Federal Court  Cour fédérale

Date: 20130624

Docket: T-1746-12

Citation: 2013 FC 703

Toronto, Ontario, June 24, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

1148902 ONTARIO LIMITED

Applicant

and

CANADA REVENUE AGENCY
ACTING ON BEHALF OF
THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant corporation seeks judicial review of a decision of the Manager of the Taxpayer Relief Program, Appeals Division, Canada Revenue Agency [CRA], dated January 27, 2012, denying its request for relief from $9,000 in interest and penalties pursuant to subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp).

[2] For the reasons that follow, this application is dismissed, with costs to the respondent.

Background

[3] The applicant corporation is fully owned and controlled by, and employs James Sadler. Indeed, the CRA explained to the applicant's accountant at least as far back as July 19, 2002, that Mr. Sadler's income must be reported as employee income on a T4 and thus remittances of tax and CPP made by the applicant. The applicant's accountant, Mr. Sinclair, apparently agreed with the CRA that it would file T4's for 2002. However, for the years 2002, 2003, and 2004, contrary to the accountant's representation to the CRA on July 19, 2002, the applicant treated Mr. Sadler as an independent contractor and did not withhold and remit his income taxes or any CPP on his behalf, or file any T4s. Instead, Mr. Sadler remitted tax and CPP on his personal income tax return.

[4] On November 4, 2005, the CRA conducted a trust examination of the applicant for the 2002, 2003, and 2004 taxation years. It assessed the applicant on the basis that Mr. Sadler's income was actually T4 employment income and also assessed late-filing penalties for the misreporting. The applicant's accountant indicated to the CRA that he intended to appeal the assessment.

The Requests for Relief

[5] On January 11, 2011, the applicant applied to the CRA for taxpayer relief in the amount of $9,000 said to represent the penalty and interest amounts arising from the 2005 trust examination. What happened between 2005 and 2011 becomes clearer below.

[6] On the relief request form, Mr. Sadler checked the box on the relief form entitled "Extraordinary circumstances" under the instruction which began "indicate the reason(s) for your request," and relief was requested in the narrative portion of that form for these exact reasons:

> 1) I received a cheque from the CRA for an income tax refund of $8541.70 dated 2010-12-02; Ref# …;
>
> 2) This refund was for the CPP paid personally for 2002, 2003, & 2004;
>
> 3) The CPP owed corporately for 2002, 2003, & 2004 was paid to the CRA on 2010-12-08; $7668.04 …;
>
> 4) I was assessed a penalty of CDN $9000 against the CPP owed corporately for 2002, 2003 & 2004. However; these taxes were paid and I am now asking the CRA to refund the CDN $9000 penalty interest which has been paid to the CRA.

[7] On February 3, 2011, the CRA declined to grant the relief requested. The substantive reasons provided were that:

> A review of the history of this account indicates that you and your accountant were advised by the Canada Revenue Agency that T4 slips with CPP and tax deductions were required. This information was communicated to you on various occasions dating back to 2001. You did not comply and continued to remit your CPP contributions incorrectly.
> …
> The circumstances presented in your submission are not considered extraordinary. …[emphasis added]

[8] On March 31, 2011, the applicant made a second-level request for relief through its accountant. The accountant's roughly one page letter represented the following "background:"

> The income of the individual taxpayer was arbitrarily adjusted from self employed income to T4 income for the tax years 2002, 2003 and 2004. The taxpayers (both the corporation and the individual) were made aware of this in approximately December, 2009 when a collection agent arrived at the office looking to collect the funds owing on the source deductions account for the company. Neither we, nor our client have any record of any communication (either verbal or written) with the Canada Revenue Agency on this matter prior to December, 2009. If we were aware of such a matter, we

> would have advised him and corrective steps would have been taken. [emphasis added]

[9] CRA was not persuaded. In its decision to reject the requested relief – the decision presently under review – it found based on its internal records that:

> [Y]ou [the applicant's accountant] and your client were advised of the balance owing prior to December 2009. Notices of Assessment were issued on November 4, 2005 and statements of account quoting a balance owing were issued on December 24, 2007, February 26, 2008, and then on a monthly basis between August 29, 2009, and December 16, 2009. Our records also confirm that CRA Collections Officers had spoken with both you and your client prior to December 3, 2009, to request payment in full.
> …
> A review of our records has also confirmed that you were advised by CRA of the requirement to file your client's income on T4 slips instead of T4A slips. You were also advised of the requirement to remit CPP source deductions on this account prior to July 2002. …

[10] Overall, the CRA concluded that the applicant had "a history of non-compliance with tax obligations; a balance [had] knowingly been allowed to exist on which arrears and interest has accrued; a reasonable amount of care has not been exercised; and actions were not taken quickly to remedy any delay or omission." As a result, it declined to award any relief from the penalty and interest arising from the 2002, 2003, and 2004 years.

Issues and Analysis

[11] The applicant submits that the CRA's second-level relief decision is unreasonable for four reasons:

a. The Minister failed to analyze the argument made in the second level request that the CRA had the benefit of Mr. Sadler's remittances while interest was accruing;

b. The Minister fettered its discretion by only considering whether the taxpayer's situation fell under "extraordinary circumstances;"

c. The Minister failed to consider the significance of the fact that a duplicate business number was in use which until November 2008 which indicated that no balance was due; and

d. The Minister "failed to consider that it has misconstrued its own records in reviewing the applicant's file.

[12] The first issue can be easily dealt with because the fact that the CRA had Mr. Sadler's remittances while interest was accruing is not a reason why the corporation ought to be relieved from interest and penalties: *PPSC Enterprises Limited v Canada (Minister of National Revenue)*, 2007 FC 784. The applicant and Mr. Sadler are separate legal entities, each with separate obligations and responsibilities to the CRA. Moreover, to repeat, the applicant and its accountant were specifically informed in 2002 that they were to remit tax and CPP on Mr. Sadler's behalf, because Mr. Sadler was an employee and not an independent contractor, but they did not comply with these directions.

[13] There is also no merit to the second issue, which is that the CRA "fettered its discretion" regarding which reason or reasons it would consider in the relief requests. It was the applicant prior to the first decision that chose to indicate that relief was warranted for "extraordinary circumstances," only. According to the standard relief form found in the record, an applicant for relief is to indicate the "reason(s)" why relief is requested. Nevertheless, the applicant argues that

the Minister ought to have analyzed the request based on all of the *potential* reasons for relief. This is patently absurd – it was an election made by the taxpayer, not the Minister "fettering his discretion." To say otherwise is to say that an administrative decision-maker has a duty to consider every possible argument that might be raised in a given circumstance, notwithstanding that those arguments are specifically not raised. There is no support for that proposition whatsoever.

[14] Importantly, and specifically with regard to the second decision, that under review, the Minister did not decide it solely on the basis of "extraordinary circumstances."

[15] Last, regarding the third and fourth issues, it is useful to consider the factual issues common to them because overall there is simply no merit to the submission that the Minister's application of its relief power was unreasonably exercised on the facts of this case and the applicant's representations in its second relief request.

[16] The factual record before the CRA and now this Court quite clearly demonstrates that the applicant and Mr. Sadler were well aware of the balance owing on the applicant's payroll account as of the time of the 2005 trust examination. Indeed, the applicant's accountant indicated at the time that he intended to "appeal the assessment." If not, the myriad subsequent communications in 2006 and 2007 confirm that the applicant was aware of the balance on its payroll account. Failing that still, CRA's April 24, 2008 diary entry in no uncertain terms demonstrates that Mr. Sadler and the applicant were made aware of the debt owing on the applicant's payroll account and the reasons for this debt. It reads:

> S/w [spoke with] Jim Sadler. He kept saying that he did not understand why he owed. Referred him to the T/E [trust

> examination] of Nov/05 & the assessment of 2002, 2003 & 2004 of his T4 income. Also pointed out to him that he has 2 BN [business numbers] opened for this corporation. He said that one of the BN was closed. Explained to him that he has been remitting with the closed BN #890478530RP0001 even as recent as the Mar/08 remits [remittances]. He also questioned his 2005 & 2006 GST refund, & advised him that the GST refunds were transferred to this acct's arrears. He said that I should contact his accountant to discuss his account. Explained to him that I expected the payment in full from him. Gave LW [last warning] & suggested that he spoke with his accountant. If his accountant required any information, he can contact me." [emphasis added]

[17] As noted above, the applicant argued in its second relief request that it had "no knowledge" of "this issue" until December 2009, and in argument he stated that this was because of the two business numbers in use. Clearly that is not correct.

[18] The CRA compared the applicant's representation to its records and came to the conclusion that the applicant was misrepresenting the facts and has "a history of non-compliance with tax obligations; a balance [had] knowingly been allowed to exist on which arrears interest has accrued; a reasonable amount of care has not been exercised; and actions were not taken quickly to remedy any delay or omission." Again, all of this is supported by the record. The decision of CRA given these facts was eminently reasonable.

[19] As was pointed out to counsel at the hearing, had the applicant and Mr. Sadler complied with the decision of CRA in 2002, as it was stated they would, that Mr. Sadler be reported as an employee and not as an independent contractor, none of this would have arisen. He and his corporation are authors of their own misfortune – not of extraordinary circumstances.

[20] The Minister sought $3,642.47 in costs and the applicant, if successful, sought $5,801.83 in costs. The amount sought by the Minister appears to be reasonable and appropriate in the circumstances.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed, with costs to the respondent fixed in the amount of $3,642.47, inclusive of disbursements and taxes.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1746-12
STYLE OF CAUSE:	1148902 ONTARIO LIMITED v CANADA REVENUE AGENCY ACTING ON BEHALF OF THE MINISTER OF NATIONAL REVENUE
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