

Denial of Application for Voluntary Disclosure - Motion to Strike Judicial Review

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[Canada \(National Revenue\) v Sifto Canada Corp, 2014 FCA 140](#)

The FCA dismissed an appeal of the FCTD's dismissal of the Crown's motion to strike two applications of judicial review (2013 FC 214) on the basis that there was sufficient doubt about the Minister's position that one of the JR applications should not be allowed to continue (despite the multiplicity of proceedings (para 26).

The FCA held that a challenge to the discretionary exercise of power (in this case discretion to waive penalties and interest) can only be made by way of judicial review to the Federal Court. (para 23). Potential remedies are a declaration based on administrative law principles that the Minister acted unreasonably in failing to waive the penalties, a declaration that the penalties should not have been assessed in the face of a valid voluntary disclosure, or an order precluding the Minister from enforcing the penalty assessment or collecting the resulting tax debt (para 25).

FACTS

Sifto submitted an application under the Voluntary Disclosure ("VD") program in relation to the transfer price of Rock salt it sold to a related US corporation. The Minister accepted the disclosure as meeting the requirements of the program, entered into agreements with Sifto to settle its income tax liability (on the basis of the mutual agreement price as between the US and Canada), BUT then issued assessments and reassessments using a price other than the mutual agreement price AND included penalties under subsection 247(3) of the ITA.

Sifto took the position that once the Minister accepts the VD as meeting the conditions of the program, the Minister is bound to waive penalties and interest, consistent with the published terms and conditions of the VD program.

ANALYSIS

The VD program induces taxpayers to disclose past compliance errors in the expectation that, if the disclosure is accepted as meeting the program conditions, any penalties and interest that may have been imposed in relation to the disclosed errors would be waived (under the Minister's authority in subsection 220(3.1))

The FCA referred to the CRA's published policy (IC 00-1R2 - Current version [IC00-1R4](#)) that contains the 4 conditions for a valid disclosure (voluntary, complete disclosure that involves application or potential application of a penalty, and information that is at least one year old). The FCA notes that the record before it did not contain an explanation for the Minister's decision.

The Court reviewed the law as to preliminary motions to strike, noting that such a motion fails " unless the application is so clearly improper as to be bereft of any possibility of success: [JP Morgan, 2013 FCA 250](#) at paragraph 47; *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [\[1995\] 1 F.C. 588](#) at page 600 (C.A.).

The standard of review was set out in *Apotex Inc. v. Canada (Governor in Council)*, [2007 FCA 374](#) at paragraph 15 (cited with approval in *Canada v. Domtar Inc.*, [2009 FCA 218](#); *Canadian Imperial Bank of Commerce v. Canada*, [2013 FCA 122](#)) :

The respondents correctly point out that the decision to grant or refuse a motion to strike is a discretionary one. When the lower court judge has made a discretionary decision, it will usually be afforded deference by the appellate court. However, the latter will be entitled to substitute the lower court judge's discretion for its own if the appellate court clearly determines that the lower court judge has given insufficient weight to relevant factors or proceeded on a wrong principle of law: *Elders Grain Co. v. Ralph Misener (The)*, [2005 FCA 139](#), at paragraph 13. This Court may also overturn a discretionary decision of a lower court where it is satisfied that the judge has seriously misapprehended the facts, or where an obvious injustice would otherwise result: *Mayne Pharma (Canada) Inc. v. Aventis Pharma Inc.*, [2005 FCA 50](#) at paragraph 9.

Sifto's argument was that the Minister has to honour the promise implicit in the VD program as described in the Information Circular. The FCA held that the record discloses no reason for it to interfere. The Federal Court has jurisdiction over some aspects of Income Tax assessments. It is only the Tax Court that has the jurisdiction to determine whether all of the statutory conditions for the imposition of the penalty were met (para 22), but the Tax Court does NOT have jurisdiction to determine whether the Minister properly exercised its discretion under subsection 220(3.1) - a challenge to the discretionary exercise of power can only be made by way of judicial review to the FC (para 23).

As for remedies, the FCA held that the FC could grant a declaration based on administrative law principles that the Minister acted unreasonably in failing to waive the penalties, a declaration that the penalties should not have been assessed in the face of a valid voluntary disclosure, or an order precluding the Minister from enforcing the penalty assessment or collecting the resulting tax debt (para 25).

- **Sas Ansari, JD LLM PhD (exp)**

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