Federal Court  Cour fédérale

Date: 20090731

Docket: T-786-08

Citation: 2009 FC 795

BETWEEN:

LOUIS ROBINSON

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

REASONS FOR JUDGMENT

LUTFY C.J.

[1] The applicant seeks judicial review of the April 2008 second level review decision (the decision) by the Canada Revenue Agency (CRA or the respondent), refusing his request for the cancellation of penalties under the Voluntary Disclosures Program (VDP).

[2] On April 15, 2005, the applicant through his tax solicitor (the applicant's solicitor) applied for relief under the VDP with respect to unpaid payroll remittances, income tax and goods and services tax (GST). The applicant's solicitor is an affiant in support of this application for judicial review. The applicant is represented by different counsel in this proceeding.

[3] On August 18, 2005, the applicant and his solicitor signed a client agreement form acknowledging that they understood the four conditions to qualify for the VDP. The principal condition in issue here is whether the applicant's disclosure was voluntary and one not made with the knowledge of an audit, investigation or other enforcement action initiated by the CRA.

[4] In his covering fax transmission sheet forwarding the client agreement form, the applicant's solicitor acknowledged one issue of prior interest by the CRA concerning the applicant:

> We should note that the only issue in terms of prior interest of the department of which I am aware is a phone call which was received by our client from the payroll department after he engaged our services… [W]e were already engaged in the process and so we contacted the person from payroll and we told them that we were in the process of making a voluntary disclosure involving GST, Income Tax and payroll.

[5] The CRA, on the other hand, relies on more than one action taken by its officials in late 2004 and early 2005, prior to the applicant's disclosure. On the basis of the respondent's affidavit and the uncontradicted information at pages 14 and 16 of the respondent's record, I accept as accurate the facts set out in the respondent's memorandum of fact and law:

> On December 13, 2004, Peter Prebtani, an Enforcement Officer of the Revenue Collections Division of the Canada Revenue Agency ("CRA") contacted the applicant's office for failing to remit the correct amount of employee source deductions for 2003 and 2004 payroll remittances. The applicant or the applicant's assistant advised Prebtani that they would speak to their accountant and call back.
>
> On February 23, 2005, Jean Salvas, a Trust Examiner of the Collection Division Branch called the applicant and left a message asking him to call back. Salvas called the applicant to set a time to conduct a payroll audit of the applicant's books and records.

> …
>
> On March 17, 2005 Salvas delivered a letter to the applicant at the applicant's place of business to set an appointment to conduct the payroll audit on April 18, 2005.
>
> On March 21, 2005 Salvas advised Marcos Collados, a Non-Filer/Non-Registrant Office Contact Agent of the Non-Filer /Non-Registrant Section in the Revenue Collections Division, of the applicant's non-registration of GST.
> (footnotes omitted)

While the applicant's solicitor may only have been aware of one of these actions, the others have not been contradicted by the applicant. It is acknowledged that the action of March 21, 2005 was internal to the CRA.

[6] The parties' submissions can be framed under two issues:

(i) did the CRA accept the applicant's disclosure concerning the unpaid income tax and GST, prior to the negative first level decision of December 6, 2006?

(ii) was the applicant's disclosure voluntary?

[7] Each of these issues is either a question of fact or a mixed question of fact and law. In either event, the decision should be reviewed under the reasonableness standard: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at ¶ 47. I do not accept the applicant's initial characterization of the issues as one of procedural fairness to be reviewed on the correctness standard. The first issue presents no question of procedural fairness. The situation in *Wong v. Canada*, 2007 FC 628, differs from this case. Moreover, in his reply submissions during the hearing, the applicant properly referred to the reasonableness standard in addressing the second issue.

(i) Did the CRA accept the applicant's disclosure concerning the unpaid income tax and GST, prior to the negative first level decision of December 6, 2006?

[8] On January 14, 2008, the applicant's solicitor made written submissions to support a favourable second level review (the second level submissions). The solicitor represented that on February 2, 2006, he met with an officer of the appeals division, VDP (the VDP officer). The VDP officer's supervisor (the supervisor) also participated in the meeting, according to the applicant's solicitor.

[9] According to the second level submissions, the supervisor: "… tentatively approved the acceptance of the voluntary disclosure… but he needed to see explanations for… [certain items]… before his decision was finalized. This condition was met and so the Voluntary Disclosure was complete and accepted."

[10] In his affidavit in this proceeding (the solicitor's affidavit), the applicant's solicitor stated that during the meeting of February 2, 2006, the CRA – through the VDP officer and the supervisor – approved which years were to be reassessed for income tax and GST. It was during his cross-examination that he appears to have realized this date was incorrect. The applicant now acknowledges that there could have been no acceptance, tentative or otherwise, on February 2, 2006.

[11] Since the cross-examination of his solicitor, the applicant now submits in his written and oral argument that the acceptance of his voluntary disclosure would have occurred at the meeting of May 9, 2006 with the VDP officer. During his cross-examination (questions 39-48), the applicant's solicitor stated that the agreement was communicated to him by the VDP officer, not the supervisor as he had suggested in his second level submissions.

[12] In the decision, the CRA determined that the file, while under the care of the VDP officer:

> "… was never closed and no correspondence was sent to you or to your client advising that the [Income Tax] and GST disclosures were accepted. As an expert in this field, we *(sic)* are confident you would agree that "tentative" acceptances of disclosures cannot be relied upon. It is our normal practice to advise taxpayers, in writing, of any decision reached regarding disclosures filed with the CRA." (Emphasis added)

[13] Put simply, the May 9, 2006 meeting, for whatever reason, was not mentioned in the second level submissions. The assertions in the solicitor's affidavit concerning a meeting with CRA on May 9, 2006, together with documentary references, were only introduced in this Court.

[14] On the record placed before the CRA decision-maker, the second level review determination that the applicant's file "… was never closed and no correspondence was sent to you or your client advising that the [Income Tax] and GST disclosures were accepted" was a reasonable one within the meaning of *Dunsmuir*. In the words used in his factum to identify the first issue, the applicant has not shown that a decision had been made on the voluntary disclosure for income tax and GST, prior to the negative one of December 6, 2006.

[15] My determination in favour of the respondent has been made solely on the information which was before the second level review, as filed in this proceeding. As urged by the applicant, I have not taken into account the information in paragraphs 24(a) and (b) of the respondent's affidavit concerning a communication said to have occurred some three months after the second level review decision. This information should not have been filed in this proceeding.

[16] Similarly, exhibits (c), (d) and (e) to the solicitor's affidavit were not before the second level review and should not form part of the record in this Court, even though the respondent does not appear to have objected to their production. The information in these exhibits suggest that the meeting of May 9, 2006 did take place, a fact that may not be in dispute even though not referred to in the second level review. Even if they were properly before the Court, these documents do little, if anything, to support the applicant's version that the CRA and he reached an agreement on that occasion.

[17] The applicant has not shown that any information concerning the May 9, 2006 meeting was before the second level review decision-maker. Also, the applicant has not established that the VDP officer or his supervisor made a decision in his favour prior to the negative first level decision of December 6, 2006.

[18] Accordingly, it is unnecessary to address the applicant's reliance on the CRA's absence of jurisdiction and the principles of *functus officio*, legitimate expectation and promissory estoppel.

(ii) Was the applicant's disclosure voluntary?

[19] Stated differently, the issue here is whether the payroll audit would have led to the discovery that the applicant's income tax and GST returns for some years had not been filed.

[20] The applicant came forward to seek relief under the VDP on April 15, 2005.

[21] Previously, in late 2004 and early 2005, the CRA had made the following contacts with the applicant: (a) an enforcement officer advised that the applicant had failed to remit the correct amount for employee payroll source deductions, to which the applicant or his assistant replied that they would speak to their accountant and call back; (b) a trust examiner left a message requesting the applicant to return his call; and (c) one month prior to the proposed appointment, the trust examiner delivered a letter to the applicant's office to set up a meeting for April 18, 2005 to conduct a payroll audit.

[22] None of this information is contested.

[23] On December 4, 2006, in its first written decision, the CRA advised that the applicant's disclosures for payroll, income tax and GST were not voluntary:

> … There was enforcement action by our Trust Compliance unit prior to your April 15, 2005 disclosure. You were contacted for a trust exam on March 17, 2005. As a result, your payroll disclosure is not accepted under the VDP.
>
> The [Income Tax] and GST disclosures are also not considered voluntary. As a result of the trust exam the unfiled [Income Tax] and GST returns would have been discovered.
> (Emphasis added)

[24] The applicant does not challenge the CRA refusal to accept his disclosure of unpaid payroll remittances as not being voluntary. The dispute under this second issue is limited to the CRA's conclusion that the applicant's disclosure of unpaid income tax and GST was not voluntary.

[25] The applicant relies on clause 8.3.5 of the CRA internal VDP Guidelines which the respondent's counsel produced, after cross-examination, with the caveat that the document was outdated at the time of the second level review.

[26] However, for the purposes of the applicant's argument, that provision is substantially reproduced, albeit in different wording, in ¶ 32 and ¶ 34 of the current publicly available information circular, dated October 22, 2007:

> ¶ 32. A disclosure will not qualify as a valid disclosure, subject to the exceptions in paragraph 34, under the "voluntary" condition if the CRA determines:
> - the taxpayer was aware of, or had knowledge of an audit, investigation or other enforcement actions to be conducted by the CRA … and
>
> …

- the enforcement action is likely to have uncovered the information being disclosed.

…

¶ 34. Not all CRA initiated enforcement action may be cause for a disclosure to be denied by the CRA. …
… There may be no correlation between [payroll and GST] issues and, as such, the enforcement action on the payroll account may not be cause to deny the [GST] disclosure, …

[27] The applicant's submission is that a refusal to accept voluntary disclosure for payroll should not necessarily dictate the same outcome for income tax and GST.

[28] For the applicant, the CRA actions prior to his disclosure were limited to payroll issues. In his view, voluntary disclosure for income tax and GST is to be seen as separate from the payroll disclosure. The applicant denies that a payroll audit would have led to the uncovering of income tax and GST returns that had not been submitted. As in the example in ¶ 34 of the information circular, the applicant argues that there is no correlation between the payroll and GST disclosures in his case. In the words of the applicant's solicitor in his second level submissions, "… it is a remote stretch to say that the Payroll officer's query would have led to the uncovering of un-filed GST and Income Tax returns. In this Counsel's extensive experience, Payroll Auditor's scope is very, very narrow."

[29] For the respondent, the three areas of unpaid taxes are correlated for purposes of voluntary disclosure in the applicant's situation, notwithstanding the possible scenario described

in ¶ 34 of the information circular. The respondent states that the facts of this case establish a correlation among the payroll, income tax and GST disclosures. I agree.

[30] In March 2005, the trust examiner advised another CRA official concerning the applicant's non-registration of GST. This communication, even if unknown at the time to the applicant, can be relied upon in assessing whether the voluntary disclosures can best be characterized as separate or correlated.

[31] There is also the evidence in the respondent's affidavit at paragraph 6 describing the role of the trust examiner in a payroll audit:

> The purpose of the payroll audit was to determine whether the correct amount of deductions have been made from the employees' remuneration for the Canada Pension Plan ("CPP"), Employment Insurance ("EI") and Income Taxes. The officer conducting the payroll audit also ensures that these deductions for CPP, EI and Income Taxes; and any amounts with respect to GST are remitted to the CRA.
> (Emphasis added)

During her cross-examination, the respondent's affiant confirmed her view that the trust examiner's role includes looking at GST as a trust fund within the scope of the payroll audit.

[32] This evidence is also consistent with the work description of the trust examiner as extending beyond payroll issues:

> **Client-Service Results**
> Enforcement of compliance with respect to withholding, remitting, and reporting requirements of various Acts including the initiation of assessments through the examination of taxpayer books and records; the provision of information to taxpayers.

> **Key Activities**
> Organizes, schedules, and examines taxpayer's books, records, and supporting documentation pertaining to unreported income, taxable benefits, and other amounts deducted or held in trust.
>
> …
>
> Obtains outstanding GST/HST returns and information slips from taxpayers or their representatives.

[33] The applicant also submits that, from his subjective point of view, he did not or could not have known that the contacts his office received from the CRA prior to April 15, 2005 were enforcement measures. There is no merit to this argument. The applicant's solicitor presented at CRA offices on April 15, 2005 to disclose under the VDP, three days prior to the date for the appointment which had been communicated to him by the trust examiner.

[34] Similarly, the applicant's reliance on the February 2006 information at page 21 of the respondent's record is misplaced. Neither party could identify the author of the document. One cannot conclude from this document that the VDP officer viewed the payroll disclosure as separate from the other two on the basis of a statement attributed to him that "part" of the voluntary disclosure was being refused. Neither counsel referred in argument to the November 2006 CRA memorandum to file (page 45 of the respondent's record) attributing a statement to the VDP officer that he "… confirmed that he did not do a voluntary check or confirm with the rep that the disclosure was voluntary".

[35] Finally, the applicant invokes the interim notification provision in clause 8.3.8 (Interim Notification) of the internal VDP Guidelines:

> Within 30 calendar days of the date the client provided all disclosure information, the client should be notified whether or not we will consider the disclosure to be "voluntary". If this decision cannot be made within 30 days, the client should be provided with the expected timeframes.

[36] Even if this guideline was in force at the relevant time, it is at most an internal best practice for CRA officers. It affords no legal rights to the applicant. Also, the applicant is hardly in a position to complain about the lapse in time in view of his solicitor's acknowledgement, in the second level submissions, of the delay caused by the "breakdown in communications" between the two of them. Also, in these same submissions, the applicant's solicitor refers to interim notification in clause 8.3.8 as having been respected. This issue cannot be dispositive of this application for judicial review, even if it had been properly raised in the applicant's factum.

[37] The applicant's argument that the payroll audit would not have led to the knowledge that income tax and GST returns had not been filed was dismissed in the second level review decision:

> Our position is that the ongoing enforcement action would have uncovered the unfiled GST and T1 returns. Significant non-compliance issues such as non-filing, non-reporting and non-remitting of amounts for many years as is the case in this payroll account would have uncovered the same issues in the T1 and GST accounts.

[38] In the light of the facts of this case, the second level review decision that the voluntary condition was not met is also a reasonable one. The applicant has not satisfied me that the payroll audit would not have disclosed the non-filings in income tax and GST.

[39] For these reasons, this application for judicial review will be dismissed. If necessary, the parties may serve and file written submissions concerning costs. Counsel can agree on the dates for the exchange of representations on the understanding that the process is completed by August 24, 2009.

"Allan Lutfy"

Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-786-08
STYLE OF CAUSE:	LOUIS ROBINSON v. HER MAJESTY THE QUEEN
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