

Federal Court



Cour fédérale

Date: 20111021

Docket: T-1984-09

Citation: 2011 FC 1208

Ottawa, Ontario, October 21, 2011

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

DOLORES SHERRY

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

THE PROCEEDING

[1] Dolores Sherry [the Applicant], seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision of the Canada Revenue Agency [CRA] made on behalf of the Minister of National Revenue [the Respondent] dated October 30, 2009 in which CRA refused to cancel or waive interest and penalties related to the Applicant's taxes for the years 1989 to 2000 [the Decision].

BACKGROUND

[2] In March of 2001, the Applicant asked CRA to cancel the interest that had accrued in relation to her 1989 to 2000 tax years based on extraordinary circumstances and financial hardship. She asked the Respondent to exercise its discretion arising from subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (15th Supp) [the Act].

[3] In August 2001, the Respondent refused to cancel the interest. The Applicant asked for reconsideration and the refusal was affirmed on February 27, 2004.

[4] The Applicant sought judicial review of the refusal and on April 25, 2005, Madam Justice Heneghan made an order on consent referring the matter back to the Respondent for reconsideration. Her Order directed the Respondent to (i) exclude the Applicant's capital gains from 1994 and (ii) consider whether the rental losses she incurred from 1989 to 1994 would affect her ability to fulfil her tax obligations regardless of whether the losses were tax deductible.

[5] On October 25, 2005, the Respondent began a fresh review of the Applicant's file in accordance with the terms of Madam Justice Heneghan's Order.

THE DECISION

[6] CRA declined to reduce the interest charged during the years 1989 to 2000 based on financial hardship although some interest was forgiven due to CRA's delay in processing the Applicant's request for interest relief.

[7] The dispositive part of the Decision reads as follows:

In reviewing your financial circumstances, we conducted a cash flow analysis to determine your ability to meet your tax obligations from 1989 to 2000. In conducting this analysis we have applied the direction in the Court Order and excluded the \$100,000 you reported as taxable capital gain in our cash flow analysis and included your rental losses for years 1989 to 1994 as cash outflow. Our cash flow analysis shows that your net cash flow (funds received less expenses paid during the applicable years) was sufficient to meet your tax obligations from 1989 to 2000, except for the negative cash flow years 1991, 1992, and 1993. However, we considered the fact that you had significant equity in properties that you owned during the years 1991 to 2000 and could use this equity to meet your tax obligations and to cover the negative cash flows. Therefore, your request for interest relief under financial hardship is denied.

THE ISSUES

[8] The Applicant has raised the following issues:

1. Are the reasons adequate?
2. Should she have been given an opportunity to comment on CRA's conclusions before the Decision was made?

3. Is CRA entitled to rely on the affidavit of James McNamara sworn on September 2, 2010 [the Affidavit] to supplement its reasons and is the material it exhibits unintelligible?
4. Did the Minister err in the exercise of his discretion?

THE STANDARD OF REVIEW

[9] In my view, the first three issues involve questions of procedural fairness. “Correctness” is the standard of review for such issues. The correctness standard was applied (i) to review the adequacy of reasons rendered under subsection 220(3.1) of the Act, see *Hi-Tech Seals Inc. v Canada (Minister of National Revenue)*, 2009 FC 901, at para. 13, (ii) to determine whether claimants should have the opportunity to comment on CRA’s conclusions, see *Costabile v Canada (Revenue Agency)*, 2008 FC 943, at para. 25 and (iii) to review CRA’s attempt to supplement its reasons with affidavit material, see *Adams v Canada (Revenue Agency)*, 2009 DTC 5174, at paras. 2 and 11-12.

[10] The last issue is to be reviewed using the reasonableness standard. The Federal Court of Appeal has confirmed that reasonableness is the appropriate standard of review to apply to a discretionary decision of the Minister under subsection 220(3.1) of the Act, see *Telfer v Canada (Revenue Agency)*, 2009 FCA 23, at para. 24-27 and *Slau Ltd. v Canada (Revenue Agency)*, 2009 FCA 270, at para. 27.

1. The Adequacy of the Reasons

[11] The Applicant submits that the Decision fails to provide adequate reasons because she has not been told what facts CRA relied on, what methods it used in its calculations and what assumptions it made.

[12] The Respondent acknowledges that CRA's *Taxpayer Bill of Rights* promises reasons but its position is that comprehensive detailed reasons are not required. The Respondent says that, because the Decision is highly discretionary, there is a low threshold for the adequacy of reasons which is met by the Decision in this case. The Decision shows that, because of positive cash flow in eight of eleven years and because of significant equity in real estate properties, CRA found no financial hardship.

[13] In my view, the real question is whether the Applicant needs further information to make the reasons intelligible. The Respondent suggests that because the Decision is largely based on information supplied by the Applicant, she has no need of further material.

[14] However, I am not persuaded by this submission. While it is true that the Applicant provided her income and expenses in 2001, CRA extrapolated those figures to generate a cash flow summary for the years 1989 to 2005. As well, when it considered whether she had equity in her real estate holdings, CRA relied, in part, on its own appraised values of the Applicant's properties.

[15] I have concluded that the Decision does not provide adequate reasons. However, a twelve page document entitled Taxpayer Relief Report signed on October 29 and 30, 2009 and informally called a “Fairness Report” gives the Applicant the information she needs. It was filed as part of the Applicant’s record on November 22, 2010 and counsel for CRA has advised the Court that there is no reason why it could not have accompanied the Decision. Had it done so, the reasons would have been sufficient.

2. A Right to Comment

[16] The Applicant also submits that she should have had an opportunity to comment on CRA’s conclusions before the Decision was made.

[17] In *Costabile v Canada (Revenue Agency)*, above at para. 9, the applicant took issue with the fact that he was afforded no opportunity to discuss the review or the outcome of his request for reassessment under subsection 152(4.2) of the Act. Mr. Justice Russell noted at para. 37 that, while the CRA must exercise its discretion under both subsections 152(4.2) and 220(3.1) fairly, no specific rules of procedural fairness governing that discretion are set out in the Act. The applicant in *Costabile* was given an opportunity to submit relevant information and documents when he submitted his request for review to CRA. The Court therefore rejected his argument that CRA was required to seek further information, documents or submissions prior to exercising its discretion to deny his request.

[18] I draw the same conclusion here. The Applicant was afforded ample opportunity to provide all necessary information to CRA when she submitted her request for review. The rules of procedural fairness did not entitle her to further comment before the Decision was made.

3. CRA'S Affidavit

[19] I have determined that the Affidavit was not filed to supplement the Reasons as the Applicant alleges. The Decision alone has been considered on the issue of the adequacy of the reasons and has been found wanting.

[20] In my view, the Affidavit was properly filed to respond to the Applicant's allegation that the Decision is unreasonable. Further, I should observe that I do not agree with the suggestion in the Applicant's Supplementary Memorandum that the exhibits to the Affidavit are unintelligible and I note that no oral submissions were made to that effect.

4. Reasonableness

[21] The Applicant challenged the reasonableness of the Decision and asked for an order that it be reconsidered. However, no written or oral submissions were made to demonstrate that the Decision was unreasonable. No evidence was adduced about the state of the real estate market which might have suggested that CRA's finding that the Applicant had equity in her properties was unreasonable. It appears that the Applicant's apparent inability to sell her properties was caused by her decision to set very high listing prices.

[22] Further, with regard to the cash flow statements, no material was filed by the Applicant to suggest that CRA's conclusions were unjustified.

[23] In these circumstances, I cannot conclude that the Decision was unreasonable.

CONCLUSIONS

[24] The application for judicial review will be allowed. However, there is no need for an order requiring CRA to provide further reasons since they were provided in the Fairness Report. Given that the Applicant has understood the underlying reasons for the Decision for some time and has not persuaded me that the Decision was unreasonable, there will be no order requiring a reconsideration.

COSTS

[25] Since the Applicant was required to make this application in order to be given the Fairness Report, an award of costs for the preparation of the application is appropriate based on Colum III of Tariff B. However, once the Fairness Report was provided, the only issue on which the Applicant was successful was resolved. Accordingly, no further costs will be awarded.

[26] If the parties cannot agree on a lump sum, the Registry may be contacted and I will fix an amount in a teleconference.

JUDGMENT

THIS COURT'S JUDGMENT is:

- (i)** The application for judicial review is allowed because the Decision dated October 30, 2009 did not provide adequate reasons.
- (ii)** The Applicant is entitled to limited costs as described in the attached reasons and a decision on the amount is reserved in case the parties cannot reach agreement on a fixed lump sum.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1984-09

STYLE OF CAUSE: Dolores Sherry v The Minister of National Revenue

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 15, 2011

REASONS FOR JUDGMENT: SIMPSON J.

DATED: October 21, 2011

APPEARANCES:

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Laurent Bartleman	FOR THE RESPONDENT

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