Federal Court  Cour fédérale

Date: 20101223

Docket: T-193-10

Citation: 2010 FC 1327

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 23, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

GABRIEL CHARKY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision made on January 20, 2010, by the Assistant Director of Enforcement of the Montréal Tax Services Office (the TSO) of the Canada Revenue Agency (the Agency), denying the voluntary disclosure request made by Gabriel Charky.

Facts

[2] During the 2005 to 2007 taxation years, Mr. Charky was the president of Allianz Madvac inc. (Allianz), a company that manufactures industrial equipment.

[3] In the tax returns that Allianz filed for those taxation years, it deducted certain expenses from its business income that were personal expenses of Mr. Charky.

[4] On April 19, 2007, Léo-Paul Dumont of the Montéregie TSO informed Michel Jagger, who at that time was employed in Allianz's accounting department, that there would be a general audit during which a taxpayer's expenses might be audited.

[5] The next day, Mr. Dumont agreed with Mr. Jagger that an Agency computer specialist would visit Allianz's offices to extract computerized data from the company's accounting system.

[6] In June 2007, members of the Agency's information technology section extracted the data.

[7] On July 13, 2007, the Agency received an anonymous request for voluntary disclosure. The taxpayer in question was Mr. Charky.

[8] Mr. Charky's identity became known to the Agency on August 13, 2008.

The first decision

[9] On February 11, 2009, the Agency confirmed, by letter, that Mr. Charky's voluntary disclosure request had been denied. In his decision, Mario Côté concluded that the request could not be considered to be voluntary because it was made in response to a tax audit of a related person.

[10] In response to that decision, Mr. Charky applied for a review of the decision.

[11] On July 28, 2009, Mr. Charky submitted additional representations to the Agency concerning his voluntary disclosure request.

The second decision

[12] On January 20, 2010, the Assistant Director of Enforcement of the Montréal TSO denied Mr. Charky's voluntary disclosure request. In exercising his discretion, the Assistant Director concluded that the disclosure was not voluntary because enforcement action that was likely to have uncovered the information that Mr. Charky wanted to disclose had already been initiated against the company of which he was president.

[13] First, the Assistant Director stated that he had read Mr. Charky's submissions and that all the facts submitted had been examined carefully in accordance with the Voluntary Disclosures Program established under subsection 220(3.1) of the *Income Tax Act*, RSC 1985 (5th Supp), c 1 (the Act).

[14] Second, the Assistant Director stated that the disclosure request was not voluntary, having regard to circular IC00-1R2, the guidelines published by the Agency in June 2008 and the particular circumstances of the case.

[15] Third, the Assistant Director stated the opinion that the general audit of Allianz was likely to uncover the information that Mr. Charky wanted to disclose.

[16] Fourth, the Assistant Director stated that in the circumstances, given that Mr. Charky was the president of Allianz, considering the disclosure to be voluntary would be contrary to the spirit of the policy and program on voluntary disclosures.

Relevant statutory provisions

[17] Subsection 220(3.1) of the *Income Tax Act* reads as follows:

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	(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

penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.	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.
…	[…]

[18] Paragraphs 31 and 32 of Income Tax Information Circular No. IC00-1R2 dated October 22, 2007, read as follows:

Conditions of a Valid Disclosure	Conditions d'une divulgation valide
31. A disclosure must meet the following four conditions in order to qualify as a valid disclosure:	31. Une divulgation doit remplir les quatre conditions suivantes afin d'être considérée comme une divulgation valide :
i) Voluntary	i) Volontaire
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:	32. Une divulgation ne sera pas considérée comme une divulgation valide, sous réserve des exceptions du paragraphe 34, en vertu de la condition « volontaire » si l'ARC détermine ce qui suit :
• the taxpayer was aware of, or had knowledge of an audit, investigation or other enforcement action set to be conducted by the CRA or any other authority or administration, with respect to the information being disclosed to the CRA, **or**	• le contribuable était au courant d'une vérification, d'une enquête ou d'autres mesures d'exécution que devait entreprendre l'ARC ou toute autre autorité ou administration, en ce qui concerne les renseignements divulgués à l'ARC; **ou**
• enforcement action relating to	• les mesures d'exécution

the disclosure was initiated by the CRA or any other authority or administration on the taxpayer, or on a person associated with, or related to the taxpayer (this includes, but is not restricted to, corporations, shareholders, spouses and partners), or on a third party, where the purpose and impact of the enforcement action against the third party is sufficiently related to the present disclosure, **and**	relatives à la divulgation ont été prises par l'ARC ou toute autre autorité ou administration, à l'égard du contribuable ou d'une personne associée ou apparentée avec le contribuable (y compris, sans toutefois s'y limiter, des sociétés, des actionnaires, des conjoints et des associés) ou contre n'importe quel autre tiers où le but et l'impact de l'action applicable contre le tiers est suffisamment lié à la divulgation actuelle; **et**
• the enforcement action is likely to have uncovered the information being disclosed.	• les mesures d'exécution sont susceptibles d'avoir révélé les renseignements divulgués.

Issues

[19] The issues in this application for judicial review are as follows

a. What standard of review applies to a decision made under subsection 220(3.1) of the Act?

b. Is the Assistant Director's decision denying Mr. Charky's voluntary disclosure request reasonable?

Standard of review

[20] Relying on *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, the parties submitted, and the Court agrees, that the standard of review that applies in the case of a discretionary power is reasonableness. In *Dunsmuir*, the Supreme Court of Canada stated, at paras. 47 and 53, that reasonableness

> [47] … is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range

> of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, p. 599-600; *Dr Q*, at para. 29; *Suresh*, at paras. 29-30). …

[21] In addition, the applicant submits that the standard of review applicable to the VDP has already been established by the courts (see *334156 Alberta Ltd v Canada (Minister of National Revenue – MNR*), 2006 FC 1133, [2006] FCJ No 1430, at para 7; *McCracken v Canada*, 2009 FC 1189, [2009] FCJ No 1486, at paras 17-19; *Spence v Canada (Revenue Agency)*, 2010 FC 52, [2010] FCJ No 51, para 17). As an example, the applicant cites paragraph 24 of the decision of the Federal Court of Appeal in *Telfer v Canada (Revenue Agency)*, 2009 FCA 23, [2009] FCJ No 71:

> [24] Unreasonableness is the standard of review normally applicable to the exercise of discretion: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 51 ("*Dunsmuir*"). Indeed, this Court had previously held in *Lanno v. Canada (Customs and Revenue Agency)*, 2005 DTC 5245, 2005 FCA 153, that unreasonableness *simpliciter* (one of the two deferential standards then applied by the courts) was the standard of review applicable to a decision made under subsection 220(3.1).

[22] The standard of review that applies in this case is therefore reasonableness, and the Court must show deference.

Voluntary Disclosures Program

[23] The spirit of the Voluntary Disclosures Program (VDP) is to encourage compliance with the *Income Tax Act*. It allows taxpayers who have not met all their tax obligations under the Act, for example, by failing to declare all their income, to bring their tax status into conformity and avoid penalties or criminal proceedings. Taxpayers may access the program if they take the initiative to

disclose. They must not be acting directly or indirectly in response to enforcement action by the Agency.

[24] On October 22, 2007, the Agency published Circular IC00-1R2, which sets out four conditions for eligibility for the VDP:

i. the disclosure must be voluntary;

ii. the disclosure must be complete;

iii. the disclosure must involve the application or potential application of a penalty; and

iv. the disclosure must include information that is at least one year past due.

[25] In June 2008, the Agency published internal guidelines entitled "Voluntary Disclosures Program Guidelines" (Canada Revenue Agency, 2008-06). The objective of the guidelines is to guide Agency employees involved in processing a disclosure request. Nonetheless, the guidelines do not overrule the circular. Section 3.2.4 of the guidelines states:

3.2.4. Impact of Enforcement Activity	3.2.4. Répercussions des activités d'exécution
Not all enforcement action is automatic cause to invalidate a disclosure. If any of the above research suggests that the CRA or any other authority or administration taken enforcement action against a disclosing taxpayer, partner, related corporation, or a third party, the VDP officer will need to evaluate whether the disclosure can still be considered voluntary.	Ce ne sont pas toutes les mesures d'exécution qui peuvent entraîner le refus d'une divulgation. Si l'une des recherches suggère que l'ARC ou toute autre autorité ou administration a pris des mesures d'exécution à l'encontre d'un contribuable faisant une divulgation, d'un associé, d'une société connexe ou contre n'importe quel autre tiers, l'agent du PDV devra déterminer si la divulgation

peut être considérée comme volontaire.

Therefore, when a VDP officer discovers that enforcement actions have begun against a taxpayer or the other persons mentioned above, the following questions need to be addressed:

Par conséquent, si un agent du PDV découvre que l'on a entrepris des mesures d'exécution à l'encontre d'un contribuable ou toutes autres personnes mentionnées ci-dessus (sic), il doit se poser les questions suivantes :

- 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?

- Un employé de l'ARC ou toute autre autorité ou administration a-t-il contacté le contribuable pour toute raison liée à l'inobservation (p. ex. questions touchant les déclarations de revenus non produites, la vérification ou le recouvrement) ou est-il possible que le contribuable ait été au courant de la mesure d'exécution?

- 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.

- Les mesures d'exécution ont tel (sic) été prises à l'égard d'une personne associée ou apparentée avec le contribuable ou contre n'importe quel autre tiers où les mesures applicables sont suffisamment liées à la divulgation actuelle et est susceptible d'avoir révélé les renseignements divulgués?

If the answer to either these questions is "NO", the disclosure may be considered voluntary.

Si la réponse à l'une ou l'autre de ces questions est « NON », on peut considérer la divulgation comme volontaire.

Analysis

[26] The Court notes that the decision for which judicial review is sought is the decision made by the Assistant Director of Enforcement at the Montréal TSO on January 20, 2010.

[27] In this case, voluntary disclosure by Mr. Charky was denied on the ground that it was not voluntary because of the Agency's contact with Mr. Jagger, an employee at Allianz.

[28] Mr. Charky submits that there is a discrepancy between the first and second subparagraphs of paragraph 32 of the circular.

[29] In Mr. Charky's submission, the first subparagraph of paragraph 32 of the circular refers to enforcement action set to be conducted by the Agency, while the second subparagraph refers, rather, to the enforcement action that has been taken. Based on that principle, Mr. Charky submits that on the facts in this case, the first subparagraph would apply to him since no audit had been initiated and only initial contact had been made with one of the employees (Mr. Jagger). He said that that contact had not been brought to his attention.

[30] Because the first subparagraph expressly states that the taxpayer had to be aware of the audit, investigation or other enforcement action set to be conducted by the Agency, Mr. Charky alleges that the Agency exercised the discretion conferred on it by the Act improperly. Based on the premise that Mr. Charky did not have knowledge, his counsel argues that intervention by the Court is warranted.

[31] In reply, the respondent submits that the administrative guidelines are not binding and were not adopted under a statutory provision. The respondent therefore submits that the decision was made within the discretion granted by the enabling statute and this Court should not intervene.

[32] At the hearing before this Court, counsel for Mr. Charky attempted to show the apparent contradiction between paragraph 34 of the circular and section 3.2.4 of the guidelines. However, the Court cannot accept Mr. Charky's arguments, for the following reasons.

[33] First, the Court starts from the fact that the guidelines are not interpretive tools in themselves and do not create law. The Act, and more specifically subsection 220(3.1), grants the Minister discretion and the guidelines cannot fetter the discretion granted by the Act to the holder of the discretion. Accordingly, the courts have held that administrative guidelines are not binding on the holder of a discretion (see *Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2). In addition to that principle of administrative law, in the case before us, the wording of the sections of the administrative guidelines does not tend to limit the discretion set out in the enabling statute. For example, section 3.2.4 (Impact of Enforcement Activity) states: "If the answer to either of these questions is "NO", the disclosure may be considered voluntary." [Emphasis added.]

[34] Section 3.2.4.1 (Audit/Investigation Just Underway) of the guidelines also indicates a discretion, when it states:

> If an audit or investigation is in the preliminary stage and, according to the Audit Division or the Enforcement Division, the taxpayer is not yet aware of this activity, the disclosure can normally be considered voluntary.
>
> [Emphasis added.]

[35] Second, the Court is satisfied that a careful reading of the wording of the circular and the wording of the guidelines confirms that they contain the same essential elements from which it may be concluded whether a disclosure is voluntary or not. There is of course a difference in wording between the circular and the guidelines, and it would undoubtedly be useful if it were clarified, but the consequence is not to fetter the exercise of the discretion. At this stage, the issue is whether the decision is reasonable.

[36] It is worth recalling the sequence of events: (i) During the 2005 to 2007 taxation years, Mr. Charky was the president of Allianz; (ii) in April 2007, a person at the Agency contacted Mr. Jagger in Allianz's accounting department to inform him of an upcoming general audit; (iii) in June 2007, members of the Agency extracted data; and (iv) in July 2007, the Agency received the voluntary disclosure request.

[37] In making his decision, the Assistant Director concluded that the general audit to be conducted in relation to a related third party (Allianz) was likely to uncover the information being disclosed since the business expenses included Mr. Charky's personal expenses and those expenses had been paid by Allianz. The Assistant Director took into consideration the difference between the circular and the guidelines, but in applying them both to all the particular circumstances of Mr. Charky's disclosure request (Applicant's Record at p. 145), he concluded that it was not voluntary (Applicant's Record, Affidavit of Pierre Gaboriault, at pp. 8-9).

[38] On the facts of this case, the Court is of the opinion that it is not unreasonable to conclude that there is a close connection between the Agency's contact with Mr. Jagger, an Allianz employee, and the voluntary disclosure request made by Mr. Charky, which was made subsequently.

[39] It is also not unreasonable to conclude that when the Agency extracted the computerized data from Allianz's accounting system it would have been able to uncover the information to which the disclosure request made by Mr. Charky would relate, since there is a correlation between the extraction of the data (June 2007) and Mr. Charky's anonymous disclosure (July 2007).

[40] The Court can appreciate, as counsel for the respondent argued, that it is impossible for the Agency to determine whether the taxpayer really had knowledge of the enforcement action, since the first contact was with Mr. Jagger. Moreover, the facts of this case show that while the enforcement action relating to the disclosure was in the embryonic stage, as noted by counsel for Mr. Charky, it had nonetheless begun. The facts also tend to show that given the close relationship between Allianz and Mr. Charky, its president, he was or could have been aware of the enforcement action and that such action was likely to uncover the information disclosed (Applicant's Record, para. 32 of the circular, at p. 54.)

[41] The Court need not decide whether the Minister was right or wrong; it must decide whether he considered all the evidence before him fairly, in order to determine whether the applicant's failure to comply with the Act was caused by factors beyond his control. The issue is not whether the Court would have made a different decision; it is whether the Minister's decision was reasonable having regard to the applicant's evidence in support of his argument.

[42] In light of the facts and after due consideration of the evidence submitted by the parties, the Court concludes that it was reasonable for the Agency to deny the voluntary disclosure request made by Mr. Charky.

[43] The decision of the Assistant Director denying the voluntary disclosure request made by Mr. Charky is reasonable and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*). The application for judicial review is therefore dismissed.

JUDGMENT

THE COURT ORDERS that this application for judicial review be dismissed with costs.

"Richard Boivin"

Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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