Federal Court  Cour fédérale

Date: 20191028

Docket: T-2197-18

Citation: 2019 FC 1343

Ottawa, Ontario, October 28, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

EDWARD MACINTOSH

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mr. Edward Macintosh participated in two separate programs where he sought to minimize his tax liability. The Union Cal Trading Joint Venture [UnionCAL] was used to generate business losses that participants then relied upon to reduce their taxable income. The Avtel Financial RRSP-Strip program [Avtel] was structured to provide participants access to

Registered Retirement Savings Plans [RRSP] funds while avoiding the tax implications of doing so.

[2] Mr. MacIntosh's participation in these programs resulted in a reassessment of his 1995 – 2000 tax returns by the Canada Revenue Agency [CRA]. In 2002 and 2003 the CRA disallowed the business losses claimed and added income to reflect the 1999 RRSP withdrawals. The result was a significant tax debt for the 1995 – 2000 taxation years. Gross negligence penalties were also assessed against Mr. MacIntosh.

[3] Mr. MacIntosh and other program participants objected to the reassessments and a lengthy period of CRA review and litigation ensued. A settlement agreement was reached in 2009. That agreement included the waiver of the gross negligence penalties.

[4] Relying on subsection 220(3.1) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), Mr. MacIntosh sought interest relief on his outstanding tax debt in 2010. Mr. MacIntosh fully discharged his tax debt in 2012. His 2010 request for interest relief remained unanswered at that point.

[5] In 2014 he received a response to the 2010 request and was granted partial interest relief on that debt. In 2018, he submitted a second request for interest relief.

[6] In a decision dated November 27, 2018 the Minister of National Revenue [Minister] granted further partial interest relief. Mr. MacIntosh now seeks judicial review of that decision.

He argues that the Minister (1) improperly fettered her discretion by relying on internal policy documents; and (2) failed to consider all of the facts that might justify further relief.

[7] In written submissions Mr. Macintosh also alleged a breach of natural justice, specifically citing an alleged failure to address errors in the calculation of interest. In oral submissions counsel for Mr. Macintosh advised the Court that the alleged failure to consider errors in interest rate calculations was not being pursued. As there were no other alleged breaches of fairness identified I have not considered this issue.

[8] In my view the application raises the following issues:

A. Did the Minister fetter her discretion;

B. Is the decision unreasonable because the Minister failed:

i. to consider all of the facts; or

ii. to provide transparent reasons for granting relief in some circumstances while refusing it in others.

[9] For the reasons that follow, I am unable to conclude that the Minister committed a reviewable error or that the decision is unreasonable. The Court's intervention is not warranted and the application is therefore dismissed.

II. Applicable Legislation

[10] Mr. MacIntosh's request for interest relief was made pursuant to subsection 220(3.1) of the *Income Tax Act* which states:

Waiver of penalty or interest	**Renonciation aux pénalités et aux intérêts**
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. [Emphasis added.]	**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. [Non souligné dan l'orginal.]

[11] Section 220(3.1) extends a broad discretionary authority to the Minister to "waive or cancel all or any portion of any interest or penalty". The purpose of the provision is to allow the Minister to provide relief to taxpayers where, due to personal misfortune or circumstances beyond their control, there has been a failure to comply with a statutory requirement (*Takenaka v*

Attorney General of Canada, 2018 FC 347 at para 28 [*Takenaka*], citing *Bozzer v Canada* 2011, FCA 186 at paras 22 – 25).

III. Decision under Review

[12] The November 27, 2018 decision flows from a November 22, 2018 document that is referred to as the Taxpayer Relief Fact Sheet Report. This report details the request for relief and the analysis relied upon in rendering the decision.

[13] After detailing the submissions advanced in support of the request for relief, and the surrounding circumstances, the Minister granted relief where delay in resolving objections to the reassessments was attributable to the CRA. The relief periods granted on the second review take account of and encompass the partial relief granted in the first relief review. The result was the grant of relief in four separate interest accrual periods between 2002 and 2012:

A. The period from May 13, 2002 to May 17, 2004 (the first relief period) for interest on arrears for the 1995 to 2000 taxation years. This reflects the period between the initiation of Mr. MacIntosh's objection to the UnionCAL reassessment and the date of the release of a CRA position paper on the UnionCal program;

B. The period from September 2, 2003 to March 30, 2006 (the second relief period) for interest on arrears for the 1999 taxation year only. This relief relates to interest accruing on the tax debt arising from the Avtel reassessments. The relief was granted on the basis of CRA delay in the objection process and reflects the period

recommended in a CRA position paper on the granting of interest relief to participants in the Avtel program;

C. The period from March 30, 2006 to October 16, 2009 (the third relief period) for interest on arrears for the 1995 to 2000 taxation years. The relief was granted due to CRA delay in the settlement process from the last date of activity on the UnionCal litigation in the Tax Court of Canada until the litigation was settled;

D. The period from December 13, 2009 to December 22, 2012 (the fourth relief period) for interest on arrears for the 1995 to 2000 taxation years. The relief was granted on the basis that the CRA should have completed a review of the first request for interest relief within one month of the November 13, 2009 settlement. As the tax debt was fully paid prior to the completion of the CRA's consideration of the 2010 request, interest relief was granted to the date the tax debt was paid in full in December 2012.

[14] Further relief was not provided. The Minister noted among other things that:

A. Canada's self-assessment tax system places responsibility on the taxpayer to ensure filings are correct and a lack of knowledge of tax rules does not prevent compliance as information is publically available; and

B. The initial 2002 and 2003 reassessments were conducted in a reasonable timeframe—it was necessary for the CRA to audit the UnionCAL and Avtel programs before it was in a position to audit individual participants.

[15] The Minister also addressed Mr. MacIntosh's assertion that errors had been made in the interest calculation noting that no explanation was provided to support the assertion and review of the file did not disclose any interest calculation errors.

IV. Standard of Review

[16] The parties agree that the decision is to be reviewed against a standard of reasonableness (*Takenaka* at para 24). I agree although note that the jurisprudence is somewhat unsettled in respect of the standard of review to be applied where it is alleged an administrative decision-maker has fettered their discretion.

[17] In *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 24 [*Stemijon*], Justice Stratus concluded that the standard of review was reasonableness but held: "A decision that is the product of a fettered discretion must per se be unreasonable". In considering the fettering submissions I will apply the *Stemijon* standard of reasonableness.

[18] In relation to the decision itself, reasonableness is a deferential standard. A reviewing court is to be concerned with whether (1) the decision-making process reflects the elements of justification, transparency, and intelligibility; and (2) the decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[19] A reasonableness review recognizes that it is not the reviewing court's role to reweigh or reassess the evidence. The delegated decision-maker is best situated to assess the evidence. In

addition there may legitimately be a number of different possible reasonable outcomes. A reviewing court will not interfere where, having considered the decision within the context of the whole record, the outcome is reasonable even if the outcome is not one the court prefers (*Hiscock v Canada (Attorney General)*, 2018 FC 727 at paras 26 and 27 citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55 and *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65).

V. Analysis

A. *Did the Minister fetter her discretion?*

[20] Mr. MacIntosh argues that the Minister failed to consider all of the facts presented in his request for relief by relying on CRA policy documents to determine the nature and extent of interest relief to be granted and confining the circumstances warranting relief to those justified by a CRA delay. I disagree.

[21] Mr. MacIntosh has framed these arguments as a fettering of discretion, noting that the interest relief granted was exactly in line with CRA-developed guidelines relating to the granting of relief to participants in the UnionCAL and Avtel programs.

[22] A decision-maker fetters his or her discretion when he or she exclusively applies policy guidance—in this case, CRA guidelines—as if they were binding (*Stemijon* at para 60). That is not what happened here.

[23] The decision letter and the November 22, 2018 Taxpayer Relief Fact Sheet Report together demonstrate that Mr. MacIntosh's submissions in support of relief were acknowledged, summarized and considered. The Minister reviewed factors such as Mr. MacIntosh's tax compliance history, his timeliness in objecting to the reassessments, his allegation that he was a victim, the fact that his participation in the UnionCAL and Avtel programs were the result of fraud, and the procedural and litigation history relating to the UnionCAL and Avtel programs. The Minister considered the prior request for relief and identified and corrected errors made in response to the initial request to provide additional relief to Mr. MacIntosh.

[24] While there is no doubt that the Minister considered and was guided by CRA guidelines relating to the UnionCAL and Avtel programs the Minister did not ignore or fail to consider the breadth and scope of her discretion under subsection 230(3.1). Ultimately relief was provided after consideration of a broad range of factors and circumstances and in respect to time periods and circumstances that fell outside the scope of the guidelines. The Minister did not fetter her discretion nor did she fail to consider and address the circumstances raised by Mr. Macintosh in his request for relief.

[25] The fact that the relief was limited to those circumstances involving delay attributable to the CRA does not render the decision unreasonable or demonstrate a fettering of discretion. As noted above, the Minister considered both Mr. MacIntosh's contention that he was an innocent victim of the coordinators of the UnionCAL and Avtel programs and his actions in seeking to retire his tax debt.

[26] The Minister also considered the degree of care exercised by Mr. MacIntosh to investigate the validity of the programs noting that Canada's self-assessment tax system puts the burden on individuals to ensure tax compliance. Mr. MacIntosh takes issue with the Minister's conclusions in this regard. However the conclusion is not, in my opinion, unreasonable. The Minister did not, as Mr. MacIntosh has suggested, conclude that investigation would have lead him to discover the programs were non-compliant. Instead the Minister has simply noted that the absence of diligence prior to participating in the programs was a relevant factor in assessing the request for relief.

[27] The Minister did not err by failing to consider all of the facts or fetter her discretion in addressing the request for interest relief.

B. *Is the decision unreasonable because the Minister failed to consider all of the facts?*

[28] For the reasons that I have concluded there was no fettering of discretion, I am also satisfied that the Minister did not err by failing to consider all of the facts and circumstances. The Minister set out the arguments advanced in support of the relief granted and linked the conclusions reached to those facts and circumstances as disclosed in the record and in the submissions provided on Mr. MacIntosh's behalf.

C. *Is the decision unreasonable because the Minister failed to provide transparent reasons for granting relief in some circumstances while refusing it in others?*

[29] Mr. MacIntosh argues that the reasons fail to disclose why the relief provided in the second relief period was limited to the 1999 taxation year and the tax debt arising out of the

Avtel program. In oral submissions Mr. MacIntosh's counsel also took issue with the reasons provided to justify the Minister's decision to rely on the March 30, 2006 entry in the litigation document to identify the commencement date of the third relief period. Neither of these arguments is persuasive.

[30] The Minister does explain why relief was granted in respect of the Avtel program only during the second relief period. The Minister's decision discloses that relief in the second relief period was limited to the Avtel reassessment because the relief was linked to delay in processing Mr. MacIntosh's objection to the 2003 Avtel reassessment. The second relief period is not linked to the UnionCAL litigation as suggested in Mr. MacIntosh's written submissions.

[31] While Mr. MacIntosh disagrees with the Minister's conclusions in this regard, the reasons provided, when considered in the context of the record as a whole are intelligible and transparent.

[32] Similarly, and although I might well agree with Mr. MacIntosh's view that the last docket entry indicating a substantive development in the litigation may have been a better date upon which to commence the third relief period, disagreement does not render this aspect of the decision unreasonable. The rationale for commencing the third relief period on March 30, 2006 is clearly set out in the Minister's reasons.

[33] The Minister's reasons reflect the required elements of justification, transparency, and intelligibility and the conclusions reached fall within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

VI. Conclusion

[34] The application is dismissed. The parties have advised the Court that they have agreed that costs to the successful party in the amount of $1500.00 inclusive of fees and disbursements are appropriate. I am satisfied that this amount is reasonable.

JUDGMENT IN T-2197-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and
2. Costs are awarded to the respondent in the amount of $1500.00 inclusive of fees and disbursements.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2197-18
STYLE OF CAUSE:	EDWARD MACINTOSH v THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 16, 2019 AND OCTOBER 17, 2019
JUDGMENT AND REASONS:	GLEESON J.
DATED:	OCTOBER 28, 2019

APPEARANCES:

Charles Haworth	FOR THE APPLICANT
Andrea Jackett	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Radnoff Law Offices Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT