Federal Court of Appeal | Cour d'appel fédérale

Date: 20220530

Docket: A-45-21

Citation: 2022 FCA 93

CORAM: **GLEASON J.A.**
MACTAVISH J.A.
ROUSSEL J.A.

BETWEEN:

ALLSTAFF INC.

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on May 11, 2022.

Judgment delivered at Ottawa, Ontario, on May 30, 2022.

REASONS FOR JUDGMENT BY: ROUSSEL J.A.

CONCURRED IN BY: GLEASON J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

ROUSSEL J.A.

[1] This is an appeal from a judgment of the Federal Court (2021 FC 52), dated January 14, 2021. The Federal Court judge dismissed the appellant's application for judicial review of a decision made by a delegate of the Minister of National Revenue (Minister), denying its request for penalty and interest relief pursuant to subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA).

[2] The appellant carries on business as a temporary employment agency. It employs its own workers and contracts them out to customers on an as-needed basis. It is responsible for deducting and remitting employee payroll deductions and paying the employer's share of those deductions to the Canada Revenue Agency (CRA). It is also responsible for charging and remitting goods and services tax/harmonized sales tax (GST/HST) on the labour that it supplies to its customers.

[3] Over the years, the appellant has failed to pay its employee payroll and GST/HST remittances on time. It has sought and been denied several requests for relief from penalties and interest assessed against it under the ITA and the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA).

[4] In June 2017, the appellant submitted a request for relief from penalties and interest under subsection 220(3.1) of the ITA, which provides that the Minister "may on application by the taxpayer … waive or cancel all or any portion of any penalty or interest otherwise payable under this Act". Relying on the *Taxpayer Bill of Rights*, the appellant maintained that it was unable to make the monthly payroll remittances, as it did not collect funds from customers for a period of 60 to 90 days after the services were provided, as per the practice established in the industry. The appellant also claimed that the CRA had misinterpreted the provisions of the ETA as to when GST/HST remittances were due and unfairly assessed penalties and interest against the appellant, causing it great financial hardship. The appellant further submitted that the CRA had acted unfairly by not granting relief under subsection 153(1.1) of the ITA. The CRA denied the appellant's request for relief in February 2018.

[5] In May 2018, the appellant sought reconsideration of the decision, raising essentially the same arguments. The appellant reiterated that it was unable to remit employee payroll deductions in a timely fashion because it instead used this money to prioritize its outstanding GST/HST payments, which it submitted the CRA collected prematurely as a result of misinterpreting subsection 168(1) of the ETA. The appellant further asserted that it could not restructure its business to meet its obligations as it was unable to borrow money from institutional lenders to assist with its cash flow requirements.

[6] On November 23, 2018, the Minister denied the appellant's reconsideration request. The Minister found that the outstanding amounts of remittances, penalties and interest charges demonstrated the appellant did not exercise the requisite degree of reasonable care. Noting that a payroll account is governed by the ITA and that the due dates for these funds are precise, the Minister emphasized that amounts remitted to the payroll deduction account are considered funds held by the employer for the employees in trust for the Receiver General of Canada, and should not be used to fund day-to-day operations of a business. The Minister also observed that the appellant's account had been non-compliant since 2013 and that it is the employer's responsibility to have arrangements in place to ensure that remittances and returns are prepared and received by their due dates. The Minister found that the appellant had sufficient time to restructure its business operations to ensure that its tax obligations were met. The Minister then considered the financial hardship of the appellant and found that its corporate finances did not show any threat to the continuity of the business or to the employment of the employees. The Minister also noted that the wages taken by the appellant's shareholder and her spouse in 2016 were over $200,000. Finally, the Minister confirmed the CRA's interpretation of subsection

168(1) of the ETA, to the effect that GST/HST was payable by the appellant's customers on the date it issued its invoices to them.

[7] The appellant sought judicial review of the Minister's decision, alleging in particular that relief from the penalties and interest was warranted due to extraordinary circumstances beyond its control, the actions of the CRA, and its inability to pay or financial hardship. The appellant's submissions in the Federal Court largely reflected those made before the Minister. The Federal Court dismissed the application, finding that the Minister's decision was reasonable.

[8] Before this Court, the appellant submits that the Federal Court erred in finding that the Minister did not misinterpret subsection 168(1) of the ETA and in concluding that the Minister acted reasonably in determining that relief from the penalties and interest assessed on the appellant's payroll account was not warranted.

[9] In an appeal from an application for judicial review before the Federal Court, this Court must step into the shoes of the Federal Court and determine whether the correct standard of review was identified and properly applied (*Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10-12; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47).

[10] Contrary to the appellant's assertion in paragraph 59 of its memorandum of fact and law, the Minister's decision is not subject to appellate oversight because the underlying application is one for judicial review and not an appeal. The exercise of the Minister's discretion to grant relief

under the ITA is reviewable on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras. 10, 16-17 [*Vavilov*]; *Belchetz v. Canada (National Revenue)*, 2020 FCA 225 at para. 30; *Canada Revenue Agency v. Telfer*, 2009 FCA 23 at para. 24, leave to appeal to SCC refused, [2009] S.C.C.A. No. 142). Therefore, the Federal Court correctly selected reasonableness as the standard of review in this case.

[11] The Federal Court also did not err in concluding that the Minister's decision was reasonable. When determining whether a decision is reasonable, the Court's focus is on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para. 83). It must ask itself "whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para. 99). The "burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para. 100).

[12] Upon review of the record, I am satisfied that the Minister considered all of the relevant factors, as well as all of the appellant's evidence and submissions. I am also satisfied that the conclusion the Minister reached was reasonable.

[13] Payroll deductions are deemed to be held in trust for the Receiver General of Canada and employers who do not comply with the requirements to make payroll deductions and to remit them to the Receiver General for Canada are liable to pay a penalty in addition to interest on the amounts due (ITA, ss. 227(4), 227(8), 227(8.3)).

[14] The appellant's decision to delay the remittance of its payroll deductions by prioritizing the payment of GST/HST was not the result of a misinterpretation of subsection 168(1) of the ETA by the CRA. This provision does not govern when the appellant was required to remit the GST/HST it collected, but rather, governs when GST/HST was payable by the appellant's customers.

[15] Generally speaking, the appellant's customers, as recipients of a taxable supply made in Canada, are required under section 165 of the ETA to pay GST/HST on the value of the consideration for the supply. The appellant, as the supplier of a taxable supply, has the concomitant obligation under subsection 221(1) of the ETA to act as an agent of Her Majesty in right of Canada and to collect the GST/HST payable by its customers. The appellant would also generally be required to remit the amounts collectible and collected from its customers less any input tax credits to the Receiver General of Canada within the applicable timeframe from the end of each of its reporting periods (ETA, s. 225, 228(1), 228(2), 238(1)).

[16] Subsection 168(1) of the ETA provides that GST/HST "in respect of a taxable supply is payable by the recipient on the earlier of the day the consideration for the supply is paid and the day the consideration for the supply becomes due". To determine when the consideration for a taxable supply becomes due, subsection 152(1) of the ETA provides:

152 (1) For the purposes of this Part, the consideration, or a part thereof, for a taxable supply shall be deemed to become due on the earliest of	152 (1) Pour l'application de la présente partie, tout ou partie de la contrepartie d'une fourniture taxable est réputée devenir due le premier en date des jours suivants :
(a) the earlier of the day the supplier first issues an invoice in respect of	a) le premier en date du jour où le fournisseur délivre, pour la première fois, une facture pour tout ou partie

the supply for that consideration or part and the date of that invoice,	de la contrepartie et du jour apparaissant sur la facture;
(b) the day the supplier would have, but for an undue delay, issued an invoice in respect of the supply for that consideration or part, and	b) le jour où le fournisseur aurait délivré une facture pour tout ou partie de la contrepartie, n'eût été un retard injustifié;
(c) the day the recipient is required to pay that consideration or part to the supplier pursuant to an agreement in writing.	c) le jour où l'acquéreur est tenu de payer tout ou partie de la contrepartie au fournisseur conformément à une convention écrite.

[17] In this case, the appellant's reliance on subsection 168(1) of the ETA is misguided and fails to consider the interplay between subsections 152(1) and 168(1) of the ETA as well as the phrase in the opening portion of subsection 152(1) of the ETA "shall be deemed to become due on the earliest of" and the phrase in subsection 168(1) "on the earlier of the day".

[18] It was open to the Minister to conclude that the appellant's decision to divert the payroll deductions to fund other obligations of the business, including shareholders' salaries, did not merit the relief sought. While the appellant may find it unfair that it be required to remit payroll deductions and GST/HST amounts before the customer invoices are paid, it is nonetheless its responsibility to structure its business operations to ensure its tax obligations are met.

[19] As for the allegation that certain CRA employees may have threatened the appellant's shareholder personally with incarceration on more than one occasion if the appellant did not remit its GST/HST taxes when due, the record does not establish that the appellant raised this allegation as a ground for relief when it submitted its 2017 request for relief in relation to its payroll deductions account. Therefore, this is not an argument that may be considered on judicial

review, where the focus of the inquiry is on the reasonableness of the Minister's reconsideration decision (*Oleynik v. Canada (Attorney General)*, 2020 FCA 5 at para. 71).

[20] The Minister's decision also reasonably explains why the appellant's circumstances or alleged hardship did not warrant relief. While the Minister did not directly address the appellant's argument that industry competition prevented it from changing its business model, I infer from the reasons that the argument was considered because the Minister noted the appellant's argument that the remittances should be payable only when it receives payment of its invoices and emphasized the appellant's ability to restructure.

[21] As for the CRA's alleged error in stating that "[the appellant] holds a positive shareholder equity after considering year end liabilities of $1,646,818.00 for the 2016 year", the appellant appears to be misconstruing the first-level decision-maker's statement. I am not persuaded that the decision-maker was implying that the shareholder equity totalled that amount. Even if an error was committed in this regard by the first-level decision-maker, the appellant's equity was properly assessed during the reconsideration review, which is the decision under review in the appellant's judicial review application.

[22] The appellant conceded in its memorandum of fact and law that the Minister enjoys a very wide discretion in deciding whether to grant relief. On the facts of this case, and in particular in light of the appellant's long history of non-compliance, I conclude that it was reasonably open to the Minister to decline to grant penalty and interest relief to the appellant.

[23] Accordingly, I would dismiss the appeal with costs.

"Sylvie E. Roussel"
J.A.

“I agree
Mary J.L. Gleason J.A.”

“I agree
Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE AHMED DATED JANUARY 14, 2021, DOCKET NO. T-2196-18

DOCKET:	A-45-21
STYLE OF CAUSE:	ALLSTAFF INC. v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 11, 2022
REASONS FOR JUDGMENT BY:	ROUSSEL J.A.
CONCURRED IN BY:	GLEASON J.A. MACTAVISH J.A.
DATED:	MAY 30, 2022

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