Federal Court  Cour fédérale

Date: 20091117

Docket: T-1208-08

Citation: 2009 FC 1161

Ottawa, Ontario, November 17, 2009

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

JACQUES COOKE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] On August 4, 2008, Jacques Cooke (the applicant) applied for judicial review of a decision made on July 3, 2008 by the Acting Assistant Director, Revenue Collections, of the Montréal Tax Services Office (TSO) of the Canada Revenue Agency (CRA) concerning a request to cancel interest and penalties under subsection 220(3.1) of the *Income Tax Act*, R.S.Q. 1985, c. 1 (5th Supp.) (ITA). The application alleges that the CRA did not correctly exercise its discretion and did not take account of the relevant facts of the applicant's request.

Facts

[2] The CRA is claiming amounts from the applicant for the 1989, 1993 and 1996 to 2002 taxation years. According to the notices of assessment for those years, the CRA is claiming $34,622.88 in duties and $2,647.40 in penalties from the applicant. On August 1, 2008, the applicant's tax liability was over $110,000. The interest portion of that liability therefore amounts to about twice the total of the duties and the assessed penalties.

[3] According to the applicant, he was unable to pay the duties, penalties and interest claimed from him owing to circumstances beyond his control, namely major financial hardship and the state of his health. The applicant and his partner, André Lesage (T-1209-08), carried on business in the real estate field. As a result of the disastrous period in the real estate industry in Quebec between 1990 and 1998, the applicant lost several million dollars in equity, there were almost no sales of land and several judgments were rendered against the applicant personally in favour of his hypothecary creditors. Because of this situation, his health declined significantly.

[4] Based on those circumstances, the applicant made a request to the CRA on May 21, 2004 to cancel the interest and penalties pursuant to subsection 220(3.1) of the ITA. According to the applicant, his circumstances fit within the "Guidelines and examples of circumstances where cancelling or waiving interest or penalties may be warranted" (Guidelines) set out in Information Circular IC 92-2 published by the CRA (now "Taxpayer Relief Provisions", Information Circular IC 07-1).

[5] Following an exchange of information in November 2004, the CRA's Manager, Revenue Collections, decided on December 2, 2004 to deny the request. According to the letter she wrote for that purpose, the applicant had not proved financial hardship, that is, an inability to provide himself with basic necessities and, within reasonable limits, to obtain other non-essential items.

[6] On January 20, 2005, as stated in paragraph 13 of Information Circular IC 92-2, the applicant requested that the Director of the Montérégie Tax Services Office review the decision of December 2, 2004.

[7] The applicant received a letter from the respondent dated February 4, 2005 stating that the request for review would be submitted to the fairness package committee. The CRA's decision of December 2, 2004 was confirmed by the Assistant Director, Revenue Collections (and not the Director of the Montérégie TSO as provided for in paragraph 14 of the Circular) in a decision dated April 11, 2005.

[8] On May 9, 2005, the applicant applied to this Court for judicial review of that decision. Pursuant to an out-of-court agreement, the applicant discontinued the application for judicial review in return for an undertaking by the CRA to have the fairness request reviewed again by a person who had not been involved in the process of deciding the first request for relief or reviewing the first decision.

[9] On November 20, 2007, the applicant proposed that his spouse stand surety for the liability if the CRA waived the interest and completed its processing of the file by December 31, 2007. On November 23, 2007, the applicant, through his counsel, confirmed and completed his request for

review and provided the CRA with various balance sheets for the years from 1990 to 2006. On July 3, 2008, the Acting Assistant Director, Revenue Collections, decided against the applicant. This application for judicial review concerns that decision.

[10] The applicant argues that the decision contains few details, which is why a request was made to the CRA for a report detailing the reasons for the decision. The request was denied because the official responsible for the file did not have the power to provide the information. The applicant was told that he could make a formal request under the access to information rules.

Issue

(1) Did the Minister correctly exercise his discretion and take account of the factors relevant to the applicant's file in his decision of July 3, 2008?

Applicable legislation

[11] Subsection 220(3.1) of the ITA reads as follows:

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

[Emphasis added]

[12] The relevant paragraphs of the Guidelines set out in Information Circular IC 92-2 published by the CRA read as follows:

5. Penalties and interest may be waived or cancelled in whole or in part where they result in circumstances beyond a taxpayer's or employer's control. For example, one of the following extraordinary circumstances may have prevented a taxpayer, a taxpayer's agent, the executor of an estate, or an employer from making a payment when due, or otherwise complying with the *Income Tax Act*: (a) natural or human-made disasters such as, flood or fire; (b) civil disturbances or disruptions in services such as, a postal strike; (c) a serious illness or accident; or (d) serious emotional or mental distress such as, death in the immediate family.	5. Il sera convenable d'annuler la totalité ou une partie des intérêts ou des pénalités, ou de renoncer à ceux-ci, si ces intérêts ou ces pénalités découlent de situations indépendantes de la volonté du contribuable ou de l'employeur. Voici des exemples de situations extraordinaires qui pourraient empêcher un contribuable, un agent d'un contribuable, l'exécuteur d'une succession ou un employeur de faire un paiement dans les délais exigés ou de se conformer à d'autres exigences de la *Loi de l'impôt sur le revenu:* a) une calamité naturelle ou une catastrophe provoquée par l'homme comme une inondation ou un incendie ; b) des troubles civils ou l'interruption de services comme une grève des postes ; c) une maladie grave ou un accident grave ; d) des troubles émotifs sérieux ou une souffrance morale grave comme un décès dans la famille immédiate.
6. Cancelling or waiving interest or penalties may also be appropriate if the interest or penalty arose primarily because of actions of the Department, such as: (a) processing delays which result in the taxpayer not being informed, within a reasonable time, that an amount was owing; (b) material available to the public contained errors which led taxpayers to file returns or make payments based on incorrect information; (c) a taxpayer or employer receives incorrect advice such as in the case where the Department wrongly advises a taxpayer that no instalment payments will be required for the current year; (d) errors in processing; or (e) delays in providing information such as the case where the taxpayer could not make the appropriate instalment or arrears payments because the necessary information was not available.	6. L'annulation des intérêts ou des pénalités ou la renonciation à ceux-ci peuvent également être justifiées si ces intérêts ou pénalités découlent principalement d'actions attribuables au Ministère comme dans les cas suivants: a) des retards de traitement, ce qui a eu pour effet que le contribuable n'a pas été informé, dans un délai raisonnable, de l'existence d'une somme en souffrance ; b) des erreurs dans la documentation mise à la disposition du public, ce qui a amené des contribuables à soumettre des déclarations ou à faire des paiements en se fondant sur des renseignements erronés ; c) une réponse erronée qu'un contribuable ou un employeur a reçue concernant une demande de renseignements comme dans le cas où le Ministère a informé par erreur un contribuable qu'aucun acompte provisionnel n'est nécessaire pour l'année en cours ; d) des erreurs de traitement ; e) des renseignements fournis en retard

comme dans le cas où un contribuable n'a pu faire les paiements voulus d'acomptes provisionnels ou d'arriérés parce qu'il n'avait pas les renseignements nécessaires.

[Emphasis added]

Standard of review

[13] The applicable standard of review in matters involving relief from penalties and interest is the standard of reasonableness. Subsection 220(3.1) of the ITA shows the extent of the Minister's power to waive penalties and interest. The decision on relief from penalties and interest therefore involves the exercise of a discretion by the Minister, with account being taken of the Guidelines. It has been demonstrated many times that the CRA has considerable freedom of action and that, in principle, the Court will interfere with the exercise of that freedom only on rare occasions: see *Jenkins v. Canada (National Revenue)*, [2007] 3 C.T.C. 104 ; 2007 FC 295.

[14] According to *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at paragraph 53, "[w]here the question is one of fact, discretion or policy, deference will usually apply automatically". More specifically, *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, applies to the interpretation of the standard of review under section 18.1 of the *Federal Courts Act*. Justice Binnie states the following at paragraph 43:

> . . . it is clear from s. 18.1(4)(*d*) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*.

Therefore, *Dunsmuir* also applies to applications for judicial review before the Federal Court.

Analysis

(1) *Did the Minister correctly exercise his discretion and take account of the factors relevant to the applicant's file in his decision of July 3, 2008?*

[15] According to *Dunsmuir*, at paragraph 47:

> In judicial review, 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.

[16] That being said, I do not think that the impugned decision in this case is unreasonable. As already stated, the CRA has considerable discretion in deciding to cancel interest and penalties under subsection 220(3.1) of the ITA. Relying on the Guidelines, it will exercise that discretion only in extraordinary circumstances.

[17] In *Kaiser v. Canada (Minister of National Revenue – M.N.R.)*, [1995] F.C.J. No. 349, the Court concluded as follows at paragraph 11:

> Every case is required to be decided on its own merit in order that circumstances unique to that individual taxpayer are properly taken into account. . . . when the Minister exercises his discretion under subsection 220(3.1), he is required to take into account considerations relevant and unique to that taxpayer alone.

The applicant submits that the respondent was negligent in not considering the specific factors raised in the request. This argument must be rejected. As will be shown, the CRA, in making its decision, took into account the important factors unique to the taxpayer.

[18] The applicant submits that the real estate slump in the 1990s is similar to extraordinary circumstances as discussed in the Guidelines, since it was an event beyond his control. The Court

notes that we are not dealing here with an event comparable to the examples set out in paragraphs 5(a) and (b) of the Guidelines, such as flood, fire, civil disturbances or disruptions in services. The real estate slump was caused by a series of decisions made by businesspeople. It did not arise out of extraordinary circumstances such as the examples in the Guidelines. Of course, the circumstances were not intended by the businesspeople, but their decisions made the circumstances possible. The same thing could apply to the crash in the high-technology sector in the late 1990s and early 2000s.

[19] In making his decision, the respondent also took account of several factors in addition to the real estate slump. According to the affidavit of Timothéos Coshiantis, a relief program officer at the CRA who was in charge of the taxpayer's request, he took account of the following in his analysis:

(a) the applicant's tax liability resulting from the reassessments for the 1989, 1993 and 1996 to 2002 taxation years, the accrued interest on the liability and the penalties for negligence assessed for the 1996 and 1997 taxation years;

(b) the real estate slump of the 1990s;

(c) financial hardship, namely the various balance sheets submitted by the applicant, the legal proceedings brought against him or against companies in which he held shares, his personal income from his activities, the financial capacity of the applicant and his spouse as a couple, the retained earnings of the businesses of which he was the sole shareholder and the amounts he received in reimbursement of advances he had made to some of those businesses;

(d) the fact that the CRA had informed the applicant regularly of the balance of his liability and had suspended collection against him several times, either because of

his promise to make a settlement offer (which he had still not done) or because the CRA was unable to take collection action anyway. The CRA never considered the applicant insolvent;

(e) the state of the applicant's health, as described in a note from his attending physician.

[20] With regard to the applicant's depression resulting from the consequences of the real estate slump, paragraphs 5(c) and (d) of the Guidelines state that extraordinary circumstances may be present where the applicant proves "a serious illness" or "serious emotional . . . distress". The applicant's file shows that, during the period under review, and notwithstanding the note from his attending physician, he went about his affairs, making the appropriate representations.

[21] The file prepared by the CRA's relief program officer shows that, during the period under review, very large amounts were in circulation both for the applicant personally and through companies in which he held shares. Moreover, the amounts assessed over the years range between $800 and $13,000. During that period, the applicant therefore made it a priority to pay certain creditors, to the CRA's detriment. By doing so, he increased amounts (the duties claimed and the penalties) with very high interest rates, thereby creating an additional liability of more than $75,000.

[22] The Minister, through his officials, exercised his discretion. The applicant was heard several times, and all his requests were examined by CRA representatives. The respondent's record shows the work done on the taxpayer's request. In his review, the analyst considered each of the points raised in the requests, commented on those points one by one and concluded in each case that the

Guidelines did not apply to the applicant's circumstances. That analysis was approved by the Acting Assistant Director before she signed the letter of July 3, 2008 denying the applicant's request.

[23] The applicant also notes that the decision contained few details and requests specific reasons for the decision. However, the decision of July 3, 2008 briefly described the analyst's review and considered each of the points raised by the applicant before concluding that the request was denied. It is a reasoned decision that meets the reasonableness standard.

[24] Finally, the applicant submits that the interest arose because of actions of the CRA, particularly delays in processing the file. It is important to note that interest continues to accrue for the applicant. Nonetheless, the delays are attributable to the actions of both the applicant and the CRA. For example, about six months passed between the out-of-court agreement following the first application for judicial review and the date when the applicant sent in additional submissions for the review of his file by a CRA officer. There was a long interval of time between the first application for judicial review and the applicant's discontinuance, but that interval resulted from the out-of-court agreement between the applicant and the respondent. The record does not show any violation by the CRA in this regard that could justify the Court's intervention.

Conclusion

[25] For the reasons set out above, the Court dismisses the application for judicial review.

Costs

[26] Although the respondent seeks an award of costs against the applicant, I am exercising my discretion under subsection 400(1) of the *Federal Courts Rules*, SOR/98-106, and I conclude that there will be no costs.

JUDGMENT

THE COURT ORDERS AS FOLLOWS:

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

"Simon Noël"

Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1208-08
STYLE OF CAUSE:	Jacques Cooke v. The Attorney General of Canada
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	November 3, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	The Honourable Justice Simon Noël
DATED:	November 17, 2009

APPEARANCES:

Emmanuelle Campeau	FOR THE APPLICANT
Ian Demers	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ravinsky, Ryan, Lemoine 1010 de la Gauchetière Street West Suite 1200 Montréal, Quebec H3B 2N2	FOR THE APPLICANT
Department of Justice Canada Guy-Favreau Complex 200 René Lévesque Blvd. West East Tower, 9th Floor Montréal, Quebec H2Z 1X4	FOR THE RESPONDENT