Federal Court  Cour fédérale

Date: 20100923

Docket: T-2165-09

Citation: 2010 FC 950

Ottawa, Ontario, September 23, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

PETER LIVADITIS

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant received a telephone call from a Canada Revenue Agency (CRA) official concerning records related to first purchasers of units in a condominium. Shortly thereafter, he disclosed to the CRA that he had failed to report capital gains on the sale of his condo unit in 2006.

[2] The Applicant applied under the CRA's Voluntary Disclosure Program (VDP) for relief from penalty and interest on the previously undisclosed capital gain. The application was denied by the Minister through his Delegate (an official of CRA) and this Applicant, as well as four of his

family members whose similar cases have been stayed pending this decision, applied for judicial review of the denial of relief from penalty.

II. FACTUAL BACKGROUND

[3] Section 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) gives the Minister of National Revenue a broad discretion to waive or cancel penalties otherwise payable. The VDP is a program established under the *Income Tax Act* and the *Excise Tax Act* for the purposes of encouraging the disclosure of information which ought to have been properly reported. There are a number of conditions which must be met for a taxpayer to gain the benefits of this discretion.

[4] The VDP requires four conditions to be met:

(a) that the disclosure be voluntary;

(b) that the disclosure be complete;

(c) that the disclosure involve the application, or potential application, of a penalty; and

(d) that the disclosure include information that is at least one year past due or less than one year past due where the disclosure is to correct a previously filed return.

In the instant case, the sole issue is the voluntariness of the disclosure. It is conceded that the Applicant met the other three conditions.

[5] The term "voluntariness" is further described in the VDP as follows:

> The disclosure must be voluntary. The client has to initiate the voluntary disclosure. A disclosure may not qualify as a voluntary disclosure under the above policy if it is found to have been made

> with the knowledge of an audit, investigation or other enforcement action that has been initiated by the CCRA, or other authorities or administrations with which the CCRA has information exchange agreements.

[6] The CRA recognizes that not all enforcement actions automatically invalidate a disclosure. Where there has been enforcement action taken, CRA has to focus on the following questions:

(a) Was any direct contact by a CRA employee, other authority or administration, for any reason relating to non-compliance (e.g. unfiled returns, audit, collection issues) made with the taxpayer or is the taxpayer likely to have been aware of the enforcement action?

(b) Was any enforcement action initiated against a person associated with, or related to, the taxpayer or a third party, where the enforcement action is sufficiently related to the present disclosure, and is likely to have uncovered the information being disclosed?

[7] A negative answer to either of the preceding questions would result in the disclosure being voluntary.

[8] In the present case, Mr. Livaditis was President of LaCaille Fifth Avenue Inc. The company's business included the development of new residential condominium projects including a project called "Five West" in downtown Calgary.

[9] In 2003 the Applicant and four of his family members personally acquired condominium units in the Five West project from Fifth Avenue Inc. before construction began. In 2006 the members of the family resold their condominium units in the Five West project for a gain prior to the completion of the project.

[10] The gains derived from the sale of these units were not reported as income by the Applicant or his family members. For the Applicant, the capital gain that went unreported amounted to $253,100.00.

[11] On October 28, 2008, Mr. Livaditis received a telephone call from the CRA official, Mr. Friesen. The Applicant's and CRA's descriptions of that telephone call are almost diametrically opposed.

[12] Mr. Livaditis claims that the conversation was very brief and general. The CRA representative called to tell him that the CRA was gathering some information pertaining to purchasers who may have condominium units in the Five West project. Mr. Livaditis claims that he referred the call to his colleague Mr. Schmidt and then forwarded the caller's contact information to Mr. Schmidt, telling him that he understood that the CRA was interested in a meeting to gather information in respect of purchasers who had acquired condominium units in the Five West project. Mr. Livaditis claims that he was not made aware that the CRA had obtained an *ex parte* order authorizing the Minister to impose a requirement to provide information on the Five West project.

[13] On the other hand, Mr. Friesen, and through him Mr. Mah who provided an affidavit in this matter, says that he informed Mr. Livaditis that the CRA had obtained an unnamed person requirement (UPR) which it intended to serve on LaCaille Fifth Avenue Inc. Mr. Friesen also claims that he advised the Applicant that the purpose of the UPR was to determine if condominium units in the Five West project had been sold for a profit by persons who had bought but never lived in the units and had failed to report the proceeds of sale either as capital gain or as income. Mr. Friesen advised Mr. Livaditis that the CRA would be seeking the names of the first-time buyers of each of these units.

[14] On October 31, 2008, three days after the disputed telephone call, Mr. Livaditis and his family members, through their accountant, made a voluntary disclosure request in relation to their unreported income.

[15] Four days later, an Order of this Court issued by Justice Mactavish was served on LaCaille Fifth Avenue Inc. requiring the production of that information and documents in respect of the group of unnamed persons who had acquired condo units in Five West.

[16] On March 25, 2009, the Respondent denied the Applicant's request for the waiver or cancellation of penalty and interest under the VDP for the 2006 tax year. The denial applied to Mr. Livaditis' family members as well.

[17] Mr. Livaditis filed a second level voluntary disclosure application contesting the first level decision. That second level application was denied on December 1, 2009, and forms the basis for this judicial review.

[18] In the second level decision (the reasons are contained in a memo prepared by Mr. Mah and approved by the Delegate), the Delegate appeared to have accepted Mr. Friesen's description of the telephone call with Mr. Livaditis. The Delegate concluded that Mr. Livaditis was fully aware of the information requested and how that information would disclose that income from the sales of the condos was not reported.

[19] There are no reasons given for accepting Mr. Friesen's version of events. However, the finding addresses the first question on voluntariness:

> Was any direct contact by a CRA employee, other authority or administration, for any reason relating to non-compliance (e.g. unfiled returns, audit, collection issues) made with the taxpayer or is the taxpayer likely to have been aware of the enforcement action?

[20] The Delegate then turns to the second question, as to whether a disclosure could be considered not voluntary. The question to be addressed was:

> Was any enforcement action initiated against a person associated with, or related to, the taxpayer or a third party, where the enforcement action is sufficiently related to the present disclosure and is likely to have uncovered the information being disclosed?

[21] The Delegate concluded that enforcement action had been initiated against a company of which Mr. Livaditis was President and thus related to or associated with him. The Order of Justice Mactavish required LaCaille Fifth Avenue Inc. to provide the condo investor names which would include those of Mr. Livaditis and his family members. It was the Delegate's conclusion that the enforcement action (the UPR) directly related to the taxpayer's disclosure and would have uncovered the information being disclosed. Therefore, the disclosure was not voluntary.

III. ANALYSIS

[22] The central issue before this Court is whether the decision of December 1, 2009 made by the Minister's Delegate refusing to exercise the discretion to waive or cancel all or any portion of the penalty assessed against the Applicant in respect of his 2006 taxation year was unreasonable.

[23] An issue was raised regarding facts included in an affidavit filed by the Applicant which had never been put to the Delegate. This issue was not pressed at the Court hearing.

[24] The standard of review in respect of this type of Ministerial exercise of discretion has been established as reasonableness (*Telfer v. Canada (Revenue Agency)*, 2009 FCA 23). On any issue of procedural fairness – an issue more fully developed in oral argument than in the Applicant's Record – the standard is correctness (*Wong v. Canada (Minister of National Revenue – M.N.R.)*, 2007 FC 628).

[25] In examining "reasonableness", the Court considers the decision-making process – of which the reasons are a part – to ensure that there is a rational justification for the decision and that it is transparent and intelligible. The Supreme Court's reference in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47 to the decision falling within a "range of possible, acceptable outcomes" refers to more than just the ultimate result of the process. It also takes into account the manner in which the result is achieved.

[26] In the present case, the discretion at issue is broad and exceptional. It can afford a taxpayer relief from what would otherwise be owed by operation of the *Income Tax Act* and the *Excise Tax Act*. However, the deference owed is context specific and relates to the issue in dispute.

[27] The Applicant raised the issue of whether the Delegate's decision was arrived at fairly. He relied, to some extent, on this Court's decision in *Wong*, above. That reliance is not entirely well placed, however, since in *Wong* the Applicant had been induced into believing that he would qualify under the VDP when he disclosed the details of his tax situation. In the present case, there was no such inducement or belief; the Applicant knew that his VDP status had not yet been determined. The frailties of the *Wong* situation are only applicable in the present case in respect of principles of fairness.

[28] The area where the Delegate's decision is legally infirmed is in the acceptance of Mr. Friesen's account of the October 28, 2008 telephone call over that of Mr. Livaditis. No rationale is provided for the Delegate, an official of the CRA, preferring the account of a fellow CRA official

over that of the taxpayer. While weight of evidence is part of the exercise of discretion, there is no reference to the weighing of one version over the other. There may have been good reason for accepting Mr. Friesen's version, but without explanation it cannot be said that the outcome is acceptable, or "defensible in respect of the facts and law".

[29] It can also be said that the failure to articulate such rationale is unfair. It deprives the Applicant of the right to know why he was not believed and to then seek judicial review of the reasonableness of that decision.

[30] This is not a situation of deference owed to the decision maker on an issue of credibility. The Delegate was in no special position to assess credibility as this was a paper exercise and without interview or presence of Mr. Livaditis.

[31] Any other form of deference owed on the basis of the exercise of discretion is tempered by the concern that preferring the evidence of a CRA official simply because he is with the CRA over the evidence of a taxpayer would not, in and of itself, be appropriate.

[32] If the Delegate's decision rested solely on the first question posed in the VDP, this judicial review would have to be granted. The Delegate's decision on that question is neither within the range of acceptable outcomes nor was the process fair.

[33] However, the Respondent argued that even if the Applicant's version of events was accepted, the Delegate's decision would be reasonable because there was direct contact with the taxpayer, the reason for such contact was non-compliance and/or the taxpayer is likely to have been aware of enforcement action before making disclosure.

[34] The difficulty with the Respondent's argument is that it does not reflect how the Delegate actually decided the matter. Mr. Livaditis' version was not accepted and he specifically denied any such awareness of enforcement action.

[35] The Court is mindful that on Mr. Livaditis' account of events, he was aware that the CRA had an interest in the initial group of condo owners and that he and his family fell into the group who were the subject of CRA inquiry. Furthermore, Mr. Livaditis made immediate disclosure after the contact with CRA. However, it is neither appropriate nor necessary to answer the hypothetical question of whether, on those facts, the Delegate could have reached a reasonable decision that the disclosure was "not voluntary" – he did not do so.

[36] However, the Delegate's second ground for finding the disclosure "not voluntary" is nonetheless reasonable. This second ground does not involve the issue of taxpayer awareness of the existence of an enforcement action. It was reasonable to conclude on the facts that the enforcement action – the UPR and Court Order – was against a person (in the form of the company) which was associated with Mr. Livaditis. He was both a shareholder and officer of the company. The enforcement action had been initiated before disclosure and it would have uncovered the same

information as was ultimately disclosed. It is also reasonable to conclude that the enforcement action would have uncovered Mr. Livaditis' purchase and sale of the condo unit.

[37] There is no basis for contending, as the Applicant does, that the enforcement action, which seeks information about the purchasers of the condo units of whom the Applicant is one, is not sufficiently related to the Applicant's disclosure. In any event, it was reasonable for the Delegate to conclude that there was sufficient nexus between enforcement and the Applicant's disclosure.

IV. CONCLUSION

[38] Therefore, this Court concludes that the decision was reasonable in respect of one issue and is sufficient to justify a conclusion that the Applicant's disclosure was "not voluntary" under the VDP.

[39] This judicial review will be dismissed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed with costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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