Date: 20090706

Docket: T-655-08

Citation: 2009 FC 698

Ottawa, Ontario, July 6, 2009

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

SERGE CÔTÉ FAMILY TRUST

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] The applicant requested the cancellation of a penalty imposed by the Canada Revenue Agency for late filing of Form T2062. The Assistant Director of the Audit Division at the Eastern Quebec Tax Services Office refused the request. The applicant is now seeking judicial review of that decision.

THE FACTS

[2] The applicant is a foreign trust established in Florida on May 23, 2000, by Serge Côté, its sole trustee. Through a transaction performed on January 31, 2005, it disposed of assets by rollover to 6287182 Canada Inc., a Canadian company incorporated by Mr. Côté in September 2004. That corporation is taxable within the meaning of the *Income Tax Act*. The transaction was related to a $625,000 debt as well as 710 class "A" shares of a third party.

[3] On March 6, 2006, relative to that transaction, the applicant filed with the CRA Form T2057 entitled "Election on Disposition of Property by a Taxpayer to a Taxable Canadian Corporation" along with the rollover contract that it had signed with the numbered company. However, it failed to file Form T2062 entitled "Request by a Non-Resident of Canada for a Certificate of Compliance Related to the Disposition of Taxable Canadian Property". That was what caused the complications now before the Court.

[4] Pursuant to subsection 116(3) of the *Income Tax Act*, every non-resident person who disposes of any taxable Canadian property must send to the Minister, within ten days following the disposition, a notice containing certain prescribed information, including Form T2062. In case of failure to produce the information prescribed by the Act, penalties are imposed under subsection 162(7) of the Act. Those provisions read as follows:

Income Tax Act, R.S.C. 1985, c.1 (5th Supp.)

116. (3) Every non-resident person who in a taxation year disposes of any taxable Canadian property of that person […] shall, not later than 10 days after the disposition, send to the Minister, by	116. (3) La personne non-résidente qui dispose de son bien canadien imposable […] au cours d'une année d'imposition est tenue d'envoyer au ministre, dans les dix jours suivant la disposition,

registered mail, a notice setting out

(*a*) the name and address of the person to whom the non-resident person disposed of the property (in this section referred to as the “purchaser”),

(*b*) a description of the property sufficient to identify it, and

(*c*) a statement of the proceeds of disposition of the property and the amount of its adjusted cost base to the non-resident person immediately before the disposition,
unless the non-resident person has, at any time before the disposition, sent to the Minister a notice under subsection 116(1) in respect of any proposed disposition of that property and

(*d*) the purchaser was the proposed purchaser referred to in that notice,

(*e*) the estimated amount set out in that notice in accordance with paragraph 116(1)(*c*) is equal to or greater than the proceeds of disposition of the property, and

(*f*) the amount set out in that notice in accordance with paragraph 116(1)(*d*) does not exceed the adjusted cost base to the non-resident person of the property immediately before the disposition.

…

sous pli recommandé, un avis contenant les renseignements suivants :

a) les nom et adresse de la personne en faveur de qui elle a disposé du bien (appelée l’« acheteur » au présent article);

b) une description du bien permettant de le reconnaître;

c) un état indiquant le produit de disposition du bien ainsi que le montant du prix de base rajusté du bien, pour elle, immédiatement avant la disposition,
sauf si la personne non-résidente a envoyé au ministre, à un moment donné avant la disposition, et conformément au paragraphe (1), un avis concernant toute disposition éventuelle de ce bien, et si, à la fois :

d) l’acheteur est l’acheteur éventuel mentionné dans cet avis;

e) le montant estimatif mentionné dans cet avis conformément à l’alinéa (1)*c*) est égal ou supérieur au produit de disposition du bien;

f) le montant mentionné dans cet avis conformément à l’alinéa (1)*d*) ne dépasse pas le prix de base rajusté du bien, pour la personne non-résidente, immédiatement avant la disposition

…

162. (7) Every person (other than a registered charity) or partnership who fails (*a*) to file an information return as and when required by this Act or the regulations, or (*b*) to comply with a duty or obligation imposed by this Act or the regulations is liable in respect of each such failure, except where another provision of this Act (other than subsection 162(10) or 162(10.1) or 163(2.22)) sets out a penalty for the failure, to a penalty equal to the greater of $100 and the product obtained when $25 is multiplied by the number of days, not exceeding 100, during which the failure continues.	162. (7) Toute personne (sauf un organisme de bienfaisance enregistré) ou société de personnes qui ne remplit pas une déclaration de renseignements selon les modalités et dans le délai prévus par la présente loi ou le *Règlement de l'impôt sur le revenu* ou qui ne se conforme pas à une obligation imposée par la présente loi ou ce règlement est passible, pour chaque défaut, sauf si une autre disposition de la présente loi (sauf les paragraphes (10) et (10.1) et 163(2.22)) prévoit une pénalité pour le défaut — d'une pénalité égale, sans être inférieure à 100 $, au produit de la multiplication de 25 $ par le nombre de jours, jusqu'à concurrence de 100, où le défaut persiste.

[5] In October 2006, a CRA auditor noticed that the applicant still had not filed Form T2062 regarding the transaction of January 31, 2005, and requested that the form be filed. The applicant followed up and submitted a duly completed Form T2062 to the CRA on November 2, 2006.

[6] On August 30, 2007, that is, almost a year later, the applicant received from the CRA a Notice of Assessment requesting that it pay a $2,500.00 penalty and interest for failing to file Form T2062 within the prescribed time limit, in accordance with subsection 162(7) of the Act.

[7] The applicant then submitted a request for cancellation of the penalty alleging confusion in regard to the obligation to file the form in question. In a letter addressed to the CRA, dated

August 30, 2007, counsel for the applicant claimed that [TRANSLATION] "upon reading Interpretation Bulletin 72-17R4, we had understood that filing the form was not obligatory and that the only consequence of not filing it was that the purchaser became responsible for the tax resulting from the transaction. Since no tax resulted from the rollover transaction of January 31, 2005, that consequence did not apply to us at all, so we did not file Form T2062". He added that it was not until March 2005, that is, after the transaction in question, that the CRA revised its Interpretation Bulletin to say that penalties set out in subsection 162(7) of the Act will be imposed in case of failure to file Form T2062 on time.

[8] The CRA first replied to the request for cancellation with a letter dated February 13, 2008, as follows:

> [TRANSLATION]
> Subsection 220(3.1) of the *Income Tax Act* gives the Minister the discretion to cancel all or part of the penalties and interest payable in a case where the taxpayer was prevented from complying with a requirement of the *Income Tax Act* as a result of extraordinary circumstances beyond the taxpayer's control (flood, fire, postal strike, serious illness or accident, serious mental distress such as death in the immediate family).

[9] Unsatisfied with that response, the applicant sought to have its request reassessed. Pierre Boutin, Assistant Director of the Audit Division, proceeded to reassess the applicant's circumstances and allegations. In a letter dated March 27, 2008, he confirmed the refusal to cancel the penalty and repeated that the CRA was unable to note [TRANSLATION] "any extraordinary circumstances beyond your representative's control or any actions of the Canada Revenue Agency that would have prevented you from fulfilling that obligation or from complying with a requirement of the Act". The reasonableness of that decision is at issue here.

ISSUES AND SUBMISSIONS OF THE PARTIES

[10] In support of its application for judicial review, the applicant submits that [TRANSLATION] "for unknown reasons, the Minister of National Revenue based his decision on extraordinary circumstances, thus exercising his discretion erroneously and unreasonably" and that [TRANSLATION] "the Minister erred in finding that the applicant's request for relief was inadmissible". The applicant refers to Information Circular IC 07-1, which states that one of the times that relief from a penalty may be granted is when the CRA's actions caused the taxpayer not to file a form as part of an obligation to report and argues that the CRA should not have analyzed its request based on "extraordinary circumstances", but rather on "actions of the CRA" and the publication of administrative material containing errors. The applicant submits that it was in fact misled by the information in Information Circular 72-17R4. According to the applicant, the Circular led it to believe that it was acceptable to provide documentation equivalent to Form T2062, which it did on March 6, 2006, by submitting a copy of the assignment agreement dated January 31, 2005, along with Form T2057. It also claimed that the Circular in question suggested that the taxpayer was required to file Form T2062 only when the underlying transaction produced taxable income, which was not so in this case, because the transfer of the applicant's assets was done by rollover pursuant to subsection 85(1) of the Act. In these circumstances, the applicant submits that its request for cancellation of the penalty at issue was admissible and repeats that it should have been analyzed based on "actions of the CRA" and not "extraordinary circumstances".

[11] In its argument, the applicant also submitted that, in order to decide whether a penalty should be imposed on it, the respondent should consider whether he had suffered any type of prejudice.

[12] After hearing the submissions of the parties to the litigation, I am satisfied that the respondent suffered no prejudice and that Form T2062 was filed. It is clear that the applicant owed no taxes after filing the form.

[13] The respondent submits that the document entitled [TRANSLATION] "Analysis of the Application" reproduced at pages 45-47 of its file showed that the Minister's delegate had considered all the facts relevant to the request, including the clarity of the requirements in subsections 116(3) and 162(7) of the Act as well as the fact that Information Circular 72-17R4 explicitly stated that non-resident vendors are required to notify the Minister within ten days after they dispose of taxable Canadian property. According to the respondent, it follows that the Assistant Director's decision is reasonable with respect to administrative law and should not be set aside.

CONSIDERATIONS

[14] In regard to situations like this one, we must recall that it is not the role of a reviewing court to reweigh the evidence. In this case, it is clear from reading the report prepared by the CRA after the applicant's second request for relief (pages 39–42 of the respondent's file) that all of the arguments presented before the Court today, except for the fact that the respondent suffered no prejudice, were duly analyzed and considered by the CRA at the time of the second request for relief. Therefore, the applicant's claim that its application was not analyzed based on the "actions of the CRA" is without merit. In fact, the author of the report recommended that the penalty be upheld precisely because the applicant's explanations that it was led astray by Circular 72-17R4 were found unsatisfactory.

[15] Having reviewed Circular 72-17R4, I agree with the author of the report that nothing in that document could reasonably lead a taxpayer in the applicant's situation to conclude that it was not necessary to comply with the requirement set out in subsection 116(3) of the Act. The fact that the consequence of failure to comply with that provision is not explicitly stated in the Circular does not justify the applicant's actions, since the *Income Tax Act* itself was very clear on that point. The applicant's position is to equate the fact that the consequence of non-compliance with an explicit provision of the Act was not explicitly stated in an information circular with a misdirection. I cannot agree with that position.

[16] For these reasons, I dismiss this application for judicial review.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed without costs.

"Max M. Teitelbaum"
Deputy Judge

Certified true translation
Margarita Gorbounova, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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