

Federal Court



Cour fédérale

Date: 20180601

**Dockets: T-1953-16
T-1955-16**

Citation: 2018 FC 574

Ottawa, Ontario, June 01, 2018

PRESENT: The Honourable Madam Justice Heneghan

Docket: T-1953-16

BETWEEN:

MOHAMMAD AL-QUQ

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1955-16

AND BETWEEN:

ARWA SAYYED

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mr. Mohammad Al-Quq (the “Applicant”) seeks judicial review of the decision dated October 7, 2016 made by Francine Gard, Team Leader of the Taxpayer Relief Program, the Canada Revenue Agency (the “CRA”). In that decision, Ms. Gard declined to exercise positive discretion to allow relief against penalties and interest, as provided for in subsection 220 (3.1) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.)(the “Act”).

[2] The Applicant’s wife, Ms. Arwa Sayyed, also seeks judicial review of a similar decision in cause number T-1955-16. The background facts and issues are similar in the two applications and will be addressed in the within Reasons for Judgment; a copy of these Reasons will be placed on the file in cause number T-1955-16.

[3] Pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”), the Attorney General of Canada represents the Minister of National Revenue as the Respondent (the “Respondent”) in this proceeding.

II. BACKGROUND

[4] The following facts are taken from the affidavits of the Applicant and of Ms. Sayyed filed on behalf of the Applicant, and the affidavit of Ms. Jennifer O’Connor filed on behalf of the Respondent in this application for judicial review.

[5] The Applicant is the sole proprietor of a business called Kamal Distribution. In 2008, the CRA audited the Applicant's business and personal taxes for the years 2004, 2005, 2006 and 2007. Ms. Sayyed was also audited for that period. A net worth analysis was conducted and it was determined that the Applicant and his wife had failed to report all of their income. Accordingly, the amount owed for taxes for those years was reassessed and penalties were imposed under the Act, for negligence for failing to report income.

[6] The Applicant and Ms. Sayyed filed Notices of Objection to the reassessment and provided the CRA with additional information. The Objections Branch partially adjusted the amount due for 2004; confirmed the amount due for 2005; and adjusted the amounts due for 2006 and 2007, in part. Pursuant to subsection 163 (2) of the Act, gross negligence penalties were imposed for the 2005, 2006 and 2007 tax years.

[7] The Applicant and Ms. Sayyed did not appeal the reassessments and confirmations to the Tax Court.

[8] The Applicant and Ms. Sayyed responded to the reassessment on April 23, 2012 by submitting a "fairness request", that is by asking for the exercise of discretion, for the waiver of interest and penalties. They made this request on the basis of delay and error on the part of the CRA. They also raised the grounds of financial hardship and inability to pay the interest and penalties. This request led to a First Level Review for which a decision was made on April 8, 2014.

[9] In that decision, the requests for relief from penalties for late remitting, false statements or omissions, and arrears interest for 2005 to 2007 were denied. A minor adjustment was made to interest accrued for the period of January 6, 2011 to July 21, 2011, on the grounds of delay by the CRA.

[10] The same decision was made in respect of Ms. Sayyed.

[11] The Team Leader, Ms. Jacinthe Roy, explained that the request for relief on the basis of CRA error was denied because the Applicant and Ms. Sayyed had been advised that if they believed an error had been made in the re-assessment, they should appeal to the Tax Court of Canada. The request for reassessment on the basis of financial hardship was denied since Ms. Roy found that payment of the tax bill would not result in suffering or deprive the Applicant and his family of the means to provide basic living requirements.

[12] Request for reversal of the gross negligence penalties was also denied, on the basis that this relief required evidence of exceptional circumstances. Ms. Roy found that the Applicant and Ms. Sayyed had been negligent in respect of their tax filing obligations and no exceptional circumstances were found to exist.

[13] The Applicant and Ms. Sayyed then sought a Second Level Review, on the same grounds as their request for the first review, that is error and the delay by the CRA and financial hardship. At this time, they raised the inability to pay based on illness. This was the first mention of this

issue, as a basis for relief. The Applicant's wife submitted notes from a doctor about his heart problems that arose in 2014.

[14] The decision upon the Second Level Request was made by Ms. Gard and that decision is the subject of this application for judicial review.

[15] In her affidavit filed in this proceeding, Ms. O'Connor described the CRA's processes, in allowing a taxpayer to seek relief from interest and penalties. She referred to the "Taxpayer Relief Guidelines" that allow for Applications for relief. Ms. O'Connor deposed that it is the practice of the CRA to conduct a joint review when relief from gross negligence penalties is requested for reasons including financial hardship. That review was conducted with the Taxpayer Relief Centre of Expertise. She deposed that she reviewed the files of the Applicant and of Ms. Sayyed. Ms. O'Connor prepared a "Taxpayer Relief Sheet" that was forwarded to the Kitchener/Waterloo office of the CRA with a recommendation not to waive those penalties.

[16] Following Ms. O'Connor's review, the file was sent to Ms. Jessica Lang, an officer with the Summerside Tax Centre, to review the aspect of financial hardship. According to the affidavit of Ms. O'Connor, Ms. Lang reviewed the compliance history and financial situation of the Applicant and Ms. Sayyed and concluded that they did not qualify for relief on the basis of financial hardship.

[17] Ms. Lang's recommendations were sent to Ms. Gard as the Team Leader Officer for final determination. Ms. Gard upheld the recommendations and refused the Applicant's request for the positive exercise of discretion pursuant to subsection 230 (3.1) of the Act.

[18] The decisions that were sent to the Applicant and Ms. Sayyed repeated that were they dissatisfied with the original reassessment, they should have sought relief in the Tax Court of Canada.

III. ISSUES

[19] The Applicants, who represented themselves, identified nine issues in their respective Memorandums of Fact and Law, including the fairness of the audit and the failure of the CRA to consider all the evidence that was submitted. The majority of the issues raised seem to attack the correctness of the original audit.

[20] That question is beyond the jurisdiction of this Court and properly lies with the Tax Court of Canada. The only issue raised by the Applicant that can be addressed in this Court is whether the decisions are reasonable.

[21] The Respondent raised a preliminary objection, that is to the inclusion of certain exhibits attached to the Applicants' affidavit that were not before the decision-maker, specifically Exhibits 1 to 4, 6 to 21, 24 to 26, 30 to 33, and 39 to 44.

IV. DISCUSSION

A. *Preliminary objection*

[22] The Respondent objects to the inclusion of certain exhibits attached to the affidavits of the Applicant in this proceeding. The same objection is made about certain attachments to the affidavit of Ms. Sayyed.

[23] I am satisfied that the objection is well-founded.

[24] According to the decisions of this Court, the general rule is that only the material that was before the decision-maker can be considered by the Court in an application for judicial review.

[25] “New” information can be introduced on an application for judicial review when the jurisdiction of a tribunal is in question; see the decision in *Gitxsan Treaty Society v. Hospital Employees’ Union et al*, [2000] 1 F.C. 135.

[26] In my opinion, the “new” material submitted by the Applicant does not fall within this exception. The exhibits that were not before the decision-maker will not be considered in the determination of the within application for judicial review.

[27] First, I will review the powers of the Court upon an application for judicial review. Those powers are set out in subsection 18.1 (3) of the *Federal Courts Act*, R. S.C. 1985, c. F- 7, as follows:

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut:

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[28] The Court can review the process by which the challenged decision was made but it cannot make an independent “new” decision.

[29] The grounds for seeking judicial review are set out in subsection 18.1 (4) of the *Federal Courts Act*, *supra* as follows:

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas:

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

[30] Insofar as the Applicants are challenging the correctness of the tax assessments and of the audit processes, including the net worth analysis, these matters cannot be reviewed in the Federal Court. These are issues that can only be considered before the Tax Court of Canada.

[31] The Federal Court, in the decision *Just d'Or v. Canada (Customs and Revenue Agency)*, 2007 FC 754 at paragraph 8 said that the Federal Court has no jurisdiction to vacate or review tax assessments.

[32] There is no evidence that the Applicant or Ms. Sayyed appealed to the Tax Court. The Federal Court has no jurisdiction to review or vacate tax assessments. The ability to ask for relief against interest and penalties cannot be used to make a collateral attack on tax assessments.

[33] The Applicant and Ms. Sayyed, however, have made it clear that they do not agree with the Second Level decision to deny relief from interest and penalties. Their arguments raise an issue that can be reviewed by this Court.

[34] The next question for consideration is the applicable standard of review.

[35] The Second Level Review decision was a discretionary decision. According to the decision in *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153 such a decision is reviewable on the standard of reasonableness.

[36] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 the Supreme Court of Canada described the content of the standard of reasonableness at paragraph 47 as meaning that a decision is justifiable, transparent and intelligible, falling within a “range of possible, acceptable outcomes which are defensible in respect of the facts and the law”.

[37] The Applicant and Ms. Sayyed argue that the Respondent should have waived the interest and penalties because errors were made in the assessments and further, that the health of the Applicant and the financial situation were not taken into account.

[38] For her part, the Respondent submits that Guidelines for the exercise of the statutory discretion are publicly available. Further, she argues that the discretionary power to provide relief is to be exercised in extraordinary circumstances arising through no fault of a taxpayer. Those circumstances include natural disasters, serious illness or error by the CRA.

[39] I have reviewed the Second Level Decision, as well as the material attached to the affidavit of Ms. O'Connor. This material was before all the CRA employees who reviewed the fairness request. In that decision, Ms. Gard provided for the decision that no relief would be given.

[40] As the decision-maker, Ms. Gard concluded that there had been no error by the CRA in preparing the reassessment, there was no additional delay by the CRA, there was no connection between the Applicant's health condition and his ability to file his returns on time or to pay taxes on time, and that there were no exceptional circumstances to justify cancellation of the gross negligence penalties.

[41] Ms. Gard made the same findings in respect of Ms. Sayyed, acknowledging the emotional stresses operating on the Applicant's wife. These conclusions of the decision-maker are reasonable, within the meaning of *Dunsmuir, supra*.

[42] Ms. Gard explained her conclusions in a clear manner that meets the requirement of intelligibility. Her conclusions are transparent on the basis of the evidence before her. Her conclusions are justifiable on the basis of that evidence.

[43] In hearing an application for judicial review, the Court can look at the evidence that was before the decision-maker.

[44] However, it is not the role of the Court to weigh that evidence.

[45] That is the task of the decision-maker, that is the person authorized under the Act to decide if discretion should be exercised in favour of the Applicant and Ms. Sayyed.

[46] In oral submissions, the Applicant and Ms. Sayyed focused on the financial hardship arising for them, as a result of the reassessment by the CRA and the imposition of gross negligence penalties.

[47] While I may be sympathetic to the Applicant and Ms. Sayyed, the Role for the Court in judicial review is to look at the decision and ask if the denial of relief against these penalties was “reasonable”, within the scope of the legal test.

[48] In my opinion, it was.

[49] Ms. Lang, who made recommendations about the financial hardship aspect of the Applicant’s request for relief, followed the factors identified in the Guidelines. These factors include consideration of a taxpayer’s history of compliance; whether the taxpayer knowingly allowed a balance of unpaid taxes to exist; whether reasonable care was taken in following the

system of self-assessment of taxes; and whether the taxpayer acted quickly to remedy any delay or omission.

[50] Ms. Lang considered these factors, on the basis of the evidence and submissions provided by the Applicant and Ms. Sayyed.

[51] I cannot say that Ms. Lang's recommendations were unreasonable or that they were based on irrelevant or extraneous factors.

[52] The adoption of those recommendations by Ms. Gard was reasonable.

[53] In the result, the Applicant and Ms. Sayyed have not shown that the decision under review is unreasonable or otherwise, that any legal error was made that would justify intervention by this Court.

[54] Accordingly, the application for judicial review will be dismissed.

[55] In the exercise of my discretion pursuant to the Rules, I make no Order as to costs. These Reasons will be filed in the cause number T-1953-16 and placed on the file in T-1955-16.

JUDGMENT in T-1953-16 and T-1955-16

THIS COURT'S JUDGMENT is that the applications for judicial review are dismissed without costs.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1953-16

STYLE OF CAUSE: MOHAMMAD AL-QUQ v. ATTORNEY GENERAL OF CANADA

AND DOCKET: T-1955-16

STYLE OF CAUSE: ARWA SAYYED v. ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 24, 2017

JUDGMENT AND REASONS: HENEGHAN J.

DATED: JUNE 1, 2018

APPEARANCES:

Mr. Mohammad Al-Quq	FOR THE APPLICANT (ON HIS OWN BEHALF)
Ms. Arwa Sayyed	FOR THE APPLICANT (T-1955-16) (ON HER OWN BEHALF)
Mr. Leonard Elias	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT
--	--------------------