

T- 1758-18

FEDERAL COURT OF CANADA**MILGRAM FOUNDATION,**

Applicant,

- and -

**ATTORNEY GENERAL OF CANADA,
and
MINISTER OF NATIONAL REVENUE,**

ID#1

D E P O S E	COUR FÉDÉRALE FEDERAL COURT		F I L E D
	OCT 04 2018		
	TAGRID AKL		
	MONTREAL, QC		

Respondents

NOTICE OF APPLICATION FOR JUDICIAL REVIEW(Paragraph 18.1(1) of the Federal Courts Act, R.S.C., 1985, c. F-7)

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Montreal.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application, or to be served with any documents in this application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules* and serve it on the Applicant's solicitors, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN
IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

Dated at the City of Montreal, in the Province of Quebec, this 4th day of
October 2018.

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APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW IN RESPECT OF:

The decision of the Minister of National Revenue (the "Minister") to pursue an audit against the Applicant for its taxation years 1998 to 2002 (the "Decision"), contrary to the agreement confirmed in writing by the Minister on December 18, 2015 (the "Agreement"), accepting the disclosure (the "Disclosure") made by the Applicant as a valid and complete disclosure under the Voluntary Disclosure Program (the "VDP"). By its Decision, the Minister is repudiating a valid and binding Agreement between the Applicant and the Minister, upon which Agreement the Applicant has relied.

THE DECISION WAS COMMUNICATED TO THE APPLICANT ON:

September 7, 2018 (the Decision is dated September 5, 2018, but was communicated to the Applicant's representatives on September 7, 2018).

THE APPLICANT MAKES APPLICATION FOR AN ORDER:

1. Declaring that the Minister is bound by the Agreement;
2. Quashing the Decision;
3. In respect of the subject matter of the Agreement, declaring that the Minister is estopped from assessing taxation years of the Applicant other than those taxation years accepted as forming part of the Agreement (i.e., 2003 to 2014);
4. Granting the Applicant its Costs of this Application;
5. Granting such further and other relief as counsel may advise and as this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

a) The Applicant's Disclosure

1. The Applicant is a non-resident entity established in 1964 and subsists under the laws of Lichtenstein.
2. Since its inception, the Applicant has been managed by an independent Foundation Council (the "Foundation Council") all of whose members at all material times have been non-residents of Canada.
3. The members of the Foundation Council, throughout the period from 2003 to 2014, inclusive have been and continue to include Georg Kieber of Lichtenstein and Edgar H. Paltzer of Switzerland.
4. The Applicant is a "Stiftung", which is generally considered by the Canada Revenue Agency ("CRA") to be a trust.
5. As a factually non-resident trust, the Applicant believed that it was not subject to Canadian income tax and therefore did not file Canadian income tax returns since its inception.
6. In 2013, the Applicant was advised that it was likely deemed to be a resident of Canada under section 94 of the Income Tax Act ("ITA").
7. Canadian counsel recommended to the Applicant that it should file a voluntary disclosure under the Voluntary Disclosure Program ("VDP") made available by the Minister as set out in Information Circular IC-00R4.
8. The Applicant retained the services of the law firms Ravinsky Ryan Lemoine LLP ("RRL") and Davies Ward Phillips & Vineberg LLP ("Davies") to assist it with the voluntary disclosure.
9. The Applicant immediately initiated a process to recover as much of its past financial records and documents as possible for review and analysis by qualified Canadian accountants, a process that lasted almost two years (the "Process").
10. As a result of the Process, the Applicant was able to retrieve relevant financial records for taxation years commencing in 2003 and following.
11. Upon completing the Process, the Applicant initiated its Disclosure pursuant to the VDP on January 12, 2015.

12. The Applicant completed its Disclosure on July 31, 2015, by sending the VDP a detailed letter (the "Disclosure Completion Letter") together with all required forms, documents and relevant financial information, as well as the required tax payments.
13. As required by the Minister, the Disclosure Completion Letter provided a full and accurate disclosure of all of the material facts, including:
 - a) a complete history of the Applicant, including the fact that the Applicant was created in 1964 and had not filed Canadian income tax returns since its establishment (a fact that can be verified by the CRA by consulting its own records); and
 - b) the fact that the Applicant was prepared to acknowledge, for the purposes of the Disclosure, that it was a deemed resident of Canada pursuant to section 94 of the ITA.
14. The sole significant issue which needed to be resolved in the Applicant's Disclosure was the number of years for which the Applicant would be required to file Canadian income tax returns, so that its Disclosure would be considered valid and complete, pursuant to the VDP, which provides that a Disclosure will only be accepted if it is "complete".
15. In the Disclosure Completion Letter, the Applicant proposed that it should file Canadian income tax returns for a period of 12 years, specifically for its taxation years 2003 to 2014, inclusive.
16. In making this proposal, the Applicant took into account, *inter alia*, the following factors:
 - a) its desire to correct its past misunderstanding of Canadian income tax laws on an amicable and reasonable basis with the CRA;
 - b) the applicable and well-known administrative practices of the Minister at the time, to accept voluntary disclosures for the period for which verifiable financial records were available (generally assumed to be 10 years pursuant to the European laws pertaining to applicable banking records retention) and not to use or require estimates for periods for which no records were available;
 - c) the fact that the Minister is legislatively authorized under the ITA to reduce and cancel interest and penalties for a period of 10 years;

- d) the fact that it had made every possible effort, over a period of almost two years, to retrieve as much information and financial records as possible;
- e) the fact that it had successfully retrieved such records for the period 2003 to 2014, inclusive;
- f) the fact that it retained, at great expense, specialized and qualified Canadian professionals, to thoroughly analyze the records retrieved and calculate the income to be declared to the Minister pursuant to the VDP; and
- g) the fact that it was proposing to file returns for 12 years, that is two more years beyond the 10-year period which was routinely accepted by the Minister at the time.

b) The Minister's acceptance of the Disclosure

- 17. For the Minister, any voluntary disclosure filed is assigned to a VDP Officer, who is guided by the CRA's VDP Manual (the "VDP Manual").
- 18. The version of the VDP Manual in force at the time of the Agreement is Version 2.0, dated July 2015 (the earlier version, which was in force at the time the Applicant initiated its Disclosure, was version 1.4, dated August 20, 2014. For the purposes of this Application, references to the VDP Manual refer to version 2.0).
- 19. The VDP Manual provides the following guidelines concerning the test for completeness:
 - a) the VDP Officer is responsible for making a determination on the completeness of the disclosure and, in all cases, the FINAL decision on completeness rests with the VDP Officer;
 - b) the VDP Officer, before making his decision, shall satisfy himself that the taxpayer *"has made every effort to provide correct and complete information"*; and
 - c) to assist him *"in determining completeness for disclosures involving foreign-source income"*, the VDP Manual provides that the VDP Officer should consult Appendix XIX to the Manual, which states, for each country, the number of years for which records should be available (10 years for Switzerland, where the Applicant had its bank accounts) pursuant to the applicable domestic law.

20. The VDP Manual provides the following guidelines with respect to the "number of years" of disclosure issue:
- a) the determination of this issue is to be made by the VDP Officer;
 - b) the taxpayer must inform the VDP Officer of all of *"the facts and circumstances of the omission"*, to enable the VDP Officer to make a *"reasoned decision"*;
 - c) for years going beyond the statutory record-keeping period for books and records (6 years pursuant to section 230 ITA), the Minister *"must have enough information to justify its assessment"* (i.e., adequate records); and,
 - d) once the VDP Officer has determined how many years or periods are to be assessed and has his decision approved by his superior, *"only amounts that properly belong to those years or periods are to be included as adjustments for those years or periods"*.
21. In complex cases, the VDP Manual also recommends that the VDP Officer should refer the matter to an audit group, to assist her with any decision she is required to make in the process.
22. In the case of the Applicant, before accepting the Disclosure, the VDP Officer indeed referred the Applicant's Disclosure to the London Tax Services Office for a thorough audit.
23. Further to this audit, the VDP Officer issued a letter dated December 18, 2015, accepting the Applicant's Disclosure as submitted (the "Disclosure Acceptance Letter").
24. The Disclosure Acceptance Letter:
- a) clearly confirms that the Applicant's Disclosure was accepted as satisfying all of the voluntary disclosure criteria, including completeness;
 - b) clearly confirms that the only years to be assessed were 2003 to 2014, inclusive; and,
 - c) clearly reserves the right of the Minister to audit and reassess only the 2003 to 2014 years, inclusive, of the Applicant.

25. The Disclosure Acceptance Letter confirmed and sealed a valid and binding Agreement between the Applicant and the Minister, whereby the Minister, after being informed of all the relevant facts, including the fact that the Applicant has been in existence since 1964, accepted the filing of tax returns and related forms and documents for Applicant's 2003 to 2014 taxation years and the payment of the applicable taxes made by the Applicant as an appropriate settlement of the Applicant's obligations in respect of its omissions reported in the Disclosure.
26. Interpreting the VDP Manual and the Agreement as being non-binding would render the VDP capricious, as it would permit the Minister, despite entering into an agreement after *bona fide* discussions with the taxpayer or his representatives, and despite the VDP Officer having rendered a "*reasoned decision*" after completing the rigorous due process described in the VDP Manual, to remain free to repudiate the agreement and her own decision at any time and retain the discretion to ask for additional years and tax in respect of such additional years, without the taxpayer being entitled to the relief granted by the VDP.
27. In other words, the VDP would effectively entrap the taxpayer, because the taxpayer would be led to believe that an agreement has been reached, while the Minister would retain full discretion to impose the precise sanctions which the taxpayer sought to avoid by filing a voluntary disclosure! In these circumstances, the Minister is estopped from resiling from her Agreement.
28. Moreover, such a result would lead to unfairness and distrust between taxpayers and the Minister, as the Minister has made similar agreements with hundreds of taxpayers, which she has respected and has not repudiated or reneged on.
29. In addition, if the Minister was free to repudiate at will agreements that she entered into, taxpayers would hardly be enticed to negotiate settlements with her or to avail themselves of the VDP, thereby burdening the Court with significant additional unnecessary litigation.

c) **The Minister's second audit**

30. Initially, the Minister appears to have interpreted the Agreement in the same manner as the Applicant (i.e., that only the 2003 to 2014 years were open for audit), since the Minister wrote to the Applicant on July 8, 2016, advising the Applicant that she wished to conduct a second audit to review the returns filed by the Applicant for the said 2003 to 2014 years (the "Second Audit").

31. As this Second Audit, being confined to the years 2003 to 2014, was in full compliance with the Agreement, the Applicant fully cooperated with the audit.

d) The Decision

32. After a meeting that was held on February 9, 2018 with the Minister's auditors, the Applicant's representatives did not hear from those auditors until the beginning of September 2018, when they were shocked and dismayed to receive the Decision.

33. In short, after more than two years of audit:

- a) the Decision confirms that the returns filed by the Applicant for 2003 to 2014, inclusive, were accurate and complete, as not a single adjustment is proposed in respect of those years;
- b) the Decision claims that the Minister also reviewed the returns of the Applicant for 1998 to 2002 (in fact, no such returns were ever filed), and that "*certain investment accounts were not included*" (which is impossible, as no returns were filed for those years) and that the Applicant would accordingly have made a "*misrepresentation attributable to neglect, carelessness or wilful default*" (which is also impossible, for the same reasons as above);
- c) the Decision claims that the Minister "*has information showing that Milgram [the Applicant] was established in 1964*" (as a matter of fact, this information was communicated to the Minister by the Applicant's representatives in the Disclosure Completion Letter);
- d) on the basis of the foregoing, the Minister claims that she would be entitled to ignore and repudiate the Agreement and issue notices of assessment for additional taxation years (the Minister is arbitrarily targeting the years 1998 to 2002), based on estimated calculations that have no accurate factual underpinnings;
- e) should the Applicant accept the new Decision requiring five additional years to be assessed, the Minister then assures the Applicant that, this time, the agreement to be reached between the Applicant and the Minister would be binding upon the Minister ("*This proposal will correct the fiscal situation of Milgram from its creation to December 31, 2014*"); and

- f) through this assurance, the Minister is acknowledging that it is perfectly appropriate for her to consider and assess only a certain number of years to correct past omissions, but now is attempting to arbitrarily "move the goal posts", by substituting a decision made by her voluntary disclosure officers with a decision made by her audit officers, the only purpose of which is to extract additional funds from the Applicant, after it paid all amounts resulting from the initial Agreement in good faith.

34. There is no justification in fact or in law for the Decision.
35. Moreover, the confirmation by the Decision that all Canadian income tax returns filed by the Applicant with the CRA were complete and accurate leads to the opposite conclusion that the Agreement must be respected by the Minister.
36. The Applicant seeks an Order from this Honourable Court that the Minister is bound by the Agreement and that she is not entitled to repudiate the Agreement by including, on a purely arbitrary basis, additional years from 1998 to 2002, inclusive.
37. Finally, in view of their relevance to this Application, the Applicant has requested access to the Minister's files and reports for all key periods and phases of this file (Disclosure review and acceptance, audit before acceptance of the Disclosure and current audit).
38. The Applicant has been informed by the Minister's officers that a lengthy delay of "*up to 350 days beyond the 30-day statutory time limit*" is required to provide a reply. The delay in the provision of relevant information to the Applicant restricts the Applicant's ability to fully respond to the Decision.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. An affidavit(s) to be sworn or affirmed;
2. All correspondence and exchanges pertaining to the Disclosure, the Audit by the London Tax Services Office and the Second Audit;
3. The VDP Manual; and
4. Such further and other evidence as counsel may advise and this Honourable Court may permit.

THE APPLICANT REQUESTS that the Minister send a certified copy of the following material, which is not in possession of the Applicant but is in the possession of the Minister, to Applicant's counsel and to the Registry:

1. All records relating to Applicant's application to, and acceptance in, the VDP;
2. All records relating to the thorough audit conducted by the London Tax Services Office; and
3. All records relating to the Second Audit.

DATED at the City of Montreal, in the Province of Quebec, this 4th day of October 2018.

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Court file No.

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