Federal Court  Cour fédérale

Date: 20190620

Docket: T-1239-18

Citation: 2019 FC 840

Ottawa, Ontario, June 20, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

DANIEL MARTEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Daniel Martel, seeks judicial review of a decision (Decision) of the Minister of National Revenue granting in part his request for relief from arrears of interest levied in respect of the 1997 and 1998 taxation years. The Applicant's request was made pursuant to subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (ITA).

[2] This application for judicial review is brought pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 (Act).

[3] For the reasons that follow, the application will be dismissed.

I. Background

[4] In 1997, on the advice of their accountant, the Applicant and his wife each invested $100,000.00 in Medi-Call Limited Partnership (Medi-Call LP). The Applicant claimed partnership losses and carrying charges in respect of his investment in the partnership in his tax returns for the 1997, 1998 and 1999 taxation years.

[5] On November 19, 2002, the Applicant's returns for the three years were reassessed (November 2002 Reassessments) and the claims for partnership losses and carrying charges were disallowed. The taxation years relevant to this application are 1997 and 1998 (Taxation Years). As a result of the reassessment, interest charges accrued until the balances owing by the Applicant for 1997 and 1998 were paid in full in August and September 2016, respectively.

[6] The Applicant filed Notices of Objection to the November 2002 Reassessments. Lengthy delays followed, in part because the Applicant's objections were held in abeyance pending the resolution of a test case regarding Medi-Call LP in the Tax Court of Canada (Tax Court).

[7] On March 10, 2014, the Minister offered to settle the Applicant's objections. The Applicant accepted the proposal on March 24, 2014. As part of the settlement, the Minister proactively extended interest relief to the Applicant from the date of filing of the Notices of Objection (December 24, 2002) to October 17, 2005 and from February 27, 2012 to April 23, 2013. The Respondent states that interest relief was also provided by the Minister for the period

from September 24, 2013 to March 10, 2014 as part of the settlement although this period is not referenced in the March 10, 2014 letter. Following the settlement, interest charges remained only in respect of the Taxation Years.

[8] The Applicant subsequently made three requests for interest relief pursuant to subsection 220(3.1) of the ITA. On December 31, 2015, the Applicant's accountant, Mr. D. Fillion, submitted a request to the Minister for the waiver of all interest charges relating to the Taxation Years. The arguments in support of the request were twofold: (1) not all investors in Medi-Call LP had been reassessed; and (2) the CRA delay in resolving the Applicant's objections was undue. On July 14, 2016, the request was partially granted due to delays during the CRA's appeals process. Interest accrued from September 22, 2008 to February 22, 2010 and from July 30, 2010 to September 30, 2011 in respect of the Taxation Years was cancelled.

[9] On September 1, 2016, a second request for interest relief was submitted on behalf of the Applicant, requesting the waiver of all interest for the Taxation Years on the basis that other investors in Medi-Call LP had not been reassessed:

> Although taxes saved or paid will vary due to different levels of income over the years, in order to achieve some level of fairness with other participants that were not re-assessed, a complete removal of the interest for 1997-1998 would be an acceptable solution.

[10] The second request was denied on November 7, 2016. The Minister noted that the Applicant's request was based on the fact that not all participants in Medi-Call LP were treated equally. The Minister stated that the CRA's treatment of other taxpayers could not form the basis of a grant of relief:

> The CRA keeps the tax affairs of taxpayers confidential, unless they give the CRA authorization to disclose specific information to a representative. The CRA treats such taxpayer as an individual, and the perceived treatment of one taxpayer cannot be presented as a circumstance for relief for another taxpayer. Each relief request is reviewed based on its own merit.

[11] A third request for interest relief was made on July 13, 2017 by Thorsteinssons LLP on behalf of certain of the investors in Medi-Call LP (Third Request Letter). The letter set out in detail a series of alleged delays in the CRA reassessment and appeal processes and requested interest relief in respect of the periods itemized. It is the Minister's response to the Third Request Letter that is the decision under review in this application.

II. Decision under review

[12] The Decision is dated May 28, 2018. The Minister's delegate, Ms Christina Martel (no relation to the Applicant), granted in part the request for relief from interest in respect of specific periods between 2001 (being 10 years prior to the date of the Applicant's first request for relief) and 2015. The relief was granted on the basis of delays by the CRA's audit division in issuing the November 2002 Reassessments, delays during the test case court proceedings, and delays by the CRA's appeal division in processing the Applicant's objections.

[13] Ms Martel listed the eight periods for which she granted relief and set out the periods in respect of which interest relief had previously been extended to the Applicant. She concluded that no further relief was warranted as "a review of the case shows that there were no further delays considering the complexity of the file".

[14] Ms Martel noted that the Applicant had been warned in letters dated July 8, 2005 and September 19, 2015 that arrears interest would continue to accrue on unpaid balances for the Taxation Years but that he had made no voluntary payments in respect of the outstanding amounts until August 2016. Ms Martel stated that it was his decision to leave balances owing. She could not conclude that the Applicant was prevented from paying the outstanding balances due to any actions of the CRA.

III. Issue and standard of review

[15] The issue in this application is whether the Decision was reasonable.

[16] The Decision is a discretionary decision of the Minister pursuant to subsection 220(3.1) of the ITA. It is well established that the review by this Court of such a decision is conducted against the standard of reasonableness (*Canada Revenue Agency v Telfer*, 2009 FCA 23 at paras 24-25 (*Telfer*); *Les Gestions Bussey Inc. v Canada (Attorney General)*, 2019 FC 17 at para 9). In *Telfer*, Justice Evans provided guidance on the nature of the review (at para 25):

> [25] When reviewing for unreasonableness, a court must examine the decision-making process (including the reasons given for the decision), in order to ensure that it contains a rational "justification" for the decision, and is transparent and intelligible. In addition, a reviewing court must determine whether the decision itself falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir* at para. 47.

[17] In practical terms, in reviewing the Decision for reasonableness, I am required to assess whether the partial grant of the Applicant's request was within the range of outcomes that were reasonable and possible in light of the facts in the file pertaining to the remaining arrears of

interest and the submissions made in support of the request for relief. I must also bear in mind that a decision by the Minister whether or not to grant relief pursuant to subsection 220(3.1) is discretionary and that deference is required to the reasonable exercise of that discretion.

IV. Legislative Background

[18] Subsection 220(3.1) of the ITA permits the Minister to waive or cancel any penalty or interest otherwise payable under the ITA:

Waiver of penalty or interest	**Renonciation aux pénalités et aux intérêts**
(3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.	**(3.1)** Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

[19] The Minister must take into account all relevant considerations in determining whether to grant taxpayer relief pursuant to subsection 220(3.1) and must base her decision on the purpose of the provision, that of fairness (*Canada v Guindon*, 2013 FCA 153 at para 58). The CRA has developed administrative guidelines that inform the exercise of the Minister's discretion. Although the Minister may not fetter her discretion in making a subsection 220(3.1) decision, the guidelines set out in *Information Circular IC07-1 Taxpayer Relief Provisions* (the Circular) are a useful starting point. Paragraph 23 of the Circular outlines the circumstances that may warrant relief:

> 23. The minister of national revenue may grant relief from penalties and interest where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation or requirement:
>
> (a) extraordinary circumstances
>
> (b) actions of the CRA
>
> (c) inability to pay or financial hardship

[20] Paragraph 24 of the Circular recognizes that the guidelines are not binding in law and that a Minister's delegate may grant relief if a taxpayer's circumstances do not fall within the categories listed in paragraph 23 (*see, Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at para 27) .

V. Preliminary Matter

[21] Before proceeding to my analysis of the Decision, I would address one preliminary matter. As part of his application, the Applicant has requested that I vacate all remaining interest and fees payable in respect of the Taxation Years. As I explained during the hearing, I do not have the authority to make an order of this nature. My role in this application is to review the

Decision and, if I conclude that it was not reasonable, I would quash or set it aside and order the Minister to reconsider the Applicant's request for interest relief. In *Kapil v Canada Revenue Agency,* 2011 FC 1373, Justice Rennie (as he then was) set out the limited remedies the Court may grant in taxpayer relief cases (at para 20):

> [20] As a matter of law, this Court does not have the jurisdiction to order the Minister to waive taxes, penalties, and arrears interest. The jurisdiction of the Court is limited to ordering the Minister to substantively reconsider his decisions not to waive the taxes and related interest and penalties. The applicant must understand, therefore, that even if this Court had found in his favour, he would not automatically be entitled to a waiver and refund of his money. This Court's review is confined to an analysis of whether the Minister's exercise of discretion in refusing the waiver requests was lawful, not to substitute its decision for that of the Minister: *Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12.

VI. Analysis – Was the Decision reasonable?

Parties' submissions

[22] The Applicant submits that the Decision was unfair and should be quashed because only 27 per cent of the investors in Medi-Call LP were reassessed by the CRA. He argues that the CRA should have audited either all or none of the investors. The Applicant also submits that he was advised to invest in Medi-Call LP by accountants who were knowledgeable and educated, and that the ordeal has been very hard on his health and income.

[23] The Respondent submits that the Decision was reasonable. The Respondent argues that the allegation of differential audit treatment by the CRA of other investors in Medi-Call LP was not part of the Applicant's third request for interest relief. The Respondent states that Ms Martel

considered the Applicant's request on its own merits and the record before her and that her partial grant of the relief requested was well within the range of acceptable outcomes.

Analysis

[24] At the outset, I note that I have every sympathy for the Applicant and the consequences he has suffered for an investment made in good faith that went very wrong. I recognize that these words are cold comfort as I am dismissing his application. However, I can assure the Applicant that I have carefully considered his submissions against the provisions of the ITA and the Act, the prior cases of this Court, and the scope of the review undertaken by Ms Martel in arriving at the Decision.

[25] The starting point for my analysis of the Decision is the Third Request Letter dated July 13, 2017. The letter was prepared by Thorsteinssons and submitted to the CRA on behalf of a number of the investors in Medi-Call LP, including the Applicant. The Third Request Letter sets out discrete periods beginning in July 2001 and describes the delays allegedly occasioned by the CRA during those periods. The letter makes no mention of the fact that only some investors in the partnership were reassessed. The request for interest relief is based solely on CRA delay.

[26] In her affidavit filed in this application, Ms Martel provides an explanation of the CRA's review of the Applicant's request for relief. She describes generally the review of taxpayer relief requests within the CRA and notes the relevant provisions of the Circular. Ms. Martel refers to the Third Request Letter and the periods in respect of which relief was requested and states:

> 14. Sandra Pion, a taxpayer relief officer of the Agency in the Shawinigan Taxation Centre, reviewed the applicant's request and the information contained within the Agency's records. Ms. Pion recommended that the Applicant's request be partially allowed. The Taxpayer Relief Fact Sheet dated May 23, 2018, prepared by Ms. Pion is attached to this Affidavit and marked as **Exhibit "G"**.
>
> 15. In my capacity as Team Leader in the Taxpayer Relief Division in the Shawinigan Taxation Centre, I reviewed the applicant's request and its attachments as well as the documents in our system relating to the taxpayer's requests for interest relief. I also reviewed the applicant's assessments and reassessments for the 1997 and 1998 taxation years which are attached and marked as **Exhibit "H"**.

[27] The Taxpayer Relief Fact Sheet relied on by Ms Martel comprehensively describes the history of the Applicant's reassessment by the CRA in respect of the Taxation Years, the periods in respect of which relief from interest had already been granted, and the Applicant's payment history, stating "[n]o voluntary payments were received towards the unpaid balance until October 16, 2015". Ms. Pion undertook an analysis of the various periods of alleged delay referenced in the Third Request Letter and concluded, in a number of instances, that the CRA had caused unwarranted delays in the processing of the Applicant's objections. In my view, the Taxpayer Relief Fact Sheet reflects a detailed consideration of the Applicant's request for relief and forms a reasonable basis for the Decision.

[28] In the Decision, Ms Martel considered the Third Request Letter and granted relief from interest levied on the Applicant under the ITA for specific periods from August 2001 to April 2015. She also set out the prior relief granted by the CRA and concluded that no further relief was justified on the basis of delay. Ms Martel emphasized the fact that the Applicant had been

formally warned in July 2005 that arrears interest would continue to accrue on unpaid balances but failed to make any voluntary payments to reduce the debt until August 2016.

[29] I find that the Decision was reasonable. The Third Request Letter sought relief due to CRA delay, one of the three factors set out in the Circular as relevant to the Minister's exercise of discretion pursuant to subsection 220(3.1) of the ITA. Ms Martel's consideration of the arguments made by Thorsteinssons in the Third Request Letter was thorough and her reasoning clear.

[30] The decision of the Minister to only partially grant relief from interest levied on outstanding balances owed by Applicant may appear harsh given the overall circumstances of the case. However, the Court's role on judicial review of the Decision is not to determine the fairness of the CRA's decision to reassess the Applicant (and not other investors) but to determine whether the Decision was made reasonably (*Parmar v Canada (Attorney General)*, 2018 FC 912 at paras 50-51).

[31] Before me, the Applicant focussed on the fact that only some of the Medi-Call LP investors were reassessed by the CRA and argued that he was the victim of unfair treatment by the CRA. This argument was not considered by Ms Martel. However, I find she committed no error in this regard.

[32] As stated above, the Third Request Letter requested interest relief in respect of identified periods and for specific delays on the part of the CRA. It did not request relief from all interest

levied on Medi-Call LP investors based on an argument of unfair treatment, nor did it simply ask for a reconsideration of the Minister's denial of the Applicant's second request for relief.

[33] The Respondent correctly submits that the Applicant cannot now argue that the Decision was unreasonable because Ms Martel failed to address the alleged unequal treatment of the investors at the audit stage. She did not err in omitting to take this argument into account; rather, the argument was not before her. This issue was raised in the Applicant's second request for relief and was addressed by the Minister in the November 7, 2016 refusal of that request. If the Applicant wished to pursue the issue once more, the onus was on him to raise it in the Third Request Letter.

[34] The Applicant submits that the Minister made the Decision based on incomplete information but has provided no detail in this regard. I am unable to identify any obvious inadequacies in the information before the Minister based on the record. To the extent that the Applicant's reference to missing information is directed at the November 2002 Reassessments, this Court has no jurisdiction to delve into the accuracy of those reassessments. The Tax Court has exclusive jurisdiction to determine the correctness of CRA assessments and reassessments by virtue of subsection 152(8) and section 169 of the ITA, section 12 of the *Tax Court of Canada Act*, RSC 1985, c T-2, and sections 18.1 and 18.5 of the Act (*Canada v Roitman*, 2006 FCA 266 at para 19).

[35] Finally, the Applicant's reliance on expert advisors to make his failed investment in Medi-Call LP was his choice. The fact that the advisors' investment advice has not resulted in a

successful investment is not sufficient to require the Minister to exercise her discretion to grant relief from the payment of accrued interest pursuant to subsection 220(3.1) of the ITA.

[36] The facts set out in the Decision are supported by the record and provide an intelligible basis for Ms Martel's conclusions. It is apparent that she was fully aware of the Applicant's history with the CRA in respect of the Taxation Years and considered the circumstances relevant to the Applicant's request fairly. Having reviewed the Decision against the evidence in the record, the guidelines established by the CRA in the Circular, and the review conducted by the CRA's Taxpayer Relief Division, I find that the Minister's decision to only partially grant the Applicant's request for interest relief was justified and transparent and was within the range of acceptable outcomes.

VII. Conclusion

[37] The application is dismissed.

[38] Neither party made submissions regarding costs. Taking into account all of the circumstances of this matter, I will make no order as to costs.

[39] Finally, the Respondent's request made pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106, to change the style of cause such that the Respondent is the Attorney General of Canada is granted.

JUDGMENT in T-1239-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No costs are awarded.

3. The style of cause is hereby amended, with immediate effect, to name the "Attorney General of Canada" as the Respondent.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1239-18
STYLE OF CAUSE:	DANIEL MARTEL v CANADA REVENUE AGENCY
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	FEBRUARY 28, 2019
JUDGMENT AND REASONS:	WALKER J.
DATED:	JUNE 20, 2019

APPEARANCES:

Daniel Martel	FOR THE APPLICANT (ON HIS OWN BEHALF)
Erica Haughey	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT