Federal Court  Cour fédérale

Date: 20110211

Docket: T-338-10

Citation: 2011 FC 166

Ottawa, Ontario, February 11, 2011

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

DAVID BURKES

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, Mr. David Burkes (the Applicant) seeks judicial review of a decision of the Canada Revenue Agency (CRA) made on or about February 26, 2010 in which it rejected his proposal to make substantial monthly payments to reduce his income tax liability over the course of several years (the Decision).

[2] The Applicant seeks:

(a) An order directing the Respondent to accept the proposed payment arrangement proposed by the Applicant in a letter dated February 24, 2010;

(b) In the alternative, an order quashing the decision and remitting the proposed payment arrangement back for reconsideration by a different decision-maker;

(c) Costs of the application above the tariff rate.

THE FACTS

[3] The Applicant is a chartered accountant and has been a tax debtor since at least 1992. A review of the CRA's computer notes shows that the Applicant does not pay his taxes on time. Instead, he lets tax debts accumulate and then enters into a payment plan to address the arrears. Once a payment plan is in place, the Applicant does not default. However, because he doesn't make instalment or year-end payments while he is servicing a payment plan, he is never free of tax debt.

[4] In 2003, the Applicant suffered from a medical condition that caused his eyesight to deteriorate. Complications from the related surgery led to depression and the Applicant required further surgery in 2006. As a result of his medical condition and his depression, the Applicant did not file his returns for the taxation years 2004 to 2007.

[5] However, in spite of his medical problems, the Applicant earned the following gross professional income: in 2004, $478,400, in 2005, $542,830, in 2006, $549,400, in 2007, $635,655 and in 2008, $633,775.

[6] CRA assessed the Applicant's tax liability without the benefit of returns and in July 2008, he received a notice of assessment indicating that he owed $765,751.59 in outstanding taxes, interest and penalties.

[7] For present purposes, the history of this matter begins in November 2008 when the Applicant retained counsel to help him resolve his income tax issues, which included the arrears and his failures to file. In a letter dated November 5, 2008, the Applicant, through counsel, proposed the following:

(a) A $20,000. lump sum payment on November 20, 2008;

(b) Cheques payable to CRA dated November 15 and December 15, 2008 in the amount of $7,500. each;

(c) Filing returns for 2004-2007 by December 15, 2008;

(d) A further payment proposal once the returns were processed and the actual arrears were calculated.

(the First Proposal)

[8] CRA's computer notes indicate that it decided that the payments offered in the First Proposal were inadequate given the size of the Debt. CRA also concluded that it needed a payment proposal which would retire the Debt in six months.

[9] In voicemail messages left on November 7 and 14, CRA asked the Applicant's counsel to call. However, there was no response.

[10] Instead, on November 28, 2008, counsel for the Applicant wrote CRA by fax saying that he had not received a reply to the First Proposal. The letter also said “Be forewarned, that you have two business days to respond before we take further action.”

[11] On December 1, 2008, CRA received the fax of November 28, 2008. That day CRA left a third voicemail message. It advised of the earlier messages and counsel’s failure to respond and it left a substantive message saying that a payment proposal would not be accepted unless it retired the assessed portion of the Debt in six months.

[12] CRA’s notes show that, on December 3, 2008, counsel and CRA talked on the phone. Counsel was told that CRA had rejected the First Proposal because it inadequate and that payment in full was required within six months.

[13] In the New Year, on January 20, 2009, CRA called Applicant’s counsel. He denied that he had spoken with CRA on December 3 and denied receiving CRA’s earlier voicemail messages.

[14] Counsel asked for a letter setting out CRA’s response to the First Proposal and threatened legal action if CRA did not find it acceptable. On that day, CRA placed a Requirement to Pay on the Applicant’s bank accounts.

[15] However, CRA also agreed to provide a letter and it was dated January 22, 2009. It confirmed that CRA had rejected the First Proposal because the sum offered did not adequately address the Debt. CRA also advised that the Requirements to Pay would remain in force until

agreement was reached on a payment plan. It said that an acceptable plan would reduce the assessed portion of the Debt in six months and would have to include a commitment to file the tax returns for 2004-2007. The First Proposal had suggested that they would be filed by December 15, 2008 but that was not done. On January 22, 2009, CRA garnished $80,000 from one of the Applicant's bank accounts.

[16] On January 28, 2009, the Applicant's counsel sent CRA cheques totalling $120,000 which CRA accepted in a letter dated January 30, 2009. CRA said that these payments cleared the Applicant's arrears through his 2003 taxation year. However, CRA declined to lift the Requirements to Pay because the returns for 2004 to 2007 remained unfiled. CRA also said that, once they were filed, payment in full was expected, failing which a reasonable payment proposal would be required.

[17] On February 3, 2009, the returns for 2004 to 2007 were filed. CRA then lifted the Requirements to Pay, reassessed the Applicant and, without an audit, accepted his lower figures. CRA then notified him that he owed $356,876 in taxes, interest and penalties.

[18] The issue then became whether a payment plan could be negotiated to reduce this amount.

[19] Counsel for the Applicant wrote CRA on July 3, 2009 saying, among other things "We are proposing a three-month interim payment of $5,000 a month while our client explores different avenues of refinancing. Once this three-month period expires, we will arrange further payments of

approximately $15,000 a month until the remainder of the debt is cleared" (the Second Proposal). This proposal would have retired the arrears in approximately two years.

[20] CRA responded by phone on July 9, 2009 and advised counsel that, because the Second Proposal involved payments over more than twelve months, it required the approval of a manager/team leader.

[21] CRA then wrote the Applicant's counsel on July 14, 2009 to advise that the Second Proposal was not acceptable. The following reasons were given:

> […]
> a. The proposal extends past the deadline normally allowed for debt repayment.
>
> b. We require a detailed account of the income and expenses, as well as assets and liabilities for your client's household before we can assess any proposal.
>
> We would accept the payment arrangement as suggested in your proposal for the first 12 months if the balance is to be paid in full by no later than July 31, 2010.
>
> […]
>
> Please also note all future tax filings should be filed on a timely basis accompanied by payments in full and all the instalments should be paid on appropriate due dates.

[22] At the end of July 2009, CRA's computerized notes show that it had not received a response to its letter of July 14, 2009.

[23] On August 21, 2009, in a conversation with CRA, Applicant's counsel indicated that his client was preparing a net worth statement.

[24] On October 2, 2009, counsel called CRA and advised that he was sending three post-dated cheques for $3,000 each and also advised, for the second time, that the Applicant was looking into refinancing. CRA responded saying that it would give the Applicant until November 9, 2009 to arrange financing.

[25] On November 12, 2009, CRA sent the Applicant's counsel a letter indicating that the outstanding $373,647.69 was to be paid in full by November 24, 2009, failing which legal action would be taken without further notice.

[26] In reply, on November 19, 2009, counsel made a proposal (the Third Proposal) by fax to CRA to retire the Applicant's debt. However, it was promptly rejected by CRA in a letter to counsel sent on the same day. The Applicant's proposal is described in a subsequent letter from counsel to CRA dated December 11, 2009. It involved monthly payments of between $3,000 and $35,000 over twenty-seven months and ending on January 31, 2012. By that date, a total of $387,000 would have been paid.

[27] Between November 19 and December 8, 2009, counsel for the Applicant left eight voicemail messages at CRA asking it to explain why it had refused the Third Proposal. CRA did not reply until December 8 when it advised by telephone that it was not required to explain its decision.

[28] After CRA rejected the Third Proposal, it issued fresh Requirements to Pay against the Applicant's bank accounts.

[29] In his letter to CRA of December 11, 2009, counsel for the Applicant characterized CRA's behaviour as reckless and abusive and characterized CRA's refusal to accept the Third Proposal as denying the Applicant's right to pay his taxes.

[30] In a final letter dated February 24, 2010, counsel for the Applicant noted that the amount then due was $348,007.03 and offered monthly payments starting in June 2010 totalling $100,000 by the end of 2010, $150,000 over the course of 2011, and another $100,000 in 2012, for a grand total of $350,000 (the Final Proposal).

[31] The letter, which presented the Final Proposal, concluded saying "We require your decision within 48 hours failing which we will proceed on the basis that your decision is to deny the payment arrangement described above."

THE DECISION

[32] The Decision under review in this application is CRA's failure to accept the Final Proposal without providing an explanation.

THE STANDARD OF REVIEW

[33] In my view, since a decision to accept or reject a payment proposal is highly discretionary, the appropriate standard of review is reasonableness, see *Dunsmuir v New Brunswick*, 2008 SCC 9,

[2008] 1 SCR 190 at para 53. As well, in *Telfer v Canada (Revenue Agency)* 2009 FCA 23, [2009] FCJ No 71, the Federal Court of Appeal held that reasonableness is the appropriate standard of review to apply to CRA decisions concerning relief from interest and penalties. In my view, the logic of the Court's analysis also applies when the CRA is considering payment proposals.

PAYMENT PROPOSALS

[34] There is no express statutory authority for CRA's practice of negotiating payment plans as a means of collecting unpaid taxes. However, in *Optical Recording Corp v Canada*, [1991] 1 FC 309 41 FTR 240 at para 27, the Federal Court of Appeal held that the Minister of National Revenue has the discretion to make suitable collection arrangements.

[35] The manner in which that discretion is exercised is described in CRA's Information Circular No. 98-1R3, dated February 12, 2008 and entitled Collections Policies (the Circular). It provides that:

> […]
>
> Any amount you owe is payable immediately when assessed or reassessed. If you do not agree with the assessment or reassessment, see Section 9 of this circular. If you cannot pay the total amount owing immediately, please contact the Revenue Collections Division of your Tax Services Office to discuss a mutually satisfactory short-term payment arrangement based on your ability to pay.
>
> We will consider payment arrangements when you have tried all reasonable ways of getting the necessary funds, either by borrowing or rearranging your financial affairs, and you still cannot pay the balance in full.
>
> To help us determine your ability to pay, you will have to make full disclosure and give evidence of your income, expenses, assets, and

> liabilities. Collection officers may verify the information you provide before accepting an arrangement.
>
> […]

PROCEEDINGS IN ONTARIO

[36] On April 29, 2010, the Applicant filed a Statement of Claim in the Ontario Superior Court of Justice seeking damages against CRA and against the collections officer assigned to his file for their failure to accept the Third and Final Proposals. The Applicant sought an injunction preventing CRA from taking further collection action. Mr. Justice Edward Belobaba denied the injunction in a decision dated June 3, 2010. He found that there was no irreparable harm to the Applicant, saying that his evidence on this point was purely speculative. In this regard, he said:

> [19] […] He says that the continuing collection efforts will put him out of business but he has produced no personal or business financial information other than his tax returns. Despite a request made by the CRA in July 2009, Mr. Burkes has not provided information about his household income and expenses or his assets and liabilities. He has not shown that he cannot make payment in full whether directly, or via financing or the liquidation of assets.
>
> [20] Mr. Burkes is not being forced into bankruptcy by the CRA. Should this happen, this will be a decision that Mr. Burkes will make on his own. Further, there is no evidence that Mr. Burkes will automatically lose his accounting licence simply by filing for bankruptcy – the process is not at all automatic and depends on the facts in each individual case. Finally, there is no evidence to suggest that declaring bankruptcy in today's economic environment because of an inability to pay back taxes will necessarily lead to the loss of one's good name

> and reputation, or at least, no evidence that any such loss could not be compensated in damages. And, if damages are awarded there is no risk that the CRA (i.e. the Government of Canada) will not be able to pay the damages award.
>
> [21] In my view, what little evidence there is consists mainly of bald assertions and is much too speculative. I am not persuaded that irreparable harm has been established.

THE ISSUES

[37] Against this background, the issues are:

1. Was CRA's Decision to reject the Final Proposal reasonable?
2. Did CRA's failure to provide reasons explaining its Decision to reject the Final Proposal amount to a breach of procedural fairness?

Issue 1 Was the Decision Reasonable?

[38] The Applicant says that, if CRA forced him to pay the entire amount due, he would be forced into bankruptcy and would then lose his license to practice as a chartered accountant. The Applicant says that, in these circumstances, CRA was obliged to analyze the situation and assess the likelihood of recovering the debt if it forced the Applicant to pay in full against the prospect for recovery under a payment plan (the Analysis). The Applicant says that such an Analysis would inevitably favour a plan because it would be irrational to force the Applicant into bankruptcy and jeopardize his earning power.

[39] However, the Applicant failed to provide CRA with any detailed evidence about his finances which might have suggested that he was at risk of bankruptcy even though he threatened bankruptcy to CRA as early as 1996. Further, he did not show CRA any rule of the Institute of Chartered Accountants of Ontario (ICAO) which said that, if bankrupt, he would lose his licence to practice as a Chartered Accountant. It is therefore impossible to see how CRA could have conducted the Analysis, as it did not have the information needed to weigh the risks of collecting the full amount due through legal action against those of collecting via a payment arrangement. Further, I note that section 358 of the ICAO by laws, which the Applicant admitted on-cross-examination that he had not read, shows that a member's bankruptcy does not automatically lead to a loss of privileges.

[40] On the facts of this case, there is no evidence to suggest that CRA is jeopardizing its ability to collect by insisting on either payment in full or on a one-year payment proposal. The Applicant may, if pressured, find the means to pay and, in my view, CRA is entitled to lean aggressively on taxpayers who, for many years, fail to bring their accounts into good standing. Accordingly, the Decision was reasonable.

2. Were Reasons Required?

[41] The Applicant says that CRA must provide reasons which show that the Analysis was undertaken and which disclose its conclusions.

[42] On the other hand, the Respondent submits that, when CRA is attempting to collect overdue taxes, it is acting as a creditor rather than as an administrator (see *Optical Recording Corp. v Canada*, supra at para 27). The Respondent says that, as a creditor, it does not owe the Applicant a duty of fairness and, therefore, need not provide reasons.

[43] I have not been persuaded by this submission. In my view, a duty of fairness does exist in these circumstances because the Decision will have an impact on how the Applicant organizes his financial affairs. Further, although there is no right of appeal, there is the possibility of judicial review of the Decision. Accordingly, in view of the Supreme Court of Canada's decision in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 at para 43, it is my view that reasons for the Decision were required.

[44] That said, little is required in the way of formality to fulfil this duty because the Decision is highly discretionary and is a matter of policy, and because the process is far removed from the judicial end of the spectrum.

[45] I should also note that a requirement of reasons is consistent with the *Taxpayers' Bill of Rights* which appears on CRA's website at www.cra.gc.ca . At point 11, it states in part that:

You have the right to expect us to be accountable.	Vous êtes en droit de vous attendre à ce que nous rendions compte.
You have the right to expect us to be accountable for what we do. When we make a decision about your tax or benefit affairs, we will explain that decision and inform you about your rights and obligations in respect of that decision. […]	Vous êtes en droit de vous attendre à ce que nous rendions compte de nos actions. Lorsque nous prenons une decision relative à vos affaires liées à l'impôt et aux prestations, nous expliquerons la décision et nous vous informerons de vos droits et obligations relativement à celle-ci. […]

[46] The real question at issue is whether, on the facts of this case, a brief statement of the reasons for rejecting the Final Proposal was required even though the correspondence from CRA since the Applicant retained counsel in 2008, shows that the reasons would have been obvious both to counsel and to the Applicant. They were:

(a) The Applicant's failure to provide the detailed financial information requested in the July 14, 2009 letter;

(b) The Applicant's failure to provide the net worth statement mentioned in the August 21, 2009 conversation;

(c) The Applicant's failure to propose a plan to retire his tax liability within one year, as the July 14, 2009 letter from CRA indicated was required;

(d) The Applicant's failure to keep his quarterly instalments current as the July 14, 2009 letter required;

(e) The Applicant's failure to secure the financing he was said to have been working on since July 3, 2009, when he submitted the Second Proposal.

[47] In the unusual circumstances of this case, the exchange of correspondence between CRA and the Applicant's counsel, together with the provisions of the Circular, make the reasons for the Decision obvious. Accordingly, it is my view that the requirement to give reasons has been met.

CONCLUSION

[48] For all these reasons, the application will be dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is hereby dismissed with costs.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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