Federal Court  Cour fédérale

Date: 20201230

Docket: T-1046-19

Citation: 2020 FC 1159

Toronto, Ontario, December 30, 2020

PRESENT: Mr. Justice A.D. Little

BETWEEN:

DOMENICO MELECA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] These reasons concern an application for judicial review by Mr Domenico Meleca in relation to his taxes. Mr Meleca applied to the Canada Revenue Agency ("CRA") for the remission of all his tax debts. CRA concluded that his circumstances did not support remission.

[2] Mr Meleca applied to this Court for judicial review. He asked the Court to order a "complete review" by CRA of amounts owing for the taxation years 2001, 2002, 2009, 2010 and

2012. He also requested an Order for the "removal and a halt to all interest and penalties" for the same taxation years. He claimed that CRA has never fully reviewed all of his supporting documentation – certain invoices he paid and advises are business expenses – for those taxation years, has refused to do so, and that CRA incorrectly concluded that he was late in filing the supporting documentation. He filed the supporting documentation on this Court application.

[3] Mr Meleca came to Court in person, without a lawyer but with his son, whose assistance and submissions were very helpful to the applicant and to the Court.

Summary of this Decision

[4] I will speak first to Mr Meleca, to explain my decision.

[5] Sir, you may remember when we were in the Courtroom, we talked a little about what the Federal Court does, compared with what the Tax Court of Canada does. The two Courts have different jobs. As I said at the time, unfortunately, the Federal Court does not have the power to order CRA to do the "complete review" of your tax assessments or to review the invoices and decide whether they are proper expenses. Instead, the Federal Court's job right now is only to look at the decision made by CRA about your request for a remission of your tax debts.

[6] CRA decided not to recommend the remission of your tax debts. The law does not allow me to overturn CRA's decision and re-decide it. I am only allowed to set aside CRA's decision, and only if it was "unreasonable".

[7] In past cases, the Supreme Court of Canada, the Federal Court of Appeal and the Federal Court have described what it means to make an “unreasonable” decision. Those past cases include ones like yours, that challenge a decision by CRA not to recommend a remission of tax debts.

[8] I have carefully read your representative Mr Filippazzo’s letter to CRA on September 9, 2015 asking for a Remission Order for all your tax debt. I have also carefully read CRA’s decision and the reasons in its letter back to Mr Filippazzo dated May 24, 2019. I have considered the laws and previous decisions of courts that apply to your case. I read your written arguments and the arguments made by the Attorney General’s lawyer. And I listened carefully to what you and your son told me in Court, including about your health and your family’s financial and personal circumstances – the difficulties you are facing. I also listened to what the Attorney General’s lawyer said in Court.

[9] After thinking about all of that, I have concluded that CRA’s decision was reasonable. Under the law, CRA has a lot of discretion when it makes this kind of decision on whether or not to recommend that tax debts be forgiven. CRA also has a written guide that describes when it will recommend tax debt forgiveness, to ensure that remission decisions are all made as consistently and fairly as they can be. A recommendation to forgive tax debt does not happen very often. In its letter dated May 24, 2019 CRA described why it made its decision not to recommend tax debt forgiveness in your case. CRA considered your specific circumstances, what Mr Filippazzo told them on your behalf, and what was in their files. It also followed its Remission Guide when making its decision.

[10] Taking everything into account, I have concluded that CRA's decision was reasonable and complied with the law. Therefore, although I am aware and sensitive to the difficult health and financial situation you and your family face, I am unable to set aside CRA's decision as you requested.

[11] I will now explain my reasons for dismissing this application in more detail.

I. **Events Leading to this Application**

[12] Mr Meleca is an electrician. He is 71 and lives in Etobicoke, Ontario. From time to time he operates a sole proprietorship business known as Tilden Electric.

[13] For Mr Meleca, CRA maintains both a personal (T1) account and a goods and services tax/harmonized sales tax ("GST/HST") account for his sole proprietorship.

[14] Mr Meleca has a tax debt in both accounts. His T1 tax liabilities arise under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (the "*ITA*") and his GST/HST liabilities arise under the *Excise Tax Act*, RSC 1985, c E-15. At the relevant time, Mr Meleca's T1 tax debt was about $17,600 and pertained to outstanding liabilities for the taxation years 2001, 2002, 2009, 2010 and 2012. His GST/HST tax debt was approximately $29,200 and pertained to outstanding liabilities for the period March 1, 2008 to December 31, 2010 and the reporting periods ending December 31, 2012 and December 31, 2013.[1]

[1] I understand from the hearing that the overall amount owing may now be much less (around $7,000) due to developments since this application was filed.

[15] Since 2005, Mr Meleca's position has been that he has no money to pay the CRA debts. Through Mr Filippazzo, he has objected and appealed decisions and assessments related to both CRA accounts, and has requested relief from interest and penalties, all with some success in reducing the amounts owing.

[16] CRA has also conducted audits of Mr Meleca. CRA audited his T1 account in 2005 (for the 2001 and 2002 taxation years) and in 2013 (for the 2009 and 2010 taxation years). CRA also audited his GST/HST account in 2005 (for the period January 1, 2001 to December 31, 2002) and in 2011 (for the period January 1, 2008 to December 31, 2010).

[17] By letter dated September 9, 2015, Mr Meleca's representative and close family friend, Mr Carl Filippazzo, wrote to CRA asking for a Remission Order for all of Mr Meleca's tax debts. The letter explained that Mr Meleca, aged 66 at that time, and his family have experienced financial and health difficulties, including the sad loss of their son in 1992, Mr Meleca's heart and other health problems in more recent years, and serious health issues recently suffered by Mrs Meleca. This letter noted that the family's income is "extremely low" and referred to previous correspondence in which Mr Filippazzo had advised CRA that Mr Meleca could not make his tax payments.

[18] Mr Filippazzo's letter also referred to CRA's "many" audits of Mr Meleca and that a CRA auditor had incorrectly attributed funds to his business account from two insurance cheques deposited into Mr Meleca's bank account, one of which was for water damage caused to the Meleca home.

[19] CRA responded to the request for remission by letter dated May 24, 2019. CRA advised that it decided not to recommend a remission of Mr Meleca's tax debts.

[20] On June 29, 2019, Mr Meleca filed an application in this Court for judicial review of CRA's decision.

II. **Tax Remission under s. 23 of the *Financial Administration Act***

[21] Section 23 of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (the "FAA") allows the Governor in Council, on recommendation of the appropriate Minister, to provide full or partial relief from tax, interest, penalty or other debt, in rare instances in which relief is justified but cannot be granted under an existing law: *Fink v. Canada (Attorney General)*, 2018 FC 936, at para 12, aff'd 2019 FCA 276. Remission of tax is an extraordinary measure: *Fink v. Canada (Attorney General)*, 2019 FCA 276 (*Fink FCA*), at para 1; *Escape Trailer Industries v. Canada (Attorney General)*, 2020 FCA 54, at para 32; *Matthew v. Canada (Attorney General)*, 2017 FC 538, at para 5.

[22] Subsection 23(2) of the FAA provides:

> **Remission of taxes and penalties**
>
> (2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, 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.

[23] The Minister's decision to recommend a remission under subs. 23(2) is a discretionary power: *Escape Trailer Industries*, at paras 3 and 20; *Internorth Ltd. v. Canada (National Revenue)*, 2019 FC 574, at para 41. The FAA confers that discretion in broad, policy-based terms. The discretion is exercisable by the Minister or a delegate within a decision-making context that may lead to a grant of extraordinary relief by the Governor in Council. As such, the Court does not normally re-weigh the factors relevant to the decision: *Waycobah First Nation v. Canada (Attorney General)*, 2011 FCA 191, at para 19.

[24] In *Waycobah First Nation*, Nadon JA characterized the phrases "unreasonable or unjust" or "otherwise in the public interest" in subs. 23(2) as "open-ended terms" that enable the Minister to take into account the "wider impact of recommending remission, including, for example, the public interest in the integrity of the tax system and its proper administration, and fairness to other taxpayers. The decision-maker must balance the competing interests to determine whether, in light of the particular facts, collection of the tax would be unreasonable, unjust or otherwise not in the public interest": at para 18.

[25] CRA has issued a Remission Guide dated October 2014, which the respondent filed in the record. Although it is not binding, the Remission Guide provides guidance on the exercise of discretion under subs. 23(2): *Escape Trailer Industries*, at para 3. The Remission Guide is designed to assist CRA officials in determining whether the collection of a tax or the enforcement of a penalty is unreasonable, unjust, or if the remission is otherwise in the public interest. The guide also contemplates the preparation of an internal report and recommendation by CRA officials when a remission request by a taxpayer is being considered (at pages 6-7).

[26] According to the Remission Guide, each request for remission is considered on its own merits, with reference to four characteristics common to past cases. The following characteristics set out in the Remission Guide, at Section III, may support a positive recommendation for remission:

- extreme hardship;
- financial setback coupled with extenuating factors;
- incorrect action or advice on the part of CRA officials; and/or
- unintended results of the legislation.

[27] The Remission Guide describes these four characteristics in detail, with examples, at pages 9-15. The four characteristics are not exhaustive, as the Remission Guide states at page 9:

> These guidelines provide a framework within which a remission might be supported. However, they do not necessarily pertain to every circumstance, and there may be other valid reasons that would justify granting a remission order. Good judgment must be exercised at all times and all relevant factors of a case should be taken into consideration, e.g., a person's compliance history, credibility, circumstances, age, and health.

See also *Waycobah First Nation,* at para 28.

III. **Standard of Review**

[28] On a judicial review of a CRA decision not to recommend a remission order under subs. 23(2) of the FAA, reasonableness is the standard of review: *Escape Trailer Industries*, at para 13; *Fink FCA*, at para 4; *Waycobah First Nation*, at para 12.

[29] The Supreme Court of Canada described the reasonableness standard of review at length in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. The focus of reasonableness review is on the decision made by the decision maker, including both the reasoning process (i.e. the rationale) that led to the decision and the outcome: *Vavilov*, at paras 83, 86; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 SCR 6, at para 12.

[30] The onus to demonstrate that the decision is unreasonable is on the applicant: *Vavilov*, at paras 75 and 100. The starting point is the reasons provided by the decision maker: *Vavilov*, at para 84. The reviewing court must read the reasons holistically and contextually, and in conjunction with the record that was before the decision maker: *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, at para 31; *Vavilov*, at paras 91-96, 97, and 103.

[31] When reviewing for reasonableness, the court asks whether the decision bears the hallmarks of reasonableness (i.e., justification, transparency and intelligibility) and whether the decision is justified in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov*, at para 99.

[32] In *Vavilov*, the Supreme Court held that to intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep". The problem must be sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100.

[33] The reviewing court does not determine how it would have resolved an issue on the evidence, nor does it reassess or reweigh the evidence on the merits: *Vavilov*, at paras 75, 83 and 125-126; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paras 59, 61 and 64.

[34] The Federal Court of Appeal has recently confirmed that decisions related to remission under the FAA are highly discretionary and are entitled to significant deference on judicial review: *Fink FCA*, at para 1; *Escape Trailer Industries*, at para 32; see also *Internorth*, at paras 10 and 41.

[35] In its two most recent decisions, the Federal Court of Appeal used the characteristics described in CRA's Remission Guide to assess the reasonableness of a recommendation decision made under FAA subs. 23(2): *Escape Trailer Industries*, at paras 15-23, 24-29 and 32; *Fink FCA*, at para 9. Recent decisions of this Court have also done so: *Internorth*, esp. at paras 24 and 39; *Matthew*, esp. at paras 20 and 27; *Boivin v. Canada (Attorney General)*, 2019 FC 210, at paras 21, 27 and 34.

IV. **Analysis**

[36] As contemplated by *Vavilov*, the analysis begins with the CRA's decision.

The CRA's Decision Not to Recommend Remission for Mr Meleca

[37] As noted already, CRA advised Mr Meleca's representative by letter dated May 24, 2019 that it decided not to recommend a remission of Mr Meleca's tax debts.

[38] Prior to the letter, a CRA official prepared a 9-page internal memorandum (plus appendices) to CRA's Headquarters Remission Committee dated April 16, 2019. The memorandum analyzed Mr Meleca's request for remission. It described the basis of his request and the history of his two CRA accounts in detail. It noted the four characteristics in the Remission Guide, analyzing two in detail: financial setback with an extenuating factor, and extreme hardship. The memorandum did not recommend remission because there were no circumstances that would support relief and none of the remission criteria applied.

[39] An internal CRA committee called the Remission Committee met on April 25, 2019. Six Committee members attended, including the author of the memorandum dated April 16, 2019, together with eight other internal attendees. Its Record of Decision states in relation to Mr Meleca, "Remission not recommended". There were no minutes of the committee's discussions.

[40] After that meeting, officials prepared CRA's letter refusing Mr Meleca's request for remission, which was ultimately dated May 24, 2019 and signed by Mr Geoff Trueman, Assistant Commissioner in CRA's Legislative Policy and Regulatory Affairs Branch. Based on his position, the process described in the Remission Guide and the language of his letter, Mr Trueman had

delegated authority from the Minister to make the decision not to recommend remission under the FAA: see Remission Guide, at p. 7; *Matthew*, at para 5.

[41] In his letter on behalf of CRA dated May 24, 2019, Mr Trueman advised that he had "concluded that remission cannot be recommended" for Mr Meleca. The letter described the remission request and set out the four characteristics in the Remission Guide. It provided an summary of the history of Mr Meleca's two accounts with CRA, including the various recourse mechanisms he had already used to object to assessments and reassessments issued by CRA. Those mechanisms resulted in some success in reducing income tax payable, penalties and interest. It noted that one relief request was still outstanding at the time.

[42] With respect to the remission request, CRA's letter specifically considered two of the four characteristics in the Remission Guide: financial setback coupled with extenuating circumstances, and extreme hardship. The letter noted that in the request for the remission, Mr Filippazzo's letter stated that "Mr Meleca has no money to pay his CRA debts and that they should also be forgiven because of his personal circumstances, which include his poor health, his wife's poor health, and the emotional distress caused by the death of their son in 1992".

[43] Considering whether Mr Meleca's circumstances exhibited a financial setback coupled with extenuating circumstances, the letter stated that in order to qualify for remission purposes, there must be a direct correlation between an illness or other distressing personal circumstance, and the taxpayer's inability to meet his or her tax obligations. The letter concluded that Mr Meleca's personal and health-related issues were not an extenuating factor for remission purposes.

The letter stated that while Mr Meleca "has experienced difficult personal circumstances and repaying his tax debts might constitute a financial setback, his personal and health-related issues, dating back to 1992, did not occur during the timeframe in which he was failing to meet his tax obligations" that were at issue in the remission request. The letter also found that the tax debts at issue arose from audits and were correctly assessed and properly owing.

[44] Considering whether Mr Meleca's circumstances constituted extreme hardship, CRA's letter recognized that Mr Meleca contended that he could not pay his tax debts. However, CRA had registered liens against Mr Meleca's personal residence which, according to CRA records, was worth approximately $800,000 in 2017. The letter found it would not be in the public interest to forgive Mr Meleca's tax debts in the circumstances, particularly not in respect of GST/HST amounts held in trust for the Crown.

[45] CRA's letter also noted that its officials were not currently pursuing Mr Meleca for payment of the tax debts.

Mr Meleca's Requested Relief on this Application

[46] As noted, Mr Meleca requested that the Court order CRA to carry out a "complete review" in respect of the taxation years 2001, 2002, 2009, 2010 and 2012, in particular to review invoices he advised that he paid and claims are business expenses, but CRA has not yet reviewed. The applicant referred to invoices issued by Ratex and Home Depot (Application Record, beginning at

p. 256). Mr Meleca also requested an Order setting aside aside all interest and penalties for the same taxation years.

[47] In his memorandum of fact and law on this application, Mr Meleca made it clear that he is "trying to resolve [the] incorrect amount owing" to CRA. He referred to the remission request as a "last ditch effort" for an "actual review of the expenses" for the tax years in audit that were never considered. He submitted that the expense review would prove that the original audit was not completed properly.

[48] The respondent submitted that the Court has no jurisdiction to grant the applicant's request because the Tax Court of Canada is the proper court to review the correctness of an assessment. On this submission, the applicant's request is an attack on the underlying tax debt, something the Federal Court cannot entertain on a judicial review application of a decision on remission under the FAA.

[49] In respect of tax matters generally, the Federal Court has limited jurisdiction under the judicial review provisions of the *Federal Courts Act*, RSC 1985, c F-7. The Court has some jurisdiction, but it should be exercised cautiously: *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 SCR 793, at paras 8-11; *Iris Technologies Inc. v. Canada (National Revenue)*, 2020 FCA 117, at para 51. The Supreme Court stated in *Addison & Leyen Ltd.*, at para 11:

> Reviewing courts should be very cautious in authorizing judicial review in such circumstances [i.e., if there is an appeal process under the *ITA*]. The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized

> court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.

[50] In many situations, an appeal or other recourse to the Tax Court of Canada (or otherwise under the *ITA*) may be available, adequate and effective in giving a taxpayer relief. In those circumstances, the Federal Court of Appeal has held that judicial review to this Court is not available: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 FCR 557, at paras 82-91. Consistent with that approach, the appellate courts have concluded that the Federal Court does not have jurisdiction to deal with the correctness of assessments under the *ITA* or the *Excise Tax Act.* Those issues are for the Tax Court of Canada: *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, at para 37; *Johnson v. Canada*, 2015 FCA 51, at paras 22-23. This Court has also noted CRA's position that the tax remission process is not to be used as an additional or parallel step to appeals processes under the *ITA* in respect of assessments or reassessments: *Internorth*, at paras 31-40.

[51] On this application, I agree with the respondent that the Orders requested by the applicant in substance concern the correctness of CRA's assessment or reassessment for specific taxation years based on new deduction information in the form of the invoices. Given the Court's limited jurisdiction on a judicial review application, I am unable to make the Orders he has requested: *JP Morgan Asset Management*, at para 82; *British Columbia Investment Management Corp.*, at para 37; *Matthew*, at para 16.

[52] This legal conclusion does not determine whether CRA should consider whether the invoices constitute proper business expenses. While the applicant advised that CRA has not reviewed these invoices, the respondent's written submissions advised that the majority of the documents included in the Applicant's Record related specifically to disallowed business expenses and disallowed input tax credits. On this application, the Court is not in a position to determine what has or has not occurred. Having said that, if CRA still has an ability to review possible business expenses that have not yet been considered and that could affect the quantum of his tax debt, one would hope that it would do so.

The CRA's Remission Decision Was Reasonable

[53] The applicant did not make any substantive legal arguments about whether CRA's remission decision was reasonable under *Vavilov* principles. The applicant did request an Order setting aside the decision of CRA in Mr Trueman's letter (in addition to the complete review of the expenses as described above). His memorandum of fact and law referred to consideration of financial hardship, both his and his wife's health and their suffering of the loss of their son, in hopes that CRA would reconsider and review their taxes.

[54] Counsel for the respondent provided cogent written and oral submissions supporting the position that the CRA's decision was reasonable.

[55] I agree substantially with the respondent's submissions. In my view, CRA made no reviewable error in the decision set out in its letter dated May 24, 2019.

[56] CRA's decision was relatively unconstrained in law, owing to the language in s. 23 of the FAA that gave the Minister's delegate broad discretion to make a recommendation on remission and CRA's expertise in matters related to taxation: see *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, at paras 25, 30 and 32; *Vavilov*, at paras 93, 108, 110, 119.

[57] CRA's reasons for the decision, set out in its letter, addressed and adequately grappled with the central issues raised by Mr Meleca's representative in the letter dated September 9, 2015 requesting the remission order: see *Vavilov*, at paras 127-128. The reasons expressly considered two of the four characteristics set out in its Remission Guide and, in my view, did so with sufficient sensitivity to the factual circumstances related to the health, personal and financial circumstances faced by Mr Meleca and his family, including his ability to pay his tax debts. The underlying record, including the CRA official's memorandum dated April 16, 2019, confirms that CRA considered the possible application of all four characteristics in the Remission Guide, focusing on two. CRA considered the events during the history of Mr Meleca's tax filings and compliance. It also considered his ability to pay, including his gross and net business income and his net family income back to 1992. CRA compared his net family income to Statistics Canada's low income cut-offs since that time.

[58] Overall, CRA's decision exhibited the requisite hallmarks of justification, transparency and intelligibility required by *Vavilov*. Its letter contained a rational chain of reasoning leading to a conclusion that was in the range of reasonable outcomes, given the facts and law that bore on CRA

in making the decision: *Vavilov*, at para 99. CRA also followed the process and reasonably applied the substantive factors described in its Remission Guide.

[59] Accordingly, in my view, the CRA decision in its letter dated May 24, 2019 was reasonable.

V. **Amendment to the Style of Cause**

[60] At the hearing, the respondent requested that the style of cause be amended to reflect that the Attorney General of Canada is the proper respondent in this proceeding under Rule 303(2) of the *Federal Courts Rules*, SOR/98-106. I agree and approve the amendment to the style of cause.

VI. **Conclusion**

[61] For these reasons, I must dismiss the application for judicial review. This is not an appropriate case for costs.

JUDGMENT in T-1046-19

THIS COURT'S JUDGMENT is that:

1. The style of cause in this proceeding is amended to substitute the Attorney General of Canada as the respondent.

2. The application for judicial review is dismissed.

3. There is no order as to costs.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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Acinkoj Magok	FOR THE RESPONDENT

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