Federal Court  Cour fédérale

Date: 20110412

Docket: T-1359-10

Citation: 2011 FC 448

Ottawa, Ontario, April 12, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

ROBERT K. PHILLIPS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a July 29, 2010 “fairness decision” of the Minister of National Revenue made by the Minister’s delegate, Mr. Alnoor Kassam, Chief of Appeals in the Calgary Tax Services Office of the Canada Revenue Agency (the CRA), which denied the applicant's request for interest relief pursuant to subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, (5th Supp.), c. 1, as amended (the Act).

FACTS

[2] The applicant is a mutual fund salesperson, a financial planner, and a cattle rancher. In 1998, the Minister issued notices of reassessment to the applicant for the 1994 and 1995 taxation years. The applicant objected to the reassessments. In June of 1998, the Minister responded to the applicant's objections by cancelling some of the applicant's arrears interest: $13,348 for the 1994 tax year and $7,784 for the 1995 tax year. That recalculation was treated by the CRA as a "first-level request" regarding the interest payments owing on the 1994 and 1995 amounts.

[3] The applicant appealed the Minister's 1998 reassessments to the Tax Court of Canada.

[4] On April 18, 2002, counsel for the Minister requested that the Tax Court of Canada adjourn the applicant's appeals pending the prosecution of a criminal case against certain individuals with respect to a tax shelter investment. The applicant was a fully arm's length investor, and not named as a defendant in that criminal case. The Minister's counsel requested the adjournment in a letter to the Tax Court dated April 18, 2002. The Tax Court appeals were scheduled to be heard on September 18, 2002. The Minister's counsel set out two reasons for the adjournment:

> 1. Three relevant witnesses could not be subpoenaed pending the criminal prosecution because the Charter would protect them from being required to testify; and
>
> 2. The evidence in the criminal proceeding would "greatly" assist the parties to the Tax Court appeals and perhaps the Tax Court in considering these appeals.

The letter said that the criminal case will be heard from September 2 to December 20, 2002.

[5] The applicant agreed to the adjournment, which was granted on April 29, 2002. The applicant did not pay the disputed amounts of tax charged while his appeals were pending. The unpaid amounts continued to be charged interest.

[6] The affidavits of the applicant's counsel, and of the applicant himself, depose that the Minister's counsel also said that disclosure of the Crown's evidence in the Tax Court appeals might prejudice the criminal cases, and if the applicant did not consent to the adjournment, the Minister's counsel would bring a motion to adjourn before the Tax Court "for which there may be cost consequences".

[7] The criminal prosecution did not end on December 20, 2002. Five years later, on August 2, 2007, with the criminal case ongoing, the applicant and the Minister reached a settlement with respect to the applicant's tax appeals, and the applicant discontinued the Tax Court appeals on December 10, 2007.

[8] Following the settlement, the Minister recalculated the accrued interest owing on the tax arrears for 1994 and 1995.

[9] In a letter dated January 17, 2008, the applicant requested that the Minister exercise his discretion to waive interest that had accumulated on the arrears between the date of the adjournment of the tax appeals on April 29, 2002, and the date of the discontinuance of the appeals on December 10, 2007. The CRA treated that request as a "second-level request" regarding the interest payments

owing on the 1994 and 1995 amounts, and, therefore, allowed the reconsideration, which would otherwise have been barred by the 10-year limitations period for such requests contained in the Act.

[10] It is the refusal of the Minister's delegate to grant the requested waiver that is the subject of this judicial review application.

The Decision under Review

[11] By letter dated July 29, 2010, the Minister's delegate, Mr. Alnoor Kassam, informed the applicant that the CRA would not grant the applicant's request for waiver of interest charges that had accrued on the amounts he owed as a result of the reassessment of his taxes for the 1994 and 1995 taxation years.

[12] The letter recognized that the applicant asserted the following two reasons for his request for waiver of the interest:

> 1. Your appeal to the Tax Court of Canada was postponed pending the determination of a criminal case; and
>
> 2. You followed tax advice from an individual and this tax advice created the situation leading to the reassessment.

[13] The Minister's delegate stated that the CRA had considered the applicant's submission in light of the guidelines set out in *Information Circular 07-1* and the applicable legislation. He provided the following reasons for rejecting the request with regard to each of the two reasons put forward by the application:

> 1. Although your appeal was adjourned from April of 2002 until October of 2007 when you reached a settlement agreement with the Crown, the reasons for the appeal to be adjourned were

> reasonable. You had also agreed to the adjournment *sine die* and we are not aware of any undue delays in the criminal matter for which your appeal was awaiting the determination of.
>
> 2. The providing of tax advice with unfavourable results does not constitute circumstances, extraordinary or otherwise, that are out of the control of the taxpayer or financial adviser. The taxpayer is responsible to the CRA for the actions of or the advice provided by the adviser. The adviser would be responsible to the taxpayer.

[14] The decision also informed the applicant of how to make a claim for relief based upon financial hardship.

[15] The fairness decision was based upon a Taxpayer Relief Report produced by a CRA appeals officer. The Taxpayer Relief Report is a detailed review of the applicant's request that describes the background facts, the particulars of the applicant's claim, and the reasons for the adjournment of the Tax Court appeals:

1. evidence in criminal proceedings would assist the parties and the Tax Court;
2. both the Crown and the taxpayer agreed to the adjournment yet the taxpayer did so "grudgingly" because the taxpayer knew the adjournment would be granted in any event; and
3. the taxpayer knew that the interest would continue to accumulate as it did before the adjournment.

RELEVANT LEGISLATION

[16] Section 220(3.1) of the Act provides the Minister with discretionary authority to waive or cancel all or part of any penalties or interest that would otherwise be payable by the taxpayer for amounts owing within the past ten years:

220 (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.	220 (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.

[17] Guidelines for the Minister's exercise of the discretionary power to waive interest or penalties under the Act are set out in the *Income Tax Information Circular IC07-1*, dated May 31, 2007. The following paragraphs of the *Income Tax Information Circular IC07-1* were pleaded by the applicant as particularly relevant to this application:

1. Paragraph 8 describes the principles of fairness and reasonableness that underlie the exercise of the Minister's discretion under the Act:

> ¶ 8. The legislation gives the CRA the ability to administer the income tax system fairly and reasonably by helping taxpayers to resolve issues that arise through no fault of their own, and to allow for a common-sense approach in dealing with taxpayers who, because of personal misfortune or circumstances beyond their control, could not comply with a statutory requirement for income tax purposes.

2. Paragraph 25 offers a non-exhaustive list of the types of extraordinary circumstances beyond a taxpayer's control that may give rise to an exercise of the Minister's discretion:

> ¶ 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.

3. Paragraph 26 offers a non-exhaustive list of the types of actions of the CRA that may give rise to an exercise of the Minister's discretion:

> ¶ 26. Penalties and interest may also be waived or cancelled <u>if</u> the penalty and <u>interest</u> arose <u>primarily because of actions of the CRA</u>, such as:
> (a) processing delays that result in the taxpayer not being informed, within a reasonable time, that an amount was owing;
> (b) errors in material available to the public, which led taxpayers to file returns or make payments based on incorrect information;
> (c) incorrect information provided to a taxpayer, such as in the case where the CRA wrongly advises a taxpayer that no instalment payments will be required for the current year;
> (d) errors in processing;
> (e) delays in providing information, such as when a taxpayer could not make the appropriate instalment or arrears payments because the necessary information was not available; or
> (f) undue delays in resolving an objection or an appeal, or in completing an audit.
>
> (underlining added to emphasize the part relied upon by the applicant)

ISSUES

[18] The applicant raises the following three issues:

1. Whether the Minister erred in refusing to exercise the discretion conferred on him by subsection 220(3.1) of the Act;

2. Whether the Minister's reasons demonstrate a reasonable apprehension of bias, a consideration of irrelevant factors and a failure to take relevant considerations into account; and

3. Whether the Minister breached procedural fairness by taking an unduly long time to issue his decision.

STANDARD OF REVIEW

[19] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[20] The parties have submitted, and the Court agrees, that discretionary decisions of the Minister under section 220(3.1) are subject to a standard of reasonableness: see, for example, *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, at paragraph 2, and *Hoffman v. Canada (Attorney General)*, 2010 FCA 310, at paragraph 5.

[21] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at paragraph 47; *Khosa*, at para. 59.

[22] In contrast, the applicant's allegations that there is a reasonable apprehension of bias and that there was an unreasonable delay in the Minister's delegate's rendering of the decision under review, are questions of procedural fairness to be determined on a standard of correctness: see, for example, *Livaditis v. Canada Revenue Agency*, 2010 FC 950, at paragraph 24.

ANALYSIS

Issue No. 1: Whether the Minister erred in refusing to exercise the discretion conferred on him by subsection 220(3.1) of the Act

[23] The applicant submits that the Minister's delegate's refusal to exercise his discretion to waive the interest owing pursuant to the settlement of the reassessment of the applicant's 1994 and 1995 tax returns was unreasonable because the decision-maker misapprehended the material facts.

[24] On April 18, 2002 counsel for CRA requested that the Tax Court adjourn the applicant's Tax Court appeals pending the determination of a criminal prosecution of fraud against three individuals. The CRA explained that the evidence of these three individuals "would be very relevant" in the Tax Court appeals, but "it would not be possible to issue a subpoena to any one of them to give evidence because of the Charter protection afforded to them during the pendency of any criminal matter". The CRA also advised the Tax Court that the criminal case is scheduled for hearing from September 2 to December 20, 2002.

[25] In the "fairness decision" dated July 29, 2010 under review written by Mr. Kassam, Chief of Appeals, Calgary Tax Services Office, Mr. Kassam writes that the Tax Court appeal was adjourned from April 2002 until October 2007 and that the reasons for the adjournment were reasonable. The Court agrees that this is a correct statement. However, Mr. Kassam then writes:

> You (being the applicant) had also agreed to the adjournment *sine die* and we are not aware of any undue delays in the criminal matter for which your appeal was awaiting the determination.

[26] With respect, the evidence is that the adjournment of Mr. Phillips' appeal to the Tax Court was adjourned on the motion of the CRA because the CRA wanted to subpoena witnesses who would not be available until the criminal case was completed. Moreover, the CRA advised the Tax Court that the hearing of the criminal case would conclude on December 20, 2002. Mr. Phillips testified that he could not stop his tax appeal from being adjourned until the criminal prosecution was completed, and his consent to the adjournment was coerced by CRA.

[27] The Court finds that Mr. Kassam in the fairness decision did not correctly appreciate that the adjournment was because of "actions of the CRA" and that the additional interest from the date of the adjournment to the date of the settlement arose clearly "because of actions of the CRA". In this regard, the fairness decision is based on a misapprehension of the facts.

[28] The fairness decision assumed the adjournment of the tax appeal was agreed to without any qualifications. In fact, the adjournment was at the request of CRA and the applicant deposed in his Affidavit that he only consented because he was told that the adjournment would be granted anyway if he opposed it and costs may be ordered against him for opposing the adjournment. Based on the evidence before the Court, the adjournment was because of the actions of CRA wanting to adjourn the case.

[29] The fairness letter also states that there were no “undue delays in the criminal matter”. The fairness letter does not note that the request for the adjournment by CRA stated that the criminal hearing would be completed by December 2002. In fact, it was five years later when the settlement agreement was reached at which time the criminal matter had still not finished.

[30] It is clear to the Court that the fairness decision was based upon a factual premise that was false. Accordingly, the decision was unreasonable to that extent. The Court relies upon the Federal Court of Appeal decision in *Slau Ltd. v. Canada (Revenue Agency)*, 2010 C.T.C. 15 per Ryer JJ.A. (as he then was) at paragraph 39:

> ¶39. … It is clear to me that a decision based upon such an important factual premise cannot be said to be “justifiable” or “intelligible”, as contemplated by *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190, 2008 SCC 9 (S.C.C.) where that factual premise has been found to be false. Accordingly, I am of the view that the decision of the Minister to refuse to cancel the Post-December 1, 1996 Accrued Interest (*sic*) was unreasonable and to that extent, I agree with the Application Judge.

[31] The applicant’s second ground for alleging the unreasonableness of the Minister’s decision is that the interest sought to be waived arose primarily because of actions of the CRA. The applicant focuses on the requirement in the Circular that the interest be primarily because of the CRA’s action.

[32] I would have agreed that the interest arose because of the adjournment which was at the request of the CRA, and which the applicant did not want. Thus the interest from the date of the adjournment would fall under paragraph 26 of the CRA Policy on granting interest relief:

> …interest arose primarily because of the actions of the CRA

However, the Federal Court of Appeal has held that when an "objection file was put on hold" pending a criminal prosecution against promoters of an investment scheme in which the taxpayer invested, the taxpayer is liable for the interest which accrues. In that case, CRA actions were primarily responsible for the delay pending the criminal prosecution. In *Comeau v. CCRA*, 2005 FCA 271 per Pelletier J.A. at paragraph 20:

> ¶20. As to the third segment, from the assessment of June 1997 to the reassessment of September 11, 2000, the Agency justified its refusal to cancel the interest by the fact that, on June 26, 1997, Mr. Comeau was aware that there was an outstanding amount and that this amount remained unpaid throughout this third segment. Mr. Comeau could have paid the outstanding amount, which would have terminated the accumulation of interest, subject to being reimbursed if his objection succeeded. In other words, a taxpayer may benefit from the suspension of collection proceedings while his objection is being processed and wager on the outcome of his objection by not paying the amounts claimed by the Agency, so that interest accumulates, but if he loses his wager (when his objection is dismissed), he cannot complain that the rules of the game put him at a disadvantage. There is nothing unreasonable about the Agency's decision.
>
> (underlining added)

[33] Therefore the delay in the applicant's Tax Court appeals pending the criminal prosecution do not warrant, in the opinion of the Federal Court of Appeal, a waiver of the interest which accrued during the adjournment. The criminal prosecution makes delay reasonable, logical and necessary.

[34] This rational is logical in that all the other actions of the CRA for which interest can be waived under the waiver of interest policy are delays caused by the CRA, and actions within the CRA's control like unreasonable delays in auditing or processing.

[35] Accordingly, for these reasons, the Minister's fairness decision was reasonably open to the Minister so that the Court cannot intervene on this basis.

Issue No. 2: Whether the Minister's reasons demonstrate a reasonable apprehension of bias, a consideration of irrelevant factors and a failure to take relevant considerations into account

[36] The applicant submits that the following statements made in the Taxpayer Relief Report demonstrate a reasonable apprehension of bias, consideration of irrelevant factors, and a failure to take relevant considerations into account:

1. That the Taxpayer Relief Report referred to a letter from the Department of Justice dated January 8, 2009, that was not produced by the respondents and was never seen by the applicant;

2. That granting the relief requested "could set a precedent", when the applicant submits that the Minister's role is to consider each request on its own facts and not be concerned with precedents; and

3. That "there was no precedent establishing an interest holiday would be granted upon the adjournment, and nothing of the kind was promised to the taxpayer". The applicant submits that the term "interest holiday" is a loaded term that suggests a biased decision.

[37] The Court rejects the applicant's first submission, that the Court draw an adverse inference regarding the content of the January 8, 2009, letter from the Department of Justice referred to in the report. The Court notes that the applicant failed to file a written request for material from the Minister's delegate pursuant to rule 317 of the *Federal Courts Rules*, SOR/98-106. As a result, the fact that the applicant does not have a copy of that document does not suggest to the Court that the document would help the applicant's case. To the contrary, that letter is referenced in the Taxpayer Relief Report as providing the factual history of the CRA's interactions with the applicant in the course of obtaining the adjournment.

[38] With regard to the applicant's concerns with precedent indicated in the Taxpayer Relief Report, the Court finds that the report demonstrates that the Minister's delegate considered the applicant's individual circumstances and the unique facts of the applicant's case in producing the report. The Court finds that the Minister's delegate was entitled to consider the consistency of his decision with other decisions of the CRA on this point, so as to avoid giving the impression of arbitrariness in the decision-making process. As the Supreme Court of Canada stated in *I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1999] 1 S.C.R. 282, "It is obvious that coherence in administrative decision-making must be fostered."

[39] With regard to the applicant's submission that the use of the term "interest holiday" suggests bias on the part of the decision-maker, the Court finds that there is no evidence to support this submission. Allegations of bias are not be made lightly, and must be supported by material evidence: *Arthur v. Attorney General of Canada*, 2001 FCA 223, at paragraph 8. The applicant has submitted no evidence to support the submission that there is anything derogatory in the use of that term. The underlying point is that the applicant was consistently informed of the interest accruing on his arrears, and that is not contested by the applicant.

[40] Finally, the Court finds that the Minister's delegate was correct in his consideration of factors relevant to his decision. The Taxpayer Relief Report clearly establishes a framework within which the Minister's delegates are to consider taxpayer requests for discretionary relief. The factors established include the following:

1. Whether the taxpayer has a history of compliance with tax obligations;

2. Whether the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued;
3. Whether the taxpayer exercised a reasonable amount of care and was not negligent or careless in conducting his or her affairs under the self-assessment system; and
4. Whether the taxpayer acted quickly to remedy any delay or omission.

[41] The Taxpayer Relief Report in this case clearly and reasonably considers all of those factors, in addition to the representations made by the applicant. The Court finds that there was no error in the Minister's delegate's consideration of the evidence.

Issue No. 3: Whether the Minister breached procedural fairness by taking an unduly long time to issue his decision

[42] The applicant submits that the time it took for the decision under review to be rendered breached the applicant's right to procedural fairness.

[43] The timeline for the issuance of the decision was as follows:

1. January 17, 2008: the date of the applicant's letter requesting the Minister to consider granting discretionary interest relief;
2. May 27, 2009: date of the Taxpayer Relief Report;
3. July 29, 2010: date of the decision.

[44] In an affidavit submitted for this case, the Minister's delegate, Mr. Kassam, describes the process by which the Calgary Tax Services Office of the CRA considers requests under section 220(3.1) of the Act. In this case, as described above, the applicant's case was treated as a "second-

level" request. A second level request is a follow-up request by a taxpayer made after the CRA has already rejected a first request for relief. In this case, the CRA treated the 1998 reassessment as the applicant's first request, and the 2008 request as a second request. In that way, the CRA allowed the applicant's request to be considered. Had the CRA treated the applicant's request as a first request, the 10-year limitations period would have expired.

[45] With a second level request, following the taxpayer's initial written request to the CRA, a CRA officer who was not associated with the first request is assigned to the file and conducts a preliminary review to ensure that the written request contains all of the information required to make the assessment—for example, the facts and reasons supporting the taxpayer's claim and any relevant documentation. The CRA officer then reviews the request and any new information submitted following the first request and makes a recommendation in a Taxpayer Relief Report. That recommendation is then forwarded to the CRA officer's "Team Leader" – a more senior CRA officer – for review. The Team Leader reviews all of the material and makes a decision. That decision must then be approved by an appeals officer—in this case, Mr. Kassam.

[46] In this case, the Taxpayer Relief Report was completed on May 27, 2009, approximately one year and three months following its receipt in the appropriate CRA section, and approximately one year and four months from the date of the applicant's request. It received approval from the Team Leader approximately one year and two months later, and was approved by Mr. Kassam and communicated to the applicant on July 29, 2010.

[47] The applicant has not submitted any evidence as to the usual amount of time that it takes CRA officers to review client files. In this case, the Taxpayer Relief Report details the efforts that the CRA officer undertook to investigate the applicant's claims. These included multiple discussions with the Department of Justice surrounding the reasons for the appeals adjournments, and investigations into the initial 1994 and 1995 reassessments – written details of which are no longer available because so much time as elapsed.

[48] The Court finds it reasonable that the detailed investigations conducted by the CRA that are described in the Taxpayer Relief Report and that were verified by the Team Leader took approximately two years and six months. The claims were with regard to very old information that was difficult to locate and assess, and the report is detailed and thorough.

CONCLUSION

[49] The applicant has the burden of satisfying the Court on a balance of probabilities that the CRA's decision was unreasonable, or that the applicant was denied procedural fairness. The Court finds that the CRA's exercise of its discretion was reasonable based on the facts before it and that the applicant was not denied procedural fairness.

COSTS

[50] The applicant has been prejudiced by the CRA request for an adjournment which delayed the resolution for five years. In these circumstances, the Court does not consider costs against the applicant are appropriate.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1359-10
STYLE OF CAUSE:	*Robert K. Phillips v. Attorney General of Canada*
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	March 23, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	KELEN J.
DATED:	April 12, 2011

APPEARANCES:

Anthony L. Dekens	FOR THE APPLICANT
Wendy Bridges	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Francis N.J. Taman Bishop & McKenzie LLP Calgary, Alberta	FOR THE APPLICANT
Myles J. Kirvan, Deputy Attorney General of Canada Edmonton Office, Prairie Region	FOR THE RESPONDENT