

Federal Court



Cour fédérale

Date: 20130531

Docket: T-1042-12

Citation: 2013 FC 588

Ottawa, Ontario, May 31, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

HOWARD BILLER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review challenging a decision by the Taxpayer Relief Center of Expertise Appeals Branch under the direction of the Minister of National Revenue [the Minister] to not use its discretion to grant Mr. Biller's [the Applicant] relief under subsection 281.1 of the *Excise Tax Act*, RSC 1985, c E-15 [ETA]. The Applicant is seeking cancellation of penalties and interests levied by Canada Revenue Agency [CRA] for the taxation periods ending December 31, 2004, December 31, 2005, December 31, 2006 and December 31, 2007 [the Periods]. The Applicant is a self-represented litigant.

I. Background

[2] The Applicant has been a Distributor for Immunotec, a Quebec-based, Multi-Level Marketing Company distributing health supplements, for over ten (10) years.

[3] The Applicant did not file Goods and Services returns of income for the Periods. As such, the Minister assessed the Applicant interest and late filing penalties on his failure to file tax returns on time as required by the *ETA*.

[4] On January 15, 2009, the Applicant applied to the Minister to waive the late filing penalties and interest assessed to him for the Periods, claiming extraordinary circumstance as the basis of his relief.

[5] On March 4, 2010, the Minister issued a decision declining to use its discretion to waive the penalties and interest owed by the Applicant under subsection 281.1 of the *ETA*.

II. Issues

[6] Did the Board err in denying the Applicant's penalty and interest relief?

III. Standard of review

[7] The appropriate standard of review is the standard of reasonableness (*Canada Revenue Agency v Telfer*, 2009 FCA 23 at para 24; see also *Holmes v Canada (Attorney General)*, 2010 FC 809).

[8] The Court should only intervene to review the decision if it does not fall “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). For a decision to be reasonable, there must be justification, transparency and intelligibility within the decision making process.

IV. Analysis

[9] A useful summary of legislative framework of the taxpayer relief provisions was provided by Justice Michel Beaudry in *Knecht v Canada (Attorney General)*, 2009 FC 940:

11 The Taxpayer Relief Provisions of the Income Tax Act, 1985, c. 1 (5th Suppl.) [subsection 220(3.1) of the Income Tax Act and section 281.1 of the ETA] gives Canada Revenue Agency (CRA) the discretion to waive or cancel all or part of properly assessed penalties and interests. Discretion will generally be exercised if the taxpayer has not complied with the Act due to circumstances beyond his or her control, financial hardship or due to actions of the CRA. In addition, prior to making a decision with regard to the cancellation of penalties or interest, the Agency will review the taxpayer's situation to determine if a reasonable standard of care has been exercised in the administration of his or her affairs.

12 The decision making process in respect of a request by a taxpayer for cancellation or waiver of interest and/or penalties (a Fairness Request) pursuant to section 281.1 of the Act begins when a CRA Fairness Officer reviews the taxpayer's first level request. The Fairness Officer prepares a report and makes a recommendation on the taxpayer's First Level Request. Where the amount in issue exceeds \$5,000, the First Level Request is reviewed by a committee of three Team Leaders (First Level Committee). If the taxpayer requests a review of the First Level Request (a Second Level Request), a report is prepared by a CRA Officer who was not involved in the First Level Request for review by a committee which consists of the Assistant Director of the Revenue Collections and Client Services Division, the Assistant Director of the Audit Division and the Director of the South Interior Tax Services office (Second Level Committee). The Second Level Committee reviews all the material and then makes a decision.

13 In deciding whether to grant a taxpayer relief in response to a Fairness Request, the factors considered by the Minister generally include the following:

- (a) the taxpayer's history of compliance with GST obligations;
- (b) whether or not the taxpayer has knowingly allowed a balance of GST payable to exist upon which arrears interest has accrued;
- (c) whether or not the taxpayer has exercised a reasonable amount of care and has not been negligent or careless in conducting his or her affairs under the self-assessment system;
- (d) whether or not the taxpayer has acted quickly to remedy any delay or omission attributable to the taxpayer; and
- (e) whether the taxpayer is subject to hardship which affects his or her ability to pay the assessed amounts.

(see paragraph 22 of *Information Circular IC07-1, Taxpayer Relief Provisions*)

[10] Justice Simon Noël's decision in *Quastel v Canada Revenue Agency*, 2011 FC 143 is also instructive in this case:

21 As instructed by the Supreme Court in Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12 (CanLII), 2009 SCC 12, at para 46, "More generally, it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with Dunsmuir. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the Federal Courts Act." Hence, as it is the exercise of discretion that is contested, the applicable standard of review is that of reasonableness, as is confirmed by the relevant case law (Canada Revenue Agency v Telfer, 2009 FCA 23 (CanLII), 2009 FCA 23; Spence v Canada Revenue Agency, 2010 FC 52 (CanLII), 2010 FC 52; Northview Apartments Ltd v Canada (Attorney General), 2009 FC 74 (CanLII), 2009 FC 74; Cayer v Canada Revenue Agency, 2009 FC 1195 (CanLII), 2009 FC 1195).

22 The Applicants were not represented before the Court thus the preceding observations in regards to the standard of review may seem technical in nature. Judicial review is different from an appeal of a decision, especially when the standard of review is that of reasonableness. The Court is to ask itself if the impugned decision is part of the reasonable outcomes defensible in fact and law, indicating that there is indeed some leeway in administrative decision-making (Dunsmuir v New Brunswick, 2008 SCC 9 (CanLII), 2008 SCC 9, at

para 47). Hence, the Court's power does not extend to a reassessment of the evidence or to substituting its decision for that of CRA. At the stage of judicial review, the outcomes are limited: either the matter is sent back for redetermination or the decision is accepted as "reasonable" or "correct", according to the applicable standard of review.

[11] The Minister has issued guidelines setting out a non-exhaustive list of factors to be considered in exercising his discretion to waive penalties and interest, including: (1) extraordinary circumstances, (2) actions of the CRA; and (3) inability to pay or financial hardship.

[12] In considering these factors, it is important to note that any applicant is responsible to file his or her return on time, and that any errors attributable to third parties are not considered extraordinary circumstances (*Babin v Canada (Customs and Revenue Agency)*, 2005 FC 972 at paras 19-20; *Quastel v Canada (Revenue Agency)*, 2011 FC 143; *Boonstra v Canada (Attorney General)*, 2006 FC 1196 at paras 17, 22).

[13] While I have some sympathy for Mr. Biller's confusion concerning his duty to remit GST for his services rendered to Immunotec, upon which commissions were paid to him, if was, nevertheless, his responsibility to ensure, in some way, that he had proper remittances made and received the necessary advice from his accountant or otherwise to ensure compliance with his GST payment obligations. While Mr. Biller's accountant and perhaps Immunotec may have failed to provide adequate or proper advice to Mr. Biller, these issues are separate from CRA considerations. CRA considered the relevant facts, and acted reasonably. Therefore this application is dismissed.

[14] The facts of this case, however, do not justify that costs should be against the Applicant. No costs shall be awarded.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed;
2. No costs are awarded.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1042-12

STYLE OF CAUSE: Biller v. AGC

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 29, 2013

**REASONS FOR ORDER
AND ORDER BY:** MANSON J.

DATED: May 31, 2013

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