

Federal Court of Appeal



Cour d'appel fédérale

Date: 20200225

Docket: A-69-19

Citation: 2020 FCA 54

**CORAM: RENNIE J.A.
DE MONTIGNY J.A.
LOCKE J.A.**

BETWEEN:

ESCAPE TRAILER INDUSTRIES INC.

Appellant

and

**ATTORNEY GENERAL OF CANADA
(THE MINISTER OF NATIONAL REVENUE)**

Respondent

Heard at Vancouver, British Columbia, on February 4, 2020.

Judgment delivered at Ottawa, Ontario, on February 25, 2020.

REASONS FOR JUDGMENT BY:

LOCKE J.A.

CONCURRED IN BY:

**RENNIE J.A.
DE MONTIGNY J.A.**

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REASONS FOR JUDGMENT

LOCKE J.A.

I. Overview

[1] Escape Trailer Industries Inc. (Escape Trailer) appeals from a judgment of the Federal Court (2019 FC 31, per Manson J.) which dismissed an application for judicial review of a decision of the Assistant Commissioner of the Canada Revenue Agency (CRA). That decision

refused to recommend a remission order under subsection 23(2) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (FAA) pursuant to Escape Trailer's request in relation to harmonized sales tax (HST) plus interest totaling \$273,183.39 (the Tax Amount).

[2] Subsection 23(2) of the FAA provides as follows:

Remission of taxes and penalties

(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.

Remise de taxes ou de pénalités

(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.

[3] The CRA has prepared a Remission Guide (the Guide) which, though not binding, provides guidance on the exercise of discretion under subsection 23(2). The Guide identifies the following "characteristics" that may justify remission:

1. Extreme hardship;
2. Financial setback coupled with extenuating factors;
3. Incorrect action or advice on the part of CRA officials; and
4. Unintended results of the legislation.

[4] The Guide adds:

These guidelines provide a framework within which a remission might be supported. However, they do not necessarily pertain to every circumstance, and there may be other valid reasons that would justify granting a remission order.

Good judgment must be exercised at all times and all relevant factors of a case should be taken into consideration, e.g., a person's compliance history, credibility, circumstances, age, and health.

[5] It is also important to bear in mind that remission is an extraordinary measure: *Fink v. Canada (Attorney General)*, 2019 FCA 276, 312 A.C.W.S. (3d) 211, at para. 1.

[6] Escape Trailer made a request for remission under subsection 23(2) of the FAA by letter dated November 24, 2014 to the CRA (the Remission Request). The relevant factual circumstances were described in the Remission Request. Escape Trailer explained that it is a manufacturer and seller of recreational vehicle travel trailers (RV trailers). The RV trailers relevant to the Remission Request (which were not registered in Canada or insured for use in Canada) were delivered by Escape Trailer to U.S. buyers in the parking lot of a Canadian duty-free shop at a border crossing between Canada and the U.S. between October 1, 2010 and September 30, 2012. The U.S. buyers would pass through Canadian customs to get to the parking lot and, upon delivery, would transport the RV trailers through U.S. customs. The U.S. buyers would be identified as the importers of the RV trailers. Escape Trailer did not collect any HST from the U.S. buyers on the basis that the supply of the RV trailers was made outside Canada, and therefore not subject to HST (or zero-rated).

[7] Following an audit, however, the CRA determined that the supply of the RV trailers was made in Canada, and therefore HST was payable. Notices of Reassessment dated February 12, 2013 and February 10, 2014 confirmed this conclusion. Escape Trailer did not appeal these Reassessments, and paid the amount owing (which included the Tax Amount) in February 2014.

As indicated in the Remission Request, section 142 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA), contains “place of supply” rules that determine liability for HST. Paragraph 142(1)(a) contemplates tangible personal property that is delivered in Canada, and which is taxable unless exempt or zero-rated. By contrast, paragraph 142(2)(a) contemplates tangible personal property that is delivered outside Canada, and which is not taxable. The CRA audit concluded that the deliveries in question occurred on the Canadian side of the border, and consequently fell under the terms of paragraph 142(1)(a). In addition, section 12 of Part V of Schedule VI of the ETA sets out conditions for zero-rating tangible personal property that is destined for export. Such goods qualify for zero-rating if the supplier:

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|--|--|
| <p>(a) ships the property to a destination outside Canada that is specified in the contract for carriage of the property;</p> | <p>a) expédie le bien à une destination à l'étranger, précisée dans le contrat de factage visant le bien;</p> |
| <p>(b) transfers possession of the property to a common carrier or consignee that has been retained, to ship the property to a destination outside Canada, by</p> | <p>b) transfère la possession du bien à un transporteur public ou à un consignataire qui a été chargé d'expédier le bien à une destination à l'étranger par l'une des personnes suivantes :</p> |
| <p>(i) the supplier on behalf of the recipient, or</p> | <p>(i) le fournisseur pour le compte de l'acquéreur,</p> |
| <p>(ii) the recipient's employer; or</p> | <p>(ii) l'employeur de l'acquéreur;</p> |
| <p>(c) sends the property by mail or courier to an address outside Canada.</p> | <p>c) envoie le bien par courrier ou messenger à une adresse à l'étranger.</p> |

[8] There is some confusion as to the grounds asserted for Escape Trailer's Remission Request. Its November 24, 2014 letter identified the four characteristics listed in paragraph 3 above, and indicated that it relied on three of them: (i) extreme hardship (also called financial hardship), (ii) incorrect action or advice on the part of CRA officials, and (iii) unintended results

of the legislation. Page 4 of the letter suggested strongly that Escape Trailer was not originally relying on the characteristic of “financial setback coupled with extenuating factors.”

[9] The confusion seems to have begun with the decision of the Assistant Commissioner that refused the Remission Request. That decision addressed each of Escape Trailer’s asserted characteristics though in a different order. It dealt first with the issue of “incorrect action or advice on the part of CRA officials,” and then with the issue of “unintended results of the legislation.” However, the third part of the Assistant Commissioner’s analysis seems to have dealt with both “extreme hardship” and “financial setback coupled with extenuating factors.” That part identified the assertion of a “significant financial setback” and went on to find that, “[a]lthough the repayment of the HST liability might have constituted a financial setback to Escape Trailers (*sic*),” it was not experiencing “financial hardship” as a result. It added that “there were no extenuating factors beyond [Escape Trailer’s owners’] control that would have prevented them from determining the correct manner in which to export the RV trailers from Canada on a zero-rated basis.”

[10] The confusion about the asserted grounds for the Remission Request was compounded by the Federal Court, which stated incorrectly at paragraph 14 of its reasons that the Remission Request had relied on “financial setback coupled with extenuating factors” (not “extreme hardship”). The Federal Court also asserted incorrectly that the Assistant Commissioner had concluded that Escape Trailer had not suffered a financial setback (see paragraph 26 of the Federal Court’s reasons). As indicated in the previous paragraph, the Assistant Commissioner acknowledged that Escape Trailer might have suffered a financial setback.

[11] In any case, Escape Trailer no longer asserts the issues of “incorrect action or advice on the part of CRA officials” and “extreme hardship”. This leaves “unintended results of the legislation” and “financial setback coupled with extenuating factors.” Escape Trailer also asserts that the Assistant Commissioner’s decision failed to respect the principles of natural justice and procedural fairness.

II. Standard of Review

[12] The standard of review applicable in a case such as this (an appeal from a decision disposing of an application for judicial review of an administrative decision) is as contemplated in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45 and 46: the appellate court is to decide whether the court below identified the appropriate standard of review and applied it correctly; the appellate court steps into the shoes of the lower court such that the appellate court’s focus is, in effect, on the administrative decision.

[13] The Federal Court identified the appropriate standard of review as reasonableness, except in relation to the issue of procedural fairness. I agree. No deference is owed to the Assistant Commissioner on the issue of procedural fairness. This Court must consider whether the procedure before the Assistant Commissioner was fair.

[14] Escape Trailer asks that we bear in mind the recent guidance in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] S.C.J. No. 65, at para. 83

(*Vavilov*), that “the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome.”

III. Unintended Results of the Legislation

[15] The guidance on consideration of “Unintended result of the legislation” in the Guide is brief, and is reproduced in its entirety here:

The application of tax legislation to certain transactions occasionally results in tax consequences that are clearly inequitable to a person and contrary to the intent of the law.

Remission may be recommended to correct the inequity, until a legislative solution can be achieved. In these cases, the Department of Finance must concur with the relief to be granted. Occasionally, the Minister of Finance will sponsor a remission order unilaterally in these circumstances.

[16] The Assistant Commissioner’s analysis of this issue was likewise brief. It is reproduced here:

You comment that the operation of paragraph 142(1)(a) of the *Excise Tax Act* has created an unintended result of the legislation, insofar as it has led in this case to the taxation of RV trailers that were directly exported to the United States. However, the elimination of the Visitor Rebate Program supports the legislative intent that only purchasers who are not consumers can take possession of goods in Canada for export on a zero-rated basis. Goods purchased by non-resident consumers are only intended to be zero-rated if they are shipped to a destination outside Canada, or they are sent by mail or courier to an address outside Canada. Effective April 1, 2007, the intent of the legislation is that non-resident consumers purchasing and taking possession of goods in Canada are taxed for GST/HST purposes, and Escape Trailers (*sic*) was correctly assessed in this regard.

[17] Escape Trailer complains that the Assistant Commissioner limited himself to a literal interpretation of section 142 of the ETA, and failed to consider the scheme and object of the

ETA or the intention of Parliament at the time of its enactment. Escape Trailer argues that the Assistant Commissioner failed to reasonably analyze the elimination of the Visitor Rebate Program (VRP), and cites indications that the VRP was eliminated due to a lack of interest rather than any change of Parliament's intention. Citing from *Montecristo Jewellers Inc. v. The Queen*, 2019 TCC 31, [2019] G.S.T.C. 10, at para. 70 (*Montecristo*), Escape Trailer argues that the intent of the ETA is to limit the imposition of GST/HST to goods and services to be consumed in Canada, and to "zero-rate" GST/HST on goods that are actually exported, in order to make them more competitive.

[18] I agree with this general intent so stated. However, based on the specific language in the ETA, it is clear that there is also a more particular intent that certain conditions be met before goods may be zero-rated, and that merely proving that the goods in question were actually exported is insufficient (see section 12 of Part V of Schedule VI of the ETA).

[19] Escape Trailer fulfilled none of these conditions for zero-rating its RV trailers.

[20] Escape Trailer argues, based on *Waycobah First Nation v. Canada (Attorney General)*, 2011 FCA 191, [2011] F.C.J. No. 847, at para. 18 (*Waycobah*), that the Assistant Commissioner should have balanced its interests in obtaining remission against the public interest in the integrity of the tax system and its proper administration, but failed to do so. I do not agree that *Waycobah* should be understood as Escape Trailer urges. The balancing discussed in *Waycobah* applies to the broad discretionary power contemplated by subsection 23(2) of the FAA. It was not intended to require any balancing of interests in the specific determination of whether the

legislation had unintended results. Moreover, it was implicit in the Assistant Commissioner's overall analysis that he was balancing these competing interests. He was not required to say so explicitly.

[21] In my view, the Assistant Commissioner's analysis of the issue of unintended results of the legislation was reasonable. He stated that "the legislative intent [is] that only purchasers who are not consumers can take possession of goods in Canada for export on a zero-rated basis." In so stating, he took into account the detailed conditions set out in section 12 of Part V of Schedule VI of the ETA. He also implicitly acknowledged the general intent noted in *Montecristo*, and cited in paragraph 17 above, that GST/HST should be limited to consumption within Canada. The next sentence of the Assistant Commissioner's analysis is equally reasonable in view of the more particular intent reflected in the detailed conditions for zero-rating: "Goods purchased by non-resident consumers are only intended to be zero-rated if they are shipped to a destination outside Canada, or they are sent by mail or courier to an address outside Canada."

[22] The Assistant Commissioner's reference to the elimination of the VRP indicates that it supports his conclusion concerning legislative intent, but suggests that that legislative intent exists independent of the elimination of that program. In my view, its elimination was not essential to the Assistant Commissioner's reasoning, and therefore it is not necessary to discuss the actual reasons for its elimination.

[23] The Assistant Commissioner concluded reasonably that the predicament in which Escape Trailer found itself (being liable for HST amounts that were not collected from customers) was

caused not by any unintended results of the legislation, but rather by its failure to comply with any of the detailed conditions for zero-rating.

IV. Financial Setback Coupled with Extenuating Factors

[24] I begin this section by repeating that Escape Trailer's Remission Request cited extreme hardship (and not financial setback coupled with extenuating factors) as a basis for remission, but that the Assistant Commissioner's decision dealt with both. In this appeal, only the latter issue remains in dispute.

[25] I repeat also that the Assistant Commissioner's decision acknowledged that Escape Trailer might have suffered a financial setback. However, remission was inappropriate because he found no related extenuating factors. The arguments made by Escape Trailer before this Court concerning its financial setback need not be analyzed because the financial setback is not disputed. The focus on this issue should be on extenuating factors. This significantly limits the arguments that require discussion under this heading.

[26] As stated in paragraph 9 above, the Assistant Commissioner concluded that "there were no extenuating factors beyond [Escape Trailer's owners'] control that would have prevented them from determining the correct manner in which to export the RV trailers from Canada on a zero-rated basis."

[27] Escape Trailer notes that the Guide identifies two main extenuating factors ("circumstances beyond a person's control" and "taxpayer error"), and complains that the

Assistant Commissioner considered only the former. Escape Trailer argues that it was unreasonable for the Assistant Commissioner to fail to consider the extenuating factor of taxpayer error.

[28] In my view, this argument would have more force if Escape Trailer had asserted the extenuating factor of taxpayer error in its Remission Request. It did not. It is true that the Remission Request did describe discussions with the CRA that led Escape Trailer to believe that no HST had to be remitted for the RV trailer sales in question. Those discussions were considered by the Assistant Commissioner (in relation to the issue of incorrect advice from CRA officials), but they were found to be uncorroborated and insufficiently detailed to be reliable. More importantly, it is difficult to fault the Assistant Commissioner for his analysis of extenuating factors when no such factors were cited as such in the Remission Request (see *Canada Revenue Agency v. Telfer*, 2009 FCA 23, [2009] F.C.J. No. 71, at para. 31). In discussing the question of extenuating factors at all, the Assistant Commissioner was going further than Escape Trailer had asked.

[29] In my view, there was nothing unreasonable in the Assistant Commissioner's analysis of extenuating factors.

V. Natural Justice and Procedural Fairness

[30] Escape Trailer argues that it was procedurally unfair for the Assistant Commissioner to refer to documents and information that were not submitted by Escape Trailer, and on which it

was not given an opportunity to comment. Escape Trailer argues that this resulted in a decision based on incomplete information.

[31] However, all of the documents and information in question concerned the issues of financial hardship and financial setback. Since neither of these issues remains in dispute (hardship because it is no longer asserted, and setback because it is acknowledged), the fairness or unfairness of the Assistant Commissioner's consideration of the documents and information in question is not relevant and need not be considered.

VI. Conclusion

[32] Having found no error in the Assistant Commissioner's analysis of the Remission Request, and noting the failure of Escape Trailer to meet any of the characteristics common in remission cases, and taking into account the discretionary and extraordinary nature of remission under subsection 23(2) of the FAA, I would dismiss the present appeal with costs.

"George R. Locke"

J.A.

"I agree.

Donald J. Rennie J.A."

"I agree.

Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-69-19

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NATIONAL REVENUE)

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DE MONTIGNY J.A.

DATED: FEBRUARY 25, 2020

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