Date: 20090429

Docket: T-808-07

Citation: 2009 FC 432

Ottawa, Ontario, April 29, 2009

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

WILLIAM POON

Applicant

and

HER MAJESTY THE QUEEN

Respondents

REASONS FOR ORDER AND ORDER

[1] William Poon (the Applicant) seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of a decision by the Canada Revenue Agency (CRA, the Respondent) made on April 11, 2007, which determined that the Applicant did not qualify for interest and penalty relief under the Voluntary Disclosures Program (VDP) administered by CRA under subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

THE VOLUNTARY DISCLOSURES PROGRAM

[2] CRA has the legislative authority to waive or cancel penalties, in whole or in part, pursuant to various Acts of Parliament. In the present case, the legislative basis for the VDP is found at subsection 220(3.1) of the *Income Tax Act* (the Act), which reads:

Waiver of penalty or interest	Renonciation aux pénalités et aux intérêts
(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.	(3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, 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 personnes pour tenir compte de pareille annulation.

[3] CRA's Information Circular 00-1R "Voluntary Disclosures Program", dated September 30, 2002 (the Circular), was the document CRA used to inform the public about the program. The Circular describes the purpose of the VDP as follows:

> The purpose of the [Canada Revenue Agency's (CRA)] Voluntary Disclosures Program (VDP) is to promote voluntary compliance with the accounting and payment of duty and tax provisions under the Customs Act, Customs Tariff, Income Tax Act, and Excise Tax Act. The VDP encourages clients to come forward and correct deficiencies to comply with their legal obligations. It is a fairness program that is aimed at providing clients with an opportunity to correct past omissions, thus rendering themselves compliant. By offering this opportunity for clients to self-correct, the program provides a greater level of fairness to all clients and stakeholders.

[4] Four conditions must be met for the voluntary disclosure to be valid: it must be voluntary, it must be complete, it must involve a monetary penalty and it must include information that is one year or more overdue or information that is less than one year overdue, where CRA determines that the disclosure was "not initiated simply to avoid the late filing or instalment penalties". As CRA rejected the Applicant's disclosure on the basis of non-voluntariness, subsection 6(a) of the Circular is relevant. It provides 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 [CRA], or other authorities or administrations with which the [CRA] has information exchange agreements.

[5] CRA elaborates on the VDP policy in the Voluntary Disclosures Program Guidelines, also dated September 30, 2002 (the Guidelines). Although there was some dispute regarding whether the Guidelines are readily available to the public, *Wong v. Canada (Minister of National Revenue)*, 2007 FC 628, 314 F.T.R. 119, at para. 6 [*Wong*], noted that they were not. The Guidelines outline how VDP requests are to be handled and assist both VDP officers in their initial determinations regarding the validity of voluntary disclosures as well as Directors in their second level reviews of VDP decisions.

[6] Section 8.3.5 of the Guidelines is titled “Impact of Enforcement Activity on Determination”. It reads:

> Not all enforcement action is automatic cause to invalidate a disclosure. If any of the above research suggests that the CRA or a related administration has taken enforcement action against a disclosing client, partner, or related corporation, the VDP officer will need to consider whether the disclosure can still be considered voluntary. For example:
>
> * a source deduction audit may have no relation at all to a GST disclosure that is being made;
> * the CRA may have established an audit protocol with a large file client and the client may have disclosed a matter unrelated to the audit.
>
> Therefore, when a VDP officer discovers that enforcement actions have begun against a client, the following judgments should be made:
>
> * Was any direct contact made with the client or is the client likely to have been aware of the enforcement action?
> * Is it likely that the CRA would have uncovered the information being disclosed based on this enforcement action?
>
> If the answer to either of these questions is "NO", the disclosure may be considered voluntary. Clients should be given the benefit of the doubt.
>
> [my emphasis]

[7] *Karia v. Canada (Minister of National Revenue)*, 2005 FC 639, [2006] 1 F.C.R. 172, at para. 7 [*Karia*], provides that the Circular and Guidelines are not delegated legislation and therefore have no force of law.

THE FACTS

[8] The Applicant is a computer consultant. He is the sole shareholder and president of a corporation known as Application Productivity Services Inc. (APS). The Applicant operates his consulting business through APS.

[9] In September of 2005, the Applicant travelled to Hong Kong to propose to his fiancée. The Applicant explained that his upcoming marriage was the main motivation for his voluntary disclosure.

[10] The Applicant's personal voluntary disclosure (the Personal Disclosure) provided that APS was his main source of income in the period from 1995 to 2005 and that he took draws from APS that were not subject to deductions at source. However, the personal portion of the request also showed: T4 employment income in 1995, 1997, 1998, 1999 and 2000 from arm's length companies other than APS, which had been subject to deductions at source; gross income from rental property, with undetermined expenses to be deducted; and investment income. Thus, the Applicant disclosed three sources of income unrelated to APS.

[11] In APS's corporate voluntary disclosure (the Corporate Disclosure), the company disclosed gross earnings estimated at $1,034,307 under the heading "APS's undisclosed income during 1997-2004". This disclosure noted that the amount was unverified and had "not taken into account various expenses incurred for earning this income or the draws taken by Mr. Poon, which may well total all of the corporation's net income". It also noted that APS was in the process of determining its potential payroll withholding liabilities and undisclosed GST liabilities.

[12] On February 8, 2006, CRA informed the Applicant that his Personal Disclosure was not voluntary because, before it was submitted, CRA had contacted him requiring the filing of corporate income tax returns for APS.

THE DECISION

[13] On April 11, 2007, the Director of the Toronto Centre Tax Service Office (the Director), informed the Applicant of CRA's decision concerning his request for a second level review under the VDP. The Personal Disclosure was denied "due to enforcement action." Reliance was placed in part on a form TX14D (the Form) dated March 4, 2005 which was directed to APS and which indicated that:

> If you do not file a return within the 30 day period we may issue an assessment under subsection 157(2) of the Income Tax Act, and further legal action may be taken.

[14] After describing other enforcement actions against APS, and the fact that the Applicant is related to APS by virtue of section 256 of the Act, the Decision provides:

> Under the Voluntary Disclosures Program guidelines, where there is an enforcement action issued against a corporation that is related to the taxpayer, based on that enforcement activity the taxpayer's voluntary disclosure would be denied. Accordingly, the disclosure under review is not considered to be voluntary as it was made with the knowledge to file the corporation's income tax returns as stated above.

[15] On May 11, 2007, the Applicant commenced the present judicial review.

ISSUES

[16] There are two issues:

1. Was the Applicant aware that enforcement activity had been commenced against APS?
2. Was the Decision complete?

STANDARD OF REVIEW

[17] The parties submit and I agree that the appropriate standard of review to be applied to findings of fact in a decision under the Fairness provisions is reasonableness: *Karia* at para. 10; *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153, 2005 D.T.C. 5245 at para. 7. However, matters of procedural fairness such as Issue 2 are outside the standard of review and decision-makers are entitled to no deference on such issues: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392, at paras. 52-54.

Issue 1: Enforcement Action

[18] The Applicant's counsel argued that, when the Applicant made the Personal Disclosure, he was unaware of enforcement action being taken against APS. In particular, he said that his client had not received the Form. It is not necessary to consider all his submissions in this regard because I have concluded, for the reasons below, that he did receive the Form. It demanded income tax returns from APS and threatened legal action if they were not filed within 30 days.

[19] In his Decision and in his affidavit for this proceeding, the Director referred to the Form as an enforcement action. However, it was not mentioned in the Applicant's affidavit. One would have expected a denial from the Applicant if the Form had not in fact been received. Further, when asked about the Form during his cross-examination, he did not clearly deny its receipt. He was asked if he was "aware" that the Form was a demand for a tax return, and he replied in the negative. One would expect that re-examination would have been undertaken to establish that the Form had not been received, if that had been the case. However, there was no such re-examination.

Conclusion

[20] I have therefore concluded that the Decision in this respect was reasonable. The Applicant received the Form and was therefore aware that enforcement action was being taken against APS.

Issue 2: The Adequacy of the Decision

[21] The question is whether, having indicated in the Decision that he was applying the Guidelines, the Director was required to address section 8.3.5 thereof. It indicates that "Not all enforcement action is automatic cause to invalidate a disclosure".

[22] As stated above, the Guidelines suggest, in part, that:

> […] when a VDP officer discovers that enforcement actions have begin against a client, the following judgments should be made:
>
> > [Question 1] Was any direct contact made with the client or is the client likely to have been aware of the enforcement action?
> > [Question 2] It is likely that the CRA would have uncovered the information being disclosed based on this enforcement action?
>
> If the answer to either of these questions is "NO", the disclosure may be considered voluntary. Clients should be given the benefit of the doubt.

[23] The Decision refers to the Guidelines and provides fairly detailed reasons for explaining, in answer to the first question, why the Director concluded that the Applicant was aware of CRA's enforcement action against APS.

[24] What is missing is any mention in the Decision of the Director's reasoning and conclusion about the second question.

[25] The Applicant said, with regard to the second question, that any enforcement action CRA took against APS would not have revealed all the personal sources of income described in the Personal Disclosure. In particular, he referred to investment income, rental income and income from employers other than APS.

[26] The Director's failure to deal with the second question in the Decision means that he has not adequately explained why he exercised his discretion to reject the Applicant's Personal Disclosure.

[27] I should note that during his re-examination on his affidavit (which does not deal with the second question), the Director was asked by his counsel how he answered the first and second questions. The passage reads as follows:

> Q. Now, in this case what were the answers to those two questions?
>
> A. Was any direct contact made with the client or is the client likely to have been aware of the enforcement action? That would have been yes. Is it likely that the CRA would have uncovered the information being disclosed based on this enforcement action, yes.
>
> Q. So in this case, did the issue of giving the client, Mr. Poon, the benefit of the doubt, did that arise?
>
> A. From my review, I personally looked at this closely, you have to take in the concept of what the voluntary disclosure program is and it's to ensure the fact that we are trying to have people disclose things without incurring a penalty. In some instances, that's what - - well, that's what we are trying to achieve. Unfortunately in this instance, there was enforcement action against Mr. Poon's corporation. I looked at it, do these apply to him, I gave it - - tried, strong consideration. Unfortunately I could not convince myself that they did.
>
> [my emphasis]

[28] In my view, answers to questions on re-examination are not capable of correcting deficiencies in a Decision.

Conclusion

[29] The Decision fails to provide adequate reasons.

ORDER

THIS COURT ORDERS that:

1. The Decision is set aside.
2. The Applicant's Personal Disclosure is to be reconsidered by a Director in another CRA office and reasons are to be provided in a manner that explains his or her conclusions about the two questions in the Guidelines and the final exercise of discretion thereunder.
3. Costs are to the Applicant.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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