Federal Court  Cour fédérale

Date: 20140407

Docket: T-548-13

Citation: 2014 FC 336

Ottawa, Ontario, April 7, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

FRANK ARTHUR INVESTMENTS INC.

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The applicant Frank Arthur Investment Inc. [Frank Arthur] seeks judicial review of a decision rendered on March 4, 2013, by an Assistant Commissioner of the Canada Revenue Agency [CRA], acting as delegate for the Minister of National Revenue. In its decision, the CRA refused to exercise the discretionary power granted to federal Ministers by subsection 23(2) of the *Financial Administration Act*, RSC (1985) c F-11 [the FAA], and so did not elect to recommend the remission

of penalties and interests that accrued from October 1990 to April 2004 on a Federal Sales Tax assessment issued on January 25, 1991.

[2] In its written submissions, the applicant argues that the decision not to grant its Remission request is unreasonable. Alternatively, it argues that the CRA fettered its discretion by relying on the conclusions of the Fairness Committee, which had been asked to assess the applicant's Fairness relief request pursuant to section 88 of the *Excise Tax Act* [ETA] and, in any event, it did not reasonably apply the Fairness relief criteria and guidelines. In its pleadings before the Court, the applicant mainly argued that the decision was unreasonable, as the Assistant Commissioner did not have all of the relevant information on hand when he rendered his decision.

[3] For the reasons discussed below, this application for judicial review will be dismissed.

II. Background

[4] All issues raised before the Court relate to the long period of time that elapsed between the assessment of the Federal Sales Tax on January 25, 1991 and April 2004, when the applicant elected to pay nearly all of the amount claimed. Accordingly, a chronology of the main events is necessary.

[5] On January 25, 1991, Frank Arthur, then known as Cornelius Industries Inc, was assessed pursuant to the ETA for an amount of $115,972.50, comprising $96,749.90 in Federal Sales Tax, $12,986.47 in interest and $6,236.13 in penalties for the period covering April 1, 1987 to October 31, 1990. The Notice of assessment stated that all amounts owing were subject to interest and penalties at the rate of 1.5% per month or part thereof.

[6] On April 5, 1991, Frank Arthur filed an opposition with the CRA, on the basis that certain goods sold should have been taxed at the reduced rate of 9% pursuant to section 31 of Part I of Schedule IV to the ETA, instead of the general rate of 13.5%. Frank Arthur did so despite a 1985 CRA ruling advancing the contrary position.

[7] On February 7, 1992, the Canadian International Trade Tribunal [CITT] rendered a decision in favour of Les Industries Vogue Ltée [Vogue], one of Frank Arthur's competitors in the business of manufacturing components for above- and in-ground swimming pools. This decision was favourable to Frank Arthur's opposition. As a result, the CRA put the applicant's opposition file in abeyance, and eventually even allegedly lost it for a time. In fact, the file was being stored in the CRA's archives.

[8] The CRA appealed the CITT decision in the Vogue file but did not exert much effort in seeking to expedite the appeal process.

[9] On March 17, 1998, after almost seven years, the applicant's opposition was finally dismissed by the CRA's opposition division.

[10] On June 17, 1998, the applicant filed an appeal of the CRA's negative decision before the CITT, but it requested that the latter put the file in abeyance, pending a final decision in the Vogue file.

[11] On May 29, 2000, this Court granted the CRA's appeal in the Vogue file. As such, this was unfavourable for the applicant's opposition.

[12] On April 15, 2002, the Federal Court of Appeal confirmed the judgment of this Court and, in June 2003, the Supreme Court of Canada dismissed Vogue's leave to appeal, rendering the Federal Court of Appeal decision final.

[13] Meanwhile, in February 2003, the applicant sold all of its assets, ceased its commercial activities, and became an investment company.

[14] Despite the final decision in the Vogue file, the applicant decided to maintain its appeal before the CITT, now claiming its facts were distinguishable from those of Vogue's case. However, on February 18, 2004, it withdrew its appeal. Frank Arthur contends it did so because evidence proved too difficult to assemble, owing to the considerable lapse in time since the Notice of assessment had first been issued.

[15] In April 2004, the applicant paid most of its debt to the CRA, aside from $1,994.30 in interest, which continues to accrue to this day. At that time, the applicant's balance had accrued from $115,972.50, as had been assessed in the Notice of assessment, to $450,645.25.

[16] In December 2004, the applicant filed a Fairness relief request with the CRA pursuant to section 88 of the ETA, which was dismissed by the first and second levels of the Fairness Committee. Both levels held that the ETA did not provide for any remedy based on the fairness

relief provisions for amounts that were payable to the CRA prior to June 14, 2001. Moreover, both levels concluded that Parliament had not intended to give a retroactive effect to this newly available remedy. As for the penalties and interests accrued since June 14, 2001, the applicant's Fairness relief request was also denied. The delay was determined not to be the fault of the CRA, as the latter had rendered its negative decision on the applicant's opposition in March 1998.

[17] At the second level, the CRA's Fairness Committee further added that the 18 month delay taken to render the first level decision had had no impact on the applicant's rights, as the payment had already been made in April 2004. In addition, had the CRA eventually been called upon to reimburse the amounts paid, interests would also have been payable to the applicant.

[18] The applicant did not file an Application for judicial review of that decision before the Court.

[19] Rather, it filed the Remission request which lead to the decision under review. The applicant basically raised the same arguments in its Remission request as it did in its Fairness relief request, adding, however, that it was patently unfair that a fairness relief remedy existed since 1990 under the ETA for Goods and Services Tax, but that no such remedy existed prior to June 14, 2001 for Federal Sales Tax.

III. Decision under Review

[20] In deciding not to recommend remission, the CRA acknowledged that there had been a considerable delay in finalizing Frank Arthur's objection while the same issue with Vogue was being decided. However, it noted that the applicant could have, at any time, requested that Frank

Arthur's objection be finalized in advance of the CITT Vogue decision. Moreover, the applicant could have appealed to the CITT 180 days after filing the Notice of Objection, all the more since it later contended that its factual situation was distinguishable from that of Vogue. The CRA also held that the steady accrual of penalties and interest was the direct consequence of Frank Arthur's decision not to acquit its liability until 2004. Pursuant to subsection 81.12(2) of the ETA, an assessment is valid and binding and is therefore immediately payable as of the Notice of assessment. The CRA had made that clear to Frank Arthur in its February 5, 1991 Request for Payment, as well as in discussions which occurred in 1996 and 1997.

[21] While the CRA was of the opinion that subsection 88(1) of the ETA could accommodate a request for taxpayer relief prior to June 14, 2001, it nonetheless held that there was nothing in the evidence to suggest that there were circumstances beyond Frank Arthur's control that prevented payment of the outstanding balance, nor was there any incidence of CRA error with respect to the prior period. It added that the Fairness Committee had in fact analyzed the applicant's claim for penalties and interests accrued prior to June 14, 2001 and had reached the same conclusion.

[22] The CRA also noted that its decision had been made based on a review of Frank Arthur's particular circumstances and on all of the information related to those circumstances, as well as on the review and on the evaluation of the case by the Headquarters Remission Committee, the details of which can be found in the Assistant Commissioner's affidavit.

IV. Issues and Standard of Review

[23] The issues raised by this Application for Judicial Review are as follows:

a. Whether the decision is unreasonable because the Assistant Commissioner misunderstood, misinterpreted, or failed to consider certain relevant facts?

b. Whether the Assistant Commissioner fettered his discretion by relying on the conclusions of the Fairness Committee (second-level) in determining whether the applicant was eligible or not for a remission order based on the criteria of the Fairness relief provisions?

c. Whether the Assistant Commissioner's decision is unreasonable in respect of the criteria and guidelines of the Fairness relief provisions?

[24] A decision not to recommend remission is subject to the standard of reasonableness (*Axa Canada Inc v Canada (National Revenue)*, 2006 FC 17 [*Axa*] and *Waycobah First Nation v Attorney General of Canada*, 2010 FC 1188 (confirmed by 2011 FCA 191) [*Waycobah First Nation*]).

[25] The applicant notes that should the Court find that the Assistant Commissioner made an error in the application of the law, the standard of review becomes one of correctness.

[26] Meanwhile, the respondent emphasizes that the discretion not to recommend remission is wide and policy based, and so is owed considerable deference (*Axa*). "[I]n assessing unreasonableness, the Court must take account of the highly discretionary nature of the scheme for the remission of tax – an exceptional remedy to which an applicant is not entitled" (*Twentieth Century Fox Home Entertainment Canada Limited v Canada (AG)*, 2012 FC 823 (confirmed by 2013 FCA 25) at para 35 [*Twentieth Century Fox*]).

V. Statutory Framework

[27] Remission of taxes and penalties may be granted by the Governor in Council pursuant to subsection 23(2) of the FAA which reads:

Remission of taxes and penalties	Remise de taxes ou de pénalités
23(2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.	23(2) Sur recommandation du ministre compétent, le gouverneur en conseil peut faire remise de toutes taxes ou pénalités, ainsi que des intérêts afférents, s'il estime que leur perception ou leur exécution forcée est déraisonnable ou injuste ou que, d'une façon générale, l'intérêt public justifie la remise.

[28] Requests for remission of the GST/HST, excise taxes and duties are managed by CRA Headquarters in Ottawa. Headquarters officials review all file materials and make a first recommendation to the Headquarters Remission Committee, which then makes a recommendation to the Assistant Commissioner. The Assistant Commissioner then must review the recommendations and make a final decision. Even if the Assistant Commissioner approves a remission request, final discretion lies with the Governor in Council to make the remission order.

[29] The Headquarters Remission Committee has guidelines at its disposal which outline that each remission request is to be considered on its own merits to determine whether the collection of tax is unreasonable or unjust or whether it is otherwise in the public interest to grant relief.

[30] Under the guidelines, the remission requests are assessed under four categories of criteria for granting relief:

a. Extreme hardship;

b. Incorrect action or advice on the part of CRA officials;

c. Financial setback coupled with extenuating factors; and

d. Unintended results of the legislation.

[31] The guidelines are not intended for every circumstance, and they acknowledge that there may be other exceptional reasons that justify consideration of relief.

VI. Analysis

[32] Ultimately, the question before this Court is whether the Assistant Commissioner's decision fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[33] As the Court held in *Twentieth Century Fox* at para 48, the Minister's decision must be looked at as a whole: "Arguments can be advanced on a number of points but both individually and cumulatively they do not establish that the decision falls outside the parameters of reasonableness set forth in *Dunsmuir*."

[34] Moreover, considerable deference must be owed to the CRA's decision, as the Court "must take account of the highly discretionary nature of the scheme for the remission of tax" (*Twentieth Century Fox* at para 36; *Axa* at para 25).

[35] As the Court in *Lina Germain v Attorney General of Canada*, 2012 FC 768 at para 57 notes, "in assessing the remission requests before him, the Assistant Commissioner must take into account the public interest. Remission remains an exceptional measure." Remission is a departure from the ordinary rules of taxation, to which the rest of Canadian society is subject: "A remission order

necessarily involves a departure, in the particular case of a taxpayer, not only from the ordinary rules of taxation, but from the principle of equality of treatment" (*Waycobah First Nation* (FC) at para 31).

[36] It is with this in mind that I will examine the three issues before this Court.

A. *Is the decision unreasonable because the Assistant Commissioner misunderstood, misinterpreted, or failed to consider certain relevant facts?*

[37] The Assistant Commissioner properly considered all of the relevant evidence of the file. He was tasked to decide whether to make a recommendation or not for remission based on a review of whether there had been any incorrect action or advice on the part of CRA officials or unintended results of the legislation. In doing so, he was to follow the remission guidelines, as long as he did not treat them as if "they were law and exhaustive of the factors that may be considered in the exercise of a broader statutory discretion" (*Waycobah First Nation* (FCA) at para 28).

[38] The Assistant Commissioner was not required to personally review all of the documents in the file. Karen Stirling, a Senior Rulings officer of the Excise and GST/HST Rulings Directorate, was tasked to investigate the issues relating to the applicant's file and she prepared a report summarizing the information on file. The Assistant Commissioner could avail himself of that report, as long as it "was sufficiently accurate and complete to enable him to make an independent decision" [*Waycobah First Nation* (FCA) at para 31). Nothing in the record suggests that this was not the case with Ms. Stirling's report.

[39] Even had he reviewed the documents raised now by the applicant before the Court, it would not have changed his decision. Firstly, it seems that aside from a misunderstanding during his cross-

examination, the Assistant Commissioner was in fact aware that the CITT Vogue decision had been favourable to the applicant. Ms. Stirling's report explicitly says that the decision had been in Vogue's favour (page 2 from exhibit 20 of the respondent's record).

[40] Moreover, the Assistant Commissioner's decision itself leaves the impression that he was aware of the holding of the CITT Vogue decision. While he does not explicitly mention it when discussing the subsequent decisions by the Federal Court and the Federal Court of Appeal in the CRA's favour, he writes, on page 2 of the decision: "In the meantime, CRA officials confirmed Frank Arthur's objection, in March 1998, on the basis of CRA policy that the above-ground pool lines were to be taxed separately at the general rate of [Federal Sales Tax], notwithstanding the CITT decision at that time of Les Industries Vogue." That sentence does not leave much in the way of ambiguity.

[41] Secondly, the Assistant Commissioner had been fully aware of the seven year delay for the processing of the applicant's objection file when rendering his decision. Nonetheless, he determined that different avenues were available to the applicant during that time period, which could have stayed the accrual of interest, or otherwise expedited the CRA's determination with regard to the applicant's objection.

[42] The applicant made a business decision at the time of its Notice of assessment not to pay the balance owing in full or under a payment arrangement, and to recover the money with interest accrued should it win its objection, despite being told on at least three occasions of the potential financial consequences in not doing so. A tax assessment is presumed to be valid and binding

immediately. A Notice of objection does not change that fact. It simply allows the objector to postpone payment of his debt, if he so chooses, until his case is resolved, all the while maintaining responsibility for the accrued interest should he not succeed with his objection (subsections 88.12(2) and 315(3) of the ETA).

[43] Moreover, in electing not to pay its debt at the time of the Notice of assessment, the applicant failed to take additional steps to expedite the resolution of its objection. While the respondent no doubt does share in the blame for the years' long process, the applicant itself decided to wait for a resolution to its objection file and not appeal directly its objection to the CITT, especially since it ended up considering that its case was distinguishable. Applicant's counsel was in an advantageous position to make such an assessment, considering he was also Vogue's counsel through most of those years. The applicant was fully aware that its objection had been put in abeyance until after an appeal of the decision favourable to Vogue had been heard.

[44] In this light, it matters not then whether the applicant's file had been lost or sent to the archives, or whether the Assistant Commissioner was aware that the CRA had informed the applicant that it was not "in a rush" to proceed with its appeal of the CITT Vogue decision. The applicant did not seem to be in such a rush either as, if its desire was truly to bring its file to a final outcome, it could have done so by being more proactive.

[45] Inversely, as previously discussed, had its desire been to avoid suffering any consequences from adopting a passive attitude, Frank Arthur could have paid in full the amounts claimed and eventually seek reimbursement with interests, just as it eventually elected to do. Counsel for the

applicant argued that no taxpayer would pay the amounts claimed by the CRA when benefiting from a favourable decision. Even if that were the case in a situation where the taxpayer can rely on a final judgment to advance its opposition, it is not the same as when the taxpayer knows that the favourable decision is not final since it is being challenged by the CRA before the Court.

[46] The same reasoning extends to whether a Collections Agent had told the applicant that, considering the CITT Vogue decision, there was no reason for it to spend more money in pursuing a matter which was settled in its favour. I note in this respect that in the applicant's own Collection Diary Display, it is clear that it was the applicant who considered the cases "associated," despite the CRA informing it that nothing was preventing Frank Arthur from "filing to the [CITT] directly to get this resolved on 3-4 mths." Considering that the applicant later readily argued that the facts in its situation were different than those of Vogue, there was no reason for it not to proceed accordingly.

[47] Lastly, the fact that in August 1997, internal CRA documents reveal that an Appeals Officer had drafted a confidential decision favourable to the applicant, based on the CITT Vogue decision, changes nothing with respect to the outcome of this case. As things stood then for the applicant, its Notice of objection was held in abeyance, and this, officially, until the Vogue case was settled in Court. Frank Arthur would not have even been aware of such a confidential draft, and so accordingly, it could not have been relied upon by the company.

B. ***Did the Assistant Commissioner fetter his discretion by relying on the conclusions of the Fairness Committee (second-level) in determining whether the applicant was eligible or not for a remission order based on the criteria of the Fairness relief provisions?***

[48] The record shows that the Assistant Commissioner did not take for granted the conclusions of the Fairness Committee (second-level) in determining whether to recommend a remission to the

applicant. In fact, he relied on Ms. Stirling's report, in which she had conducted her own investigation into this very issue. After speaking with Francine Perreault, who had been asked to prepare a recommendation for the second-level review of the applicant's fairness relief request, Ms. Stirling concluded that the applicant's request for the period prior to June 14, 2001 had been considered, but ultimately rejected.

[49] Ultimately, the Assistant Commissioner was called upon to consider the applicant's argument that it was patently unfair that a fairness relief remedy existed for Goods and Services Tax since 1990, but that for Federal Sales Tax, no such remedy existed prior to June 14, 2001. I note that he did do so when he concluded that this argument should fail since both the Fairness Committee and Ms. Stirling had nevertheless assessed the applicant's pre-June 14, 2001 claim and found that it had no merit.

[50] Moreover, the Assistant Commissioner, in his decision-making capacity, had no obligation to personally review and analyze the facts and circumstances of the applicant in light of the criteria and guidelines pursuant to the Fairness relief legislation. His obligations only extend to the criteria he was meant to examine pursuant to section 23(2) of the FAA. Nor as a general rule is he required to do more than an analysis of the summaries provided to him by other CRA officials, as long as the record the summaries are based on contain the relevant information.

C. *Whether the Assistant Commissioner's decision is unreasonable in respect of the criteria and guidelines of the Fairness relief provisions?*

[51] As the applicant suggests, the Assistant Commissioner was called on to render his decision based on the powers conferred by the FAA, the remission guidelines and all of the relevant facts, and this, with regard to the issues brought before him by the applicant. He had no duty to do so in

light of the Fairness relief guidelines. He need not then consider the fact that the applicant had a clear history of meeting and respecting its fiscal and tax obligations. He only had to consider the seven year delay for the processing of its objection file and the fairness of the negative decision rendered by the Minister pursuant to the ETA. The Assistant Commissioner considered both of these factors in making his decision.

VII. Conclusion

[52] In light of the issues raised before him, the Assistant Commissioner's assessment of the applicant's entire situation, including the events that occured prior to June 14, 2001, is reasonable and so the intervention of the Court is not warranted. The respondent asked the Court to grant costs in its favour in the amount of $4,000.00, which I find reasonable in these circumstances.

JUDGMENT

THIS COURT'S JUDGMENT is that :

1. The Application for judicial review is dismissed.

2. Costs are granted in favour of the respondent in the amount of $4,000.00.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-548-13
STYLE OF CAUSE:	FRANK ARTHUR INVESTMENTS INC. v MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 26, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	GAGNÉ J.
DATED:	APRIL 7, 2014

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