Federal Court  Cour fédérale

Date: 20110624

Docket: T-1946-07

Citation: 2011 FC 766

Ottawa, Ontario, June 24, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

R. JON WILLIAMS

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks an order setting aside the Minister of National Revenue's decision that he did not qualify under the Voluntary Disclosure Program (VDP) for relief from certain obligations imposed under the *Income Tax Act*, RSC 1985 (5th Supp), c1 (the *Act*). For the reasons that follow, this application for judicial review is dismissed.

Background

[2] Voluntary reporting of income and payment of tax is the foundation of the Canadian taxation system. Individuals who fail to report their income or pay amounts owed have an obligation to pay the tax and associated interest and penalties. However, section 220(3.1) of the *Income Tax Act* grants the Minister of National Revenue (the Minister) broad discretion to waive or cancel penalties to which the taxpayer would otherwise be subject. The Minister's exercise of discretion is guided by various policy considerations, including those set forth in Information Circular IC-001R. This document is available to the public and sets out guidelines for the exercise of the Minister's discretion in relation to the Voluntary Disclosure Program.

[3] According to IC-001R, the purpose of the VDP is to promote voluntary compliance with the provisions of the *Customs Act*, *Customs Tariff*, *Excise Tax Act*, and *Income Tax Act*. It encourages taxpayers to correct inaccurate or incomplete information or to disclose information not previously reported. Taxpayers who make disclosure under the program are liable for the taxes and duties owing, plus interest, but the penalties that would otherwise be imposed under the Acts may be waived.

[4] In order to qualify for the VDP, a valid disclosure must meet four conditions set out in IC-001R:

i) The disclosure is voluntary;
ii) The disclosure is complete;
iii) The disclosure involves a penalty; and
iv) The disclosure includes information that is at least one year past due, or if less than one year past due, not initiated simply to avoid the late filing or instalment penalties.

[5] A voluntary disclosure must be initiated by the taxpayer. A disclosure will not qualify as voluntary if it was found to have been made with the knowledge of an audit, investigation or other enforcement action that has been initiated by the Canada Revenue Agency. The purpose of this condition is self-evident. The objective of the VDP is to promote and enhance the voluntary compliance and reporting that is the cornerstone of the *Income Tax Act*. The VDP is not a safety-valve for individuals who see the wisdom of compliance only after they come across CRA's radar screen.

[6] A complete disclosure must include full and accurate reporting of all previously inaccurate, incomplete or unreported information. Information provided must be substantially complete. Disclosures with material errors or omissions will not qualify for the VDP.

[7] The applicant had not filed T1 returns for the 1997, 1998, and 2000-2003 tax years, or GST returns for 1997-2002. In consequence, the applicant received Demand to File Notices for his outstanding T1 returns. He also had periodic contact with officers in the Non-Filer Division of the Canada Revenue Agency who requested that he file his outstanding returns.

[8] After several years of contact with the Non-Filer Division, in a letter dated April 21, 2006, the applicant applied under the VDP for relief in respect of his failure to file the 1997-2003 taxation years and for related GST obligations.

The Decision Under Review

[9] The applicant's VDP request was rejected after a first-level review by a VDP officer. The applicant requested a second-level review of the decision to deny his VDP request, but the first level-decision was upheld.

[10] In both the first level and second level decisions, the applicant's VDP request was denied on the grounds that neither the voluntary nor the completeness criteria were met. The voluntary condition of VDP was not met because the Non-Filer unit had contacted the applicant on numerous occasions regarding the outstanding T1 returns. Notices were also sent to the applicant requesting that the returns be filed for tax years 1997, 1998 and 2000-2003. The completeness criteria was not met because the applicant did not file the outstanding returns by the deadline, and therefore failed to provide complete disclosure.

[11] The applicant challenges the second-level review decision upholding the denial of his VDP application.

Issues

[12] The applicant contends that the decision to deny him the benefits of the VDP was unreasonable, that he was not afforded procedural fairness and that the decision under review infringed his rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*.

Standard of Review

[13] Decisions made under the taxpayer relief provisions of the *Act* are reviewed on a standard of reasonableness: *Canada Revenue Agency v Telfer*, 2009 FCA 23 at para 2. In *Telfer* the Court held that the broad nature of the Minister's extraordinary statutory discretion militates against close scrutiny of the decision (para 40). Procedural fairness issues arising from the decision making process are reviewed on a correctness standard: *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53.

Preliminary Issue

[14] As a preliminary issue, the applicant challenges the accuracy and admissibility of a paragraph in an affidavit filed by the respondent on the basis that it contains inadmissible hearsay. In paragraph 14 of the affidavit sworn by Mr. Merali, the affiant states that he has reviewed the internal computer diary notes made by CRA employees when they have contact with taxpayers. The computerized diary notes relating to the applicant are attached as an exhibit to the affidavit.

[15] The computerized notes were not written by Mr. Merali, and he cannot confirm the truth of their contents. Consistent with Rule 81(1) of the *Federal Courts Rules* (SOR/98-106), I find that paragraph 14 of the Merali Affidavit and the attached computerized notes are admissible as part of the record before the decision maker, but I have not relied on the computerized notes as evidence of the truth of their contents.

What Constitutes Enforcement Action?

[16] The applicant argues that the computer generated Demands to File his return and his contact with the Non-Filer Division do not constitute enforcement action, and that the Minister's delegate erred in law in considering them as such. I find that the decision that the issuance of Notices to File and the contact with CRA Non-Filer officials constituted enforcement action for the purposes of the VDP was, having regard to the facts before the decision-maker, reasonable.

[17] Mr. Merali's second level review report notes that TX11 or TX14D computer-generated notices to file were issued with respect to each outstanding return the applicant sought to file under the VDP. As well, the Non-Filer section of CRA had contact with the applicant over the two years prior to the purported disclosure in an effort to convince the applicant to file his outstanding returns. The returns the CRA sought from the applicant were exactly the returns he sought to file under the VDP.

[18] I do not accept the argument advanced that enforcement activity is confined to use of criminal prosecution authority. Compliance with the *Act* is through voluntary self-reporting and the Minister, under the *Act* has various mechanisms to encourage, short of prosecution, compliance. To confine enforcement to prosecution would be to take a narrow view of the scope and nature of remedies open to the Minister.

[19] The Voluntary Disclosure Program Guidelines are internal Guidelines which describe how VDP requests are to be assessed in both first and second level reviews. The Guidelines explicitly

state that enforcement activity includes “computer-generated notices to file (e.g. TX11, TX14, RC80)”, and collection activity in progress.

[20] In response to the question in the VDP Client Agreement Form whether there had been any enforcement action, the applicant responded “Calls from the non-filer section only. No enforcement action to my knowledge.” Whether or not conduct by the CRA constitutes enforcement action cannot depend on the subjective view of either the CRA or the applicant. It must be an objective assessment, informed by the facts, and of course, the provisions of the *Income Tax Act*. Thus the applicant’s argument that he, personally, did not perceive the Notices to File as enforcement activity, does not assist his case. Moreover, there was clear evidence before the officer that the applicant sought refuge in the VDP directly in response to the CRA collection efforts. A reasonable person would conclude, having regard to the extent of non-compliance, the repeated issuance of Notices to File and the communications with the Non-Filers Division of CRA that enforcement activity was underway. Viewed in light of the on-going efforts by CRA to obtain compliance, the decision that the applicant’s disclosure was not voluntary is reasonable.

Incomplete Disclosure

[21] Finally, the applicant argues that he should not have to make a disclosure prior to a determination being made on his VDP application, and that it was unreasonable to find that his disclosure was incomplete. This argument is based on a misunderstanding of how the VDP works.

[22] Taxpayers who want to ensure they will qualify for the VDP prior to making a disclosure can approach the CRA on an anonymous basis to obtain an opinion whether their disclosure will be

accepted under the VDP. Once a hypothetical VDP determination has been made the taxpayer can file an actual disclosure under his or her identity. CRA will honour any determination made under a "no-name" process. This is explained in the IC00-1R policy.

[23] The requirements and risks of the VDP are clearly set out in the IC-001R and the Client Agreement Form. Taxpayers must make full disclosure, and if they are not accepted as voluntary, or found to be incomplete, the taxpayer may be liable for the penalties that flow from their disclosure. In this regard, the applicant received a letter from the VDP stating "you have 90 days from the date of disclosure to submit all documentation needed to substantiate the disclosure". The applicant replied that he would deliver his outstanding returns on October 4, 2006. He did not do so.

[24] The purpose of the program is to encourage taxpayers to make disclosure. The applicant was provided with the Client Agreement Form (VDP-1) which described the need to provide complete disclosure, and the consequences of failing to do so. The applicant in this case never disclosed his outstanding returns. In these circumstances, it was reasonable for the CRA to refuse the applicant's VDP application on the grounds that it was incomplete.

[25] This case is unlike *Wong v Canada (National Revenue)* 2007 FC 628, where Justice Michael Phelan found that the applicant disclosed under the illusion that the only issue with respect to his VDP application was completeness. In that case, it was a breach of procedural fairness for the officials to accept Wong's disclosure, knowing full well that it would be considered involuntary and failing to inform him to that effect. To further mark the distinction between this case and *Wong*,

Justice Phelan noted at paragraph 28 that the presentation of the VDP-1 form might have eliminated all of the problems in that proceeding. In this case, the VDP-1 form was presented to the applicant, and signed.

Procedural Fairness

[26] The substantive content of the duty of procedural fairness varies depending on the nature of the decision under review and its consequence: *Baker v Canada (MCI)*, [1999] 2 SCR 817 at paras 21-22. Here, the obligation of fairness in reaching a decision under the VDP program is minimal: *Wong v Canada (MNR)*, 2007 FC 628 at para 29. The applicant was under an obligation to comply with the requirements of the *Act*, and became liable for penalties when he failed to do so. The discretion accorded to the Minister to waive or cancel any penalties imposed is broad, and constitutes exceptional relief from penalties for which taxpayers are otherwise liable to pay under statute.

[27] In support of the procedural fairness argument the applicant argues that there was both an actual lack of independence and a perceived lack of independence in the way the second level review was conducted. The applicant points out that all of the people involved in reviewing his file work closely together in the same CRA Team:

i. The second level review was conducted by Mr. Merali, who was a co-worker of the person who conducted the first level review (Ms. Neal).

ii. The official who signed off on the first review is Ms. Giraldi. Ms. Giraldi was the officer who trained Mr. Merali on key aspects of the VDP. Ms. Giraldi was Mr. Merali's supervisor prior to the second level review taking place. Therefore, Mr. Merali was essentially reviewing his supervisor's decision.

iii. The officer who signed off on the second level review, Mr. Meggetto, was also part of the same tax office, and should have known of Mr. Merali's working relationship with the other CRA officials involved in the first level review.

[28] Mr. Merali confirmed that he simply reviewed the file, and did not take any notes or conduct any interviews in order to prepare his second level review report. Mr. Meggetto also did not interview anyone or conduct any independent analysis before signing off on the second level review.

[29] In my view, the relationships between the officers conducting the first and second level reviews do not amount to a breach of procedural fairness. There was no evidence that the individuals involved in the second review, Mr. Merali and Mr. Megetto, consulted with Ms. Neal or Ms. Garibaldi, the individuals who conducted the first level review. There was no evidence that either Mr. Merali or Mr. Megetto felt pressure to uphold the findings of the first review. In fact, during cross-examination Mr. Merali consistently stated that he understood that his review had to be independent from the first review.

[30] Importantly, the applicant made no allegations that Mr. Megetto's independence was compromised by his proximity to Ms. Giraldi or Ms. Neal. Mr. Megetto was the actual decision maker. It is a common administrative practice with respect to discretionary decisions to have a junior officer prepare a report for a senior officer to review and sign off on. On the facts of this case, it was not a breach of procedural fairness for Mr. Megetto to sign off on Mr. Merali's report.

[31] Before leaving this argument, I would add that the degree of procedural fairness and the robustness by which the principle is implemented varies with the nature of the interests or rights engaged and with the nature of the discretion. The VDP is a highly discretionary program which, as its object, encourages compliance with important mandatory statutory requirements. Put more

bluntly, it is designed to encourage taxpayers to do that which they were required by law to have done in the first place. As such, the criteria governing the exercise of discretion are strict and narrow and the *rights* involved are minimal.

Charter Claim

[32] The applicant relies on *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 for the proposition that the decision to deny him the benefits of the VDP imposed severe psychological harm and infringed his security of the person under section 7 of the *Charter*.

[33] The applicant's *Charter* arguments were advanced at a late stage in the proceedings, after the parties filed their affidavits and completed cross-examinations. The applicant did not refer to the *Charter* in his Notice of Application, nor did he submit an amended Notice of Application. The applicant did not submit any affidavit evidence to support his *Charter* claim.

[34] The Supreme Court of Canada (SCC) has stressed the importance of deciding *Charter* claims based on a proper factual foundation. In *MacKay v Manitoba*, [1989] 2 SCR 357, at para 20, the SCC held that:

> If the deleterious effects are not established there can be no Charter violation and no case has been made out. Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellant's position.

[35] These comments are apt. The applicant has not provided affidavit evidence to support his claim of psychological harm and has not made out the deleterious effects of the Minister's negative decision. This is fatal to the applicant's position. Without a proper factual foundation the Court

will not hear a *Charter* issue. In any event, if I were to hear the applicant's *Charter* claim, I would find that section 7 rights are not implicated in the decision under review. There being no breach of procedural fairness, or natural justice, it is difficult to see what aspect of the procedural protections encompassed by section 7 are engaged.

[36] Turning to the substantive content of section 7, the test for assessing whether psychological harm amounts to a deprivation of section 7 of the *Charter* is set out in *Blencoe*, above. The psychological harm must be imposed by the state and must have a "serious and profound effect on [their] psychological integrity"; *Blencoe* para 81. In *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 59, the SCC held that section 7 does not protect individuals from "the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action". There is no evidence in this case that the applicant would suffer anything other than the ordinary stresses experienced by any Canadian who does not comply with the requirements of the *Act*. In sum, even if the *Charter* claim had a proper evidentiary footing, it would fail on the merits.

Conclusion

[37] The respondent decided that the applicant did not qualify for the VDP because he was subject to enforcement action relating to the outstanding returns prior to applying for the VDP and because he failed to actually disclose his outstanding returns. In my view, the respondent's conclusions fall within the range of acceptable outcomes having regard to the facts, and having regard to the nature of the discretion. Turning to the second issue, the applicant was afforded procedural fairness in the second level review of the negative VDP decision. For these reasons, I

conclude there are no grounds to intervene in the Minister's decision to deny the applicant the benefits of the VDP program.

[38] The application for judicial review is dismissed. I make no order for costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1946-07
STYLE OF CAUSE:	R. JON WILLIAMS v. THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Toronto
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