

Date: 20071016

Docket: A-535-06

Citation: 2007 FCA 323

**CORAM: NADON J.A.
SEXTON J.A.
SHARLOW J.A.**

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

AJIT S. LIDDAR

Respondent

Heard at Toronto, Ontario, on October 4, 2007.

Judgment delivered at Ottawa, Ontario, on October 16, 2007.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

**NADON J.A.
SEXTON J.A.**

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The respondent Ajit S. Liddar has an interest in a corporation, The Travel People Inc., carrying on business as Imagine Holidays Oakville. The Minister assessed the corporation for goods and services tax (GST) under the *Excise Tax Act*, R.S.C. 1985, c. E-15, including interest and penalties totalling approximately \$4,500. Mr. Liddar, citing a series of events that caused financial hardship to the corporation, asked the Minister to waive the interest and penalties under section 281.1 of the *Excise Tax Act*. Mr. Liddar personally paid the corporation's entire liability as assessed because he was told by the Minister's officials that the Minister would waive the interest and

penalties if he did so. Given that assurance, Mr. Liddar expected a refund of the amount of the interest and penalties. However, the Minister refused Mr. Liddar's request for a waiver.

[2] Mr. Liddar filed an application under subsection 18.1(1) of the *Federal Courts Act* for judicial review of the Minister's decision. A judge of the Federal Court allowed the application based on the uncontradicted evidence of Mr. Liddar that he had been assured that the interest and penalties would be waived if he paid the corporation's liability. The judgment orders the Minister to repay Mr. Liddar the amount of the interest and penalties, with interest (2006 FC 1303), and also awards Mr. Liddar \$500 representing his disbursements.

[3] The Minister has appealed the judgment. The only ground of appeal is that subsection 18.1(3) of the *Federal Courts Act* does not give the Federal Court the authority to order the Minister to refund interest and penalties that have been paid under the *Excise Tax Act*.

[4] The Minister does not challenge the conclusion of the judge as to Mr. Liddar's reason for making the payment. Nor does the Minister challenge the judge's factual conclusion that Mr. Liddar was given the assurance he claims to have been given. Indeed, such a challenge would be difficult to sustain because the record contains no evidence from the Minister denying that the assurance was given, or asserting that such an assurance was not authorized. The only evidence from the Minister bearing on that point is a note in the report of the "Fairness Reviewer" speculating that this was "probably a misunderstanding related to possible relief".

[5] On the record before this Court, it is not possible to find any error in the decision of the judge to allow Mr.Liddar's application for judicial review. It follows that the judge was entitled to quash the Minister's decision to refuse to waive the interest and penalties. The issue is whether he should have simply referred the matter back to the Minister for reconsideration of Mr. Liddar's request, perhaps with directions, or whether he erred in law in going further and ordering the refund.

[6] The answer depends upon the correct interpretation of subsection 18.1(3) of the *Federal Courts Act* which reads as follows:

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[7] Paragraph 18.1(3)(a) describes the authority of the Federal Court to make an order in the nature of mandamus. In substance, that is the order the judge made when he ordered the Minister to refund the interest and penalties to Mr. Liddar. The difficulty is that the facts of this case do not

warrant such an order because it has not been established that the statutory conditions for a refund under the *Excise Tax Act* are met.

[8] The assessment and refund provisions of the *Excise Tax Act* (Division V of Part IX of the *Excise Tax Act*) contemplate a number of different situations. They do not contemplate the refund of interest or penalties paid by one person for the account of another (where the person making the payment has not been assessed for those amounts). In the circumstances of this case, any refund of the tax and interest that the corporation was legally obliged to pay could be refunded only to the corporation once waived by the Minister, even if it was Mr. Liddar who made the payment. Mr. Liddar would have to look to the corporation for reimbursement of the amounts he paid on its behalf. For that reason, I agree with the Minister that the portion of the judgment requiring the refund to be paid to Mr. Liddar should be set aside.

[9] The remedy to which Mr. Liddar was and is entitled must be within the scope of paragraph 18.1(3)(b) of the *Federal Courts Act*. As indicated above, there can be no doubt that the Minister's decision should have been quashed and the request for a waiver of interest and penalties referred back to the Minister for reconsideration. A question remains as to whether a direction should have been made as permitted by paragraph 18.1(3)(b), and if so what the direction should have been.

[10] In this regard, the Minister has requested that he be permitted to determine the question of whether an undertaking was made to Mr. Liddar to waive the corporation's interest and penalties. However, the Minister has already had an opportunity to present all available evidence contradicting

the evidence of Mr. Liddar on that point, which the judge determined conclusively in Mr. Liddar's favour. It is now too late for the Minister to attempt to re-examine that fact. Counsel for the Minister conceded at the hearing that, on these facts, the only reasonable response of the Minister to Mr. Liddar's request for a waiver of interest and penalties is to grant the waiver.

[11] For these reasons, I would allow the appeal in part. I would set aside the portion of the judgment of the Federal Court that orders the Minister to pay Mr. Liddar a refund, and order instead that the Minister's decision be quashed, that Mr. Liddar's request for a waiver be referred back to the Minister for reconsideration on the basis that Mr. Liddar paid the liability of the corporation for tax, interest and penalties because he was assured by tax officials that if he did so, the interest and penalties would be waived.

[12] I would not disturb the \$500 award made by the judge. I would award Mr. Liddar a further \$500, the amount of his estimated disbursements on appeal.

“K. Sharlow”

J.A.

“I agree
M. Nadon J.A.”

“I agree
J. Edgar Sexton J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-535-06

(APPEAL FROM A JUDGMENT OF HUGHES J. DATED OCTOBER 27, 2006, NO. T-264-06)

STYLE OF CAUSE: MINISTER OF NATIONAL
REVENUE v. AJIT S. LIDDAR

PLACE OF HEARING: TORONTO

DATE OF HEARING: OCTOBER 4, 2007

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: NADON J.A.
SEXTON J.A.

DATED: OCTOBER 16, 2007

APPEARANCES:

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AJIT LIDDAR FOR THE RESPONDENT

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