Federal Court		Cour fédérale

Date: 20110211

Docket: T-2125-09

Citation: 2011 FC 165

Ottawa, Ontario, February 11, 2011

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

LARRY BONTJE

Applicant

and

FORCAP INTERNATIONAL LIMITED

Applicant

and

FORCAP INTERNATIONAL INC.

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The issue in this case is whether Mr. Lawrence Bontje and his two companies are entitled to benefit from the Canada Revenue Agency (CRA) Voluntary Disclosures Policy (VDP). In a

decision dated November 19, 2009 (the Decision), CRA refused to apply the VDP to the applicants. This application is for judicial review of that Decision.

BACKGROUND

[2] Lawrence Bontje (who will be described as the Applicant) is the sole director, officer and shareholder of Forcap International Ltd. (FIL) and Forcap International Inc. (FII). Both corporations pay all their income to the Applicant. The Applicant has never filed tax returns for either company although they were incorporated in 2000 and 1997 respectively.

[3] The Applicant filed his last personal income tax return in 1999 and did not pay the taxes owed for either his 1998 or 1999 taxation years. He subsequently arranged a payment schedule with CRA to cover those unpaid amounts but he defaulted on his obligations.

[4] CRA maintained contact with the Applicant from 2000 until April 29, 2002 in an effort to recover the unpaid taxes. However, after April 2002, the Applicant changed his residence several times and did not advise CRA of his new addresses. Accordingly, CRA lost contact with the Applicant for approximately four years.

[5] On March 28, 2002, CRA issued a request to the Applicant to file his return for the 2000 taxation year. It was followed with a request dated July 12, 2002 asking for his return for 2001. Approximately two years later, on March 30, 2004, CRA issued another request asking the

Applicant to file returns for both his 2000 and 2001 taxation years. On the same date, CRA also sent a request to FII asking for its returns for the years 1998 to 2002. No responses were received.

[6] In 2003, since no return had been filed, CRA completed and mailed to the Applicant an arbitrary assessment for his 2000 taxation year pursuant to subsection 152(7) of the Act. However, this assessment did not reach the Applicant because he had moved.

[7] The Applicant says that he was contacted by CRA in 2004 or 2005 and that he referred them to his trustee (the Trustee). On the other hand, CRA says that, on February 1, 2006, it was contacted by the Trustee. He provided CRA with the Applicant's then current address and spoke with CRA several times between February 1, 2006 and March 14, 2007. At that time, the Trustee advised CRA that the Applicant was considering declaring bankruptcy.

[8] In 2007, CRA prepared arbitrary assessments for the Applicant's 2001 to 2004 taxation years. Although these were mailed to the Applicant, he says that they were not received.

[9] On March 28, 2008 and May 13, 2008, further requests to file a tax return for 2006 were sent to the Applicant. On May 8, 2008, the Applicant filed his return for 2006 showing that nothing was owing. However, a subsequent Notice of Assessment for 2006 dated July 28, 2008 shows that a balance of approximately $396,350.00 was due from previous years.

[10] CRA relied on the affidavit of Lauraine Friskey sworn on March 10, 2010. She admitted in her cross-examination that, when the Applicant filed his 2006 return, the enforcement action (i.e., the request to file that return) was "complete".

[11] On August 25, 2008, requests for relief under the VDP were filed for the Applicant and his two corporations in respect of their unfiled returns. The Applicant's request covered the years 2000 to 2005 and 2007. The request for FIL dealt with 2000 to 2007 and the one for FII covered 1997 to 2007.

THE INFORMATION CIRCULAR

[12] On October 22, 2007, CRA published an information circular No. IC00-1R2 (the Circular) dealing with the VDP. Its introduction reminds the reader that the program is discretionary and says that the Circular "...outlines the administrative guidelines the CRA will follow in making a decision whether to accept the disclosure as valid".

[13] Paragraph 32 of the Circular reads, in part, as follows:

> 32. A disclosure will not qualify as a valid disclosure, subject to the exceptions in paragraph 34, under the "voluntary" condition if the CRA determines:
>
> [...]
>
> • Enforcement action relating to the disclosure was initiated by the CRA or any other authority or administration on the taxpayer, or on a person associated with, or related to the taxpayer (this includes, but is not restricted to, corporations, shareholders, spouses and partners), or on a third party [...]

[14] Paragraph 33 of the Circular says that, for the purposes of the VDP, an "enforcement action" may include, but is not limited to:

- requests issued by CRA relating to unfiled returns and, although the request may only relate to one year, it will be considered an enforcement action for all taxation years for the purposes of the VDP; and
- direct contact by a CRA employee for any reason relating to non-compliance.

THE DECISION

[15] The Decision denied VDP relief to the Applicant and to FIL and FII for the following reasons:

(i) According to the Circular, the March 28, 2008 Request was an enforcement action for all years covered by the VDP;

(ii) As well, the Applicant had been spoken to by a CRA Collections officer about payment on more than one occasion and, according to the Circular, this disentitled him to the VDP relief;

(iii) The arbitrary assessments of the Applicant, under subsection 152 of the *Income Tax Act*, RS 1985, c 1 (5th Supp) (the Act) were also enforcement actions;

(iv) CRA had made numerous attempts to contact the Applicant when he did not update his addresses. These efforts were made by mail, phone and personal visits to his home and office; and

(v) Promises to pay had been made and were broken.

THE APPLICANT'S SUBMISSIONS

[16] Against this background, the Applicant says that, although the request of March 28, 2008 asking the Applicant to file his 2006 income tax return (the Request) was an enforcement action, it expired in May 2008 once the return was filed. Accordingly, he says that the Request cannot bar his application for VDP relief because it was made five months later.

[17] On this issue, the Applicant also notes that, in the illustration provided in paragraph 33 of the Circular, the request to file which defeated the application for VDP relief had not been complied with when the VDP application was filed. In this case, in contrast, the Request was not outstanding when the VDP application was made in August 2008.

[18] The Applicant further submits that he was not "on CRA's radar" when he applied for the VDP because he had complied with the Request and because, after it stopped dealing with the Trustee in March of 2007, CRA took no action for eighteen months to collect amounts owing pursuant to the arbitrary assessments of 2003 and 2007.

[19] According to the Applicant, this meant that he was not "on CRA's radar" from March 2007 until it issued the Request on March 28, 2008 and, once the 2006 return was filed, the Applicant was again "off CRA's radar" when the request for VDP relief was filed. Accordingly, it is submitted that he came forward voluntarily.

[20] The Applicant also says that CRA erred in law when it treated the arbitrary assessments as enforcement actions for the purposes of the VDP. He says that, while such assessments create liability and can lead to collections activity, they are not, in themselves, enforcement actions and are not described as such in the Circular.

[21] Further, the Applicant says that CRA also erred in law when it treated the numerous conversations between the Applicant and CRA Collections as enforcement actions because those conversations all took place between 2000 and April 29, 2002 and concerned the 1998, 1999 and 2000 taxation years. The Applicant says that there must be a recognition that enforcement actions expire and that it is not reasonable that they be open-ended. Accordingly, the earlier contact should be ignored when an application for VDP relief is being considered.

[22] Lastly, the Applicant submits that the contacts between CRA Collections and the Trustee are too far in the past to have been considered when the Decision was made. Their last contact was in March 2007.

[23] For all these reasons, the Applicant says that his VDP applications were not prompted by action on CRA's part.

THE RESPONDENT'S SUBMISSIONS

[24] The Respondent says that the fact that the Request was issued disqualifies the Applicant from VDP consideration even though he complied with the Request before applying for VDP relief.

Compliance, in the Respondent's submissions is irrelevant. In its view, the purpose of the VDP is to give relief to taxpayers who come forward of their own volition before any enforcement action is taken. In other words, once the taxpayer is "on CRA's radar", relief under the VDP is no longer available.

THE STANDARD OF REVIEW

[25] In my view, the Decision involves the exercise of extraordinary discretion. As well, it relies on CRA's expertise in the administration of the VDP. Accordingly, I will consider the Decision using reasonableness as the standard of review. In reaching this conclusion, I have been mindful of the decision of Mr. Justice Roger Hughes in *McCracken v The Queen*, 2009 FC 1189, 2009 DTC 5192 in which he was reviewing a decision under the VDP and applied the reasonableness standard.

DISCUSSION

[26] I have not been persuaded by the majority of the Applicant's submissions. First, there is no suggestion in the Circular that, for the purpose of the VDP, enforcement actions "expire". The Circular says, in paragraph 32, that the "initiation" of enforcement action precludes taxpayers from obtaining relief. Accordingly, the issuance of the Request on March 28, 2008 was an enforcement action and it served as a clear signal that CRA was pursuing the Applicant. In these circumstances, his application, five months later, for VDP relief cannot be considered voluntary.

[27] In reaching this conclusion, I have determined that the fact that the enforcement action was "completed" when the 2006 return was filed is irrelevant for the purpose of the VDP. As well, the fact that, for a time in March 2008, the CRA considered writing off the Applicant's tax debt is also, in my view, irrelevant.

[28] Second, I do not agree with the Applicant's submission that CRA is somehow estopped from denying VDP relief because it took no collection action on the arbitrary assessments of 2003 and 2007 after March of 2007, when it last spoke with the Trustee. In my view, the enthusiasm the CRA displays for collection activity has nothing to do with whether discretion should be exercised in favour of allowing a taxpayer VDP relief. What is important, according to the Circular, is enforcement activity.

[29] Third, since the taxpayer's unfiled returns date back into the last century, it was not unreasonable for CRA to rely on contact in 2000 and 2001 for the purpose of collections and contact in 2006 and 2007 with the Trustee and the Applicant (according to his affidavit) to defeat VDP relief. The Circular makes it clear that even one such contract is treated as an enforcement action.

[30] On the other hand, I do agree with the Applicant's submission that the arbitrary assessments should not have been treated as enforcement actions. They simply create liability and make it possible to start collections procedures. This explains why they are not mentioned in the Circular. However, the mischaracterization of the arbitrary assessments as enforcement action is not fatal to the Decision because it was also based on other enforcement actions that are listed in the Circular.

DISPOSITION

[31] Having concluded that the Decision is reasonable, the application will be dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that, for all these reasons, the application for judicial review is dismissed with costs to the Respondent.

"Sandra J. Simpson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2125-09
STYLE OF CAUSE:	LARRY BONTJE ET AL v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 27, 2010
REASONS FOR JUDGMENT:	SIMPSON J.
DATED:	February 11, 2011

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