

Federal Court



Cour fédérale

Date: 20110114

Docket: T-1879-09

Citation: 2011 FC 40

Ottawa, Ontario, January 14, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

CHARTER MACCLOY KIDZUGANE

Applicant

and

THE CANADA REVENUE AGENCY

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Charter MacCloy Kidzugane (the “Applicant”) seeks judicial review of a Second Level Taxpayer Relief Request made pursuant to subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). In that decision dated October 23, 2009, Mr. Joseph Turgeon, Assistant Director, Revenue Collections and Client Services, Canada Revenue Agency (“CRA”) denied the Applicant’s request to waive interest and penalties in respect of his income tax debt. The Applicant had sought the waiver on the basis of financial hardship.

[2] The Applicant is the sole director and officer of Magaga Management Inc. (“Magaga”). At the time of his initial fairness request, in December 2008, he was the sole shareholder of that company and also of CH Health & Home Care Services Inc. (“CH Health & Home”).

[3] The Applicant was audited by the CRA in 2004 and consequently, the sum of \$204,766 in claimed expenses was disallowed. This sum included amounts for which the Applicant could not provide receipts in connection with conducting business in Kenya, Uganda and South Africa, as well as personal use of a company vehicle. The Applicant disputed the reassessment in 2005 and the matter was resolved in 2008.

[4] The Applicant was ultimately assessed personal taxes for the years 2001 through 2003, totalling \$27,138. Penalties and interest were assessed against the Applicant in relation to this amount.

[5] Between 2001 and 2008, the Applicant’s net family income ranged from \$74,659 to \$144,478. In five of these years, his net family income was above \$135,000. Between 2004 and 2007, the Applicant received tax refunds every year but made no payments on the outstanding tax debt.

[6] The Applicant was assessed penalties for failing to declare RRSP income in 2002 and 2003. Magaga was assessed roughly \$50,000 in taxes for the 2002 tax year but this tax debt was reduced to \$6.44, due to carry back of subsequent business losses.

[7] On December 11, 2008, the Applicant wrote the CRA requesting a reduction of interest and waiver of penalties for his personal income tax for years 2001 – 2003 and for Magaga for 2002, pursuant to subsection 220(3.1) of the *Income Tax Act*, based on financial hardship and inability to pay. Ms. Angela Pedley, Manager, Revenue Collections and Client Services Division, reviewed the application and denied the request for relief in a letter dated June 11, 2009. The Applicant failed to demonstrate financial hardship. The decision was also due, in part, to the fact that the Applicant's related corporations, Magaga and CH Health & Home, have a history of late filings, including GST returns that were outstanding at that time.

[8] The Applicant then began making monthly payments on the tax debt.

[9] The Applicant submitted a Second Level Taxpayer Relief Request on September 21, 2009. He submitted nil GST returns for the outstanding periods for Magaga. The Applicant also asserted that he had an inability to pay based on his family circumstances and loans he had made to Magaga and subsequent business losses of that corporation.

[10] The Assistant Director reviewed the materials related to the first and second level review requests. By letter dated October 23, 2009, he denied the Applicant's second level request on the grounds that the first level review adequately addressed the appropriate factors.

[11] The Assistant Director also responded to the Applicant's specific concerns about the first level review. He concluded that the Applicant had not provided any documentation to support his

assertion of his inability to pay and financial hardship based on his family circumstances. He determined that the tax situation of Magaga was not material to a request for relief on interest and penalties on his personal tax account. The Assistant Director also noted that GST returns for CH Health & Home remained outstanding at that time.

Arguments of the Parties

[12] The Applicant argues that the Assistant Director failed to consider the financial situation resulting from his loans to Magaga for business ventures that were unsuccessful. This led to business expenses being disallowed, resulting in personal income tax liability to him. He argues that the Assistant Director erred in his treatment of the loss of \$50,000 by Magaga and its bearing on personal financial hardship to him.

[13] The Applicant further submits that the Assistant Director failed to properly consider that Magaga did in fact submit GST returns for periods ending September 30, 2008, March 31, 2009 and June 30, 2009 since Magaga was not carrying on any business and therefore not liable for collecting or remitting GST.

[14] He further submits that CH Health & Home did submit a GST return for the period ending March 31, 2009, contrary to the findings of the Assistant Director.

[15] The Respondent takes the position that the Applicant has submitted documentary evidence that was not before the decision-maker, and that the Court should not consider that evidence.

[16] The Respondent further argues that the Assistant Director took into account a number of relevant facts, and addressed the Applicant's concerns with the first level review. His decision is reasonable.

Discussion and Disposition

[17] The Applicant has filed an Affidavit as part of his Application Record that includes many documents that were not submitted to the CRA, specifically Exhibits "B" through "G", Exhibits "N" through "X", and Exhibits "DD" and "EE". These materials consist largely of bank statements, and since they were not submitted with the fairness request and were not considered by the decision-maker, they are not properly before the Court in this application and will not be taken into account.

[18] Other materials were submitted to the CRA, but not in the course of the fairness request, namely, Exhibits "H" through "L". These exhibits consist of letters and forms submitted to the CRA from the Applicant regarding GST returns for Magaga, and other corporate tax returns. They too will not be taken into account. Regardless, the facts of these exhibits are reflected in the CRA's Record and the material attached to the affidavit filed on behalf of the Respondent.

[19] The decision under review is a discretionary one made pursuant to subsection 220(3.1) of the *Income Tax Act*.

[20] The first matter to be addressed is the applicable standard of review. According to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190,

decisions of statutory decision-makers are reviewable on one of two standards, that is correctness or reasonableness. The standard of correctness applies to questions of law and issues of procedural fairness. The standard of reasonableness applies to questions of fact, questions of mixed fact and law and discretionary decisions. In *Telfer v. Canada (Revenue Agency)* (2009), 386 N.R. 212 at paragraph 24, the Federal Court of Appeal said that this type of discretionary decision is reviewable on the standard of reasonableness, as follows:

Unreasonableness is the standard of review normally applicable to the exercise of discretion: *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190, 2008 SCC 9 (S.C.C.), at para. 51 ("*Dunsmuir*"). Indeed, this Court had previously held in *Lanno v. Canada (Customs & Revenue Agency)*, 2005 D.T.C. 5245 (Eng.), 2005 FCA 153 (F.C.A.), 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).

[21] Insofar as the Applicant argues that the Assistant Director failed to properly consider a number of factual issues, he raises a question of mixed fact and law. Regardless of whether the matter is considered as a question of mixed fact and law or a question of the proper exercise of discretion, as discussed in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, the applicable standard of review is reasonableness.

[22] The Assistant Director's discretion in this case is guided by Information Circular IC07-1. A copy of IC07-1 was included in the Respondent's Application Record. Part II, sections 19 to 44, is entitled "Taxpayer Relief Provisions". Sections 23, 24 and 25 are relevant and provide as follows:

Circumstances Where Relief From Penalty and Interest May Be Warranted

¶23. The Minister may grant relief from the application of penalty and interest where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation or requirement at issue:

- (a) extraordinary circumstances
- (a) actions of the CRA
- (b) inability to pay or financial hardship

¶24. The Minister may also grant relief if a taxpayer's circumstances do not fall within the situations stated in ¶23.

Extraordinary Circumstances

¶25. Penalties and interest may be waived or cancelled in whole or in part where 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 man-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.

[23] The Information Circular proceeds to identify factors to be considered in the exercise of discretion to waive interest and penalties including the prior history of a taxpayer in complying with the requirements of the Act:

Factors Used in Arriving at the Decision

¶33. Where circumstances beyond a taxpayer's control, actions of the CRA, or inability to pay or financial hardship has prevented the taxpayer from complying with the Act, the following factors will be considered when determining whether or not the CRA will cancel or waive penalties and interest:

- (a) whether or not the taxpayer has a history of compliance with tax obligations;

- (b) whether or not the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued;
- (c) whether or not the taxpayer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system; and
- (d) whether or not the taxpayer has acted quickly to remedy any delay or omission.

[24] In assessing the Applicant's history of compliance, the Assistant Director considered the late GST returns filed by the Applicant's corporations. The Assistant Director specifically addressed the fact that Magaga had filed GST returns after the first level review, but that the filing for CH Health & Home remained outstanding. The CRA Record, included as an exhibit to the Corrected Affidavit of Joseph Lionel Wayne Turgeon as part of the Respondent's Record, shows a computer printout indicating that the GST remittance of CH Health & Home for the period ending March 31, 2009 was overdue until October 26, 2009. The computer printout, although dated October 26, that is after the negative decision in issue, clearly relates to the decision of October 23, 2010. The Assistant Director made no error in concluding that the GST returns for CH Health & Home remained outstanding at the time of his decision.

[25] The Assistant Director accounted for a number of considerations in his assessment of the Applicant's assertion of financial hardship, including his net family income and the equity in his home. In this context, the Assistant Director reasonably concluded that Magaga's tax situation was immaterial to the Applicant's personal inability to pay his own tax debt.

[26] In the result, I am satisfied that the conclusions of the Assistant Director meet the standard of reasonableness.

[27] This judicial review is dismissed. In the exercise of my discretion, pursuant to Rule 400 of the *Federal Court Rules*, SOR/98-106, I make no order as to costs.

ORDER

THIS COURT ORDERS that the application for judicial review is dismissed. Pursuant to Rule 400 of the *Federal Courts Rules*, SOR/98-106, I make no order as to costs.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1879-09

STYLE OF CAUSE: CHARTER MACCLOY KIDZUGANE v. THE
CANADA REVENUE AGENCY

PLACE OF HEARING: Winnipeg, MB

DATE OF HEARING: November 10, 2010

**REASONS FOR ORDER
AND ORDER:** HENEGHAN J.

DATED: January 14, 2011

APPEARANCES:

Charter MacCloy Kidzugane

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Penny Piper

FOR THE RESPONDENT

SOLICITORS OF RECORD:

N/A

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Myles J. Kirvan
Deputy Attorney General of Canada
Winnipeg, MB

FOR THE RESPONDENT