. Zen who allegedly asked her to speak to Mr. Moran.

[12] On August 11, 2005, after her so-called warning letter of August 3, 2005, Ms. Sherman wrote to Mr. Zen's lawyer in answer to a letter also dated August 11, 2005. Among other things, she wrote:

> A review of our records shows that Mr. Zen did make an application under the Fairness Policy, however this application was denied as the debt pertained to assessments on years prior to 1985. The Fairness option only covers assessments on tax years after 1985. Mr. Zen was advised that his application for fairness was reviewed and denied and that he should make payment arrangements

[13] Less than two weeks later, on August 23, Mr. Zen was served with five notices of requirement for information ("RFIs") pursuant to 2.231.2(1)(a) of the Act.

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[14] On September 23, 2005, Mr. Zen's lawyer responded to Mr. Sherman, stating that the purpose of his letter was to raise a number of issues prior to commencing proceedings in an attempt to find some common ground. On page 4 of this letter, he notes "to date, Mr. Zen has not received a written response from Revenue Canada or the Minister. (Unless Ms. Sherman's letter of August 11, 2005, is to be considered the response?)." The letter concludes at page 9 with the comment that "on any view of the facts and the relevant law it is apparent that given the long and tortured history of this mater (*sic*) Mr. Zen is deserving of some relief. Again, prior to further protracted court proceedings being initiated, we would be pleased to discuss these issues with you and/or your counsel." From then on, up until the week of July 24, 2006, there were ongoing "without prejudice" discussions between counsel for Mr. Zen and the CRA about a resolution of the Zen assessment[4].

[15] On August 2, 2006, the Minister of National Revenue filed a notice of application seeking a compliance order with respect to the RFI's, pursuant to ss. 231.2 of the Act (Court File no. T-1360-06). On August 17, 2006, Mr. Zen filed his notice of application in the present file.

[16] In her affidavit, Ms. Sherman indicates that in her letter to Mr. Zen's lawyer of August 11, 2005, she was in error in stating that a review of the records showed that Mr.

[4] See paragraph 39 of Mr. Moran's affidavit, and paragraph 4 of the affidavit of Sylvia Jorger (filed by consent after the hearing to clarify two issues raised by the Court) which establishes the date at which negotiations ended.

Zen had made a fairness application and that his application had been reviewed and denied. She gives the basis for her "erroneous statement" at para. 19 of her affidavit.

II. Analysis

[17] The legal issues raised by the applicant's motion in this application are not particularly complex. However, the one basic fact essential to the resolution of both the motion and the application, that is the point in time when the impugned decision was taken or communicated is not clear.

[18] In fact, the respondent even took the position that there was no fairness request and no decision in this matter. Then it submitted in the alternative that if indeed Mr. Zen's letter of June 10, 1999 was a proper fairness request, the Minister’s decision was made and communicated to the applicant in July of 1999.

[19] Although the circular IC92-2 entitled "Guidelines for the Cancellation and Waiver of Interest and Penalties" dated March 18, 1992, indicates at paragraph 8 that taxpayers …"can make their request by writing to the taxation centre… or by sending their request to the district office serving their area", and at paragraph 9 that "certain information is required", the parties are agreed that there is no specific requirement in that respect in the Act or the Regulations.

[20] In the present circumstances, and considering what needs to be decided, the Court is prepared to work on the best possible scenario[5] for the applicant and assume that indeed such a request was made in 1999, as did Ms. Sherman in August 2005. When the refusal was communicated to the applicant will be dealt with when reviewing the explanation for the delay in filing the application.

[21] The principles applicable to the motion for an extension of time are well known and they are set out in numerous decisions of this Court and the Federal Court of Appeal. In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, [2007] F.C.J. No. 37 at paras. 32 and 33, Justice Gilles Létourneau summarized them as follows:

> [32] There is no dispute as to what the correct legal test is on a motion for an extension of time to file an application for leave to appeal: see *Marshall v. Canada*, [2002] F.C.J. No. 669, 2002 FCA 172; *Neis v. Baksa*, [2002] F.C.J. No. 832, 2002 FCA 230. What is required is that:
>
> a) there was and is a continuing intention on the part of the party presenting the motion to pursue the appeal;
>
> b) the subject matter of the appeal discloses an arguable case;
>
> c) there is a reasonable explanation for the defaulting party's delay; and
>
> d) there is no prejudice to the other party in allowing the extension.

[5] Indeed, if no request was ever made, the applicant would have no arguable case, in light of the amendment brought in 2005 to ss. 220(3.1) of the Act (see paragraph 24).

> [33] This test is not in contradiction with the statement of this Court made more than twenty (20) years ago in *Grewal v. Canada (Min. of Employment and Immigration)*, [1985] 2 F.C. 263 that the underlying consideration in an application to extend time is to ensure that justice is done between the parties. The above stated four-pronged test is a means of ensuring the fulfillment of the underlying consideration. It ensues that an extension of time can still be granted even if one of the criteria is not satisfied: see *Grewal v. Canada, supra*, at pages 278-279.

[22] The Court will proceed to examine the four criteria listed above in the order they were presented at the hearing.

A. *Arguable Case*

[23] In 1999, section 220(3.1) read 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 cancellation of the penalty or interest.

[24] It was amended in 2005 by the *Budget Implementation Act, 2004, No. 2*, 2005, c.19, s.48 (assented to May 13, 2005) to read as follows:

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

[25] In *Montgomery v. Canada (Minister of National Revenue)*, [1994] F.C.J. No. 624, the Federal Court held that the Minister's power to waive interest and penalties applies to 1985 and subsequent taxation years only. This was based on the conclusion that ss. 127(5) of S.C. 1993, c.24, *An Act to Amend the Income Tax Act*, effected a limitation over what period the Minister could exercise his discretion under s. 220(3.1).

[26] Here, it appears that the Minister denied Mr. Zen's fairness request on the basis that the assessment, although issued in 1986, related to the taxation years 1981, 1982 and 1983 (see Pacific tax assessments referred to above), and thus predated the threshold year of 1985. This interpretation is based on the fact that pursuant to ss. 227.1(1), Mr. Zen is and was jointly and severally liable for Pacific's tax debt.

[27] Because of conditions set out in ss. 227.1(2), the collection of that debt (this includes the issuance of a personalized tax assessment against Mr. Zen himself) was delayed until 1986. Thus, Mr. Zen's tax debt relates to the taxation years 1981 to 1983 and the Minister denies having any authority to waive the interest as requested.

[28] The applicant interprets the legislation differently. He says that ss. 227.1(1) describes which directors are liable for a corporation's tax debt (see the decision of Justice Marshall Rothstein in *Kyte v. The Queen,* 96 DTC 6050 (FCTD)), while ss. 227.1(2) sets out conditions precedent to their liability for the company's tax debt, as it was articulated by the Tax Court of Canada in *Green v. MNR*, 90 DTC 1898.

[29] Thus, the answer to this question ultimately turns on the interpretation of the words "interest…payable under this Act by a taxpayer" in ss. 220(3.1).

[30] It is agreed that the only interest in dispute between the parties is the interest that ran on the personal tax assessment issued in 1986. The Minister also agrees that his power to seek interest in this case is based on ss. 227.1(1) rather than his authority to apply penalties and interest to Pacific's own tax assessments:

> 227.1(1) Where a corporation has failed to deduct or withhold an amount as required by subsection 135(3) or 135.1(7) or section 153 or 215, has failed to remit such an amount or has failed to pay an amount of tax for a taxation year as required under Part VII or VIII, the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.

[31] At this stage, for the purpose of determining whether an extension should be granted and having considered that the parties are in agreement that *Kyte,* above, is the

only authority relevant to this matter, I am satisfied that on this question the applicant has a strong case.

[32] The Court notes that in addition to the argument discussed above, Mr. Zen also contests the Minister's authority to apply penalties and interest to a director's liability under ss. 227.1(1) of the Act. The applicant intends to raise this argument if and when the respondent again seeks a compliance order.

[33] The respondent raises an additional argument based on the fact that in 2005, when ss. 220(3.1) was amended, a new condition was added: henceforth, one could only apply for relief before the date that is ten calendar years after the end of the taxation year of a taxpayer, or upon application by that taxpayer on or before that date. As the respondent maintains that no request for relief under the fairness provisions was ever made by the applicant, it is contended that the ten year limitation period would now preclude the granting of any such request.

[34] While the Court appreciates the logic of the respondent's additional argument, it remains the case that the applicant has made out an arguable case that he requested a fairness review in 1999, and as mentioned above, the Court is prepared at this point to proceed on the assumption that such a request was made.

B. *Explanation for the Delay*

[35] Mr. Zen says that if the Court indeed finds the decision of the Minister was made in 1999, it should consider that as noted in paragraphs 32 to 34 of Mr. Moran's affidavit, he believed until August 11, 2005 that no final ruling had been made with respect to his request and that the CRA had simply decided not to pursue its claim.

[36] Mr. Zen also submits that after the refusal was communicated in August 2005 and as indicated in the letter of his counsel dated September 23, 2005, he clearly intended to contest the Minister's decision and to commence judicial proceedings if necessary. However, given the history of the file, it was only reasonable for him to first attempt to negotiate a settlement of the matter.

[37] As indicated in Mr. Moran's affidavit, said negotiations were carried through until the summer of 2006, and although there are no details as to why an application was not immediately filed after negotiations were concluded[6], the applicant says that in view of the timing and sequence of events, one may conclude that as soon as possible thereafter he filed his application for judicial review.

[6] There is evidence that the applicant's affiant Mr. Moran was on personal business on August 17, 2006 (see the affidavit of legal assistant Lisa Sessoms), but this would not have prevented the filing of a notice of application under Rule 301 of the *Federal Court Rules.*

[38] The Court does not find reasonable or even plausible the applicant's explanation that he thought Revenue Canada had decided not to pursue its claim, given the actual tenor and content of his communications with the CRA since 1996, and given that he hadn't even remitted the principal owing under the 1986 assessment, which would not be covered by a fairness request in any event. The fact is that even if the Court were to conclude that the decision was communicated as final in 2005, it cannot ignore that both Mr. Zen and Mr. Moran were first notified that there was a problem with respect to the application of the fairness package in July of 1999. If at that time Mr. Zen could have assumed that this stemmed from a misunderstanding as to the taxation years covered by the assessment, this was no longer the case in 2005, when it was clear that the decision was not based on a misunderstanding and had not changed since 1999. By that time, Mr. Moran had clearly indicated that in his view, the assessment was for the year 1986 and not the years 1981 to 1984.

[39] Moreover, it is clear that at all times Mr. Zen had the benefit of advisers and legal counsel. As such, he could not ignore or ought not to have ignored the strict time limits applicable to the filing of an application for judicial review. In this regard, the Court notes that the mere existence of negotiations between the parties does not by itself operate the suspension of time limitations. As it was stated by Justice John Evans in *Eli Lilly and Co. v. Abbott Laboratories*, [1999] F.C.J. No. 466, at para. 12. "Experienced counsel understand that settlement discussions may be protracted and that meanwhile they have to keep limitation periods in mind." Even it was made in an admittedly

different context, the comment is apt here, where it appears to the Court that the applicant pursued settlement negotiations for an inordinate length of time, and failed to appreciate that the short window for seeking judicial review or an extension of time would not remain open indefinitely. There is no explanation as to why a notice of application could not have been filed at least to stop the clock, if not to show the seriousness of his position.

[40] It is the respondent's position that at the very least, the applicant's inaction between 1999 and 2005 reveals a failure to pursue the matter diligently[7]. The Court cannot disagree that the applicant's attitude after August 2005 is coloured by his prior lack of diligence in handling the matter.

[41] In light of the above, the Court concludes that the applicant has failed to set out a satisfactory explanation for his delay in instituting the present proceeding.

C. *Intention to Pursue his Rights through Judicial Review*

[42] There is no affidavit from Mr. Zen himself in the record. Instead, the applicant filed an affidavit from his tax counsel with respect to the proceeding before the Tax Court between 1987 and 1996. He also filed an affidavit from Mr. Moran who worked with him for more than 25 years as a close adviser, particularly in matters involving the review of

[7] If he thought that no decision had been made, at the very least it would have been reasonable for the applicant to seek clarification of the matter if not to endeavor to elicit an actual decision from the CRA or the Minister, if need be by an order of *mandamus*.

complicated documents and correspondence. In fact, because Mr. Zen has some difficulty reading English material, Mr. Moran attests that he personally read all of the correspondence and documentation relevant to this matter and that all correspondence signed by Mr. Zen would have been written and reviewed with him before being signed.

[43] Although Mr. Moran does not specifically attest that Mr. Zen had the intention to seek judicial review of the decision of the Minister at all times after its communication to him, the applicant submits that it is apparent from his general behaviour throughout the history of this file and particularly from the letter of his counsel dated September 23 2005, that he was at all times resolved to contest any refusal on the part of the Minister and to institute appropriate legal proceedings if need be.

[44] The evidence in this respect is certainly tenuous. Although it is evident that throughout the history of this file, the applicant opposed any attempt by the CRA to collect this debt, he did very little to actively pursue the recognition of his rights. In fact, it appears that it was only when the Minister again moved to collect the debt by filing an application for the issuance of a compliance order that the applicant indeed went ahead and filed his own notice of application.

[45] Having considered the history of the file, the Court is not satisfied that Mr. Zen has demonstrated a continuing intention to seek judicial review. Rather, it appears to the Court that although he was at the very least alert as of 1999 to a problem in the

application of the fairness package, for close to seven years he did little more than cross his fingers and hope this matter would go away, along with the claim for the principal amount of $103, 463.32. This falls somewhat short of behaviour consistent with a continuing intention to assert one's rights.

D. *Prejudice*

[46] There is no evidence of an actual prejudice to the respondent other than the fact that it would be deprived of the benefit of the time limitation set out in ss. 18.1(2) of the *Federal Courts Act*, S.C. 1990 c. 8, s. 5; S.C. 2002 c. 8, s. 27. (*Berhard v. Canada*, 2005 F.C.J. No. 1302, at para. 60)

[47] The applicant argues that even if he does not meet all of the criteria for an extension, because of the strength of his case, it is nonetheless clearly in the interest of justice that he be granted an extension. He cites the recent decisions of this Court in *Metlakatla Indian Band v. Canada (Attorney General)*, [2007] F.C. 553 and *Tzeachten First Nation v. Canada (Attorney General)*, [2007] F.C. 1131 in support of this argument.

[48] The Court notes that in both of those cases, the underlying applications involved the determination of constitutionally guaranteed aboriginal rights. In both cases, Justice François Lemieux considered that this was a relevant consideration with respect to the

opportunity of granting an extension, especially where the Crown's duty to consult is understood as ongoing and case-specific (*Metlakatla Indian Band*, para. 50; *Tzeachten*, para. 48).

[49] As it was stated by the Federal Court of Appeal in *Stanfield v. Canada*, 2005 FCA 107, at para. 3, on a motion for an extension of time, the weight to be given to any one factor will vary with the circumstances of the case. Unfortunately for the applicant, the Court does not consider that the circumstances of the present case are in any way comparable to those of *Metlakatla Indian Band* or *Tzeachten.* Simply put, there is little in the way of analogy to be drawn between the two cases cited by the applicant and the present matter.

[50] As mentioned at the outset, the four-pronged test was developed to help the Court determine what would best ensure that justice be done between the parties in a given case.

[51] Here, counsel for the applicant have done an excellent job of casting Mr. Zen's delay in the best possible light and have made out what appears to be a strong case on the merits, or some aspect of them.

[52] However, the time limit for bringing an application for judicial review was not intended to capture only "weak" cases. As noted by Justice Gilles Létourneau in *Berhad*,

above, at para. 60, this 30-day limit is not whimsical. It brings finality to administrative decisions and ensures their effective implementation.

[53] Accordingly, and having carefully considered all of the circumstances of this case, including the nature of the right at issue, the Court finds that the extension should not be granted. That the applicant appears to have a strong case on the merits is not enough to tilt the scales in his favour here.

[54] Having dismissed the motion for an extension of the time to file this application, the application must also be dismissed.

ORDER

THIS COURT ORDERS that:

The motion for an extension of the time to file this application and the application are dismissed with costs.

"Johanne Gauthier"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1506-06
STYLE OF CAUSE:	GIOVANNI ZENN and THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	January 31, 2008
REASONS FOR JUDGMENT AND JUDMENT:	The Honourable Justice Johanne Gauthier
DATED:	March 12, 2008

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