Federal Court  Cour fédérale

Date: 20210609

Docket: T-1862-19

Citation: 2021 FC 576

St. John's, Newfoundland and Labrador, June 9, 2021

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SALLY MARIE DAVIS, IN HER CAPACITY AS EXECUTRIX OF THE ESTATE OF THE LATE BEVERLEY M. SHAW

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Ms. Sally Marie Davis, in her capacity as the Executrix of the Estate of the Late Beverley M. Shaw (the "Applicant"), seeks judicial review of the decision made on January 25, 2019 by Ms. Kimberley Baillie, Delegate (the "Delegate") of the Minister of National Revenue (the "Minister"). In that decision, the Delegate refused the Applicant's second request for taxpayer

relief against the imposition of late-filing fees and interest relative to the 2010 tax return of the Estate of the late Beverley M. Shaw, mother of the Applicant.

[2] Pursuant to Rule 303(2) of the *Federal Courts Rules*, S.O.R./98-106 (the "Rules"), the Attorney General of Canada represents the Minister as the Respondent (the "Respondent").

II. **BACKGROUND**

[3] The following details are taken from the affidavits filed by the parties, the Tribunal Record and the replies to the Written Examination conducted by the Applicant pursuant to Rule 99 of the Rules.

[4] The Applicant filed her affidavit affirmed on December 4, 2019. She also filed the affidavit of her husband, Mr. Gordon Edward Davis; that affidavit was also affirmed on December 4, 2019.

[5] The Respondent submitted the affidavit of Ms. Tracy Dahl, a Senior Taxpayer Relief Officer with the Canada Revenue Agency (the "CRA"). The Written Examination conducted by the Applicant was directed to Ms. Dahl.

[6] The Tribunal Record consists of the documents that were before the decision maker.

[7] Beverley M. Shaw died on October 31, 2010. The taxes in respect of her Estate were due on April 30, 2011.

[8] The CRA issued an assessment on November 12, 2013. At that time no balance was shown to be due; no late-filing fees or interest as assessed.

[9] On August 28, 2014, the CRA issued a reassessment with no changes.

[10] In 2016, the Applicant applied for a clearance certificate. This request led to an audit and a reassessment was issued on July 4, 2016. The reassessment included two previously unreported Registered Retirement Income Funds ("RRIFs") slips that increased the taxable income by $189,401.00. This led to the imposition of additional taxes in the amount of $79,852.80, as well as a late-filing fee of $13,189.68, calculated at 17% of the amount owning as of April 30, 2011, and arrears interest in the amount of $27,455.04, for a total amount due of $120,515.54.

[11] The Applicant paid this amount in full by payments made on July 5, 6 and 14, 2016.

[12] On September 21, 2016, the Applicant filed a Notice of Objection. On September 29, 2017, the CRA issued a reassessment confirming the July 4, 2016 reassessment.

[13] On October 4, 2016, the CRA received the Applicant's first request for cancellation of the late-filing fee and interest accrued between May 1, 2011 and July 4, 2016. The Applicant sought that relief pursuant to section 220(3.1) of the *Income Tax Act*, R.S.C. 1985 c. 1 (5th Supp.) (the "Act").

[14] On April 27, 2018, S. Carroll, Team Leader of the Taxpayer Relief Centre of Expertise, issued a decision to cancel the interest accrued between July 23, 2013 and July 4, 2016, in the amount of $16,790.14.

[15] On January 4, 2019, the CRA received a second request from the Applicant, seeking the cancellation of the late-filing fee.

[16] Ms. Dahl considered the second request as relating to both the penalty and waiver of the remaining interest. She recommended that the penalty be maintained and that no more relief be granted in respect of the interest. On January 25, 2019, the Delegate acted upon this recommendation and issued the decision, denying the Applicant's second request.

III. **SUBMISSIONS**

A. ***The Applicant's Submissions***

[17] The Applicant argues that the decision of the Delegate is unreasonable. She also submits that she was denied procedural fairness, on the basis of a reasonable apprehension of bias.

[18] Among other things, the Applicant notes the short time frame between the CRA's receipt of her second request, that is January 4, 2019, and the date of the decision, that is January 25, 2019. She also refers to the "fact" that Tracy Dahl, the Tax Relief Officer who considered the second request, is subordinate to the person who made the first decision and "presumably" would not want to override the decision of her superior.

[19] The Applicant submits that pursuant to subsection 26(a) of the Income Tax Information Circular ICU7-1R1 (the "ICU7-1R1") addressing "Taxpayer Relief Provisions", the CRA was obliged to inform her about the missing RRIF slips in a timely manner. She argues that the failure of the CRA to provide her with those slips meant that she was unaware of the RRIFs and unable to file a tax return that included them. The Applicant characterizes this as circumstances beyond her control.

[20] The Applicant also submits that the imposition of penalty and interest charges were also attributable to circumstances beyond her control and accordingly, the Delegate was required to consider the serious emotional distress resulting from her mother's death, in light of section 25 of the ICU7-1R1, as well as her history of compliance with the Act and early steps to remedy the omission, pursuant to section 33 of the ICU7-1R1.

[21] Further, the Applicant argues that in making the decision, the Delegate breached Articles 8 and 12 of the Taxpayers' Bill of Rights.

[22] Article 8 guarantees that the law will be applied consistently. In her affidavit, the Applicant alleges that the CRA auditor told her that penalties are not normally assessed in situations such as hers.

[23] The Applicant argues that if penalties are not usually assessed in situations like hers, they cannot now be applied without breaching the guarantee of consistent application.

[24] Article 12 of the Taxpayers' Bill of Rights guarantees a taxpayer the right to consideration of a request for waiver of interest and penalties when resulting from circumstances beyond the taxpayer's control.

[25] Finally, the Applicant alleges that the decision conflicts with the principles of natural justice and procedural fairness.

B. ***The Respondent's Submissions***

[26] The Respondent argues that the correctness of the July 4, 2016 tax reassessment and the filing date are not in issue in this application for judicial review. The only issue is the reasonableness of the decision.

[27] The Respondent submits that the decision is reasonable and procedurally fair.

IV. **DISCUSSION AND DISPOSITION**

[28] The decision in issue was made pursuant to subsection 220(3.1) of the Act which provides as follows:

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	(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

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.	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.

[29] This statutory provision gives the Minister a discretion to waive interest and penalties. According to the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019), 441 D.L.R. (4th) 1 (S.C.C), this decision is presumptively reviewable on the standard of reasonableness.

[30] In *Vavilov*, *supra*, at paragraphs 75 and 83 the Supreme Court of Canada explained the content of the reasonableness standard, as follows:

> [75] … As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. Moreover, as explained below, reasonableness review considers all relevant circumstances in order to determine whether the applicant has met their onus.
>
> …
>
> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the

> "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. …

[31] I refer also to the decision in *Canada Revenue Agency v. Telfer*, 2009 D.T.C. 5046 (F.C.A.) at paragraph 24 where the Federal Court of Appeal said the following:

> Unreasonableness is the standard of review normally applicable to the exercise of discretion: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 51 ("*Dunsmuir*"). Indeed, this Court had previously held in *Lanno v. Canada (Customs and Revenue Agency)*, 2005 DTC 5245, 2005 FCA 153, that unreasonableness simpliciter (one of the two deferential standards then applied by the courts) was the standard of review applicable to a decision made under subsection 220(3.1).

[32] Issues of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

[33] The filing date of the tax return is not in issue in this application. The evidence shows that the Applicant filed the return, that was due on April 30, 2011, on July 23, 2013. The late-filing penalty was imposed because the return was filed late.

[34] The Delegate reviewed the Applicant's file and according to the decision of January 25, 2019, she completed a "second independent review of the facts and circumstance" and denied the relief sought. The Delegate said that the late-filing penalty was charged because the tax return had been filed late. The Delegate said that because the Applicant had not "provided a circumstance beyond your control which prevented you from filing the return by the due date, relief of this penalty is not warranted".

[35] The Applicant sought relief pursuant to section 23 of IC07-1R1 which provides as follows:

> 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

[36] Section 25 of IC07-1R1 addresses "extraordinary circumstances" as follows:

> Penalties and interest may be waived or cancelled in whole or in part, if they result from circumstances beyond a taxpayer's control. Extraordinary circumstances that may have prevented a taxpayer from making a payment when due, filing a return on time, or otherwise complying with an obligation under the act include, but are not limited to, the following examples:
>
> a) natural or human-made disasters, such as flood or fire
>
> b) civil disturbances or disruptions in services, such as a postal strike
>
> c) serious illness or accident
>
> d) serious emotional or mental distress, such as death in the immediate family

[37] The Applicant, in her initial request for relief, cited delay by the CRA, financial hardship, and special circumstances for her request. In her second request, she again cited CRA delay and special circumstances.

[38] The Delegate focused upon the delay in the filing of the tax return as the reason for the imposition of the late-filing penalty. She noted that although the Applicant contended that the return had been initially filed in early 2011, that contention was not supported by the evidence.

[39] Considering the contents of the Tribunal Record, which includes the Applicant's first request for relief, the materials consulted by the first decision maker, the decision upon the first request, and the second request, the Delegate's conclusion that the tax return was filed late, is reasonable.

[40] The decision made in response to the first request for relief, that is to partially waive interest charges, was made on the basis that the Applicant did not have all the information about taxable income, that is the RRIFs.

[41] The legal test is not a subjective one; it requires the elements of transparency, justification, and intelligibility, as discussed in *Dunsmuir v. New Brunswick* (2008), 291 D.L.R. (4th) 577 (S.C.C.).

[42] These three elements require a reviewing Court to consider the evidence before a decision maker. The Court is not to re-weigh the evidence, but according to *Vavilov*, *supra*, the Court is to look at the evidence that was before the decision maker.

[43] I am satisfied that the Delegate reasonably concluded that the tax return was filed late and that there were no special circumstances to justify cancellation or waiver of the late-filing penalty.

[44] Although the Delegate did not separately address the request for waiver or cancellation of interest, refusal of that request is implicit in the denial of the request to waive the late-filing penalty.

[45] The issue of procedural fairness remains.

[46] The Applicant argues that the Delegate did not act impartially in reaching her decision.

[47] Essentially, the Applicant submits that the Delegate failed to conduct a fair and neutral assessment of her second request for relief, that she was biased.

[48] The legal test for bias is high.

[49] The party alleging bias carries the burden of establishing it.

[50] The test for bias was recently addressed by the Federal Court of Appeal in *Oleynik v. Canada (Attorney General)*, 2020 FCA 5 at para 56, (leave to appeal to S.C.C. refused, 39118 (15 October 2020)), relying on the decision of the Supreme Court of Canada in *Committee for*

Justice and Liberty et al. v. National Energy Board et al., [1978] 1 S.C.R. 369. That test is as follows:

> [W]hat would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[51] At paragraph 57 of its decision in *Oleynik, supra,* the Federal Court of Appeal noted the following:

> In setting out this test in *Committee for Justice and Liberty* at 394, Justice de Grandpré was careful to state that the grounds for the apprehension must be "substantial." He also agreed that the test – what would a reasonable, informed person think – cannot be related to the "very sensitive or scrupulous conscience." In other words, the threshold for a finding of a reasonable apprehension of bias is a high one, and the burden on the party seeking to establish a reasonable apprehension is correspondingly high: see *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 25-26.

[52] In my opinion, the Applicant failed to establish any foundation for the allegation of bias on the part of the Delegate, arising from her working relationship with another employee of the CRA who is engaged in assessing requests for relief.

[53] I would note that an allegation of bias against a public servant is a serious matter and should not be made in the absence of significant evidence. There is no such evidence in this case.

[54] There is no evidence to support the Applicant's claim that her second request was not fairly considered. The submissions made upon the second request were not lengthy. I see nothing

suspicious in the passage of time between delivery of that request and submissions, and the delivery of a decision.

[55] As noted above, a decision to grant or refuse relief from penalties and interest is discretionary. The exercise of that discretion will be informed by the guidelines in ICU7-1R1.

[56] In the decision, the Delegate said the following:

> My review shows that even if all RRIF income had been reported when the paper filed return was received on July 23, 2013, the same late-filing penalty amount would have been charged as it was on July 4, 2016. This is due to the fact that the return was filed more than 12 months after the due date. As you have not provided a circumstance beyond your control which prevented you from filing the return by the due date, relief of this penalty is not warranted.

[57] In my view, this statement reflects the opinion of the Delegate after her assessment of the materials and submissions presented by the Applicant. The Delegate was mandated to assess the evidence and arguments presented in support of the request for relief, to determine if the Applicant met the conditions for obtaining relief. The Applicant asked for that relief on the basis of extenuating circumstances beyond her control.

[58] On the basis of the materials contained in the Tribunal Record including “Fact Sheets”, I am satisfied that the Delegate’s conclusion is reasonable. A negative decision does not, *per se*, give rise to a reasonable apprehension of bias. The Applicant has failed to meet her burden of showing any such reasonable apprehension of bias in the manner in which her second request for relief was decided.

[59] Likewise, I see no impropriety arising from the fact that the Delegate reviewed the earlier request for relief and the decision that was made in that respect.

[60] Those materials are part of the Applicant's file. In *Leblanc v. Canada (Attorney General)*, 2010 FC 688, the Court commented on the fact that the decision maker in that case looked at previously quashed decisions with "appropriate caution" and reached an independent conclusion.

[61] I see nothing in the record to rebut the presumption that the Delegate here performed her job appropriately and independently.

[62] Again, there is no evidence that the Delegate was influenced by irrelevant considerations, including an alleged "need" to accommodate a superior.

[63] The Applicant has failed to show a breach of procedural fairness.

[64] In the result, this application for judicial review will be dismissed. The decision is reasonable and there was no breach of procedural fairness.

[65] The parties agreed to bear their own costs and there will be no Order as to costs.

JUDGMENT in T-1862-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no Order as to costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1862-19
STYLE OF CAUSE:	SALLY MARIE DAVIS, IN HER CAPACITY AS EXECUTRIX OF THE ESTATE OF THE LATE BEVERLEY M. SHAW v. ATTORNEY GENERAL OF CANADA
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