Federal Court  Cour fédérale

Date: 20180119

Docket: T-63-17

Citation: 2018 FC 53

Ottawa, Ontario, January 19, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

MATTHEW BOADI PROFESSIONAL CORPORATION

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review of a decision ("Decision") by a delegate of the Minister of National Revenue ("Minister's Delegate") denying Matthew Boadi Professional Corporation's (the "Applicant") request for relief from penalties and interest under the Canada Revenue Agency's Voluntary Disclosure Program ("VDP"). The Minister's Delegate refused to exercise the discretion provided in ss. 220(3.1) of the *Income Tax Act* RSC, 1985, c 1 (5th Supp.) (the

"*Act*") to cancel or waive some or all of a penalty or interest otherwise payable under the *Act*. The Minister's Delegate found that the Applicant's disclosure did not qualify for the VDP as it was not voluntary.

II. Background

[2] The Applicant is a Canadian corporation that owns property in Ghana worth over $100,000 Canadian dollars. The *Act* requires specific Canadian entities (referred to as reporting entities) owning certain foreign property valued at over $100,000 to file a tax return in the prescribed form. In this case, the prescribed form is a T1135 Foreign Income Verification Statement ("T1135 return"). The Applicant is a reporting entity and was required to file T1135 returns for the 2005-2013 tax years, but failed to do so. The Applicant is subject to a penalty of $2500 per return, plus interest at the prescribed rate (currently 5%) for its late filing of these returns.

[3] The Minister's Delegate has broad discretion under ss. 220(3.1) of the *Act* to waive or cancel penalties that are otherwise payable under the *Act*. Encompassed within the Minister's Delegate's discretion is the VDP. The VDP was created to encourage taxpayers to correct inaccurate or incomplete information and to disclose previously unreported information to the Canada Revenue Agency ("CRA"). The VDP, as it existed at the time of the Decision, is described in Information Circular IC00-1R4 and sets out four conditions that a taxpayer's disclosure must meet in order for the Minister's Delegate to cancel or waive penalties under the program. The disclosure must be:

1. Voluntary
2. Complete
3. Involve a penalty
4. Include information that is at least one year past due

[4] The Applicant states that it became aware of the T1135 filing obligation for 2005-2013 in January 2015. On March 17, 2015 the Applicant submitted its 2005-2013 T1135 returns for consideration under the VDP. By letter dated June 2, 2015 the Minister's Delegate denied the Applicant's disclosure on the grounds that it was not voluntary because the Applicant was subject to ongoing enforcement action which would have likely uncovered the Applicant's T1135 disclosure obligations.

[5] This enforcement action was the result of the Applicant's history of filing its annual T2 Corporate Income Tax Returns ("T2 returns") late. As a result, the CRA issued a number of demand letters for the Applicant to file its T2 returns, and CRA agents placed two phone calls to request the Applicant's T2 returns for 2011-2013. At the date of the VDP disclosure, the Applicant's 2005-2010 T2s had been filed and assessed, while its 2011-2013 T2 returns had been filed, but not yet assessed.

[6] The Applicant requested a review and reconsideration of its VDP application on July 17, 2015. The second review was denied on March 18, 2016, again on the grounds that the Applicant's disclosure was not voluntary. On March 24, 2016, the Applicant filed an application with the Federal Court for judicial review of the Minister's decision.

[7] On May 20, 2016 the Applicant proposed to the Department of Justice ("DOJ") counsel, Mr. Whittaker, that the judicial review be settled on the basis that the 2005-2010 T1135 returns were voluntary and thus would qualify for the program, while the 2011-2013 T1135 returns would be subject to the statutory penalties. Mr. Whittaker responded by suggesting they settle the matter by discontinuing the judicial review and referring the application back to a new decision-maker for a reconsideration. He added that the DOJ would advise the new decision-maker that, in the DOJ's opinion, it was unlikely that the 2005-2010 information returns would have been uncovered by the CRA's enforcement action. On the basis of this proposal, the Applicant discontinued its judicial review and the decision was sent back for reconsideration. On reconsideration, the Minister's Delegate once again concluded that the Applicant's disclosure was not voluntary. The latter Decision is the subject of this judicial review.

III. Issues

[8] This matter raises the following issue: was the Minister's Delegate's Decision reasonable?

[9] The applicable provisions of the Act are as follows:

Waiver of penalty or interest	**Renonciation aux pénalités et aux intérêts**
220(3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or	**220(3.1)** Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là,

cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.

renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

Information Return

233(1) Every person shall, on written demand from the Minister served personally or otherwise, whether or not the person has filed an information return as required by this Act or the regulations, file with the Minister, within such reasonable time as is stipulated in the demand, the information return if it has not been filed or such information as is designated in the demand.

Déclaration de renseignements

233(1) Toute personne est tenue de fournir au ministre, sur demande écrite de celui-ci signifiée à personne ou autrement et dans le délai raisonnable qui y est fixé, qu'elle ait produit ou non, ou présenté ou non, une déclaration de renseignements en application de la présente loi ou du Règlement de l'impôt sur le revenu, les renseignements exigés dans la demande ou la déclaration de renseignements si elle n'a pas été produite ou présentée.

IV. Analysis

A. *Standard of review*

[10] The standard of review to be applied to questions of fact, as well as the review of the Minister's Delegate's Decision, is reasonableness. In *Easton v Canada (Revenue Agency)*, 2017 FC 113 at paragraph 41, 275 ACWS (3d) 664, this Court set out the standard of review as follows:

> [41] A decision under subsection 220(3.1) of the Act is of a discretionary nature and the Court must thus show deference to the Minister's Delegate *(Tomaszewski v Canada (Minister of Finance)*, 2010 FC 145 at para 17). Hence, the decision rendered by the Minister's Delegate under the taxpayer relief provisions must be assessed against the reasonableness standard *(Lanno v Canada (Customs and Revenue Agency)*, 2005 FCA 153; *Amoroso v Canada (Attorney General)*, 2013 FC 157 at para 50; *Christie Estate v Canada (Attorney General)*, 2007 FC 1014 at para 11).

B. *The Parties' Submissions*

(1) Applicant

[11] The Applicant submits the Minister's Delegate relied on three facts when concluding that the CRA would likely have uncovered the Applicant's T1135 filing obligations: 1) the Minister requested that the Applicant file its outstanding T2 income tax returns at various times from 2002-2014; 2) at the time of the Applicant's 2005-2013 T1135 disclosure, its outstanding T2 returns had not yet been assessed; and 3) the Applicant's 2011-2013 T2 returns indicated that it owned foreign property valued over $100,000.

[12] The Applicant submits the first and second facts are incorrect, as its 2005-2010 T2 returns had already been assessed at the date of disclosure, and thus there was no enforcement action outstanding regarding the Applicant's 2005-2010 taxation years.

[13] The Applicant submits the third fact is accurate, but is insufficient on its own to support the Minister's Delegate's finding that it was likely the CRA would uncover the Applicant's 2005-2010 and 2011-2013 T1135 filing obligation. The Applicant filed an access to information request with the CRA asking if it had records of any practice in 2011, 2012, or 2013 of investigating or following up with taxpayers who submit T2 return and check "yes" to box 259 indicating that the corporation owns foreign property valued at over $100,000, but who failed to attach a T1135 return. The Applicant received a response that no records were located.

[14] The Applicant submits that the requirement to file T1135 returns exists in ss. 233.3(3) of the *Act* and, as such, it is separate and apart from the requirement to file a T2 return under ss.150(1) of the *Act*. The Applicant submits that, while line 259 of the T2 return asks whether a T1135 information return should be filed, there is no requirement in the *Act* that a T1135 information return be filed alongside the T2 return. The Applicant further submits that there is nothing in a filed T1135 return that discloses a requirement to file a T1135 return for prior years.

[15] Based on the above, the Applicant submits that the Minister's Delegate's finding that enforcement action against it would likely have uncovered its T1135 filing obligations was pure conjecture, of the type rejected by this Court in *Amour International Mines d'Or Ltée v. Canada (Attorney General)*, 2010 FC 1070 and *Worsfold v Canada (National Revenue)*, 2012 FC 644.

[16] The Applicant further submits that there is nothing in the record that was before the Minister's Delegate that would have made her finding reasonable. The Applicant submits that a tax service office (TSO) review of the Applicant (as referenced in the Minster's February 9, 2015 diary notes) is unlikely to have uncovered the Applicant's T1135 filing obligations. The Applicant further submits that the CRA agents who telephoned the Applicant focused on the 2011-2013 T2 returns, and not T1135 information returns.

(2) Respondent

[17] The Respondent submits that the Minister reasonably concluded that the CRA's enforcement action would likely have uncovered the Applicant's T1135 filing obligations. It begins by noting that, in response to a demand from the Minister, ss. 150(2) of the *Act* requires a person to file income tax returns in the prescribed form and containing the prescribed information. It further notes that the prescribed form for a corporation is the T2 Corporate Income Tax Return, and that page 2 of the T2 return states "[f]or each yes response, attach the schedule to the T2 return" (emphasis in original). Line 259 of the T2 asks "[d]id the corporation own specified foreign property in the year with a cost amount over $100,000", and the Respondent submits that that if the taxpayer answers yes, the corresponding T1135 return must be filed with the T2 return.

[18] The Respondent further submits that CRA's demand for the Applicant to file its 2011-2013 T2s not only would have uncovered the information that the Applicant sought to disclose, but that it did in fact uncover this information, as line 259 on the Applicant's returns indicated it is a reporting entity obliged to file T1135 information returns.

[19] The Respondent submits that having learned of the foreign property from the demanded 2011-2013 T2 returns, having flagged the Applicant's compliance for further review (in part, for having assets over $500,000), and being in possession of information that the largest asset reported in the Applicant's 2011-2013 returns was land valued at $1,552,500, the CRA was likely to discover that the Applicant's ownership of the foreign land predated 2011. The Respondent submits that, to hold otherwise would be to find that no one at the CRA would ask how and when the Applicant acquired foreign land worth $1,552,500 while reporting modest net income.

[20] The Respondent submits that the VDP's purpose is to encourage taxpayers to voluntarily correct their failures to fulfill tax obligations, and that it was reasonable for the Minister's Delegate to reject the Applicant's attempt to deliberately omit the required T1135 information returns from its 2011-2013 returns and then later purport to file them voluntarily under the VDP. The Respondent submits the VDP is not intended to serve as a vehicle for taxpayers to intentionally avoid their legal obligation under the *Act*.

C. *Voluntariness of the Disclosure*

[21] Both parties agree that the only issue in dispute is whether the Applicant's disclosure was voluntary. Both parties also agree that two key issues for determining voluntariness are whether the CRA was engaged in enforcement action involving the Applicant, and, if so, whether this enforcement action was likely to uncover the disclosed T1135 returns.

(1) Was enforcement action ongoing?

[22] As stated by the Applicant, the Minister's Delegate's assertion that "on the date that we received your disclosure request, your T2 returns were not assessed," is partially inaccurate. The Applicant's 2005-2010 T2 returns had, in fact, been assessed. As the Information Circular is silent as to when enforcement action is deemed complete, I believe that in the present circumstances (i.e. having accepted and assessed the Applicant's 2005-2010 T2 returns), the only reasonable interpretation is that the CRA's enforcement action regarding these returns was complete. However, as the Respondent and the Decision point out, paragraph 33 of the Information Circular states that enforcement actions relating to *any period or year* is considered to be enforcement actions for *all taxation years*. While the Applicant had submitted its 2011-2013 T2 returns one day prior to submitting its VDP application, these returns had not yet been assessed. I agree with the Respondent that that this means enforcement action was ongoing in relation to the 2011-2013 T2 returns, and thus that enforcement action was ongoing for all years.

[23] While it would have been preferable for the Minister's Delegate to draw a distinction between the enforcement actions that had concluded and those that were ongoing, I believe nothing substantial stems from this error.

(2) Was enforcement action likely to uncover the Applicant's failure to file its T1135 returns?

[24] The next question is whether enforcement action was likely to uncover the Applicant's failure to file its T1135 returns. I agree with the Applicant that the returns should be considered

in two separate groups, 2011-2013 and 2005-2010, and thus will proceed to analyze them on this basis.

(a) *2011–2013 Returns*

[25] I believe the Minister's Delegate's finding regarding the Applicant's 2011-2013 T1135 returns was reasonable. I agree with the Respondent that ss. 150(1) and 150(2) of the *Act* require information to be submitted in the prescribed form, and that page two of the T2 returns directs individuals to attach the required schedules to any submitted T2 return. Thus, the Applicant is incorrect that the *Act* allows it to file T1135 returns separately from its T2 returns.

[26] The Minister's Delegate found that, as the Applicant's 2011-2013 T2 returns stated that it was required to file T1135 returns, the enforcement action taken by the CRA would likely have uncovered its obligation to file T1135 returns. This is clearly a reasonable finding. I am not persuaded by the Applicant's submissions concerning its access to information request; the fact that the request failed to return any relevant documents does not constitute proof that the CRA would not have discovered the Applicant's failure to file its T1135 returns. T1135 returns are one of over 50 different schedules corporations may be required to attach to their T2 returns. I believe it was reasonable for the Minister's Delegate to conclude that a CRA agent would seek to follow up with the Applicant regarding its obviously missing T1135 return.

(b) *2005–2010 Returns*

[27] I agree with the Applicant that the Minister's Delegate's finding regarding the Applicant's 2005-2010 returns was unreasonable. The Minister's Delegate's reasons do not indicate that she considered the possibility that the 2005-2010 disclosure may have been voluntary, even if the 2011-2013 disclosure was not. Although the enforcement action regarding the Applicant's 2011-2013 T2 returns is clearly considered by the VDP program to be enforcement action regarding the 2005-2010 period, I do not believe the Minister's Delegate has provided adequate reasons to support her finding that this enforcement action would likely have uncovered the Applicant's 2005-2010 T1135 filing obligation.

[28] The Respondent evokes a plausible scenario in which a CRA agent, having discovered that a T1135 return is required for a given year, is likely to check whether a T1135 return was required and filed for previous years. However, the scenario the Respondent describes has no basis in the record, nor has the Respondent provided any evidence that such an approach is a standard practice of the CRA. Nothing in the Minister's Delegate's reasons, or the materials before her, suggest that such a scenario was the reason that she found the Applicant's 2005-2010 disclosure was not voluntary. Rather, the reasons provided by the Minister's Delegate were that filing T1135 returns is an integral part of completing T2 returns, and that the Applicant's T2 returns had not yet been assessed. However, as noted above, the Applicant's 2005-2010 T2 returns had been assessed. Given this scenario, there is nothing in the Decision that supports the Minister's Delegate's conclusion that the CRA would likely have uncovered the Applicant's requirement to file T1135 returns for 2005-2010.

[29] I also agree with the Applicant that Minister's Delegate's failure to consider the 2005-2010 T1135 returns separately from the 2011-2013 T1135 returns was particularly troubling, as this distinction was the basis upon which the first judicial review application was resolved. The Minister's Delegate was certainly not bound by the DOJ letter. However, it was reasonable for the Applicant to expect that the Minister's Delegate would at least explain why it was departing from the advice of its own legal counsel.

[30] The record before the Minister's Delegate shows the CRA officer who reviewed the two VDP decisions, and made a recommendation to the Minister's Delegate, was aware of the DOJ letter. The CRA officer wrote that the "recommendation of the DOJ mentions that the agent that reviewed the second review did not address the issue of if the enforcement action was likely to have uncovered the information being disclosed." This in-and-of itself indicates an erroneous understanding the DOJ's recommendation letter, and the CRA officer's notes do not show that he considered the possibility that some, but not all, of the disclosure may have been voluntary. Notably, the notes include the error repeated in the Minister's Delegate's decision that "[a]t the time of the Voluntary Disclosure, the T2 Returns were not assessed". Nothing in the decision shows that the Minister's Delegate even considered the DOJ letter, nor does the Decision explain why the Minister's Delegate believed that the CRA's enforcement action was likely to uncover the Applicant's 2005-2010 T1135 returns. In this regard, for these reason and based on the facts of this case, the Decision is unreasonable.

V. Conclusions

[31] The application for judicial review is allowed. The Minister's Delegate's Decision was based on erroneous findings of fact and without regard for the material before her.

[32] Moreover, the Decision failed to explain why the CRA's enforcement action was likely to uncover the Applicant's 2005-2010 T1135 filing obligations, and failed to address the DOJ letter advising the same.

JUDGMENT in T-63-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.
2. The Decision was based on a finding of fact that was unreasonable.
3. This matter is referred back to a different delegate authorized by the Minister for redetermination.
4. There will be no order as to costs.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-63-17
STYLE OF CAUSE:	MATTHEW BOADI PROFESSIONAL CORPORATION v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	DECEMBER 11, 2017
JUDGMENT AND REASONS:	AHMED J.
DATED:	JANUARY 19, 2018

APPEARANCES:

Mr. Lauchlin MacEachern	FOR THE APPLICANT
Ms. Valerie Meier	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Moodys Gartner Tax Law LLP Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANT
Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT