

Federal Court



Cour fédérale

Date: 20100805

Docket: T-2135-07

Citation: 2010 FC 809

Ottawa, Ontario, August 5, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ROBERT D. HOLMES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of a decision dated November 3, 2007, wherein a director at Canada Revenue Agency (CRA), did not use her discretion to grant the applicant relief under subsection 281.1 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the ETA), from penalties and interest assessed.

Background

[2] The applicant, a businessman, sold multiple condominium units located in Moncton, New Brunswick. He did not remit HST on the sale as was required under the ETA. On an audit review, CRA caught the mistake and assessed the applicant at \$105,368.26 owing in arrears.

[3] In February 2007, after unsuccessfully appealing the assessment, the applicant sought to have cancelled or waived the interest and penalties, approximately \$11,434.43, under the tax fairness provisions in the ETA. The basis of the applicant's request for cancellation was that he was suffering from severe depression at the time of the real estate transactions in question. The failure to collect the appropriate taxes was unintentional. His illness had caused him to resign from his employment at Correctional Services Canada and begin receiving extended earnings replacement benefits under the *Workers Compensation Act* for his permanent medical impairment. He also received a buyout from his employer, but claimed that his wife and lawyer handled his financial decisions as he was not competent to do so.

[4] On March 30, 2007, CRA issued a decision letter to the applicant denying his request on the basis that he had failed to show extraordinary circumstances preventing him from complying with his statutory obligations.

[5] On June 6, 2007, the applicant sought a second independent review of this decision to the Director.

[6] On September 27, 2007, Yvon Boudreau prepared a synopsis of the applicant's fairness request and tax history for internal use. He recommended that the penalty and interest applicable to the two condominium units be waived plus any interest accrued on the account since December of 2006. He further recommended that the interest on the total amount of the penalty be waived for the period June 2007 to September 2007 due to departmental delay.

[7] Significantly, the review of the applicant's tax history revealed several things. It revealed that the officer who had conducted the original audit of the applicant had previously advised the applicant on how to deal with the sale of the condominiums. It also revealed that after the applicant's diagnosis with depression, he purchased and renovated a commercial building for which he found a tenant. Also since his diagnosis, the applicant had opened a fast food restaurant with his son called "Skipper Jacks", and had filed his HST returns on time.

[8] On September 28, 2007, a second internal memorandum was created in regards to the applicant's request. This memo completed by Kevin Jensen and titled Fairness Committee Recommendations was signed by two other employees. In the memorandum, denial of the request was recommended because:

1. The applicant had a poor compliance history;
2. The applicant had knowingly allowed a balance to exist on his HST account and his related accounts;

3. The applicant was told on two separate occasions that he must self-assess and/or charge the GST/HST when he sold the condominium units; and

4. Despite a diagnosis of major depressive disorder and bipolar mood disorder, the applicant continued to purchase properties, renovate and open a restaurant.

[9] On October 22, 2007, the applicant's request was the subject of a third memorandum, this time considering whether the request should be granted on the basis of financial hardship. The memorandum recommended denial of the request because the applicant had realizable equity in property and owned non-income producing real property for investment purposes. It also divulged that after December 2006, the applicant had purchased a vacant commercial lot.

[10] In the final adjudication of the applicant's request, the Director of the Moncton Tax Services Office (the director) considered all of the applicant's evidence, as well as the information on his file and each of the recommendations. Her conclusion was that the applicant's situation showed no financial hardship or extraordinary circumstances that would warrant a cancellation of the penalties. The decision did waive the interest that had accrued during the period in which the request was processed.

Issues

[11] The issues are as follows:

1. Has the applicant plead a proper ground of review?

2. What is the standard of review?
3. Was the CRA director's ultimate decision reasonable?

Applicant's Written Submissions

[12] The applicant submits that the decision was unreasonable and refers to Information Circular 07-1, the guidelines which inform discretionary decisions regarding the cancellation or waiver of tax penalties or fees (the Guidelines). The applicant submits that his diagnosed bipolar condition ought to have been considered as extraordinary circumstances under Part II of the Guidelines, because it prevented him from making logical decisions. It was revealed in cross-examination that the director relied on the Workers' Compensation report for information about bipolar disorder and did not do any other research on the condition. Moreover, the director's decision was also based on the applicant's apparent ability to continue making business decisions despite his condition, demonstrated by several transactions and deals he entered into post-diagnosis. In reality, many of those transactions were clearly illogical decisions on the applicant's part. For example, he sold a \$350,000 home for \$200,000 and borrowed \$30,000 to finance the purchase of a \$5,000 vacant commercial lot. The applicant further suggests that taking all of his retirement money and investing it into a restaurant was also an illogical decision.

Respondent's Written Submissions

[13] The respondent submits that the standard of review is reasonableness. The discretion conferred to the Minister under the ETA is similar to that conferred in the taxpayer relief provisions of the *Income Tax Act*, R.S.C. 1985, c. 1, decisions under which the jurisprudence has held are reviewable against the reasonableness standard.

[14] The respondent submits that the decision was reasonable and that the director considered all of the relevant facts in the case. She considered the statements the applicant submitted regarding his medical condition, but there was not sufficient information before her explaining how those conditions prevented compliance. She also had evidence before her that the applicant had been informed on two occasions about the necessity of collecting and paying tax on the disposition of the condominium units. There was also evidence of the applicant's involvement in other commercial activity during the period in question. In sum, her decision was justified, transparent and intelligible, and clearly falls within the range of possible acceptable outcomes.

Analysis and Decision

[15] **Issue 1**

Has the applicant plead a proper ground of review?

Counsel for the respondent has argued in the memorandum of fact and law that the applicant has failed to identify a ground of review on which the Court is entitled to interfere with the respondent's exercise of discretion under section 281.1 of the ETA.

[16] Subsection 18.1(4) of the *Federal Courts Act* does not specifically identify any ground on which the Court can grant an application for judicial review of the exercise of statutory discretion. In *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] 4 C.T.C. 123, there was a similar deficiency, yet it was held at paragraph 23 that:

. . . the grounds of review set out in subsection 18.1(4) are potentially applicable to discretionary administrative action, including error of law (paragraph 18.1(4)(c)) and the residual ground of review in paragraph 18.1(4)(f) ("acted in any other way that was contrary to law").

Thus, I would not hold that the applicant has failed to raise a proper ground of review.

[17] **Issue 2**

What is the standard of review?

Section 281.1 of the ETA, set out in the annex to this decision, is a fairness provision and in particular, provides the Minister with the discretion to waive penalties or interest. It is similar in substance to the taxpayer fairness provisions of the *Income Tax Act*, decisions under which the Federal Court of Appeal has recently confirmed are to be afforded significant deference (see *Telfer* above).

[18] Where the nature of the question is one of discretion, the deferential standard of reasonableness will usually automatically apply (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9 (QL) at paragraph 53). Indeed, the Federal Court of Appeal in *Telfer* above, applied the reasonableness standard as set out by the Supreme Court at paragraph 47 of the *Dunsmuir* decision. That approach requires the reviewing court to peer into the

qualities which make the decision reasonable and be concerned with justification, transparency and intelligibility and whether the ultimate result falls into the range of possible, acceptable outcomes.

[19] However, the *Telfer* Court also recognized that this standard is not a one-size-fits-all approach. Applying the reasonableness standard to administrative decisions requires the reviewing court to have regard to the context in which the decision takes place (see *Telfer* above at paragraph 29).

[20] Tax fairness decisions are informal and non-adjudicative in nature. In their oft-cited text, D. J. M. Brown and J. M. Evans refer specifically to discretionary tax fairness/relief decisions as an example of discretionary non-adjudicative action not subject to a strict duty of fairness (Brown and Evans, *Judicial Review of Administrative Action in Canada*, Toronto: Canvasback, 1998 (loose-leaf)], at pp. 15-21).

[21] In my view, a judicial review of such decisions exercising statutory discretion ought to heed the words of the Supreme Court in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at pages 7 and 8:

... It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

[22] For the decision in the present case, I shall apply the deferential reasonableness standard in accordance with this passage.

[23] **Issue 3**

Was the CRA director's ultimate decision reasonable?

The centrepiece of the applicant's relief request related to his diagnosed psychiatric disorder and the effect it had had on his ability to make logical decisions. This, in the applicant's view, fell squarely into the category of exceptional circumstances outlined in the Guidelines.

[24] As referred to above, there was an internal recommendation that the penalty and interest be waived made by an officer with extensive knowledge of the applicant's tax history. That recommendation read in part:

In Dec 2002, after having received instructions as to what was required regarding a change in use of the condo units, the registrant failed to disclose to the auditor Don Daigle, that he was renting two of units to his children. Mr. Holmes was diagnosed with a major depressive disorder in Aug 2003. I would think that this disorder did not show itself overnight and that Mr. Holmes was affected by this medical condition prior to Aug 03 and most likely would have been suffering from this in Dec 2002 when the self supply on the 2 units occupied by his children, was due. In view of this I recommend the penalty and interest applicable to these two units be waived. The amount of the recommended reduction is \$9,830.28 plus any interest accrued on this amount since Dec 2006.

On another note, Mr. Holmes second request for fairness was submitted in June 2007. Due to departmental delays it has taken 4 months for this request to be dealt with. In view of this I recommend interest on the total amount of the penalty be waived for the period June 07 to Oct 07.

[25] This internal recommendation was not accepted. Instead, it appears that a second internal memo was requested by the Director. This second memo recommended denying relief for the following reasons:

1. The applicant had a poor compliance history.
2. The applicant had knowingly allowed a balance to exist on his HST account and his related accounts.
3. The applicant was told on two separate occasions that he must self-assess and/or charge the GST/HST when he sells the condo units.
4. Despite a diagnosis of major depressive disorder and bipolar Mood disorder, the applicant continued to purchase properties, renovate and open a restaurant.

[26] The decision letter received by the applicant contained no explanation as to how the Director viewed his condition. In relevant part it simply read:

...

After considering all the circumstances of your case, I remain of the opinion that cancellation of interest and penalty under the financial hardship or extraordinary circumstance categories is not warranted and that the original decision to deny your request should stand....

[27] Since the decision letter did not provide any guidance except for providing a result, I must conclude that the second memo was preferred over the first, but I cannot ascertain why. Nor was it explained why a second recommendation was required.

[28] While it should be expected that the reasons provided in tax fairness decisions will be short and reflect the informal nature discussed above, I would expect the taxpayer to be informed as to how the primary consideration was dealt with. The Guidelines are an indication that a somewhat structured decision will be made.

[29] I am of the view that given the specific facts of the record before her in this case, the Director was required to provide some reasons accompanying the decision explaining, even if very briefly, why his primary ground had not been accepted. Without this, the taxpayer had a legitimate concern that the discretionary decision had been made without taking into account a very relevant consideration.

[30] I am also of the view that this omission left the decision making process lacking a necessary component of transparency. In either case, it is enough to render the decision unreasonable.

[31] I would attribute little if any weight to the portion of the Director's affidavit that provided a more thorough explanation of her decision. I similarly give little weight to the transcript of her cross-examination by the self-represented applicant. This information was not conveyed in the actual decision but was only made available to support or justify the Director's original decision.

[32] The application for judicial review is therefore allowed and the matter is referred to the Minister to redetermine whether or not to cancel all or part of the penalty assessed to the applicant.

JUDGMENT

[33] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to the Minister to redetermine whether or not to cancel all or part of the penalty assessed to the applicant.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

Excise Tax Act, R.S.C. 1985, c. E-15

281.1(1) The Minister may, on or before the day that is 10 calendar years after the end of a reporting period of a person, or on application by the person on or before that day, waive or cancel interest payable by the person under section 280 on an amount that is required to be remitted or paid by the person under this Part in respect of the reporting period.

(2) The Minister may, on or before the day that is 10 calendar years after the end of a reporting period of a person, or on application by the person on or before that day, waive or cancel all or any portion of any

(a) penalty that became payable by the person under section 280 before April 1, 2007, in respect of the reporting period; and

(b) penalty payable by the person under section 280.1, 280.11 or 284.01 in respect of a

281.1(1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin d'une période de déclaration d'une personne ou sur demande de la personne présentée au plus tard ce jour-là, annuler les intérêts payables par la personne en application de l'article 280 sur tout montant qu'elle est tenue de verser ou de payer en vertu de la présente partie relativement à la période de déclaration, ou y renoncer.

(2) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin d'une période de déclaration d'une personne ou sur demande de la personne présentée au plus tard ce jour-là, annuler tout ou partie des pénalités ci-après, ou y renoncer :

a) toute pénalité devenue payable par la personne en application de l'article 280 avant le 1er avril 2007 relativement à la période de déclaration;

b) toute pénalité payable par la personne en application des articles 280.1, 280.11 ou 284.01

return for the reporting period. relativement à une déclaration
pour la période de déclaration.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2135-07

STYLE OF CAUSE: ROBERT D. HOLMES
- and -
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Moncton, New Brunswick

DATE OF HEARING: February 11, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: August 5, 2010

APPEARANCES:

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Caitlin Ward FOR THE RESPONDENT

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