Federal Court Cour fédérale

Date: 20210723

Docket: T-1028-20
T-1029-20

Citation: 2021 FC 788

Ottawa, Ontario, July 23, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

Docket: T-1028-20

JOEL ANDERTON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

Docket: T-1029-20

BERNADETTE ANDERTON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This decision concerns two applications for judicial review brought by a husband and wife, Joel Anderton and Bernadette Anderton [the Applicants], seeking judicial review of two decisions, each dated August 6, 2020 [the Decisions], by the Director General of the Legislative Policy Directorate and Legislative Policy and Regulatory Affairs Branch [the Director General] of the Canada Revenue Agency [CRA]. In each of the Decisions, the Director General refused to recommend remission, under s 23(2) of the *Financial Administration Act*, RSC 1985, c F-11 [the Act] of amounts owing by the relevant Applicant in respect of income taxes, interest and penalties.

[2] The Applicants argue in their applications for judicial review that the Director General erred by not granting their remission requests on the basis that collection of the amounts owing would be unreasonable, unjust, or otherwise not in the public interest. Mr. Anderton's application is brought under Court File No. T-1028-20, and Mrs. Anderton's application is brought under Court File No. T-1029-20. Pursuant to an Order issued by Prothonotary Ring on January 13, 2021, both applications were heard together. The Decisions and the parties' written submissions and other materials filed in the two applications are largely identical, although there are some factual differences in the amounts owing for the two Applicants and their particular medical circumstances.

[3] Mr. and Mrs. Anderton are self-represented. At the hearing of these applications on June 30, 2021, Mr. Anderton presented oral argument intended to apply to both applications, and Mrs. Anderton made additional submissions. The Respondent, the Attorney General of Canada, responded to both applications together. As such, I am analyzing the merits of both applications together in this Judgment and Reasons, although I will note wherever there is a relevant distinction between the applications.

[4] As explained in more detail below, these applications are dismissed because, applying the relevant standard of review, there is no basis for the Court to find that the Decisions are unreasonable, in terms of either the reasoning employed by the Director General or the conclusions at which the Director General arrived.

II. **Background**

[5] Much of the Applicants' tax debts relate to unpaid amounts arising from the exercise of stock option benefits. The Applicants are former employees of Solucorp Industries Ltd. [Solucorp], which offered a stock option plan. In 1997 and 1998, they exercised their stock options to acquire shares of Solucorp. Thereafter, Solucorp stock lost its value. The Applicants explained in their remission requests that Solucorp ran afoul of the United States Security and Exchange Commission, and trading of Solucorp stock was suspended in 1998 until a judgment was entered against certain insiders in 2003. The Applicants were not implicated in these proceedings. The British Columbia Securities Commission also ceased trading Solucorp stock for failure to submit required records.

[6] The Applicants were required to report the stock option benefit as part of their income for 1997 and 1998. According to memoranda dated February 19, 2020, prepared as part of CRA's consideration of the remission requests [the Memoranda], CRA's assessments of the Applicants' income tax returns resulted in tax, late filing penalties and interest, totalling $14,044 and $1,680 owing by Mr. Anderton and $53,555 and $31,416 owing by Mrs. Anderton, for 1997 and 1998 respectively. Neither Applicant payed their balance owing in full following these assessments.

[7] In addition, Mr. Anderton owes amounts related to the 1999-2003 and 2005 taxation years, and Mrs. Anderton owes amounts related to the 1999-2003 and 2007-2008 taxation years. Taking into account all of their tax liabilities, including interest and penalties, the Memoranda reflect that, by January 2020, Mr. Anderton owed $48,315 and Mrs. Anderton owed $268,093.

[8] Since 1997, CRA has taken measures to secure payment of the Applicants' debts, including registering judgments against their house in Vancouver and issuing Requirements to Pay to their financial institutions and employers and in respect of Mr. Anderton's Canada Pension Plan benefits and proceeds from Mrs. Anderton's mother's estate.

[9] On December 27, 2017, the Applicants sent a joint letter to the Vancouver Tax Service Office of CRA, applying for remission of tax, interest and penalties. They submitted that they should be granted remission for reasons including the following:

A. Extreme hardship - The Applicants indicated that they have no ability to pay the amounts outstanding and cannot borrow to pay the amounts. They

explained that the only asset they have is their home and argued that being forced to liquidate that asset would be unreasonable and unjust.

B. Extenuating circumstances - The Applicants submitted that certain health issues (identified in their letter), their age as senior citizens, and their financial circumstances constitute extenuating circumstances.

C. Public interest - The Applicants argued that it is not in the public interest to force them to liquidate their home, as it is express public policy to keep senior citizens in their homes when possible.

[10] In the Memoranda analyzing the Applicants' remission requests, CRA set out relevant facts and analyzed whether there was reason to grant the Applicants a remission order, taking into account applicable guidelines intended to assist CRA officials in such assessments. Each of the Memoranda states that remission is not recommended, as none of the criteria apply and there are no other circumstances which would support relief.

[11] The Certified Tribunal Record reflects that, on February 25, 2020, a CRA body named the Remission Committee held a meeting at which the Applicants' remission requests were considered. The Remission Committee concurred with the recommendations of the Memoranda that the Applicants' requests for remission should be denied.

[12] On August 6, 2020, the Director General issued the Decisions under review in this application, advising the Applicants of the conclusion that remission could not be recommended and providing reasons for that conclusion.

III. **Decisions Under Review**

A. *Decision Regarding Mr. Anderton's Remission Request*

[13] At the outset of the Decision related to Mr. Anderton's remission request, the Director General explained the process for reviewing such a request. He explained that CRA reviews remission requests to consider whether there are unintended results of legislation, incorrect action or advice from CRA officials, extreme financial hardship, a significant financial setback with an extenuating factor, or other factors that support remission. The Director General also indicated that he considered Mr. Anderton's particular circumstances to determine whether it was fair, reasonable, or in the public interest to recommend remission.

[14] The Director General provided a summary of the facts that led to Mr. Anderton's request for remission and then analysed Mr. Anderton's arguments respecting his financial circumstances, his investment decision that he submitted had resulted in an unfair outcome, and health issues that Mr. Anderton had explained in his request.

[15] The Director General began his analysis by considering whether extreme financial hardship applied. The Director General indicated that, to support a remission decision, such hardship should exist at the time the person makes the remission request and will normally have existed from the time the original tax liability arose. He found that Mr. Anderton had, and continues to have, the means to resolve his debt, pointing out that he has owned a house in Vancouver since 1984, valued at $1,061,900 in 2017. Additionally, the Director General found that, between 1997 and 2011, Mr. Anderton's family income was consistently above the low

income cut-offs set by Statistics Canada, except for two years. The Director General concluded that, since his debt arose, Mr. Anderton has had sufficient equity in his house to pay the amounts owing in full, but he instead prioritized other payments including re-mortgaging the home in 2001 and using the funds to assist Solucorp. The Director General explained that remission is generally not considered where a taxpayer has, or had, the capacity to pay their debt at the time it arose but chose not to, even if the debt has now grown to an amount where payment would be difficult.

[16] The Director General next considered whether there had been a significant financial setback with an extenuating factor. He explained that remission may be considered if circumstances outside a taxpayer's control prevent them from meeting their tax obligations and payment of the resulting tax debt would strain their limited financial resources. The Director General noted that Mr. Anderton submitted that it was unfair that he must pay the tax on an investment (his Solucorp stock options) that he was unable to profit from. However, the Director General found that risks of acquiring shares are commonly known, including the potential for a sudden decline in their value. If an employee makes an investment decision to exercise a stock option, they accept the financial risk associated with doing so. The Director General determined that, although the Solucorp shares declined in value, Mr. Anderton exercising his stock option in 1997 and 1998 was within his control and was not considered an extenuating circumstance for the purposes of remission. He also noted that, as Mr. Anderton is still in possession of the Solucorp shares, he could possibly benefit from his investment if the value of the shares returns.

[17] The Director General also found that a portion of Mr. Anderton's debt was the result of his decision not to file his income tax returns or pay his properly assessed tax as required. There was a record of CRA visiting his residence in 2003 and Mr. Anderton indicating that he had no intention of paying his debts. The Director General indicated that remission generally cannot be supported in cases where a taxpayer chose to avoid their tax and payment obligations.

[18] With respect to Mr. Anderton's submissions that he suffers from certain health issues, the Director General explained that in order for health problems to be considered an extenuating factor for the purposes of remission, there should be a direct correlation between the illness and a taxpayer's inability to meet their tax obligations at the time they arose. The Director General found that Mr. Anderton did not provide any medical or other records to demonstrate how his health issues would have rendered him incapable of meeting his tax payment obligations at the time they arose. Therefore, the Director General concluded that his health issues could not be considered extenuating circumstances for the purposes of remission.

[19] Lastly, the Director General noted that it is generally not considered to be in the public interest to remit tax, penalties, or interest for taxation years for which taxpayers did not file an income tax return on time or pay any amounts owing as required, unless there were circumstances that rendered them incapable of doing so.

[20] The Director General concluded that, having considered Mr. Anderton's submissions, it was not unreasonable or unjust to collect properly assessed tax, interest, and penalties, nor was it within the public interest to grant remission.

B. *Decision Regarding Mrs. Anderton's Remission Request*

[21] In the Decision related to Mrs. Anderton's remission request, the Director General rejected her request for remission on essentially the same grounds as that of Mr. Anderton. The only material distinctions between the Decisions are that the Decision related to Mrs. Anderton described Mrs. Anderton's particular tax debt, which is different than Mr. Anderton's debt, and discussed Mrs. Anderton's particular health problems.

[22] The Decision concluded by stating that, having considered Mrs. Anderton's submissions, it was not unreasonable or unjust to collect properly assessed tax, interest, and penalties, nor was it within the public interest to grant remission.

IV. **Issues and Standard of Review**

[23] In each of the applications, the Applicant seeks to have the Decision at issue quashed and remitted back to the Director General for re-determination in accordance with the Court's directions.

[24] The Applicants raise the following issues in their respective applications for judicial review:

A. Whether it was unreasonable for the Director General to find no extreme hardship; and

B. Whether it was unreasonable for the Director General to find that it was not in the public interest to grant the remission request.

[25] The parties agree that the standard of review applicable to the Court's consideration of the Decisions is reasonableness. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada established that reasonableness is the presumptive standard of review for judicial review applications, subject to certain exceptions that do not apply to these applications. The Applicants also cite *Germain v Canada (Attorney General)*, 2012 FC 768 [*Germain*], which held that the standard of review applicable to a decision under s 23(2) of the Act is reasonableness (at para 28). While *Germain* pre-dates *Vavilov*, I consider its conclusion to remain good law and agree with the parties that the reasonableness standard of review applies to my consideration of the Decisions.

[26] The Respondent also raises a preliminary issue for the Court's consideration. The Respondent takes the position that certain paragraphs of the affidavits filed by the Applicants in support of their applications for judicial review should not be considered by the Court, because they contain evidence that was not before the Director General when making the Decisions.

V. **Legal Framework**

[27] Remission orders are granted by the Governor in Council, on the recommendation of the appropriate Minister, pursuant to s 23(2) of the Act, which provides as follows:

Remission of taxes and penalties	**Remise de taxes ou de pénalités**
23(2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.	**23(2)** Sur recommandation du ministre compétent, le gouverneur en conseil peut faire remise de toutes taxes ou pénalités, ainsi que des intérêts afférents, s'il estime que leur perception ou leur exécution forcée est déraisonnable ou injuste ou que, d'une façon générale, l'intérêt public justifie la remise.

[28] As noted in the Memoranda, CRA has created guidelines intended to apply to consideration of remission requests. The guidelines are included in a document, which forms part of the record before the Court in these matters, entitled Canada Revenue Agency Employee Remission Manual [the Guidelines]. The Guidelines state that they are intended to provide general guidance but are not meant to limit the matters that may be considered when determining if a request could be supported. The Guidelines identify, for consideration in relation to remission requests, the categories of: (a) extreme hardship; (b) financial setback with an extenuating factor; (c) incorrect action or advice on the part of CRA officials; and (d) unintended results of the legislation.

VI. **Analysis**

A. *Preliminary Issue*

[29] The preliminary issue raised by the Respondent relates to three paragraphs in each of the essentially identical affidavits filed by Mr. and Mrs. Anderton, as well as one exhibit to each affidavit. The impugned paragraphs note the date that the British Columbia Security Commission ceased trading the shares of Solucorp (supported by a copy of a Cease Trade Order attached as an exhibit), state that the affairs of Solucorp have never been reinstated in British Columbia, and state that the corporate registration of Solucorp by the Territory of the Yukon was dissolved on October 4, 2017.

[30] In response to the Respondent's position on the preliminary issue, the Applicants note that, while their submissions to CRA in support of the remission request did not provide as much detail as their affidavits surrounding the termination of Solucorp's activities, their submissions did provide evidence to the same effect. They also argue that CRA could easily have obtained the information that was provided in their affidavits by contacting the British Columbia Security Commission or the Corporate Registry of the Territory of the Yukon.

[31] With limited exceptions that have no application in the case at hand, applications for judicial review must proceed based on the evidentiary record that was before the decision-maker (see, e.g., *Zolotareva v Canada (Minister of Citizenship and Immigration),* 2003 FC 1274 at para 36). I therefore agree with the Respondent's position that the Court should not consider the portions of the Applicants' evidence identified above. However, this conclusion has no effect on my analysis of the issues in these applications because, as the Applicants note, submissions surrounding the termination of Solucorp's activities were included with their remission requests and were therefore before the decision-maker.

B. *Substantive Issues*

[32] As identified in the Applicants' articulation of the substantive issues for the Court's consideration, they argue that it was unreasonable for the Director General to conclude that their circumstances did not represent extreme hardship and that it was not in the public interest to grant their remission requests.

[33] With respect to extreme hardship, the Applicants note that, as explained in their remission requests, their sole source of income is government assistance and, in the case of Mr. Anderton, CRA has garnished 100% of his Canada Pension Plan benefits. They therefore submit that they have no ability to pay CRA and that any payments would amount to extreme hardship. The Applicants identify that their only asset of any value is their matrimonial home, and they argue that sale of the home would represent extreme hardship, as the Applicants would then not have sufficient resources to purchase a condominium, much less a home, in metro Vancouver.

[34] With respect to the public interest, the Applicants submit that virtually every level of government in Canada states that keeping senior citizens in their home is a societal goal. They therefore argue that forcing the sale of their home would not be in the public interest and submit that the Director General either was not aware of this policy or chose to ignore or minimize its significance in making the Decisions.

[35] At the hearing, Mr. Anderton also explained his perspective on the Decisions in advancing these applications for judicial review. He submits that the Decisions, and the record

before the Court, demonstrate that the Director General approached the remission requests with a particular mindset, which focused entirely on the goal of collecting taxes, and filtered all the facts and arguments in these matters through that mindset, such that the result was effectively predetermined. Mr. Anderton argues that, in assessing the public interest, the Director General took into account only the interest in collecting taxes and did not meaningfully consider other public interests, including in particular the interest in keeping seniors in their homes.

[36] Mr. Anderton also takes issue with the extent to which the Director General's analysis focused upon the Applicants' past circumstances and conduct. In considering the factor of extreme financial hardship, the Decisions note that, to support a recommendation for remission, the hardship should exist at the time the person makes the remission request and normally will also have existed from the time the original tax liability arose. Mr. Anderton argues that it was unreasonable for the Director General to rely, at least in part, on the Applicants' past financial circumstances in assessing their ability to pay their tax debts.

[37] In her own oral submissions, Mrs. Anderton emphasized that she is not necessarily seeking total forgiveness of her tax debt but considers it reasonable, and consistent with the public interest, that she would be afforded some measure of relief. She emphasizes the Applicants' overall position that their financial means are very limited and that the choices they have been required to make, between paying their tax liabilities and paying for the necessities of life, have necessarily favoured the latter.

[38] I also note that the Applicants explained at the hearing that, since the time of the Decisions, their matrimonial home has been sold and their tax debts paid. Mr. Anderton expressed that, in a sense, this means that their applications have already been lost, because the asset they were seeking to protect has been liquidated. However, the Applicants remain interested in adjudication of their applications, because they believe that their remission requests were not treated reasonably. I agree with the Applicants' position that the sale of the home is not an impediment to the Court deciding these applications, and I do not understand the Respondent to be arguing otherwise. The sale of the home is not relevant to the reasonableness of the Decisions because, as noted previously in these Reasons, such reasonableness must be assessed based on the record that was before the decision-maker at the time the Decisions were made.

[39] Mr. and Mrs. Anderton have ably advanced their arguments in these applications. Those arguments present a compelling picture of their circumstances, including their efforts to avoid selling their matrimonial home. However, the outcome of these applications is mandated by the Court's particular role in judicial review, including the reasonableness standard of review explained in *Vavilov*. As the Respondent's submissions note, the *Vavilov* framework requires a focus upon the reasonableness of the decision under review, including its transparency, intelligibility and justification and whether it falls within a range of possible acceptable outcomes that are defensible in respect of the facts and law. It is not the role of the Court to consider the conclusion it would have reached in the administrative decision-maker's place (at paras 83, 86, 99). I am also conscious of the explanation by Justice Phelan in *Twentieth Century Fox Home Entertainment Canada Ltd v Canada (Attorney General)*, 2012 FC 823 [*Twentieth Century Fox*], affirmed 2013 FCA 25, that, in assessing the reasonableness of a decision under s

23(2) of the Act, the Court must take into account the highly discretionary nature of the statutory regime for remission of tax (at para 36).

[40] Against that jurisprudential backdrop, there is no basis for the Court to find that the Decisions are unreasonable, in terms of either the reasoning employed or the conclusions at which the Director General arrived.

[41] The Decisions demonstrate that the Director General considered whether the Applicants' circumstances demonstrated extreme financial hardship or a significant financial setback. In conducting that analysis, the Director General took into account the Applicants' health issues and their financial circumstances, including the fact that they have achieved no financial advantage through the stock options that gave rise to a significant portion of their tax liabilities. However, the Director General noted that the Applicants had sufficient equity in their house to pay their outstanding tax liability, the extent of their family income over the relevant years, and the fact that they had in the past refinanced their house but not used those funds to pay their tax debts. The Director General observed that the potential for a sudden decline in value after acquiring shares is a known risk. The Director General also found that the Applicants had not demonstrated that any of their health issues had rendered them incapable of meeting their tax obligations.

[42] The Director General's reasoning is intelligible and justified in relation to the relevant evidence. The reasoning is therefore reasonable.

[43] I also find that the Directors General's reasoning does not support a conclusion that the outcome of the Applicants' remission request was effectively predetermined, While the Applicants take issue with the Directors General's mindset, as focusing on the goal of collecting taxes, it was within the Director General's discretion to be influenced significantly by the public interest in collection of taxes. As explained by Justice Phelan in *Twentieth Century Fox* at para 47:

> 47. Lastly, and as referred to earlier, the Applicant complains that it is unreasonable, unjust and "against good conscience" for the CRA to keep the money. I adopt the reasoning of Justice de Montigny in *Waycobah (FC)*, above, at para 31:
>
> > 31. I agree with the Respondent that the concept of "public interest" cannot be viewed merely in terms of the interests of any one group of taxpayers, but rather must also take into consideration the concerns of society generally. Through a remission order, the Applicant is asking for exemption from the application of legislation to which the rest of Canadian society is subject. The granting of a remission order necessarily involves a departure, in the particular case of a taxpayer, not only from the ordinary rules of taxation, but from the principle of equality of treatment. The phrase "public interest" must therefore be viewed in the context of the broad regulatory scheme governing the operation of taxation statutes and with an eye towards the principles animating the *Excise Tax Act* as a whole.

[44] I accept that the Applicants' submissions in support of their remission requests, including the argument that the public interest in keeping seniors in their homes militated in favour of granting remission, could have supported a different outcome. Similarly, it may have been available to the Director General to focus to a greater extent on the Applicants current financial circumstances, as opposed to their past circumstances and conduct. However, the outcome at which the Director General arrived is not outside the range of outcomes that is supportable by the

relevant facts and law. Therefore, conscious of this Court's role in judicial review, there is no basis to interfere with the Decisions.

[45] In arriving at this conclusion, I have considered Mr. Anderton's argument at the hearing that, with Solucorp's activities having ceased, there is no potential for its stock to rise in value in the future. I note this point, because the Decisions observe that, as it appears the Applicants still hold the Solucorp shares, there is a possibility that they will benefit from this investment should the value of the shares return.

[46] I accept the Applicants' submission that the evidence does not support this particular conclusion. However, as explained in *Vavilov*, reasonableness review by a court is not a "line-by-line treasure hunt for error". Rather, the reviewing court must be able to trace the decision-maker's reasoning without encountering any fatal flaws in its overarching logic (at para 102). The Director General's observation that the shares could again rise in value does not affect the overarching logic of the Decisions. The determinative reasoning in the Decisions, in relation to the argument surrounding the shares, is the fact that the acquisition of shares necessarily involves a risk of a decline in value.

[47] In conclusion, having considered the parties' respective submissions, I must dismiss this application for judicial review.

VII. **Costs**

[48] The Respondent's Memorandum of Fact and Law requests that costs be awarded against the Applicants in the event their applications for judicial review are dismissed. However, the Respondent made no submissions in support of this request at the hearing of these applications. While costs are typically awarded against the unsuccessful party in an application for judicial review, the decision whether to award costs is ultimately in the discretion of the Court. Taking into account the particular circumstances of these matters, I decline to award costs against Mr. and Mrs. Anderton.

JUDGMENT IN T-1028-20 AND T-1029-20

THIS COURT'S JUDGMENT is that:

1. These applications for judicial review are dismissed.

2. No costs are awarded.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1028-20 T-1029-20
STYLE OF CAUSE:	JOEL ANDERTON V THE ATTORNEY GENERAL OF CANADA AND BETWEEN BERNADETTE ANDERTON V. THE ATTORNEY GENERAL OF CANADA
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