

Federal Court



Cour fédérale

**Date: 20210330**

**Docket: T-928-17**

**Citation: 2021 FC 273**

**Ottawa, Ontario, March 30, 2021**

**PRESENT: Madam Justice Walker**

**BETWEEN:**

**BRIAN CHEESEMAN**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] Mr. Cheeseman seeks the Court's review of a decision by the Minister of National Revenue (Minister) refusing his fourth request for relief from penalties and interest imposed under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (ITA). The refusal is set forth in a letter from the Minister's delegate dated May 18, 2017 (Decision).

[2] Mr. Cheeseman's request for taxpayer relief was made pursuant to subsection 220(3.1) of the ITA. The subsection permits the Minister to waive or cancel all or a portion of any penalty or

interest otherwise payable by a taxpayer. Subsection 220(3.1) is one of a number of taxpayer relief provisions in the ITA intended to moderate the application of its many rigid requirements. Broadly stated, these provisions permit the Minister to provide relief to taxpayers who, through personal misfortune or circumstances beyond their control, could not comply with their federal income tax obligations. The Minister's authority to grant discretionary relief is based on the principle of fairness. The Minister's delegate is an individual who is authorized by the Minister to make decisions under subsection 220(3.1).

[3] I have carefully considered Mr. Cheeseman's submissions and evidence. I acknowledge the difficult financial and personal circumstances he faced beginning in 2007 and his personal bankruptcy, and continuing through 2013 and the final breakdown of his family situation. I have also reviewed the Minister's refusals of Mr. Cheeseman's first two requests for relief. As I explained to Mr. Cheeseman at the hearing, my authority in this application is limited to a review of the Decision. I cannot address his concerns regarding the accuracy of his income tax assessments for the 2007-2009 years or the conduct of the audits undertaken by the Canada Revenue Agency (CRA) in respect of those years.

[4] I will dismiss this application for judicial review of the Minister's Decision because Mr. Cheeseman's new evidence in support of his Fourth Request does not establish a causal link between the emotional stress and depression he relies on and his failure to declare certain income earned during the 2007-2009 period. Although the Decision does not set out detailed reasons, it is a reflection of the multiple prior requests for relief submitted by Mr. Cheeseman and the nature of the response required of the Minister upon receipt of a fourth request.

I. Overview

[5] The issues in this application centre on Mr. Cheeseman's 2007-2009 taxation years. Mr. Cheeseman filed tax returns for each of the taxation years but did not immediately pay the amounts owing. In addition, he had unreported income of approximately \$40,000 during those years. The CRA audited Mr. Cheeseman's 2007-2009 tax returns and issued Notices of Reassessment. In addition to the tax amounts owing, the Minister assessed interest and penalties, including penalties for gross negligence due to the failure to report income. Over the next few years, the interest and penalty components of Mr. Cheeseman's tax debt grew to a significant sum.

[6] Mr. Cheeseman remortgaged his home and made instalment payments on the outstanding tax debt until the balance was fully paid in February 2016.

[7] Mr. Cheeseman does not contest the errors in his tax returns that resulted in the Notices of Reassessment but contends that the penalties and interest levied were excessive. He relies on a series of personal setbacks and incompetent professional representation in support of his requests for relief. Mr. Cheeseman and his wife separated in 2009 and he suffered a divorce in 2013 as a result of the ongoing financial strain and emotional distress caused by the increasing interest and penalties. In addition, Mr. Cheeseman states that his omission to declare the \$40,000 in income was an error on the part of his accountant. As he had each year, he provided all of his business records and receipts to the accountant to prepare his tax returns and does not know why the additional amount was overlooked.

[8] Mr. Cheeseman submits that, following his bankruptcy in 2007, he has worked extremely hard to correct his financial position, for himself and his family. However, his wages were garnished (in respect of Goods and Services Tax owing), he made monthly payments to satisfy his tax debt and his financial position has remained precarious due to the actions of the CRA.

[9] I will return to the substance of Mr. Cheeseman's prior requests for relief from interest and penalties and the Minister's responses but a timeline of those requests and responses is as follows:

- First Request – March 21, 2013. Mr. Cheeseman submitted a request for relief on the basis of financial hardship and emotional distress (marriage breakdown) with respect to his 2007-2011 taxation years.
- First Refusal – June 9, 2014. The Minister refused the First Request because Mr. Cheeseman had not demonstrated financial hardship or inability to pay based on a review of his financial situation.
- Second Request – February 27, 2015. Mr. Cheeseman stated that he wanted to talk to someone because he had done everything he could but had been passed around at the CRA. Mr. Cheeseman requested a second impartial review of his relief request, again based on financial hardship and exceptional circumstances (emotional distress, error on the part of his accountant).
- Second Refusal – February 29, 2016. The Minister refused the Second Request, stating that relief from penalties imposed for gross negligence could only be granted in exceptional circumstances. An error by a professional advisor did not constitute exceptional circumstances. Also, the Minister concluded that Mr. Cheeseman had not demonstrated financial hardship because the CRA had not received the supporting financial documentation they had requested and Mr. Cheeseman had paid the full balance owing, demonstrating his ability to pay.
- Third Request – March 7, 2016 (2007 to 2009 taxation years). In this request, Mr. Cheeseman repeated that he had been passed around at the CRA and wanted to explain his position. He made no specific request for further review but stated that he had paid excessive amounts of penalties and interest. Mr. Cheeseman stated that, if he could not have the matter resolved at that stage, he wanted to take the next step and go to court.
- Third Refusal – April 19, 2016. The Minister stated that a second administrative review of Mr. Cheeseman's request for relief had been completed and

communicated to him by way of the Second Refusal letter, in which Mr. Cheeseman was advised of his right to apply for judicial review of the Second Refusal.

- Fourth Request – March 28, 2017 (2007 to 2009 taxation years). Mr. Cheeseman submitted his Fourth Request for relief, attaching medical evidence of stress, anxiety and depression. Mr. Cheeseman also explained the background to his request, including his 2007 bankruptcy and the significant strain that his adverse tax situation placed on his family over an extended period of time. It is the Fourth Request that resulted in the Decision under review in this application.

## II. Decision under review

[10] As noted above, the Decision responds to Mr. Cheeseman’s Fourth Request and is brief. The Minister’s delegate acknowledged Mr. Cheeseman’s March 28, 2017 request for a further consideration of the taxpayer relief provisions in respect of his 2007-2009 taxation years and stated:

A second administrative review of your request was completed and our final decision was communicated to you in a letter dated February 29, 2016.

In that letter, you were advised of your right to apply for a judicial review to the Federal Court under section 18.1(2) of the “Federal Court[s] Act” within 30 days of the date the decision was communicated to you.

While I acknowledge the concerns addressed in your letter received on March 28, 2017, I confirm that we are upholding our previous decision.

## III. Issues and standard of review

[11] Mr. Cheeseman raises a number of issues in his written submissions. He questions the amount of the penalties and interest assessed against him and the CRA’s audit process. Mr. Cheeseman also requests a review of the Decision. I will address Mr. Cheeseman’s assessment and audit concerns below as a preliminary matter of the Court’s jurisdiction or authority.

[12] The issue before me is whether the Decision denying Ms. Cheeseman's request for relief should stand or should be overturned and reconsidered by a Minister's delegate. This issue is subject to review for reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23-25 (*Vavilov*)).

[13] A request for the Court's review of the merits of an administrative decision requires me to respect Parliament's intention to empower the original decision maker to make the decision in question and "to function with a minimum of judicial interference" (*Vavilov* at para 24). My role is to assess the reasons given in the Decision and consider whether the Minister's delegate applied the relevant law to the facts of the case in a rational and coherent way that justifies the conclusion reached (*Vavilov* at paras 86, 95). If so, I must give deference to the Decision made and not substitute my own analysis and conclusion. Conversely, if there are serious shortcomings in the Decision such that it does not reflect the required degree of justification, intelligibility and transparency, I will set aside the Decision and remit Mr. Cheeseman's case for reconsideration (*Vavilov* at para 100).

#### IV. Preliminary matters

##### *Nature of judicial review and authority (jurisdiction) of the Court*

[14] Mr. Cheeseman has requested that the Court consider issues relating to the CRA's conduct of its audits and the amounts assessed against him as penalties (including penalties for gross negligence) and interest. As I explained during the hearing, I do not have the authority to consider and determine these issues. My role in this application is to review the Decision and, if I conclude that it was not reasonable, to set the Decision aside and order the Minister to reconsider

Mr. Cheeseman's request for relief. The Tax Court of Canada has the sole authority to consider a taxpayer's assessment and audit issues through the Notice of Objection and appeal procedure.

[15] 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, [2009] 1 SCR 339.

*Admissibility of Mr. Cheeseman's additional evidence*

[16] Mr. Cheeseman prepared and filed an affidavit in support of this application, attaching as Exhibit A to the affidavit detailed financial information from the licensed insolvency trustee involved in his 2007 bankruptcy. The information in Exhibit A was not before the Minister's delegate when making the Decision.

[17] The general rule is that the evidentiary record on an application for judicial review is restricted to the record that was before the decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 (*Access Copyright*); see also *Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149 at para 7). The rule reflects the different roles Parliament has conferred on the decision maker and the Court. The decision maker decides the case on its merits based on the evidence before them. The reviewing court reviews the overall legality of the decision in light of

that evidence and does not engage in a new trial of the questions before the decision maker (*Access Copyright* at paras 17-19). The exceptions to the general rule do not apply to the information contained in Exhibit A. Therefore, I have not considered that information in my review of the Decision.

V. Legislative background

[18] Subsection 220(3.1) permits the Minister to waive or cancel any penalty or interest otherwise payable by a taxpayer under the ITA. The Minister must take into account all relevant considerations in determining whether to grant taxpayer relief pursuant to the subsection 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 improperly restrict her discretion in making a 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.

[19] 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).

VI. Analysis – Was the Decision reasonable?

[20] In order to determine whether the Decision was reasonable, it is first necessary to identify its substance: was the Decision a refusal to undertake a further review of the Second Refusal or was it a substantive review and refusal of the Fourth Request? In my view, and as conceded by Respondent's counsel, the Decision is somewhat of a hybrid. The Minister did not undertake a full reconsideration of Mr. Cheeseman's personal and financial circumstances in response to the Fourth Request. The CRA did not prepare a taxpayer relief fact sheet, as it would in the ordinary course of a substantive review, and the Minister's delegate made no reference in the Decision to the substantive reasons for the First and Second Refusals. However, it is clear that some consideration of the merits of Mr. Cheeseman's Fourth Request occurred.

[21] In the course of making the Decision, the Minister's delegate relied on an April 24, 2017 email report written by a senior CRA taxpayer relief officer (April 24 Report). The officer analysed the CRA's reviews of the First and Second Requests but concluded that the Minister should not undertake a further review of Mr. Cheeseman's request for relief, despite a minor oversight in the second CRA review.

[22] With respect to the Fourth Request, the officer noted that Mr. Cheeseman reiterated his arguments from the First and Second Requests and added medical information substantiating his stress and depression. The officer considered the medical information and the fact that the note

from Mr. Cheeseman's doctor referred to treatment between 2009 and 2016 for ongoing stress, anxiety and depression. Despite some overlap between the medical information and the 2009 taxation year, the officer concluded that Mr. Cheeseman's medical issues did not fall within the timeframe during which he failed to comply with his tax obligations and would not warrant relief.

[23] The starting point for my analysis is that the Minister's delegate was reviewing a fourth request for relief from the interest and penalties assessed in respect of Mr. Cheeseman's 2009-2011 taxation years. Mr. Cheeseman's first two Requests were considered in depth by the CRA as reflected in the taxpayer relief fact sheets completed by CRA officers. The First and Second Refusals contained detailed explanations for the Minister's refusals and Mr. Cheeseman was properly informed in the Second Refusal of his right to pursue his request for relief in this Court. He acknowledged this information in his Third Request and indicated an intention to pursue an application for judicial review.

[24] Mr. Cheeseman had no automatic right to a fourth review of his request for relief. Absent significant new evidence or other compelling reason, such as a significant breach of process or substantive error in the first two CRA relief processes and refusals, I find no obligation on the part of the Minister to conduct a full review of Mr. Cheeseman's circumstances or to repeat in the Decision the findings of the First and Second Refusals. I have some sympathy for the Minister's position that this process must come to an end and that Mr. Cheeseman was required to pursue his objections to the Second Refusal by way of court application. Therefore, the brevity

of the reasons given in the Decision is not a sufficient basis on which to allow this application (*Jewett v Canada (Attorney General)*, 2020 FCA 187 at para 4).

[25] Further, the CRA undertook a review of Mr. Cheeseman's new evidence and of the processes and conclusions that resulted in the First and Second Refusals. I have reviewed the First and Second Refusals, and supporting fact sheets, in assessing the officer's advice to the Minister's delegate in the April 24 Report and Mr. Cheeseman's new evidence. I find that the CRA officer reasonably reviewed the new evidence against the timeframes relevant to the initial imposition of the interest and penalties that are at the heart of Mr. Cheeseman's Fourth Request. The officer also reviewed in some detail the First and Second Refusals to ensure there were no significant errors or oversights. The record demonstrates that the Minister's delegate reviewed the April 24 Report.

[26] As a result, I find that the delegate's statement in the Decision acknowledging Mr. Cheeseman's new concerns, coupled with the April 24 Report, supports the Minister's decision not to carry out a full review of Mr. Cheeseman's Fourth Request. Mr. Cheeseman has not established a basis for the Court's intervention in the exercise of the Minister's discretion. Mr. Cheeseman's continued frustration with the CRA's audit process, while understandable, cannot be addressed in this application.

## VII. Conclusion

[27] The application for judicial review will be dismissed.

[28] The Respondent made no request for costs in this matter and none will be awarded.

**JUDGMENT IN T-928-17**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. No costs are awarded.

"Elizabeth Walker"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-928-17

**STYLE OF CAUSE:** BRIAN CHEESEMAN v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO (THE COURT) AND ST. JOHN'S, NEWFOUNDLAND AND LABRADOR (THE PARTIES)

**DATE OF HEARING:** OCTOBER 21, 2020

**JUDGMENT AND REASONS:** WALKER J.

**DATED:** MARCH 30, 2021

**APPEARANCES:**

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(ON HIS OWN BEHALF)

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FOR THE RESPONDENT

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