

Federal Court



Cour fédérale

Date: 20111220

Docket: T-490-07

Citation: 2011 FC 1506

Toronto, Ontario, December 20, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

INLINE FIBERGLASS LTD.

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Inline Fiberglass Ltd., has brought this judicial review, which seeks to set aside and return to another decision-maker in the Respondent Canada Revenue Agency (CRA), a decision communicated to Inline by letter dated February 22, 2007. That decision was a second and final review of the CRA's decision issued on May 31, 2006 to deny the cancellation of interest and penalties assessed against Inline pertaining to the 2004, 2005 and 2006 taxation years on the basis of financial hardship. In that second and final decision, the CRA stated that it was unable to grant Inline relief in respect of interest and penalties that it requested.

[2] For the reasons that follow, I am dismissing this application, with costs.

[3] Inline has a lengthy history with the CRA with respect to interest and penalties imposed for failure to comply with *Income Tax Act*, RSC 1985 c 1 (5th supp) provisions. In 1996 and 1997, CRA refused to waive such interest and penalties; in 2003 and 2004, it did waive interest and penalties. Gross negligence penalties arose out of Trust Account Examinations conducted in 2005 and 2006. Inline's director and representatives were given a prosecution warning as a result of the 2005 examination.

[4] Inline, in the present case, seeks waiver of \$42,125.58 in penalties and \$19,236.00 in interest (at the time the evidence was submitted in these proceedings) accruing with respect to the 2005, 2006 and 2007 taxation years. It made several submissions to CRA stressing financial hardship, including references to senior officials mortgaging their home and restructuring their salaries to assist in funding the corporation.

[5] The evidence submitted by Inline to CRA indicates that in the year ending January 31, 2004 it made over \$900,000.00 profit; in the year ending January 31, 2005 over \$72,000.00 profit; in the year ending January 31, 2006 over \$235,000.00 profit; and that in the year ending January 31, 2007 it expected to make in the order of \$700,000.00 profit.

[6] In response to Inline's request for waiver of interest and penalties, CRA provided a first response by letter dated May 31, 2006. That letter stated, *inter alia*:

A review of the facts of this case has failed to show that there is conclusive evidence of financial hardship. Consequently, we have concluded that it would be inappropriate to cancel any penalty or interest charges.

As you will appreciate, the charging of penalties and interest serves to encourage compliance with our filing, withholding and remitting requirements. In particular, since amounts withheld under the "Excise Tax Act," the "Excise Act," 2001, the "Income Tax Act," the "Canada Pension Plan" and the "Employment Insurance Act" are trust funds, the laws governing the handling of these funds are necessarily strict.

[7] Inline requested a second administrative review of this decision. This caused a CRA employee, Webster, to review the file and prepare a report. That report was not sent to Inline, although CRA's Counsel advises that it would have been available to Inline upon request. That report stated:

Summary of facts:

This company was previously denied cancellation of interest and penalties in October 1996, March 1997 and November 2006. The company was allowed cancellation of interest and penalties totalling \$111,802.00 in September 2003 and \$15,636.06 in July 2004. In May 2006 the corporation was denied cancellation of interest and penalties on the basis of financial hardship. In August 2006 a request was received for an administrative review. On August 11, 2006 a letter was issued to the corporation requesting copies of supporting documents and financial statements. These documents were submitted to the Agency in January 2007.

This company operates as a manufacturer of fibreglass products and has been in Collections since 1994. According to the owner, the corporation had a very poor year in 2004 followed by chronic

financial hardship in 2005. Our records show the corporate tax return for 2004 showed a net profit of \$931,309.00 and total revenues of \$11,196,389.00. The 2005 return showed a net profit of \$72,565.00 and total revenues of \$11,496,359.00. Although the T2 return for the fiscal period ending January 31, 2006 has not been filed, financial statements submitted by the director show a net profit of \$235,029.00 and total revenues of \$13,541,428.00. Our records show that the corporation received a research and development credit of \$702,287.00 in August 2004 and \$540,214.38 in August 2005. There is currently a credit of \$723,001.00 approved. This balance is currently being held until the amount required to repay this account is transferred. In February 2006 the mortgage on the property the corporation operates from was refinanced for an additional \$287,000.00. According to the letter, the shareholders remortgaged their property and injected the funds into the business. Documents submitted show the property is the premise the corporation operates from. Although the director's letter states that in 2006 all remittances were made as required, our records show the company was assessed six failure to remit penalties in 2006 and three late remitting penalties and a late filing penalty. According to the director, for 2007 they are projecting profits of \$700,000.00 and sales of 14.3 million. The corporate account and Goods and Services Tax account both have nil balances. The last payment to this debt was \$20,000.00 in December 2006.

Based on the information submitted the request does not meet the criteria of the Fairness Legislation on the basis of financial hardship. There is currently a research and developments credit available in the amount of \$723,001.00 and the funds to repay this account are being transferred from this credit. The corporation has shown a net profit every year for the past three years. The corporation was assessed ten additional penalties in 2006. The company was previously allowed cancellation of interest and penalties in September 2003 in the amount of \$111,802.50 and an additional \$15,636.06 IN July 2004. There is no indication that the payment of this debt will cause financial hardship to the corporation. I recommend that the request be denied.

[8] The Director of the Toronto West Tax Services Offices reviewed the file and made the decision under review delivered by letter to Inline dated February 22, 2007. In part, that letter stated:

The Fairness Legislation allows for the cancellation or reduction of all or a portion of penalties and interest payable. A number of factors are given consideration by the Agency in determining whether such relief can be granted. We have again carefully reviewed your submission with regard to the interest and penalties charged to your account in relation to this legislation. After careful consideration, we have concluded that there is no conclusive evidence that the payment of this debt will cause financial hardship to the corporation. Our records also show that in 2006 the company has been assessed three additional late remitting penalties, a late filing penalty and six failure to remit penalties. The corporate return for the fiscal period ending January 31, 2006 has also not been filed. Therefore, I regret that we are unable to grant the relief you request.

[9] The Applicant has filed the affidavit of Michael Shurety, President of Inline, in support of its application. The Respondent has filed the affidavits of Marisetti, the person making the decision under review; of Webster, the person making the report previously referred to; and the affidavit of Allen, a legal assistant in the Department of Justice Office in Toronto. There was no cross-examination upon any of the affidavits.

[10] Applicant's Counsel objects to certain portions of the Marisetti affidavit, particularly paragraph 17, being read in as part of this evidence. Counsel argues that this material is really an attempt to provide further and better reasons for the decision at issue. Respondent's Counsel argues that the affidavit "fleshes out" rather than supplements the reasons given in the decision. The remarks of Pelletier JA in *Sellathurai v Canada*, 2008 FCA 255, at paragraph 46, are appropriate...*"a tribunal or a decision-maker cannot improve upon the reasons given by means of an affidavit filed in the judicial review."* I will give no weight to paragraph 17 or those other portions of the Morisetti affidavit, which purport to "flush out" the decision.

[11] Applicant's Counsel raises essentially two arguments respecting the decision at issue. First, the decision states erroneously that the Applicant had not filed its 2006 return. Second, the decision-maker failed to give full weight to the precarious cash flow situation experienced by Inline. Both Counsel are agreed that the standard of review is reasonableness.

[12] With respect to the first issue, the 2006 return had been filed, albeit a month late, by the time the decision under review was made. It is, however, to be noted that the decision under review states that the 2006 report "*has also not been filed (emphasis added)*". The use of the word also means that this is an additional ground for refusing to waive interest and penalties. The main ground for refusal is that "*...there is no conclusive evidence that the payment of this debt will cause financial hardship to the corporation.*" Thus, even if the failure to file the 2006 return was in error, the principal ground for refusal remains intact.

[13] As to the principal ground, Applicant's Counsel argues that too little, if any weight, was given to Inline's precarious cash flow situation. This is a matter of weight and judgment to be afforded by the CRA. As O'Keefe J of this Court stated in *Holmes v Canada (Attorney General)*, 2010 FC 809, at paragraph 20: "*Tax fairness decisions are informal and non-adjudicative in nature.*" As the Supreme Court of Canada has written very recently in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 17:

Reviewing judges should pay "respectful attention" to the decision-maker's reasons and be cautious about submitting their own view about designating certain omissions in the reasons to be fateful.

[14] In the present case, the Report to the decision-maker outlines in considerable detail all aspects of Inline's financial situation, including its cash flow and past history respecting penalties and interest. The decision at issue states that the record has been carefully reviewed, including the submissions made on behalf of Inline.

[15] The decision at issue is reasonable within the boundaries established in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, at paras 46-50. Accordingly, the application is dismissed. The parties are agreed that the prevailing party, here the Respondent, should be awarded lump sum costs of \$2,500.00.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. The Respondent is awarded costs in the sum of \$2,500.00.

"Roger T. Hughes"

Judge

Federal Court



Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-490-07

STYLE OF CAUSE: INLINE FIBERGLASS LTD. v. CANADA REVENUE AGENCY

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 19, 2011

REASONS FOR JUDGMENT AND JUDGMENT: HUGHES J.

DATED: December 20, 2011

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