Federal Court Cour fédérale

Date: 20120814

Docket: T-655-11

Citation: 2012 FC 994

Vancouver, British Columbia, August 14, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

JAMES PETER TAYLOR

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, who is self-represented, challenges the legality of a decision dated March 21, 2011, taken on behalf of the respondent by an official of the Canada Revenue Agency [CRA] and denying his request for relief pursuant to subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp.), as amended [ITA] in respect of the reassessment of the applicant's 2005 Income Tax Return.

[2] The ministerial power to grant taxpayer relief is broad and the decision to waive or cancel penalty or interest is discretionary. Subsection 220(3.1) of the ITA, provides that:

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.

[3] The principal issue before this Court is whether the refusal to waive or cancel the arrears interest ($4,000.36) and penalty ($3,517.29) assessed to the applicant with respect to his 2005 taxation year falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law. It is common ground that the standard of review applicable to such decisions is that of reasonableness as per *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, while the standard of correctness applies to issues of procedural fairness.

[4] As stated by the Court in *Kapil v Canada (Revenue Agency)*, 2011 FC 1373 at para 20:

> As a matter of law, this Court does not have the jurisdiction to order the Minister to waive taxes, penalties, and arrears interest. The jurisdiction of the Court is limited to ordering the Minister to substantively reconsider his decisions not to waive the taxes and

> related interest and penalties. The applicant must understand, therefore, that even if this Court had found in his favour, he would not automatically be entitled to a waiver and refund of his money. This Court's review is confined to an analysis of whether the Minister's exercise of discretion in refusing the waiver requests was lawful, not to substitute its decision for that of the Minister: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339.

[5] It must also be remembered that each taxpayer relief request must be considered on its own merit. That said, the *Information Circular 07-1 Taxpayer Relief Provisions* [*IC 07-1*] provides some guidance as to the type of cases that may warrant the exercise of the broad discretion conferred by subsection 220 (3.1) of the ITA:

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:	23. Le ministre peut accorder un allègement de l'application des pénalités et des intérêts lorsque les situations suivantes sont présentes et qu'elles justifient l'incapacité du contribuable à s'acquitter de l'obligation ou de l'exigence fiscale en cause :
(a) extraordinary circumstances	a. circonstances exceptionnelles;
(b) actions of the CRA	b. actions de l'ARC;
(c) inability to pay or financial hardship.	c. incapacité de payer ou difficultés financiers.

[6] The *IC 07-1* specifies that "extraordinary circumstances" include:

25. Penalties and interest may be waived or cancelled in whole or in part where they result from circumstances beyond a taxpayer's control.	25. Les pénalités et les intérêts peuvent faire l'objet d'une renonciation ou d'une annulation, en tout ou en partie, lorsqu'ils découlent de

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:	circonstances indépendantes de la volonté du contribuable. Les circonstances exceptionnelles qui peuvent avoir empêché un contribuable d'effectuer un paiement lorsqu'il était dû, de produire une déclaration à temps ou de s'acquitter de toute autre obligation que lui impose la Loi sont les suivantes, sans être exhaustives :
(a) natural or man-made disasters such as, flood or fire;	a. une catastrophe naturelle ou causée par l'homme, telle qu'une inondation ou un incendie;
(b) civil disturbances or disruptions in services, such as a postal strike;	b. des troubles publics ou l'interruption de services, tels qu'une grève des postes;
(c) a serious illness or accident; or	c. une maladie grave ou un accident grave;
(d) serious emotional or mental distress, such as death in the immediate family.	d. des troubles émotifs sévères ou une souffrance morale grave, tels qu'un décès dans la famille immédiate.

[7] Having reviewed the totality of the evidence and closely examined the reasons for refusal in light of the record and relevant criteria, read the parties' memoranda and considered their oral submissions, I see no legal reason to intervene in this case. I have concluded that overall the impugned decision is reasonable and that there has been no breach of procedural fairness. I will first expose the proper relevant background and then dispose of the arguments made by the applicant.

[8] In the case at bar, the applicant was assessed for interest and penalties as a result of his failure to report a capital gain of $282,490.00 on the sale of corporate shares, until October 29, 2006, i.e. six months after the statutory deadline to file his income tax for 2005 (initially filed on September 4, 2006). On December 27, 2006, the CRA reassessed the applicant's 2005 taxation year to include the unreported capital gain and accordingly imposed a late filing penalty.

[9] The applicant applied for tax relief. On June 13, 2007, the applicant's first level request for relief from interest was refused [First Review]. On September 10, 2008, the CRA denied the applicant's second level request for relief from interest and his first level request for relief from penalties [Initial Second Review]. On November 24, 2008, the applicant's second level request for relief from penalties was denied [Latter Second Review].

[10] Applications for judicial review alleging breach of natural justice (court files T-740-09 and T-1364-09) were made to the Court.

[11] On September 14, 2010, this Court referred the matter back for redetermination.
The respondent consented to the order. Apparently, the problem was that the applicant's file had been handled earlier by the Tax Services Office in Sudbury, Ontario (audit and First Review), while the applicant had moved to Vancouver in 2006. In the meantime, the Initial Second Review and the Latter Second Review were conducted by the Tax Services Office in Victoria, British Columbia, who had apparently failed to meet with the applicant and to obtain all necessary information from him before making a final decision.

[12] The applicant now contends that the CRA did not conduct a genuine review after the matter was remitted back for redetermination, because both the Initial and the Latter Second Reviews were completed based on the history of the applicant's file as prepared by the CRA and without the benefit of the applicant's file itself. The applicant also argues that he was not afforded reasonable assurance that his correspondence with the CRA had been included and considered by decision-makers as part of the requested review.

[13] The grievances made against the Initial and the Latter Second Reviews are no longer relevant. Based on the evidence on record, the respondent, including the CRA, fully complied with the order made by the Court in September 2011. In January 2011, the Burnaby Fraser Tax Services Office in British Columbia [BFTSO], who had no previous involvement with the applicant's file, conducted a fresh review of the applicant's file. Mrs. Tracy Sine, Technical Advisor of the Appeals Division in the BFTSO [the Technical Advisor] met with the applicant on January 19, 2011. The meeting lasted three-and-a half hours. On this occasion, the applicant submitted documents. The following day, the applicant's spouse made further submissions.

[14] In January 2011, the Technical Advisor's report and recommendation to deny the applicant's request was then reviewed by the Chief of Appeals in the BFTSO, Mr. Mumtaz Amlani, who provided an affidavit in this proceeding. Having considered the applicant's representations with respect to his request for relief from interest and penalties (as found in the Technical Advisor's notes), the Chief of Appeals issued a written decision informing the applicant that such relief was not warranted in his case; hence the present application for judicial review.

[15] The applicant has failed to explicitly identify any documents that should have been before the decision-maker or any evidence that was ignored. In the absence of any evidence to the contrary, and in view of the affidavit of the Chief of Appeals in the Burnaby Fraser Tax Service Office, as well as the reasons provided in the impugned decision, I am satisfied that all of the necessary information was duly considered upon an independent Fresh Fairness Review. The Technical Advisor met with the applicant and provided him with the opportunity to present his arguments and to comment on the draft report prepared by the Technical Advisor before a recommendation and final decision was made. Accordingly, no breach to procedural fairness was committed in the redetermination of the applicant's request for relief.

[16] The other reproaches made by the applicant against the impugned decision do not actually concern the Fairness Review itself, but past actions of the CRA going back to 2004 and 2005 in response to a request by the applicant to increase his rental losses for the 1997 taxation year. The claimed losses or maintenance expenses related to a duplex property in Toronto [the Lonsdale Property], which was the applicant's principal residence, while a portion was rented to an unrelated third party. As a result of the audit, which was completed by July 7, 2005, the adjusted cost base of the Lonsdale Property was increased. The applicant alleges that the CRA failed to provide him with all the relevant documents in his ongoing file from 1997 in an accurate and timely manner, in accordance with the requirements of subsection 165(3) of the ITA and item 6 of CRA's *Taxpayer Bill of Rights*.

[17] In this regard, the applicant explains that he requested a hardcopy documentation detailing the relevant calculations with respect to the revised Capital Cost Base for the rental portion of the

Lonsdale Property located in Toronto, but was provided with the requested documentation only on July 11, 2006, i.e. 72 days after the April 30, 2006 filing deadline. Thus, the applicant argues that he should not have been assessed a late filing penalty, and that he was due a tax refund as a result of previous review of his tax filings. The respondent replies that the adjusted cost base of the Lonsdale Property was provided to the applicant in a letter dated October 17, 2005, and that the further breakdown of the adjusted cost base between land and building was not the CRA's responsibility to determine.

[18] The arguments made by the applicant are without merit in this case. The blatant problem is that they are based on the mistaken assumption that there must necessarily be a link between the applicant's requests for revision relating to his 1997 and 2005 tax filings. This is simply not the case as the tax base determined for each fiscal year is independent, and more particularly in this case, the capital gain that the applicant failed to report in his 2005 T1 Income Tax Return and the accompanying claim with respect to an offsetting capital gain deduction were not related in any way to the Capital Cost Base of his revenue property that was subject to readjustment after the 2004-2005 audit.

[19] The applicant's relations with the CRA were always tense. He explains: "I stopped filing annual returns in an attempt to solicit communication from [the CRA]." However, it remains that under Canada's self-assessing tax system, it was the applicant's sole responsibility to comply with his tax obligations under the ITA and to report the capital gain and make proper calculations (*R v McKinlay Transport Ltd*, [1990] 1 SCR 627). CRA's employees are not at fault. The evidence on record simply does not allow me to conclude that CRA's employees acted in bad faith or made

promises or representations that had a binding effect. Certainly, the respondent did not renounce making a reassessment or claiming all or any portion of any penalty or interest otherwise payable under the ITA.

[20] The applicant further contends that the decision-maker made contradictory assertions and reiterated misconceptions and numerical errors of earlier decision-makers, but does not specify any such problems in the CRA's impugned decision, except to state that allegations of poor compliance history are false or greatly exaggerated in this case. Having closely reviewed the record and evidence submitted by the parties, I am unable to conclude that the refusal to waive or cancel all or any portion of the assessed interest and penalty is based on an erroneous finding of fact that the CRA made in a perverse or capricious manner or without regard for the material before it. Overall I am not satisfied, based on the evidence on record, that any of the CRA's actions complained of by the applicant, individually or cumulatively, render the impugned decision to refuse relief unreasonable in the circumstances.

[21] Moreover, while the Technical Advisor's report apparently contains incorrect information with respect to the dates the applicant filed T1 Income Tax Returns for the taxation years from 1999 to 2009, other information with respect to the applicant's compliance history is correct. In any event, although it was one element considered, the compliance history was not a determinative factor in the refusal to grant relief in this case. Essentially, the main reason for not cancelling the interest and penalty assessed was that the applicant's inability to make a timely declaration of the capital gain was not due to extraordinary circumstances, actions of the CRA, or inability to pay or financial hardship.

[22] The applicant also invites the Court to declare that past arbitrary assessments cannot be fully enforced. However, in this proceeding the applicant is barred from challenging the legality of the 2005 reassessment and/or other assessments under the authority of the ITA. The applicant did not file a Notice of Objection with respect to the 2005 reassessment and has not challenged the adjustments of $2,500 made with respect to maintenance and repairs on the Lonsdale Property. He cannot complain today before the Court that there was an arbitrary assessment or that it resulted in double taxation.

[23] This is not an appeal of a notice of assessment (which would have to be determined by the Tax Court of Canada), but a judicial review of a discretionary action taken under the authority of subsection 220(3.1) of the ITA. The cases cited by the applicant are either irrelevant or not applicable to the facts of this case. As stated in *Jenkins v Canada (Revenue)*, 2007 FC 295 at para 13:

> [I]t is important to keep in mind that the power of the Minister, as set out in subsection 220(3.1) of the Act, is a discretionary power and as such, there is no obligation on the part of the Minister to reach any given conclusion. Furthermore, the liability of a taxpayer to pay penalties and interests for the late filing of income tax returns results from the application of the Act itself, not from any discretionary decision of the Minister to impose such penalties and interests. Therefore, the discretionary power of the Minister is limited to providing exceptional relief from the operation of the Act, where the Minister believes such relief to be warranted.

[24] Overall, I am satisfied in this case that the decision-maker did not fetter his discretion, did not discard any relevant evidence, or ignore any relevant criteria. Indeed, the refusal to cancel the

interest and penalty is based on a number of valid reasons which are not unreasonable under the circumstances:

- According to the evidence on record, the CRA acted in a timely and efficient manner on the applicant's request to adjust his 2005 T1 Income Tax Return;
- The interest and penalties that were imposed with respect to the applicant's 2005 taxation year were correctly assessed and were the result of the applicant's actions only;
- By the time the applicant's 2005 T1 Income Tax Return was due (i.e. April 30, 2006), the applicant was aware that he had realized a capital gain on the sale of corporate shares during the taxation year;
- The audit of the applicant's 1997 Income Tax Return, further to the applicant's 2004 taxpayer relief request, had been dealt with and communicated to the applicant on October 17, 2005, allowing ample time for him to assess and file his 2005 income tax before April 30, 2006;
- There were no undue delays by the CRA in providing the required information to the applicant;
- There were no actions by the CRA that impacted on the accrued interest or the late filing penalty;
- There were no circumstances that were beyond the applicant's control or a result of personal misfortune that made him unable to comply with the statutory requirements for income tax purposes; and
- The applicant did not meet the requirements of the Voluntary Disclosure programme although the applicant voluntarily reported the capital gain at issue; namely, the unreported information was more than one year overdue and no written submission

> was made along with the required Form RC199 "Taxpayer Agreement – Voluntary Disclosure programme" and supporting documentation.

[25] In summary, the applicant has not identified any specific breach of procedural fairness in the exercise of the ministerial discretion to deny the taxpayer relief in this matter. The applicant has cited no authorities with respect to the nature and the content of the alleged duty of care. The applicant has not demonstrated that any delay in providing the applicant documentation relating to his 1997 income tax review should be held against CRA's employees. Be that as it may, the adjusted Capital Cost Base of the applicant's property had no impact on the applicant's 2005 taxation year as the 2005 tax filings did not require a statement of the adjusted cost base or any other information that the applicant did not dispose of by April 30, 2006. Furthermore, once the adjusted cost base of the applicant's revenue property was provided to the applicant (in a letter dated October 17, 2005), any further assessment or breakdown of the adjusted cost base was not the CRA's responsibility under the Canadian self-reporting and self-assessing tax system.

[26] Considering all of the above, the present application for judicial review must fail.

[27] In view of the result, costs will be in favour of the respondent. Considering that the applicant is self-represented and that this is a rather simple case, the relatively minimal amount of work required and the actual contribution of respondent's counsel, in the exercise of my discretion, I have decided to award to the respondent a lump sum of $750 inclusive of all disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review made by the applicant is dismissed. Costs in the amount of $750, inclusive of all disbursements, are awarded to the respondent.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	JAMES PETER TAYLOR v MNR
PLACE OF HEARING:	Vancouver, BC
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