

TAXADVISOR

Prompt Payment Penalty

COURT REPORT

BY JAMIE GOLOMBEK



Can the Canada Revenue Agency's discretion be held to task if it's not exercised reasonably? That was the subject in a case (*McNaught Pontiac Buick Cadillac Ltd. v. Canada*, 2006 FC 1296) decided in October when a taxpayer asked for a judicial review of the CRA's decision to deny his fairness request for waiver of a \$10,000 income tax penalty.

The taxpayer, a Winnipeg car dealership, is considered for income tax purposes to be a "large employer." As a result, under the *Income Tax Act* it is required to remit its payroll source withholding tax deductions to the CRA through a financial institution. On Sept. 20, 2005, McNaught was required to remit \$105,386 in payroll taxes.

Albert Sankow, an employee of McNaught, was responsible for delivering documents and cheques that day. He was given a cheque for the amount owing along with a remittance slip by McNaught's accounting department. When Sankow arrived at a local Royal Bank branch he discovered that he had misplaced the remittance form. Unfortunately, he was told that without the form, the bank could not accept the tax payment.

As Sankow knew the urgency of this payment being made on time, he went over to the Winnipeg Tax Services Office of the CRA and explained that he did not have the remittance form but did have the cheque. The CRA accepted the payment and Sankow was given a cheque remittance stub stamped Sept. 20, 2005.

About a week later, the CRA sent a Notice of Assessment indicating a penalty of \$10,539 or 10% of the amount of tax owing because the remittance of \$105,386 had been made directly to the CRA rather than to a financial institution, as required for large employers under the act. Two days later, McNaught requested to have the penalty waived, explaining that its "in-house courier mistakenly took the remittance to your location on Broadway instead of the Royal Bank."

On Oct. 21, 2005, the CRA denied his fairness request to waive the payment, saying: "We are unable to approve your request for relief under the criteria of 'extraordinary circumstances,' because we can find no evidence of circum-

stances beyond your control that would have prevented you from complying with the requirements of the *Income Tax Act*."

The CRA then went on to cite examples of extraordinary circumstances" which would include a natural disaster or a postal strike, all of which have grave impact on our day-to-day activities. The response continued, "Unfortunately, human error is not considered to be an 'extraordinary circumstance' as per our policies."

Shortly thereafter, McNaught

wrote another letter asking the CRA to reconsider its decision. The letter set out in more detail what had actually transpired on Sept. 20, 2005. This time, McNaught emphasized the fact that "the cheque was accepted at the Tax Services Office by the cashier and a receipt issued and no suggestion was made by the cashier that a remittance to that office was improper."

Again, the CRA denied the taxpayer's request for penalty relief and thus McNaught requested a

judicial review of the case by the Federal Court.

The judge analyzed the facts and then referred to the CRA's own document, Information Circular 92-2, "Guidelines for the Cancellation and Waiver of Interest and Penalties." In that circular, one of the examples of extraordinary circumstances was in paragraph 6(d) "errors in processing."

The judge wondered whether the CRA "should have considered whether the willingness of the cashier at the Tax Services Office to accept a cheque for \$105,386.05 was not an 'error in processing.'" The judge was not convinced by the CRA's arguments

that a cashier could not ascertain whether this taxpayer was entitled to remit to the Tax Services Office.

As a result, the judge concluded that the decision made by the CRA should be set aside "because [it] did not have regard to some relevant factors." The penalty was referred back to the CRA for reconsideration, "having regard to whether... discretion should be exercised so as to waive the penalty in whole or in part."

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