

Federal Court



Cour fédérale

Date: 20180918

Docket: T-531-18

Citation: 2018 FC 928

Ottawa, Ontario, September 18, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ADEL ZAKI

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of the Minister of National Revenue [the Minister] denying the Applicant's request for relief from interest and penalties owed in relation to the 2002 and 2003 taxation years, pursuant to subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the Act].

II. Background

[2] In 2008, the CRA completed an audit of the Applicant and 1465076 Inc., the Applicant's company [the Numbered Company]. The CRA increased the taxable income for both the Applicant and the Numbered Company in the taxation years 2002 and 2003. The CRA also assessed gross negligence penalties.

[3] The Applicant and the Numbered Company appealed to the Tax Court of Canada. The Applicant's appeal was allowed in part and the Numbered Company's appeal was allowed in full (*Zaki v The Queen*, 2010 TCC 606) [the Judgment]. The Judgment referred both matters back to the Minister. The Minister issued a reassessment dated February 9, 2011, that largely reflected the Judgment. The Applicant's unreported income for the 2002 taxation year was reduced and the gross negligence penalty for the 2002 taxation year was waived.

[4] The CRA applied the Applicant's tax refunds for the 2010, 2011, and 2012 tax years to reduce the Applicant's debt. The Applicant paid his outstanding debt on January 8, 2014.

[5] On September 1, 2015, the Applicant requested taxpayer relief, asking that the \$200.00 gross negligence penalty assessed for 2003 and the arrears interest of \$3,948.39 assessed for 2002 and 2003 be cancelled. The Applicant submitted CRA error, CRA delay, and financial hardship as reasons for the request. In his description of the circumstances supporting his request for relief, the Applicant wrote that a line of credit, his wife's income, and his child benefit had

been included in his income by mistake. No request for relief was made on behalf of the Numbered Company.

[6] Subsection 220(3.1) of the Act grants the Minister discretion to cancel interest and penalties that would otherwise be payable by a taxpayer. The CRA's discretion is limited to the ten calendar years prior to the year the first request for taxpayer relief was made. Therefore, in considering the Applicant's request, the Minister could only consider waiving interest dating back to January 1, 2005.

[7] The affidavit of Diane Poirier, Taxpayer Relief Officer, CRA, outlines the two-step process that occurs when a taxpayer makes a request for relief under subsection 220(3.1) of the Act. Upon receipt of a request for taxpayer relief, a first level review is completed by CRA officials.

[8] The Act provides no guidelines on how the Minister should exercise their discretion. However, section 33 of Information Circular 07-1R1, published by the CRA, outlines factors that a delegate of the Minister should use in deciding whether to exercise discretion:

33. Where circumstances beyond a taxpayer's control, actions of the CRA, inability to pay, or financial hardship has prevented the taxpayer from complying with the act, the following factors will be considered when determining if the minister's delegate will cancel or waive penalties and interest:

- a) whether the taxpayer has a history of compliance with tax obligations
- b) whether the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued

c) whether the taxpayer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system

d) whether the taxpayer has acted quickly to remedy any delay or omission

[9] If a taxpayer disagrees with the results of the first level review, they may submit a written request for a second level review. The second level review is completed by an officer who was not involved in the first level review. The officer reviews the file to date and any additional information submitted by the taxpayer. The officer prepares a report on the file which includes a recommendation as to whether the requested relief should be granted. This report is forwarded to the ultimate decision maker who makes the final decision.

[10] The first level review of the Applicant's request was conducted by Officer Collett [the first level Officer]. The first level Officer considered all of the factors outlined in section 33 of Information Circular 07-1R1 in arriving at her recommendations. As part of her review, the first level Officer requested financial information from the Applicant; no such information was provided. As a result, she did not consider the financial hardship ground. The first level Officer recommended that the gross negligence penalty for 2003 be cancelled to reflect the Judgment. She also recommended that arrears interest be cancelled for two periods of time to account for CRA delay as well as time when the Applicant had been unsuccessfully trying to file an objection.

[11] Francine Gard, Taxpayer Relief Team Leader, CRA, signed off on these recommendations and communicated her decision to the Applicant by way of a letter dated September 13, 2016.

[12] On September 7, 2017, the Applicant requested a second level review, asking for penalty relief and interest relief. The Applicant submitted as reasons for the request CRA error, CRA delay, and financial hardship. The Applicant subsequently provided financial information to be considered in the second level review.

[13] While the request was made in the name of the Numbered Company, it listed the Applicant's social insurance number. In the section of the request form where the writer may offer reasons for a second review, the Applicant listed both "Corporate" and "Personal" reasons. The CRA chose to separate the request. Ms. Poirier [the second level Officer] conducted both a second level review of the Applicant's matter and a first level review of the Numbered Company's matter.

[14] In her report on the Applicant's second level review, the second level Officer considered the request for relief of arrears interest. Both of the gross negligence penalties assessed against the Applicant had previously been waived.

[15] The second level Officer considered all of the factors outlined in section 33 of Information Circular 07-1R1. She considered the Applicant's first level review and the materials provided by the Applicant for the second level review. With respect to the financial hardship

ground, the second level Officer conducted a detailed review of the Applicant's financial information and concluded that the Applicant had not shown financial hardship. In particular, she noted that when calculating his monthly expenses, the Applicant had included payments on lines of credit far in excess of the minimum required payments.

[16] The second level Officer concluded that the Applicant had not shown any CRA error or delay beyond what had been identified in the first level review, nor had the Applicant shown financial hardship. The second level Officer recommended that the Applicant's request for relief be denied.

[17] Amanda DesRoches, Team Leader, Taxpayer Relief Centre of Expertise, Appeals Branch, CRA, approved this recommendation and communicated her decision to the Applicant in a letter dated February 20, 2018 [the Minister's Decision]. The Applicant seeks judicial review of the Minister's Decision.

III. Issue

[18] Was the decision of the Minister to deny the Applicant's request for tax and interest relief reasonable?

IV. Standard of Review

[19] The appropriate standard of review is reasonableness (*Lanno v Canada (Customs and Revenue Agency)*, 2005 FCA 153 at paras 3-7; *Al-Quq v Canada (Attorney General)*, 2018 FC 574 at paras 34-36).

V. Analysis

Preliminary issues

[20] The Applicant raises several issues which are not within this Court's jurisdiction or properly before the Court. First, the Applicant challenges the correctness of tax assessments which have previously been disposed of by the Tax Court of Canada. The Federal Court has no jurisdiction to vacate or review tax assessments (*Jus d'Or Inc v Canada (Customs and Revenue Agency)*, 2007 FC 754 at para 8). The ability to ask for relief against interest and penalties under subsection 220(3.1) of the Act cannot be used to attack the correctness of tax assessments (*Al-Quq v Canada (Attorney General)*, 2018 FC 574 at para 32).

[21] Second, the Applicant requests confirmation that collection actions against the Numbered Company are limited to the application of future tax refunds. The Applicant's Notice of Application references only the Minister's decision with respect to the Applicant's personal taxation, and therefore issues relating to the Numbered Company are not properly before the Court.

[22] Finally, the Applicant refers to subsection 281.1(1) of the *Excise Tax Act*, RSC 1985, c E-15. The Minister's Decision related to a potential exercise of discretion under subsection 220(3.1) of the Act. This Court is limited to a review of that Decision.

[23] The Respondent also submits that paragraphs 1, 3, 4, 5, 7, 9, and 11 of the Applicant's affidavit, as well as Exhibits 1 to 36, were not before the Minister at the time of the first and second level reviews.

[24] However, several of the exhibits highlighted by the Respondent are referenced in the Minister's first and second level reviews, including exhibits 1, 16, 17, 18, 19, 25, and 31.

[25] These materials do not alter my decision that the application for judicial review should be dismissed. The material relates to events that took place before the Applicant's first request for relief dated September 1, 2015, and does not affect my analysis of the reasonableness of the Minister's Decision.

A. *Was the decision of the Minister to deny the Applicant's request for tax and interest relief reasonable?*

[26] The only potential factual allegation related to the Minister's Decision under review is where the Applicant asks for his personal tax, approximately \$7000, to be refunded.

[27] The Respondent submits that the guidelines for the exercise of the Minister's discretion under subsection 220(3.1) of the Act were followed. The second level Officer carefully

considered the Applicant's representations and reviewed the documents submitted in support of his request. Her report set out her recommendation that no further relief be granted.

[28] The Officer's team leader approved her recommendation.

[29] The second level Officer's report considered all of the factors outlined in Information Circular 07-1R1, which is publicly available, as well as several other relevant considerations. She reviewed the Applicant's request, the results of the first level review, and the documents provided by the Applicant in support of his request. The Officer found that:

- i. Any delay or error made by the CRA had already been remedied in the first level review, as the gross negligence penalties relating to the 2003 taxation year had been cancelled and arrears interest for both 2002 and 2003 which had accrued during the periods 2009-04-22 to 2009-07-14 and 2012-10-17 to 2014-01-08 was cancelled to account for CRA delay;
- ii. The request for a review was, in fact, improperly seeking to dispute the correctness of the reassessments made as a result of the Applicant's appeal to the Tax Court of Canada; and
- iii. The Applicant had not substantiated financial hardship based on the information provided.

[30] I agree with the Respondent that the second level Officer's report was transparent and intelligible and her recommendation was reasonable and justified. The Minister's Decision to follow this recommendation was also reasonable.

JUDGMENT in T-531-18

THIS COURT'S JUDGMENT is that:

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

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-531-18

STYLE OF CAUSE: ADEL ZAKI v THE MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 12, 2018

JUDGMENT AND REASONS: MANSON J.

DATED: SEPTEMBER 18, 2018

APPEARANCES:

Mr. Adel Zaki

FOR THE APPLICANT,
ON HIS OWN BEHALF

Ms. Samantha Hurst
Ms. Rini Rashid

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT