Federal Court  Cour fédérale

Date: 20141031

Docket: T-1410-13

Citation: 2014 FC 1033

Ottawa, Ontario, October 31, 2014

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

GREGORY SAILSMAN

Applicant

and

MINISTRY OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision by the Minister of National Revenue, acting through the Canadian Revenue Agency (CRA), refusing to grant the Applicant an extension of time to file a non-resident tax return under the *Income Tax Act*, (RSC, 1985, c 1 (5th Supp.)) (the Act) so as to avoid the penalty associated with the late filing.

[2] For the reasons that follow, the judicial review application is dismissed.

I. Background

A. *Mr. Sailsman's Tax Arrangements While Residing Outside Canada*

[3] On or around December 2007, Mr. Sailsman moved to Bermuda with his wife and son. While in Bermuda, he arranged for his father to be his agent and submit tax returns on his behalf and receive all related correspondence. In a letter dated March 30, 2009, Mr Sailsman was notified by the CRA that he was considered a non-resident and could be subject to non-resident withholding tax on rental income received from a Canadian source.

[4] According to subsection 212(1) of the *Income Tax Act* every non-resident shall pay an income tax of 25% on every amount that a Canadian resident pays or credits to the non-resident. The non-resident has the option of choosing another method of payment of that tax by undertaking to file, within six months after the end of his taxation year, an income tax return under Part I of the Act, and more particularly, subsection 216(4). Pursuant to that method of payment, the tax is calculated based on the net, as opposed to the gross, rental income.

[5] This is the option Mr Sailsman chose by submitting an "Undertaking to File an Income Tax Return by a Non-Resident Receiving Rent form Real Property or Receiving a Timber Royalty" (the NR6 Form) which was received by the CRA on February 4, 2010 and was deemed to apply to the 2010 taxation year.

[6] By submitting the NR6 Form, Mr. Sailsman undertook to file, pursuant to subsection 216(4) the Act, a tax return for his rental income from Canadian sources for the 2010 taxation year (the 2010 Rental Income Return). The deadline for doing so was June 30, 2011.

B. ***Mr. Sailsman's Divorce while in Bermuda***

[7] On or around April 6, 2010, Mr Sailsman was served with an application for divorce by his wife, which he alleges took him completely by surprise. A battle for custody of their only son ensued. Finally, on or about September 22, 2010, the Supreme Court of Bermuda ordered the son back to Canada. Mr Sailsman and his son therefore moved back to Canada on September 25, 2010. The Applicant's wife stayed in Bermuda, although she now lives in Jamaica, and has continued her legal proceedings for custody and equalization of assets. In 2013, these proceedings were still ongoing. Additionally, Mr Sailsman lost his job at IBM in March of 2012.

C. ***Mr. Sailsman's Return to Canada***

[8] In a letter dated December 31, 2010, Mr Sailsman attempted to advise the CRA that he had returned to Canada and was no longer a non-resident by submitting the form "Statement of Amounts Paid or Credited to Non-Residents of Canada" (the NR4 Form). He included a cheque for $180.00 and asked that his non-residency account be closed.

[9] In February 2011, Mr. Sailsman's father called the CRA to inquire whether Mr. Sailsman's NR4 Form had been received and asked that his non-residency account be closed

once the NR4 Form processed. Mr. Sailsman's father was informed that the NR4 Form had been received but not yet processed.

[10] On September 26, 2011, the CRA sent a letter to Mr Sailsman advising him that he had failed to file his 2010 Rental Income Return by the June 30, 2011 deadline as undertaken in his NR6 Form. The CRA therefore advised him that a 25% non-resident tax was payable on his Canadian rental income. This amount was assessed as being $7,920.00, plus applicable interest.

D. ***Mr. Sailsman's Request that the late filing of his 2010 Rental Income Return be Accepted***

[11] In a letter dated October 9, 2011, Mr Sailsman's father advised the CRA that Mr Sailsman did not know that, although he had filed an NR4 Form, he was still required to file his 2010 Rental Income Return. He attached a completed Section 216(4) return form to this letter asking for it to be accepted with no penalty.

[12] On February 2, 2012, the CRA acknowledged receipt of the October 9, 2011 letter and informed Mr. Sailsman that the request contained therein would be referred to the Taxpayer Relief Committee. On March 1, 2012, Mr Sailsman was informed that this request would be treated by the Taxpayer Relief Committee as a request for an extension of time under subsection 220(3) of the Act which empowers the Minister of National Revenue to extend, at any time, the deadlines for making a return under the Act.

[13] By a letter dated March 12, 2012, the CRA advised Mr Sailsman that his request for an extension of time was denied.

E. ***Mr. Sailsman's First Request for Reconsideration***

[14] On March 28, 2012, Mr Sailsman applied to the Director of International Tax Services of the CRA for reconsideration of the March 12, 2012 decision. He reiterated that had he understood what documents were required for his tax return filings for the year 2010, he would have submitted them as there was no logical reason to file one form and not another. He further reiterated that this situation "could only be attributed to [his] understanding of the requirements, which [he] can only attribute to [his] state of mind at the time". He added that "the complexities of the filing process and lack of easily getting information regarding [his] filing did not help as (sic) either" Mr. Sailsman concluded by "appealing for leniency" as although some mistakes were made, he "did what [he] thought was right at the time".

[15] Mr. Sailsman's reconsideration request was assigned to a Taxpayer Relief Officer of the International Tax Services Office. By a letter dated August 23, 2012, Mr. Sailsman was informed that his request had been denied. He began thereafter a process for judicial review of that decision. This application was discontinued when the Director of the International Tax Services Office agreed to have his request for reconsideration referred to a CRA officer not previously involved in the matter.

F. ***Mr. Sailsman's Second Request for Reconsideration and the Impugned Decision***

[16] On July 23, 2013, Mr Sailsman 's second request for reconsideration was denied on the ground that it revealed no circumstances that would have prevented the filing of the 2010 Rental Income Return by the June 30, 2011 deadline.

[17] The July 23, 2013 decision (the Impugned Decision) addressed each reason given by Mr Sailsman for not filing the 2010 Return on time. It can be summarized as follows:

a. The Canadian tax system being based on self-assessment, it is up to the tax payer to educate himself on his tax responsibilities, and misunderstanding of the filing requirements is not a valid reason for granting relief;

b. Although Mr Sailsman's divorce proceedings and custody battles could be viewed as extraordinary circumstances, these events were resolved by the end of 2010, giving the Applicant time to file his 2010 Return by June 30, 2011;

c. The fact that Mr Sailsman and his son were returning to regular life in Canada as of November 1, 2010 should not have prevented him from filing by June 30, 2011;

d. It is not the responsibility of the taxpayer's agent to file tax returns nor is it the responsibility of the CRA's phone officers to provide the agent or the tax payer with information outside of the nature of the inquiry; and

e. Mr Sailsman filed an income tax return on May 17, 2011 for the 2010 taxation year, meaning that he should have been able to file the 2010 Rental Income Return by the applicable deadline a month a half later.

[18] Mr. Sailsman began the present application for judicial review on August 21, 2013.

II. Issues

[19] Mr. Sailsman's judicial review application has two aspects. First, Mr. Sailsman complains of a failure, on the part of the CRA, to provide clear and timely assistance when he requested it following his return to Canada in the Fall of 2010. He attributes this failure to the CRA's delays in answering his letters, the amount of time he had to wait on the phone before speaking to CRA's phone officers, and the alleged lack of information that he was given by these officers. He claims that in so doing, the CRA "failed to observe a principle of procedural fairness".

[20] Second, Mr. Sailsman questions the reasonableness of the Impugned Decision on the ground that the CRA did not adequately consider his extraordinary circumstances, that is the severe stress he was facing, and is still facing, due to the abrupt end of his marriage in April 2010. While he recognizes that it is the tax payers' responsibility "to exercise reasonable care in conducting their tax matters", he says that he "tried [his] upmost" in that regard.

III. Analysis

A. *The Procedural Fairness Concern*

[21] This argument on the part of Mr. Sailsman stems from a misunderstanding of the nature of the decision that is being challenged through the present judicial review application. What is

being challenged is the decision of the CRA not to extend the time Mr. Sailsman had under the Act to file his 2010 Rental Income Return. As a result, any procedural fairness concerns that would be relevant to the disposition of the present judicial review application would have to do with the way Mr. Sailsman's October 9, 2011 request for leave to file his 2010 Rental Income Return without a penalty had been handled, from a procedural standpoint, by the CRA and his agents.

[22] Mr. Sailsman alleges no such concerns. Rather, the argument he advances as a procedural fairness concern is related to the way the CRA handled his NR4 and NR6 Forms and what led the CRA to take the position that he had failed to file his 2010 Rental Income Return by the applicable deadline. This argument forms part of the merits of his claim that the CRA should have extended the time for filing his 2010 Rental Income Return under subsection 220(3) of the Act. It goes to the facts that, according to him, should have prompted the CRA to accept the late filing of his 2010 Rental Income Return. It goes, as a result, to the reasonableness of the Impugned Decision, not to its legality from a procedural fairness perspective.

[23] In any event, there were no breaches of procedural fairness in the CRA's decision-making process that led to the Impugned Decision. As indicated previously, subsection 220(3) of the Act provides that the Minister of National Revenue "may at any time extend the time for making a return under this Act". The power conferred on the Minister is purely discretionary (*Sixgraph Informatique Ltée v Minister of National Revenue*, 2004 FC 759). No statutory procedural framework governs requests made under subsection 220(3) of the Act.

[24] In this context, Mr. Sailsman was entitled to expect that he would be given the opportunity to make representations in support of his request for late filing and that these representations would be considered by the CRA. The evidence on record clearly shows that the Impugned Decision was procedurally fair : Mr. Sailsman was provided with the opportunity to state his case, his request for late filing was reconsidered on two occasions and his representations in support of such request were considered by the CRA at all stages of the treatment of the said request.

B. ***The CRA's Decision not to Extend the Deadline for Filing the 2010 Income Return was Reasonable***

[25] Mr. Sailsman contends that the Impugned Decision is unreasonable because the CRA did not adequately consider his extraordinary circumstances resulting from the stressful breakdown of his marriage. He also contends that the Impugned Decision is reviewable on the ground that the CRA did not adequately consider the fact that he was not provided with clear and timely assistance when he requested it following his return to Canada in the Fall of 2010, specifically, the delays in answering his letters, the amount of time he had to wait on the phone before speaking to CRA's phone officers, and the lack of information he was given by these officers.

[26] It is well settled that on findings of facts and discretionary decisions, the reasonableness standard, which is the most deferential standard, will usually apply (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 53-54). In *Sixgraph*, above, this Court ruled that a decision made pursuant to subsection 220(3) of the Act was to be reviewed on the "patent

unreasonableness" standard. Before *Dunsmuir*, this was the most deferential standard, and post-*Dunsmuir*, it refers to the reasonableness standard (*Dunsmuir*, at para 45).

[27] In this case the Impugned Decision was discretionary and was based on the specific facts of Mr. Sailsman's circumstances. Therefore, the reasonableness standard of review applies. This standard of review recognizes that there is a range of acceptable outcomes in any given case and that a decision-maker cannot be faulted for choosing one over the other. What this means in this case is that the Court cannot review the facts of the case and substitute the outcome of the Impugned Decision with its own conclusion and that it can only interfere with it if it lacks "justification, transparency and intelligibility within the decision-making process" and if it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, paragraph 47).

[28] In this case, I find that the Impugned Decision is reasonable: it sets out the reasons for decision in the letter sent to Mr. Sailsman on July 23, 2013; it addresses each point made by Mr Sailsman in his request that the late filing of his 2010 Rental Income Return be accepted and indicates why the extension of time should not be granted; it points out relevant facts and explains why the circumstances are not enough to justify granting an extension in this case.

[29] All the points raised by Mr Sailsman as to why he did not file on time and should be granted an extension of time were examined.

[30] First, the CRA found that misunderstanding the legal requirement to file was not a valid reason to grant an extension of time. It is explained in the Impugned Decision that, because there is a self-assessment system in Canada, taxpayers must properly educate themselves on their tax responsibilities.

[31] Second, the CRA concluded that, even though Mr Sailsman underwent divorce and custody proceedings in 2010, he would have had enough time to file his 2010 Rental Income Return. The impugned Decision states that in the evidence presented by Mr Sailsman, his custody and divorce proceedings were finalized by the end of 2010, and his 2010 Return was only due on June 30, 2011, which the CRA considered to be ample time to file.

[32] Third, the CRA decided that Mr Sailsman's resumption of regular life in Canada as of November 1, 2010 and his son suffering trauma as a result of the divorce and custody proceedings were not acceptable reasons for missing the June 30, 2011 deadline for filing his 2010 Rental Income Return. The CRA indicated that although there would be an adjustment period for him and his son, Mr Sailsman did not explain how this prevented him from filing on time.

[33] Fourth, the CRA found that Mr Sailsman's father not being advised of the 2010 Rental Income Return filing requirement was not a valid reason to grant an extension either. The CRA stated that it was Mr Sailsman's responsibility to file the income tax returns, not his father's. Additionally, the CRA noted that Mr Sailsman's father had not inquired specifically about

obligations regarding proper tax compliance while on the phone with the CRA officer but that the inquiry was of a more general nature.

[34] Fifth, the CRA concluded that Mr Sailsman not being advised of the filing requirements while inquiring about his NR4 Form and residency status was not a valid reason to grant an extension of time. The CRA explained that when making a general inquiry on the phone with a CRA officer, the phone officer would not be prompted to provide information about additional filing requirements unless more specific information was given**,** such as the fact that Mr Sailsman was renting property in Canada while a non-resident. Mr Sailsman did not provide this information in this case. This evidence was not challenged by Mr. Sailsman.

[35] Finally, the CRA noted that, since Mr Sailsman had filed an income tax return for the 2010 tax year on May 17, 2011, he should have been able to file his 2010 Rental Income Return by June 30, 2011.

[36] In sum, Mr. Sailsman was told in February 2011 that his NR4 Form had not yet been processed. He nevertheless assumed that he did not have to produce, by the June 30, 2011 deadline, the 2010 Rental Income Return he had undertaken to file through the NR6 Form submitted the year before. As he says, had he had known what to file, he would have filed the proper returns in time. However, in a self-assessment tax system like the one we have in Canada, it is for him to be aware of his tax responsibilities. There is no evidence that he was misled by the CRA in this regard.

[37] Mr. Sailsman proceeded on the assumption that he no longer had to file his 2010 Rental Income Return. This assumption was incorrect. As evidenced by his filing of an income tax return for the 2010 tax year on May 17, 2011, had he not made that incorrect assumption, nothing would have prevented him from producing his 2010 Rental Income Return despite the circumstances he describes with respect to his state of mind at the time.

[38] As a result, considered as a whole, I am satisfied that the Impugned Decision is justified, transparent and intelligible and falls within the range of possible acceptable outcomes. In other words, there is nothing in the decision that warrants intervention by this Court.

[39] Mr. Sailsman recognizes in his written submissions that it is the tax payers' responsibility "to exercise reasonable care in conducting their tax matters". He says in this regard that he "tried [his] upmost". However, this was not the test he had to meet. Rather, he had to satisfy the CRA that there were special circumstances that prevented him from meeting the June 30, 2011 deadline. The CRA found that he had not established that he was facing such circumstances. Based on the record before me, I find that this was an acceptable and defensible outcome in respect of the facts and the law.

[40] Throughout his oral submissions before the Court, Mr. Sailsman kept referring to the fact that he would have expected a much better service on the part of the CRA, like the services financial institutions provide to their clients. These expectations were simply misplaced.

[41] Unlike financial institutions, the CRA is not a commercial undertaking offering its products and services in an open, competitive market. The CRA is a creature of statute whose mandate is to administer an income tax system that relies on self reporting by taxpayers. To that end, the Act gives the CRA broad powers in supervising the scheme of assessing and auditing taxpayers. In such context, the CRA and the taxpayers have opposing interests. Their relationship is therefore not one where the CRA should be responsible for protecting taxpayers from losses arising from their assessments (*Leighton v Canada (Attorney General)*, 2012 BCSC 961, at para 54). Rather, it is that of debtor-creditor, governed by statute and in a sense, adverse. As a result, absent a breach of the powers in the Act, the CRA has no duty towards a taxpayer other than to act in accordance with the Act for the purposes of the Act (*Humby v Central Springs Ltd*. 2013 FC 1136, at paras 118-122).

[42] Although Mr. Sailsman did not seek costs on his application for judicial review, the CRA has. According to Rule 400 of the *Federal Courts Rules*, the Court has full discretion over the amount and allocation of costs and the determination of by whom they are to be paid. As a general rule, costs should follow the event and they will in this case. However, considering that Mr. Sailsman is self-represented, that he showed good faith all along and this is a straightforward case, I have decided to award to the CRA a lump sum of $500.00, inclusive of all disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. Costs in favour of the Respondent in the amount of $500.00 inclusive of all disbursements.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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