Federal Court  Cour fédérale

Date: 20191129

Docket: T-2123-18

Citation: 2019 FC 1528

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, November 29, 2019

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

SUCCESSION OF YANICK LOYER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] The succession of Yanick Loyer [Succession], represented by Geneviève Martel in her capacity as acting liquidator of the succession, is challenging the July 16, 2018, decision by a delegate of the Minister of National Revenue [Delegate], after a second review, to allow only in

part a request for relief for the 2007 to 2010 taxation years submitted under subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp.) [Act]. In August 2013, these taxation years were reassessed by the Canada Revenue Agency [CRA] for income unreported by Mr. Loyer [Tax Debt], based on information sent to the CRA by the Agence du revenu du Québec [ARQ].

[2] A first review of the request, submitted in April 2017, led to the cancellation of the interest on the Tax Debt between August 1, 2012, the date the CRA considered to be Mr. Loyer's date of death, and September 18, 2017, the date of the decision in the first review.

[3] The decision in the second review [Decision] grants nothing more, except a reduction in interest for the period from June 4 to July 16, 2018, because of the processing time of the second review request, deemed unreasonable by the CRA itself. The request in question had been submitted in November 2017.

[4] Ms. Martel, representing herself, is essentially arguing that this decision is unreasonable on the ground that the Delegate did not consider the agreement she entered into with the ARQ in November 2015 [Agreement], which cancelled the amounts and penalties assessed for 2009 and the penalties assessed for 2007, 2008 and 2010, in relation to the reassessments made by the ARQ against Mr. Loyer for the same years (2007 to 2010).

[5] She also alleges that there was a breach of the rules of procedural fairness because in the Decision, the Delegate did not explain why the Agreement had not been considered, nor did she identify the legislative provisions on which the Decision was based.

II. BACKGROUND

[6] The background to this case is anything but mundane, to say the least. Ms. Martel is Mr. Loyer's ex-wife. His death occurred in strange and tragic circumstances. He was murdered after having been declared missing during a stay abroad. At the time, he was under police investigation in Quebec. Before his body was found, Mr. Loyer was considered a fugitive in Quebec. He was suspected of being the leader of a narcotics trafficking ring.

[7] Once the succession was opened, problems arose because of the deficient management of the first liquidator; this required Ms. Martel to go to court to protect the Succession's assets, the sole beneficiary of which is her minor daughter, whom she had with Mr. Loyer. In February 2016, a judge of the Quebec Superior Court appointed her acting liquidator of the Succession. This was when she learned of the scope of the Succession's precarious financial situation and when she and the CRA first contacted each other.

[8] The evidence on the record reveals that the former liquidator objected to the reassessments made by ARQ for unreported income for the 2007 to 2010 taxation years. It also revealed that the former liquidator also objected to the reassessments made by the CRA in August 2013, but his notices of opposition were dismissed by reason of lateness. The former liquidator alleged that he had not received the reassessments from the CRA in a timely manner.

[9] The lawyer who represented the Succession before Ms. Martel became liquidator, Maxime Beauregard, refused to cooperate with her on the ground he was still awaiting payment

of his professional fees for services rendered to the Succession. It was only in October 2017 that she received the documents related to the Succession that Mr. Beauregard had in his possession.

[10] In the meantime, in March 2017, Ms. Martel entered into an agreement with the CRA to repay the Tax Debt at a rate of $450 per month; she ended this agreement a few months later because the Succession's only income, a rental income, was no longer available. A new agreement, this time at a rate of $500 per month, was entered into by the parties one year later, in July 2018, after Ms. Martel had sold a property belonging to the Succession.

[11] As indicated above, Ms. Martel also presented a request for relief to the CRA one month later, in April 2017. In it, she requested the cancellation of gross negligence penalties and the interest arrears in the notices of reassessment. This represented $86,574.16. The total Tax Debt was therefore $158,035.58.

[12] Ms. Martel submits that this relief should apply for the following reasons:

a. The notices of reassessment are arbitrary.

b. The explanation that the Succession never received these notices is entirely unfounded.

c. The penalties and interest added to the unpaid tax amounts for the taxation years in question accumulated because of the willful blindness of a member of Mr. Loyer's family and the first liquidator of the Succession, removed by court order.

d. The Succession is in a pitiful state: assets have disappeared, and other items have been sold at rock-bottom prices or given to Mr. Loyer's family and friends. Moreover, and the

remaining property is suffering from lack of maintenance and is no longer insured, and property taxes on that property have not been paid;

e. Ms. Martel and Mr. Loyer's daughter, a minor, is liable for the Succession's debts because of the poor management of the first liquidator.

f. Ms. Martel's personal situation has deteriorated considerably, both physically and psychologically, since Mr. Loyer's death, owing to the stress related to his disappearance, the repatriation of his body, and the management of the Succession, for which she became responsible when it was withering away financially.

[13] I have already stated that the only relief allowed by the CRA during the first review of Ms. Martel's request was for the interest accrued between August 1, 2012, the date the CRA considered to be Mr. Loyer's date of death, and September 18, 2017, the date of the decision in the first review. The CRA, acting through a Minister's delegate, was thus of the view that this relief was justified because of the deficient management of the first liquidator and Ms. Martel's health issues, which prevented her from carrying out her duties as liquidator of the Succession to the best of her abilities.

[14] This delegate found, however, that no other relief was justified in the circumstances, since Mr. Loyer's income tax returns for the 2007 to 2010 taxation years were all produced before his death and there is nothing in Ms. Martel's arguments that support the argument that Mr. Loyer was unable to report all his income for the taxation years in question or that his financial situation, prior to his death, prevented him from meeting his tax obligations.

[15] In support of her application for a second review of the request for relief, produced on November 22, 2017, Ms. Martel essentially repeated the same arguments as those in the initial request. Of note, she presented the details of what she experienced in the wake of Mr. Loyer's disappearance. She made particular note of the efforts she made to find the alleged killer and have him convicted, her endeavours to have the body repatriated, and her issues with Mr. Loyer's family in relation to the management of the Succession.

[16] However, with her request, she also included documents she did not have in her possession at the time of the initial request: a copy of the amended notices of reassessment issued by the ARQ in May 2016 further to the Agreement, which, I must note, cancelled the amounts and penalties assessed for 2009 as well as the penalties and interest assessed for 2007, 2008 and 2010. In the body of her request, Ms. Martel also reproduced large excerpts from the arguments Mr. Beauregard submitted to the ARQ for the objection presented by the Succession against the notices of reassessment issued by the ARQ for those years; she also made comments on these arguments. However, she did not include the Agreement she had in her possession but stated at the hearing of this judicial review that that she was advised against sharing it with the CRA for confidentiality reasons.

[17] As indicated at the start, the Delegate did not allow the second review request, except for a portion of the interest related to the fact she took too long to process the request. She found that a review of the file did not lead to the conclusion that circumstances out of Mr. Loyer's control were the reason he did not meet his tax obligations prior to his death.

[18] Ms. Martel, for the Succession, is essentially arguing that the Delegate's decision in the second review request is unreasonable because she completely overlooked the Agreement when, Ms. Martel argues, it cannot be ignored in the circumstances of this case.

[19] She also argues that the sale of one of the Succession's properties a few days before the Decision was rendered, a sale that earned the Succession sufficient liquid assets to essentially pay off the Tax Debt, seems to have been the Delegate's main—if not entire—consideration.

III. ISSUES AND STANDARD OF REVIEW

[20] In my opinion, the only issue to be decided is whether, as the Succession claims, the Delegate committed an error that justifies the Court's intervention because she neglected to consider the Agreement before rendering her decision on the second review of the request for relief.

[21] It is well established that the standard of review for CRA decisions to grant tax relief or not under subsection 220(3.1) of the Act is reasonableness (*Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at para 20 [*Stemijon*]; *Canada Revenue Agency v Telfer*, 2009 FCA 23 at paras 24 to 28 [*Telfer*]). According to *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[22] For the reasons that follow, I find that the Decision does not have the characteristics of justification, transparency and intelligibility and that this Court should therefore intervene and allow this application for judicial review.

IV. ANALYSIS

[23] Subsection 220(3.1) of the Act confers on the Minister of National Revenue [Minister], on application by the taxpayer, the power to cancel all or any portion of the penalty or interest otherwise payable under the Act by the taxpayer for a given taxation year, where this application is made in the 10 years following the end of that taxation year.

[24] This is a discretionary power, but it must be based on both the purpose of the Act and the underlying purpose of subsection 220(3.1). The purpose of this provision, as with all the other so-called "fairness" provisions in the Act, "is to provide relief from the overly rigid application of some of the [Act]'s provisions by helping taxpayers resolve issues that arise through no fault of their own and by allowing for a common-sense approach" (*Lalonde v Canada (Canada Revenue Agency)*, 2008 FC 183 [*Lalonde*], at para 9). A decision-maker's review of a request for relief must be based on a rational assessment of all the relevant circumstances of the case (*Canada v Guindon*, 2013 FCA 153 at para 58; *Chekosky v Canada (Revenue Agency*), 2019 FC 841 [*Chekosky*] at para 42).

[25] The Act is silent as to the criteria that might guide the exercise of this discretion, so CRA policies, such as the Information Circulars, exist to support the work of the CRA's employees to whom the Minister has delegated his decision-making power under subsection 220(3.1). As the

Court stated in *Lalonde*, these are merely guidelines that "are not intended to be exhaustive and are not meant to restrict the spirit or intent of the legislation" (*Lalonde* at para 9).

[26] In other words, these guidelines may be a useful starting point in the analysis of a request for relief (*Chekosky* at para 42), but must not be interpreted or applied in a manner that fetters or interferes with the exercise of the Minister's discretion (*Stemijon* at para 27).

[27] Here, the relevant guidelines at the time of the assessment of the request for relief presented by the Succession are in Circular *IC07-1R1 – Taxpayer Relief Provisions* [Circular]. They provide that the Minister may grant relief from penalties and interest when extraordinary circumstances, the actions of the CRA or the inability to pay or financial hardship of the taxpayer justify the taxpayer's inability to satisfy a tax obligation. They state, however, that relief may be granted in situations other than those stated in the Circular.

[28] Regarding the extraordinary circumstances that could result in relief being granted, the Circular provides a non-exhaustive list. These include natural or human-made disasters, such as flood or fire; disruptions in public services, such as a postal strike; serious illness or accident; or serious emotional or mental distress, such as death in the immediate family of the taxpayer.

[29] Section 26 of the Circular provides examples of cases when the actions of the CRA could justify relief. These mostly involve delays in processing a taxpayer's file or in providing relevant information; errors in material available to the public; incorrect information provided to the taxpayer; or errors in processing.

[30] The Attorney General submits that in light of what the Delegate had before her at the time of the second review of the request for relief, based, in the Attorney General's opinion, on the Succession's inability to pay, the Delegate could reasonably have concluded that the Succession was indeed able to pay, since it had just sold a property for an amount that exceeded the balance of the Tax Debt. As for Ms. Martel's financial and other difficulties, the Delegate was entitled to not give them any weight, as they were not relevant to the resolution of the request for relief.

[31] With regard to the Agreement, the Attorney General submits that since Ms. Martel did not raise or include it in support of her second review request, the Delegate cannot be faulted for failing to consider it. He adds that it is now too late, at the judicial review stage, to produce and rely on the Agreement.

[32] Citing *Telfer*, he notes that when the issue is not "squarely presented to a decision-maker, it will be difficult to establish on judicial review that a failure to deal with it in the reasons for decision so deprives the process of 'justification, transparency and intelligibility' as to render it unreasonable" (*Telfer* at para 31).

[33] I am well aware that the power conferred on the Minister under subsection 220(3.1) is an "extraordinary statutory discretion" (*Telfer* at para 34). However, and although I recognize that the second review request could have been more clearly worded, I am of the view that there were sufficient elements in the file to link this request to the Agreement and to require the Delegate to consider it.

[34] On the one hand, I note that the amended notices of reassessment issued by the ARQ further to the Agreement, and which Ms. Martel sent to the CRA in support of her second review request, all refer to the Agreement. This is also true of the journal notes of the CRA employees who were involved in the Succession's file; these notes can be found at Tab 3 of the Certified Tribunal Record. Indeed, on several occasions, there are references to the Agreement, its negotiation, its content and its signing. In particular, it states that on January 12, 2016, the CRA was advised by Mr. Beauregard that the Agreement had been signed and he was awaiting the notices of reassessment from the ARQ. The CRA even indicated, before the Agreement was signed, that it would wait for the results of the objection filed against the ARQ's notices of reassessment before proceeding with the active recovery of the Tax Debt.

[35] The journal notes also show that before Ms. Martel became liquidator, the Succession resolved to request adjustments after it received the amended notices of reassessment reflecting the Agreement [TRANSLATION] "to track the [ARQ] assessments" since the CRA notices of reassessment [TRANSLATION] "had been made based on figures provided by the [ARQ]". On August 24, 2016, the CRA received confirmation from the ARQ that, further to the objection filed by the Succession against the notices of reassessment issued by the ARQ for 2007 to 2010, reductions had been accepted and penalties had been cancelled.

[36] The journal notes also indicate that the first contact between the CRA and Ms. Martel in relation to the Succession was on August 25, 2016. A journal note indicates that on October 19, 2017, Ms. Martel received a communication from someone understood to be Mr. Beauregard, that her request to the ARQ for [TRANSLATION] "relief" was also understood to have been

accepted in full, that she was working on a [TRANSLATION] "second request for relief with the CRA" and that she [TRANSLATION] "would be using this [ARQ] decision in support of her request".

[37] As I previously noted, the second review request presented by Ms. Martel, on behalf of the Succession, was produced one month later. Ms. Martel thought she would do the right thing by including Mr. Beauregard's arguments with the ARQ in her request for a second review. These arguments were, in her opinion, a factor in the signing of the Agreement, which is referenced in the amended notices of reassessment issued by the ARQ in May 2016 further to the Agreement; these notices were appended to her request. She believed, I will state again, that she was not to produce this Agreement herself, for confidentiality reasons.

[38] Given the very particular circumstances of this case, only an unduly restrictive and limited reading of the file would allow one to claim, as the Attorney General does, that Ms. Martel's second review request was not sufficiently precise to justify taking the Agreement into consideration, when the Delegate had the journal notes before her that referred to the Agreement and the negotiations that preceded it, which seem to link the recovery of the Tax Debt to the outcome of the negotiations between the ARQ and the Succession and which clearly state Ms. Martel's intention to base her request for a second review on the Agreement,.

[39] At the very least, in this context, Ms. Martel had the right to know why the Agreement was not taken into consideration. As she stated at the hearing of this judicial review, since the notices of reassessment issued by the CRA in August 2013 for the years 2007 to 2010 were

actually [TRANSLATION] "mirror" assessments of those previously issued by the ARQ, then it followed that the Agreement would also apply to the CRA assessments. In such a context, what is good for the goose is good for the gander, as she would argue.

[40] It is not for me to determine whether the Agreement should apply in the case of the Succession, but I find that the Succession was entitled to expect the Agreement to be considered and to know why it did not apply in this case, if such is the CRA's opinion. I find that in the specific circumstances of this case and in the context of applying what is essentially a fairness provision, the failure to do either of these things in the Decision itself or in the recommendation that came before it "deprives the process of 'justification, transparency and intelligibility'" to use the expression from *Telfer* (see also: *Lalonde* at para 61).

[41] The Attorney General asks that I draw a parallel between the facts in this case and those in *Telfer*, *Internorth Ltd. v Canada (National Revenue)*, 2019 FC 574 [*Internorth*] and *Robinson v Canada*, 2009 FC 795 [*Robinson*]. However, in my humble opinion, those three cases can be distinguished from the present case.

[42] First, in *Telfer*, there was a significant gap between the basis of the request for relief at the second level and what counsel for the taxpayer was arguing. This is the context in which the Court of Appeal's warning on the risk to taxpayers who do not present their question precisely to the Minister applies. At any rate, in that case, the Federal Court of Appeal was satisfied that the letter of decision and the recommendation report that preceded it took into consideration all the relevant facts on which the request for relief was based and that, as a result, it would be difficult

to argue that the Minister's delegate did not take everything into consideration (*Telfer* at paras 32-33). The same cannot be said in the present case.

[43] As for *Internorth*, it involved a request for the remission of a tax debt under the *Financial Administration Act*, RSC 1985, c F-11. Subsection 23(2) of that act confers on the Governor in Council the power, on the recommendation of the appropriate Minister, to remit any tax or penalty where the Governor in Council "considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty." The Attorney General relies on this decision to propose that the relief procedure set out in the Act cannot be used to bypass or avoid the appeal process set out in the Act or as a mechanism to challenge a tax assessment.

[44] Even assuming that the principle from subsection 23(2) of the *Financial Administration Act* also applied to requests for relief presented under subsection 220(3.1) of the Act, it is of little use in the present case as it is the complete lack of consideration for what appears to be the key point of the Succession's request for a second review, and therefore the intelligibility and transparency of the Decision, that is in question and not the failure to challenge the notices of reassessment in a timely manner.

[45] Lastly, *Robinson* offers no support to the Attorney General in the specific circumstances of the present case. What emerges from that judgment is that the taxpayer had not shown that the decision-maker responsible for the second level review [TRANSLATION] "had any information

whatsoever" regarding an argument that did not appear in the request for relief. This is not the situation in the present cast, as I have noted.

[46] I will restate that it is not my role to determine whether the Agreement must also benefit the Succession and provide comparable relief. It is to determine whether the fact the Agreement was completely ignored in the Decision and in the preceding recommendation report affected the quality of the decision-making process that led to the Decision, such that the Court's intervention is justified. I find that this is the case. Indeed, I am of the opinion that the Delegate could not ignore the Agreement in her assessment of the second review request made by the Succession, considering all the information she had at the time. The Succession had the right to know the reason the Agreement was not considered; then, it could have accepted the explanation or challenged its reasonableness. In my opinion, not doing this undermined the intelligibility and transparency of the process that led to the Decision.

[47] This application for judicial review will therefore be allowed and the case returned to the Minister for reconsideration by another officer authorized to consider a request for relief made at the second level.

[48] Given the outcome of the case, the Succession, as it requested, is entitled to costs.

JUDGMENT in Docket T-2123-18

THE COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision by the delegate of the Minister of National Revenue of Canada, dated July 16, 2018, to allow only in part the request for relief at the second level submitted by the applicant under subsection 220(3.1) of the *Income Tax Act* is quashed.

3. The case is referred back to the Minister of National Revenue of Canada for reconsideration, in light of the terms of this judgment, by another officer authorized by the Minister to consider such a request.

4. With costs in favour of the applicant.

"René LeBlanc"
Judge

Certified true translation
This 18th day of December, 2019.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	QUÉBEC, QUEBEC
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APPEARANCES:

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Annie Laflamme	FOR THE RESPONDENT

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