Federal Court  Cour fédérale

Date: 20110411

Docket: T-1450-10

Citation: 2011 FC 446

Toronto, Ontario, April 11, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

VITOL REFINING S.A.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Vitol Refining S.A. for judicial review and consequent relief in respect of a decision made by the Canada Revenue Agency (CRA) as communicated to Vitol's lawyers by a letter dated August 10, 2010. That decision was not to reverse the CRA's assessment that "arrears interest" was payable by Vitol in respect of certain GST/HST transactions disclosed by Vitol to the CRA under the Voluntary Disclosures Program (VDP).

[2] For the reasons that follow, I find that the application is dismissed with costs to the Respondent fixed in the sum of $1750.00.

FACTS

[3] The Applicant Vitol (also referred to as VRSA) sells petroleum products in Canada including what is described as feedstock. Vitol is registered with the CRA for GST/HST purposes. GST (Goods and Services Tax) is a tax imposed by the federal government and is calculated as a percentage of the monetary value of the transaction. HST (Harmonized Sales Tax) is a similar tax which includes GST plus a tax imposed by a provincial government, but is collected by the federal government. Depending on agreements entered into at certain times between the federal government and certain provincial governments, HST is imposed in respect of transactions occurring in certain provinces as of certain dates, but is not uniformly imposed in all provinces as of any particular date. A vendor such as Vitol is required to collect from its customers the GST or HST applicable to any transaction depending on the date and province in which it occurs. If the customer resells the product and is registered with the CRA for GST/HST purposes, it in turn must collect the applicable GST/HST from its customers. Through a scheme known as input tax credits, the Vitol customers can recover the GST or HST that it paid to Vitol. Since the monies paid go in and out of the hands of the CRA relatively quickly such transactions are sometimes called wash transactions.

[4] In the period from October 2006 to April 2007, Vitol sold feedstock in Newfoundland to a customer registered for GST/HST purposes. That customer refined the feedstock and sold the refined product to others and charged the applicable GST/HST. Vitol, however, collected only the GST (6%) on the feedstock that it sold to that customer. Given the dates and location of the transaction, Vitol should have charged HST (14%) on the sale price. Vitol quickly realized its error and made a voluntary disclosure to CRA. The sum in question was large, the difference between

GST and HST amounted to over one hundred and one million dollars. The dispute between the parties does not arise in respect of this amount. Rather, the dispute arises as to interest payable. No penalties were imposed.

[5] There are two kinds of interest that are the subject of considerable correspondence between the CRA and lawyers and accountants for Vitol. One kind has been resolved, the other remains at issue in these proceedings. The one that has been resolved is termed as "wash transaction interest". The one that remains unresolved is termed as "arrears interest". Unfortunately, it appears that in some of the correspondence these terms have been incorrectly or interchangeably used, although that seems to have been straightened around at the end.

[6] The terms "wash transaction interest" and "arrears interest" have been defined by the Applicant in paragraph 3 of the Grounds portion of its Notice of Application as follows:

> *Wash Transaction Interest: Interest relating to the period between the date on which tax should have been remitted by the taxpayer and the date the Notice of Assessment is issued.*
>
> *Arrears Interest: Interest relating to the period between the date the Notice of Assessment is issued and the date on which the tax is remitted by the taxpayer.*

[7] The amount of the "arrears interest" that is in dispute amounts to one million, nineteen thousand, five hundred and seventy-five dollars ($1,019,575.00). Vitol has paid that amount to CRA. The issue is whether CRA should reconsider its requirement that this amount or a portion should be paid in the circumstances.

[8] Both parties argue that the unique facts of this case require that special consideration be given as to whether or not interest otherwise payable should have been waived by the CRA. Each party submitted affidavit evidence with attached exhibits. Vitol submitted the affidavit of John Zimmerman, Vice President – Compliance. The Respondent submitted the affidavit of Brian Miklos, Assistant Director of the Enforcement Division of the East Central Ontario Tax Services Office of the CRA. Neither affiant was cross-examined.

[9] The relevant facts as set out in those affidavits and exhibits are:

a. October 1, 2006 to April 30, 2007, Vitol failed to collect from its customer, North Atlantic Refining Limited (NARL) and remit to CRA the provincial portion of the HST, amounting to $101,336,891.00;

b. Ernst & Young LLP (E & Y), an accounting firm acting for Vitol, submitted a no-name voluntary disclosure to CRA on behalf of Vitol in respect of the unpaid taxes;

c. October 23, 2007, E & Y disclosed Vitol's name and other particulars to CRA respecting the voluntary disclosure;

d. December 21, 2007, the CRA sent a letter to a named individual at E & Y who, as it now appears, had left E & Y by that time, stating that the submission had been accepted as a valid voluntary disclosure and requesting that certain information and records be sent to CRA's St. John's Tax Centre;

e. It appears that the December 21, 2007 letter never reached the intended recipient at E & Y and was eventually returned to CRA, unopened, on June 12, 2008;

f. March 18, 2008, CRA faxed a copy of the December 21, 2007 letter to E & Y. No response was apparently made;

g. May 21, 2008, CRA made a reassessment as to GST/HST owing and sent it directly to Vitol. This reassessment confused wash interest with arrears interest;

h. June 5, 2008, CRA sent a further reassessment of GST/HST to Vitol. Again wash interest and arrears interest were confused;

i. June 12, 2008, CRA sent another copy of the December 21, 2007 letter to E & Y;

j. June 19, 2008, CRA sent yet a further reassessment of GST/HST to Vitol. Again, wash interest and arrears interest were confused;

k. June 23, 2008, CRA sent a further reassessment of GST/HST. Again, wash interest and arrears interest were confused;

l. June 27, 2008, Vitol secured from its customer, NARL, a Direction addressed to the CRA that the first $101,336,891.22 of the net tax refund owing by CRA to NARL be

paid in satisfaction of the amount owing by Vitol. Vitol filed this Direction with the CRA the same day;

m. At the hearing, while it is not clearly in evidence, Counsel for both parties agreed that, the same day, June 27, 2008, a representative of CRA spoke on the telephone with one of Vitol's lawyers and advised that CRA did not accept such a Direction;

n. July 10, 2008, NARL (who had apparently received from CRA the funds representing its tax credit on July 7, 2008) paid CRA the amount owing by Vitol, $101,336,891.22;

o. Throughout, there were frequent conversations and telephone calls between the CRA and Vitol's lawyers;

p. January 28, 2009, Vitol's lawyers wrote to CRA requesting a second administrative review of both wash interest and arrears interest;

q. December 3, 2009, eleven months later, CRA responds. The "wash interest" assessment was reversed but not the arrears interest;

r. December 21, 2009, Vitol's lawyers responded to CRA's letter of December 3, 2009 with recalculations as to the quantum of the arrears interest, reviewing the circumstances and requesting that the decision to charge arrears interest be reversed;

s. March 31, 2010, CRA published revised Guidelines as to waiver of interest and penalties respecting GST/HST replacing Guidelines in place since 2000;

t. August 10, 2010, CRA sent a letter to Vitol's lawyers declining to reverse its decision as to arrears interest and recalculating the sum in question. This is the decision at issue here;

u. September 2, 2010, CRA sent a Statement of Arrears to Vitol including lengthy calculations;

v. These proceedings were launched.

[10] The decision under review is set out in CRA's letter to Vitol's lawyers dated August 10 2010. The first page of that letter reviews some of the background and confirms that wash interest had been forgiven. It also confirms a recalculation by CRA of arrears interest at an amount lower than that calculated by Vitol. The arrears interest now at issue is $1,019,575.24.

[11] The second page of the letter of August 10, 2010 sets out the basis for CRA's refusal to forgive arrears interest. It says:

> *In Part B of your letter, you make essentially two points as follows:*
>
> *i. At some point in time, a letter sent from CRA to E & Y was returned to CRA unopened and this somehow prevented E & Y from being aware of the pending reassessments and delayed the ITC claim. According to your letter, the ITC*

> *claim was made by NARL on June 18 and they received their refund on July 7, 2008 – a delay of about 20 days. The returned decision letter that you refer to was dated December 21, 2007 and faxed to E & Y on March 18, 2008 to the attention of Shawn Starks. This was well before the reassessment date and had E & Y moved forward with the ITC claim at that time, it is likely that the refund would have been issued before the May 15, 2008 posting date.*
>
> ii. *NARL filed a Direction with CRA that authorized and directed CRA to apply NARL's net tax refund into Vitol's GST/HST account. According to our records, on June 27, 2008, Dale Hill at Gowlings was advised by Michele Locke of CRA that we do not accept such Directions.*
>
> *In the normal course of business, HST registrants must fund the cash-flow requirements to meet the payment obligations for taxes when due. This is no different than their obligation to pay for inventory – often in advance of being paid by their client. Typically, failure to pay when due attracts interest costs. In this case, the fact that the net tax was not paid when due attracted arrears interest. With respect to HST, it is the normal course that there is a time lag between when the liability for tax occurs and when the input tax credit is paid out and the Crown is the beneficiary of the time value of the money. This is the normal course of business and there is nothing peculiar to the facts in this case that would propel me to grant your request to reverse the arrears interest.*
>
> *The circumstances of this case have been carefully considered and as detailed above all interest has already been reversed with the exception of the arrears interest between the posting of the transaction and the date of payment and this interest amount is less than what was calculated in your submission. No further adjustments are warranted.*

[12] Counsel for Vitol requests that this decision be quashed and that either CRA be directed to reverse the arrears interest payable by Vitol or that the matter be returned to CRA for reconsideration by different persons.

ISSUES

[13] Vitol in its written memorandum articulated three issues and a number of subsidiary issues which were elaborated upon at the hearing through Counsel:

1. What is the standard of review?

2. Did the CRA unreasonably fetter its discretion?

3. Did the CRA err in failing to consider the unique circumstances of this case in exercising its discretion?

GENERAL CONSIDERATIONS

[14] The *Excise Tax Act*, RSC 1985, c. E-15, as amended, makes provision for the collection of GST and HST in respect of a number of transactions. Section 280. (1) provides that interest is to be paid on any amount that a taxpayer fails to remit or pay. Section 281.1 provides that the Minister *may* waive or cancel such interest:

> ***280.*** *(1) Subject to this section and section 281, if a person fails to remit or pay an amount to the Receiver General when required under this Part, the person shall pay interest at the prescribed rate on the amount, computed for the period beginning on the first day following the day on or before which the amount was required to be remitted or paid and ending on the day the amount is remitted or paid.*

. . .

> ***281.1*** *(1) The Minister may, on or before the day that is 10 calendar years after the end of a reporting period of a person, or on application by the person on or before that day, waive or cancel interest payable by the person under section 280 on an amount that is required to be remitted or paid by the person under this Part in respect of the reporting period.*

[15] The CRA has from time to time published Guidelines as to how, acting on behalf of the Minister, it would deal with waiver or cancellation of interest. In September 2000, it published Guidelines which were directed to, among other things, wash transactions and voluntary disclosure. Section 10 provided:

> *Voluntary disclosure – Where a voluntary disclosure involving a wash transaction has been made and is accepted by the CCRA as a valid disclosure in accordance with GST Memorandum 500-3-4, Voluntary Disclosure (to be re-issued as GST/HST Memorandum 16.5), the 4% penalty will not be applied to the transaction identified as a wash transaction and reported in the course of a voluntary disclosure. In such circumstances, only the taxes that should have been collected originally by the supplier for that transaction will be sought by the CCRA.*

[16] On March 31, 2010, those Guidelines were amended. Section 10 was replaced by Section 11 which adds that interest will be assessed on arrears:

> *11. Where a disclosure involving a wash transaction has been made and is accepted by the CRA as a valid disclosure in accordance with IC00-1R2, Voluntary Disclosures Program, the interest and penalty will first be reduced to a penalty of 4% of the transaction amount at the time of assessment. This 4% penalty will not be applied to the transaction identified as a wash transaction and reported in the course of a disclosure pursuant to the Voluntary Disclosures Program. In such circumstances, up to the date of*

> *assessment, only the taxes that should have been collected originally by the supplier, or the ITCs not accounted for properly for that transaction, will be sought by the CRA. Any amount of the assessment that is unpaid on the date of assessment will then be subject to normal interest under section 280 from the date of assessment until the date the outstanding amount is paid.*

[17] Another matter for consideration is whether the CRA was correct in refusing to accept the Direction from NARL that tax credits owing to it should be applied to Vitol's indebtedness. Respondent's Counsel argued that the authority for this refusal is to be found in section 229.(1) of the *Excise Tax Act*, supra, which states that a refund should be paid to the person claiming the refund and in section 26 of the *Financial Administration Act*, RSC 1985, c.F-11 as amended, which says that funds can only be paid out as authorized by Parliament .Section 229.(1) of the *Excise Tax Act* reads:

> ***229.(1) Payment of net tax refund*** *– Where a net tax refund payable to a person is claimed in a return filed under the Division by the person, the Minister shall pay the refund to the person with all due dispatch after the return is filed.*

[18] Section 26 of the *Financial Administration Act* reads:

> *26. Subject to the Constitution Acts, 1867 to 1982, no payments shall be made out of the Consolidated Revenue Fund without authority of Parliament.*

[19] The CRA should not have concluded that these provisions *prevent* it from acting on a Direction such as the one tendered here. In a normal commercial transaction, a Direction such as this would be honoured. There is no explicit statutory or regulatory provision *one way or the other* as to how CRA is to react to a Direction. It is to be noted that in cases such as *Union Gas Ltd. v*

Minister of National Revenue, [1991] l CTC 1 (FCA) and *Wannan v. R*, 2003 FCA 423, the Court considered it to be acceptable that a taxpayer could direct that funds be reallocated as against various tax liabilities that were owed by that tax payer. While these cases deal with various liabilities owed by the same taxpayer, they demonstrate that a degree of flexibility should be afforded by the CRA in considering such matters.

ISSUE #1 What is the standard of review?

[20] Counsel for the Attorney General argues that the standard is reasonableness. Counsel for the applicant argues that the standard of reasonableness would apply unless the Court finds that CRA unreasonably fettered its discretion. This leads to the second issue.

ISSUE #2 Did the CRA unreasonably fetter its discretion?

[21] Vitol's Counsel argues that the CRA unreasonably fettered its discretion by applying the 2010 Guidelines as to Voluntary Disclosure and Wash Transactions, which expressly state that interest will be charged on arrears instead of the 2000 Guidelines, which are silent on the subject. In this regard, I drew both Counsel's attention to the decision of this Court in *Brunico Communications Inc. v Canada (Attorney General)* 2004 FC 642, where the Minister of Canadian Heritage in considering a program designed to support certain kinds of magazines considered new guidelines that had come into force during the period while the matter was under consideration. No notice had been given to the party in question. Von Finckenstein J. (as he then was) wrote at paragraphs 19 to 22:

> ***19*** *During the summer and fall of 2001, the Minister held consultations and, as a result, adopted a definition for newspapers in January 2002. But instead of applying it to the next funding cycle, the Minister applied it to the existing funding cycle and to applications already in the pipeline. In effect, the Minister applied the rules set out in the Applicant's Guide for 2002-2003 to applications received for 2001-2002. Or, to put it another way, for 2001-2002, the Minister published a guide that set out one set of rules and then applied another.*
>
> ***20*** *This violated both the most elementary rule of procedural fairness (an applicant should know the case he has to meet) and violated the legitimate basic expectation held by the applicant (that the Minister would act in accordance with her own published Guide).*
>
> ***21*** *It is no defense, as counsel for the respondent argued, that there was no opportunity for applicants to comply once the new system was adopted. Where one runs a program, such as the Support for Editorial Content Grant Program, in which past performance determines an applicant's eligibility for future benefits, one cannot change the rules in midstream without there being any transitional provisions or without giving applicants advance notice. No matter how broad the discretion of the Minister is, elementary procedural fairness demands that where the Minister publishes program rules for a given cycle she apply the same.*
>
> ***22*** *The decisions of Marie France Gosselin, made in the name of the Minister of Canadian Heritage on March 18th, 2002 in respect of the applications of Brunico for funding in respect of Strategy and Playback are, therefore, set aside. The matter is referred back to Canadian Heritage to be determined in accordance with the rules set out in the Applicant's Guide for 2001-2002 so that Brunico, in respect of Strategy and Playback (if they otherwise qualify), can receive the amounts that they would otherwise would have been awarded without the adoption of the new rules on January 25th, 2002.*

[22] Counsel for the CRA argues that one only has to look at the letters written by Vitol's lawyers such as that of a January 28, 2009 to appreciate that Vitol was well aware that arrears

interest was to be paid and that waiver was a discretionary matter. At no time, even under the 2000 Guidelines, were Vitol or its lawyers under any misapprehension that interest was to be paid and waiver was discretionary.

[23] The question as to fettering of discretion has been considered in cases such as *Gandy v Canada (Customs and Revenue Agency)*, [2006] 5 CTC 109, 2006 FC 862 at paragraph 28 and *3500772 Canada Inc. v Canada (MNR)*, [2008], 1 CTC 1, 2008 FC 554 at paragraph 43 without an express discussion as to whether that issue is to be considered on a "correctness" or a "reasonableness" standard. No consideration of the Supreme Court of Canada decision in *Dunsmuir v New Brunswick* [2008], 1 SCR 190 was made.

[24] In *Waycobah First Nation v Canada (Attorney General)*, 2010 FC 1188, Justice de Montigny of this Court considered that a matter that was not of central importance and not outside the expertise of the administrative decision maker should be reviewed on a standard of reasonableness. He wrote at paragraph 23:

> ***23*** *The argument revolving around the fettering of discretion, on the other hand, raises a question of law. In essence, the Applicant argues that the CRA Assistant Commissioner did not properly apply the test for remission set out in the* Financial Administration Act *and failed to take the public interest into account, and rather chose to elevate the CRA guidelines to the level of law. Such a fettering of discretion, if it is established, would clearly amount to a reviewable error of law: see, for ex.,* CBC *v.* Canada (Copyright Appeal Board)*; 30 C.P.R.(3d) 269, [1990] F.C.J. No. 500 (F.C.A.). That being said, it is not a question of law that is of "central importance to the legal system...and outside the ...specialized area of expertise" of the administrative decision maker:* Dunsmuir*, above, at para. 55. As such, it must therefore be reviewed against a reasonableness standard.*

[25] In the present circumstances, there is nothing in the Record to suggest that the CRA acted upon the 2010 Guidelines and not the 2000 Guidelines. The Record indicates that Vitol's lawyers were clearly aware that the waiver of arrears interest was something that the CRA had to consider as a discretionary matter.

[26] I am satisfied that the CRA did not fetter its discretion.

ISSUE#3 Did the CRA err in failing to consider the unique circumstances of this case in exercising its discretion?

[27] Vitol's Counsel argues that the CRA failed to give sufficient consideration to the unique circumstances of this case, as a result of which, the decision not to waive arrears interest was unreasonable. Among the factors said to make the circumstances unique are:

a. the amount of unpaid taxes is very large, over a hundred million dollars;

b. the transaction is a wash transaction, the CRA is not really "out of pocket";

c. Vitol made a Voluntary Disclosure and cooperated fully with the CRA;

d. the matter got off to a bad start with miscommunication with E & Y. This was not Vitol's fault;

e. Vitol had offered a viable solution in presenting the Direction from NARL to CRA that funds owing to is should be paid to the credit of Vitol.

[28] The Minister's Counsel urges that the CRA did take into account the whole of the circumstances, including:

a. the sum of over a hundred million dollars was unpaid for some 51 days after the assessments were made and notified to Vitol;

b. the Direction was, in the very least, not a usual practice and CRA's unwillingness to accept it was communicated to Vitol the same day that it was submitted;

c. the CRA did forgive penalties and wash interest, as well as recalculate arrears interest to a lower amount in Vitol's favour;

d. Vitol did not demonstrate any unusual hardship or demonstrate that it could not come up with the monies owing.

[29] I am satisfied that the CRA gave ample opportunity to Vitol to make submissions and that those submissions were fairly considered. The matter of forgiveness of interest is a matter for the CRA's discretion, provided that such discretion is exercised fairly and reasonably. There is nothing in this case to suggest that the CRA overlooked or misunderstood any important consideration.

[30] The well known statements by the Supreme Court in *Dunsmuir*, supra, apply in these circumstances. I quote paragraphs 46 and 47:

> ***46*** *What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?*
>
> ***47*** *Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness 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.*

[31] The decision of the CRA was within the range of reasonable possible decisions. It should not be set aside by the Court.

CONCLUSION AND COSTS

[32] In the result, the application will be dismissed. Respondent's Counsel suggested costs fixed in the sum of $1,750.00. I agree as to that amount and will so fix the costs.

JUDGMENT

FOR THE REASONS provided:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. The Respondent is entitled to recover costs fixed in the sum of $1,750.00.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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