

Federal Court



Cour fédérale

Date: 20221205

Docket: T-308-22

Citation: 2022 FC 1676

Ottawa, Ontario, December 5, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

EBENEZER ASARE

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ebenezer Asare, seeks judicial review of a decision of a Canada Revenue Agency [CRA] Appeals Officer, as the delegate of the Minister of National Revenue [Minister], to not cancel or waive gross negligence penalties [GNP], pursuant to s 220(3.1) of the *Income Tax Act*, RSC 1985 c1 (5th Supp) [ITA], in relation to the settlement of an objection to an ITA reassessment.

Background

[2] CRA reassessed the Applicant's personal and corporate income tax returns for the 2014, 2015 and 2016 taxation years. Pursuant to s 165(1) of the *ITA*, the Applicant filed notices of objection to the reassessments.

[3] By letter dated October 6, 2021, the Applicant proposed a settlement of the objections. CRA responded by two letters from an appeals officer, Appeals Division, CRA [Appeals Officer], one to the Applicant and another to his corporation, Afro Capital Inc., both dated November 18, 2021, in which the CRA proposed settlement counter-offers. In these letters, the Appeals Officer noted that the basis of the Applicant's objection was that the notices of reassessment dated January 16, 2020 issued in connection with the Applicant's 2014, 2015 and 2016 tax years were incorrect. In addition, the Applicant disputed the application of GNPs pursuant to s 163(2) of the *ITA*. Concerning the GNPs, the Appeals Officer stated, with respect to the Applicant personally, that the assessment of the GNP was justified and would not be vacated, but that the GNP amount would be reduced by CRA's proposed adjustments to his total net income, as outlined in its settlement counter-offer. As to Afro Capitol Inc., CRA proposed to vacate the GNP imposed on the corporation for the relevant taxation years.

[4] The Applicant responded by letter dated December 1, 2021. He indicated that he was agreeable to CRA's settlement counter-offer on the condition that the GNP, with respect to him personally, be waived or cancelled. The Applicant stated that he was not adverse to a finding of liability pursuant to s 163(2) of the *ITA*, but that the assessment of the GNP put the amount

required to be paid beyond his reach. The Applicant stated his view that the Minister retains the discretion to cancel a penalty assessed pursuant to s 163(2) of the *ITA* by way of the authority granted by s 220(3.1) of the *ITA*, which appeals officers have the delegated authority to administer. By letter dated December 13, 2021, the Applicant provided the Appeals Officer with case law and CRA policy documents which he asserted supported his position.

[5] On January 20, 2022, the Appeals Officer replied to the Applicant's correspondence, advising that the GNPs would not be vacated and that there would be no changes to the CRA's settlement counter-offer.

[6] The Applicant seeks judicial review of the Appeals Officer's January 20, 2022 decision on the basis that the Appeals Officer fettered the discretion granted to her by s 220(3.1) of the *ITA*.

Relevant Legislation and Guidelines

[7] The relevant provisions of the *ITA*, and of the CRA guidelines as contained in *Income Tax Information Circular IC07-1R1* [Information Circular], are reproduced in Annex A to these reasons.

Decision Under Review

[8] By letter of January 20, 2022, the Appeals Officer acknowledged that the outstanding issue in relation to the Applicant's objection to the reassessments was the cancellation of GNPs and stated:

We have communicated with you that we cannot cancel or waive the GNP in order to settle the objection. The Appeals Officer's job is to determine if the GNP was properly assessed, and if so the GNP must be confirmed. If the taxpayer meets any of the conditions outlined in the taxpayer relief (TPR) program, they can file a TPR request in relation to the GNP. A request to cancel a gross negligence penalty can be considered under subsection 220(3.1) of the Income Tax Act (ITA). ITA section 220(3.1) ties in with the taxpayer relief program to allow for waivers and cancellation of interest and penalties but even then there are limits as to why these can be cancelled or waived.

The delegation of the ministerial powers to include appeals officers for subsection 220(3.1) is to allow appeals officers to provide proactive taxpayer relief when the circumstances warranted it (for example, CRA delays when reviewing objection). In addition, the taxpayer relief officer is included in the most current delegation in respect of subsection 220(3.1).

The mandate of an appeals officer and that of the taxpayer relief officer must be understood. When reviewing objections, the mandate of the appeals officer is to review the correctness of the assessment and issue a decision on the dispute. The taxpayer relief officer is to review whether certain actions can allow relief of interest and penalties being charged to the taxpayer (for example, extraordinary events or financial hardship). Although a dispute of penalties and interest can involve both objections and taxpayer relief, each area addresses different aspects of the dispute.

Based on the reason stated above, no changes will be made in the settlement offer. You may apply for a taxpayer relief in relation to the gross negligence penalties under the TPR program if you meet the circumstances in which interest and penalties may be cancelled or waived.

As indicated in our letter November 18, 2021, the settlement offer is based on the specific circumstances of the case and is given

without prejudice to other cases where the circumstances may be different. Please advise us whether or not you are in agreement with the Settlement and Waiver. If we do not receive a response within 15 days from the date of this letter, it will be assumed that you have decided not to accept our offer, and we will process the objection files based on our proposal letter dated June 24, 2021.

An [*sic*] interest relief would be granted for the period attributable to CRA delays for any amount that will be assessed as a result of the Appeals review. Any taxpayer relief in respect of interest is to be processed at the time of the decision of the objection.

Issues

[9] The Applicant frames the issues as:

1. Whether the Minister erred in fettering the discretion conferred by subsection 220(3.1) of the *ITA*;
2. Whether the Minister erred in refusing to exercise that discretion; and
3. Whether the Minister should be directed to exercise her discretion and make a decision pursuant to subsection 220(3.1) of the *ITA*.

[10] The Respondent interprets the application for judicial review as one seeking relief in the nature of *mandamus* and, accordingly, frames the issue as whether the Applicant is entitled to an order in the nature of *mandamus*.

[11] In properly identifying the issues that arise in this matter, it is of note that the relief sought by the Applicant is an order of this Court directing the Minister to exercise her discretion, pursuant to s 220(3.1) of the *ITA*, in respect of the Applicant's request to cancel penalties

assessed pursuant to s 163(2) of the *ITA*, and requiring the Minister to make a decision pursuant to s 220(3.1).

[12] Having considered the submissions of both parties, I am of the view that the issues can be appropriately addressed if framed as follows:

1. Was the Appeals Officer, as the Minister's delegate, required to exercise her discretion?
2. Did the Appeals Officer, as the Minister's delegate, err in fettering the discretion conferred by s 220(3.1) of the *ITA*?

Standard of Review

[13] In assessing the merits of a decision of an administrative decision maker, such as the Appeals Officer, there is a presumption that the reviewing court will apply the reasonableness standard of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25 [*Vavilov*]; see also *Cheeseman v Canada (Attorney General)*, 2021 FC 273 at para 12; *Neyedly v Canada (Attorney General)*, 2020 FC 678 at para 22). The parties do not submit that any of the circumstances that might warrant a departure from that presumption arise in this matter and I find that they do not.

[14] On judicial review, the Court “must develop an understanding of the decision maker’s reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in

relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99).

Analysis

Applicant’s Position

[15] The Applicant submits that s 220(3.1) of the *ITA* grants the Minister the power to cancel penalties assessed and, pursuant to s 220(2.01), that that power can be delegated. The Applicant submits that the *Delegation of Authority Instrument* grants appeals officers the authority to waive or cancel penalties pursuant to s 220(3.1) of the *ITA* (referencing Canada Revenue Agency, *Income Tax Act – Authorization to exercise powers or perform duties of the Minister of National Revenue*, Administrative consolidation (24 November 2021) [*Delegation of Authority Instrument*]). Further, that the power to cancel penalties extends to those assessed pursuant to s 163(2), GNPs, in the resolution of an objection, referencing *Cayer v Canada Revenue Agency*, 2009 FC 1195 at paragraphs 49-67 [*Cayer*]. The Applicant submits that paragraph 37 of the Information Circular specifically contemplates that the cancellation of GNPs may be effected pursuant to s 220(3.1) of the *ITA*.

[16] The Applicant interprets the Appeals Officer’s January 20, 2022 letter as confirming the Minister’s view that a request to cancel a GNP can be considered under s 220(3.1), and that the power to cancel penalties extends to appeals officers pursuant to their delegated authority. Based on the Appeals Officer’s answers to a question posed in the written cross-examination on the Appeal Officer’s affidavit filed in response to the Applicant’s application for judicial review, the

Applicant submits that the Appeals Officer confirmed her authority and that the scope of the authority was determined by the Information Circular. The Applicant submits the Appeals Officer's reliance on the Information Circular was an impermissible fettering of Ministerial discretion, a refusal to exercise jurisdiction and a failure to follow a procedure which was required by law. This renders the January 20, 2022 decision unreasonable, referencing, among other decisions, *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at paragraphs 25-27 and *Belchetz v Canada*, 2020 FCA 225 at paragraphs 39-41.

Respondent's Position

[17] The Respondent submits that the Applicant seeks an order of *mandamus* but does not address the criteria required to obtain such an order, as set out in *Apotex Inc v Canada (Attorney General)*, 1993 CanLII 3004 (FCA); aff'd CanLII 47 (SCC). Specifically, the Respondent submits that there is no public legal duty to act. This is because s 165(3) of the *ITA* requires the Minister, upon receipt of a notice of objection from a taxpayer, to reconsider the assessment and vacate, confirm, or vary it. That public legal duty does not extend to the waiver of interest and penalties pursuant to the taxpayer relief provisions. Section 220(3.1) grants the Minister discretionary power which she may or may not exercise. The Respondent submits that the courts will not grant *mandamus* to compel a decision maker to make a particular decision when no decision has been made or when the decision making power is discretionary in nature. The Respondent submits that there is no public legal duty to consider a request for interest and penalty relief pursuant to s 220(3.1) in the course of considering a notice of objection pursuant to s 165. Further, the Applicant has an adequate alternative remedy that he has not exercised: the filing of an appeal to the Tax Court of Canada.

[18] The Respondent also submits that the Applicant's request for an order of *mandamus* requiring the Appeals Officer to consider the waiver of penalties pursuant to the taxpayer relief provisions at the objections stage is premature. Taxpayer relief is typically not considered prior to a taxpayer's tax liability being finalized either by objection or appeal, or the expiration of time to appeal, as demonstrated by paragraphs 109-110.1 of the Information Circular. Further, different considerations apply in an appeal of an assessment of GNP than in a taxpayer relief request. The Applicant's letter to the Appeals Officer did not set out any basis for a taxpayer relief application such that the Appeals Officer could even forward the request to the taxpayer relief division to be held in abeyance. Accordingly, the Applicant should not be granted an order of *mandamus* until his tax liability has been finally determined and he has provided a complete application.

[19] The Respondent also submits that the Appeals Officer did not fetter her discretion by directing the Applicant to appeal the assessment of GNP to the Tax Court and, if unsuccessful, to make a separate taxpayer relief application. Taxpayers have a legitimate expectation that the process set out in the published policy will be followed when a taxpayer relief decision is made. Further, administrative tribunals may control their own procedures so long as they are procedurally fair. By controlling the procedure to be followed, the Appeals Officer did not fetter her discretion. The Appeals Officer merely directed the Applicant to follow the procedure.

Analysis

- i. The Minister's delegate did not have a duty to exercise her discretion

[20] In *Cayer*, this Court found that s 220(3.1) “clearly provides that the taxpayer fairness relief provided for therein may be applied to any penalties otherwise payable under the Act [ITA]. This clearly includes the penalties imposed under subsection 163(2) of the Act which are known as gross negligence penalties” (*Cayer* at para 51).

[21] In that case, the decision under review denied relief to the applicant under the taxpayer fairness provisions of the *ITA* in regard to two matters, one of which was GNPs. The Court, when addressing a quality assurance review by CRA, found that the review correctly stated the scope of s 220(3.1) of the *ITA*, which can apply to GNPs. The Court also found that the quality assurance review correctly stated the policy set out in the Information Circular, that is, because of the very nature of GNPs, undefined “exceptional circumstances” are required in order to contemplate cancellation of such penalties pursuant to the taxpayer fairness relief provisions (*Cayer* at para 53).

[22] The Court noted that the applicant in *Cayer* was specifically targeting the GNPs and that the grounds for such relief were financial hardship and emotional distress, as had been clearly set out in her fairness relief request and expanded upon in her accompanying documents. Among other grounds for relief, the applicant noted that she was living on the Ontario Disability Support Program, that she suffered from rheumatoid arthritis and extreme depression, that she had no money, that she could not pay her mortgage and had trouble feeding and clothing her children, and that her life had been basically ruined.

[23] This Court held that:

[57] Consequently, though it is true that the Applicant's main argument against the application of the gross negligence penalty was based on the inappropriateness of these penalties being imposed in the first place, these arguments were then being dealt with in an appeal to the Federal Court of Appeal. However, the Applicant was also pursuing another recourse under the taxpayer fairness relief provisions of the Act based on arguments which did not concern the appropriateness of these penalties but which rather sought their cancellation in light of her financial situation and emotional distress. These are two separate and distinct recourses based on completely different considerations and which were unfortunately melded together in the "Quality Assurance Review" dated May 22, 2008.

[58] It is understandable that the CRA did not wish to grant any taxpayer fairness relief to the Applicant while the challenge to the assessment of the gross negligence penalties was still before the courts. In such circumstances the taxpayer fairness relief request could have been held in abeyance until the outcome of the objection or appeal process or until all rights of appeal had expired. This is not what the "Quality Assurance Review" dated May 22, 2008 recommended. On the contrary, the recommendation concerning the gross negligence penalties stated at page 4 of this Review was rather the following:

We agree that no relief of the gross negligence penalties be granted via the taxpayer relief provisions. Since the taxpayer has objected-appealed the levying of these penalties, the issue should be resolved via the court process. (We recommend that you may wish to advise the taxpayer of this in your decision letter.)

[Emphasis in original.]

[24] Although the appeal process challenging the appropriateness of the GNPs was over when the application for judicial review was heard, the CRA had continued to insist that the taxpayer fairness relief request relating to the GNPs be dealt with through the courts rather than through s 220(3.1) of the *ITA*.

[25] This Court held that:

[62] The inescapable conclusion here is that the CRA melded together the appeal on the assessment of the gross negligence penalties and the request for taxpayer fairness relief pursuant to subsection 220(3.1) of the Act. **The net result of this approach is to have denied the Applicant a proper review of her request under subsection 220(3.1) of the Act by tying the fate of this request to the fate of her appeal on the assessment of the penalty. Yet, as I have already stated, these are two separate and distinct recourses, and different considerations apply to each.**

.....

[64] **The considerations which apply in an appeal of an assessment challenging gross negligence penalties are not the same as those which apply in a taxpayer fairness relief request. One deals with the appropriateness of the penalties in light of the conduct of the taxpayer in making a return, the other with exceptional circumstances which may justify the cancellation of the penalties on fairness considerations. These are two different matters and are treated as such by the Act.** Indeed subsection 220(3.1) of the Act does not limit or exclude the gross negligence penalties from its ambit. Rather the subsection states that it applies to “any penalty [...] otherwise payable under this Act” [emphasis added].

[65] The financial hardship and emotional distress grounds raised by the Applicant to justify her taxpayer fairness relief request for cancellation of the gross negligence penalties may perhaps be insufficient to meet the high standard of “exceptional circumstances” which the Minister has set out in the Guidelines in order to grant relief from such penalties under subsection 220(3.1) of the Act. However, this is an issue to be properly considered and eventually decided by the Minister and not by this Court.

[66] In this case, the Applicant’s fairness relief request for cancellation of the gross negligence penalties was not reviewed under subsection 220(3.1) of the Act. This constitutes a refusal to exercise jurisdiction, a failure to follow a procedure which was required by law to be observed or an error in law under the meaning of subsection 18.1(4) of the *Federal Courts Act*.

[Emphasis in bold added.]

[26] To the extent that the Applicant relies on *Cayer* to support that a failure by the Appeals Officer to consider a cancellation of gross negligence penalties in this matter is a refusal to exercise jurisdiction as required by law, *Cayer* is distinguishable on its facts. There, the applicant was pursuing the question of the appropriateness of the GNPs in Tax Court and was also seeking recourse under the taxpayer fairness relief provisions of the *ITA* – not based on the appropriateness of these penalties – but seeking their cancellation in light of her financial situation and emotional distress. Because CRA melded these two recourses, it did not review the applicant’s request for relief based on her financial situation and emotional distress.

[27] Here, in her letter to the Applicant dated January 20, 2022, the Appeals Officer attempted to explain, in the context of the Applicant’s objections to the notices of reassessment and the application of GNPs pursuant to s 163(2) of the *ITA*, the difference between the role of an appeals officer and the role of a taxpayer relief officer. That is, the appeals officer’s role is to determine if the GNP was properly assessed, and, if so, it is to be confirmed. When reviewing objections, the mandate of the appeals officer is to review the correctness of the assessment and issue a decision on the dispute.

[28] The Appeals Officer noted that taxpayers can *also* file a taxpayer relief program request in relation to the GNP. The taxpayer relief officer is to review whether certain actions can allow relief of interest and penalties being charged to the taxpayer (for example, extraordinary events or financial hardship). The Appeals Officer advised the Applicant that he could apply for taxpayer relief in relation to the GNPs under the tax relief program if he meet the circumstances in which interest and penalties may be cancelled or waived.

[29] In other words, the Appeals Officer was attempting to convey to the Applicant that there are two separate processes – the process for assessing whether the GNP was appropriate (in response to his objections pursuant to s 165(3)) and the process for assessing taxpayer relief (pursuant to s 220(3.1)). She was engaged in the former but it was open to the Applicant to seek relief via the latter.

[30] As stated in *Cayer*:

[38] When, as in this case, an assessment is under objection or appeal, paragraph 109 of the Guidelines [Information Circular] indicates that a request to cancel a penalty and interest on the grounds of extraordinary circumstances, such as serious illness or accident or serious emotional or mental distress, may be reviewed and an informal decision communicated to the taxpayer. However the final decision concerning the fairness relief on such grounds will be withheld until the objection or appeal is resolved or until all rights of appeal have expired.

[39] When, however, the request for fairness relief concerns the cancellation of penalties and interest on the grounds of inability to pay or financial hardship under subsection 220(3.1) of the Act, and the concerned assessment is under objection or appeal, paragraph 110 of the Guidelines state the request “will generally be held in abeyance until the outcome of the objection or appeal process or until all rights of appeal have expired”.

[31] Thus, if the Applicant had made an application for taxpayer relief – the cancellation of the GNPs – on the grounds of inability to pay or financial hardship, then that request could have been held in abeyance until the outcome of the objection, at which point, information submitted in support of such a request could be assessed to determine if taxpayer relief was warranted.

[32] Accordingly, although s 220(3.1) imposes a duty on the Minister or her delegate to exercise their discretion with respect to requests for taxpayer relief from assessed GNPs, in this

matter the Applicant did not make a request for taxpayer relief and, unlike *Cayer*, provided no information to support a claim of inability to pay or financial hardship, or otherwise. Therefore, even if it was the role of the Appeals Officer to consider such requests, any obligation to exercise her discretion did not arise in this circumstance.

[33] Viewed from a different perspective, the CRA, as an administrative decision maker, is entitled to control its own procedure as long as that process is procedurally fair (see *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130 at para 138). The CRA makes available to the public its procedures pertaining to the taxpayer relief provisions in the Information Circular. The Information Circular informs that a request to cancel penalties and interest based on inability to pay for financial hardship under s 220(3.1) will generally be put on hold until the outcome of the objection or appeal process is determined (paragraph 110). Therefore, even if there had been a request for taxpayer relief – and there was not – the Appeals Officer did not have a duty to exercise any discretion to make a determination on the taxpayer relief sought prior to a final determination of the Applicant’s liability under s 163(2) of the *ITA*.

[34] In this way, the application for judicial review is premature, as the Respondent submits.

ii. Fettering of discretion

[35] Given my finding above, in my view, the Appeals Officer did not fetter her discretion. I will, however, briefly deal with the Applicant’s submissions in that regard.

[36] Unlike *Cayer*, the Applicant did not make a request for taxpayer relief based on the grounds set out in the Information Circular, which CRA failed to consider. Rather, the basis for his request was that the GNPs be cancelled or waived in order to settle his notices of objection to his reassessments. Those notices of objection were made pursuant to s 165(1). That provision required the Minister, or her delegate, to reconsider the assessment and vacate, confirm or vary the assessment (s 165(3), *ITA*). The Appeals Officer stated that she could not cancel or waive the GNPs for the purpose of settling the objections.

[37] The Appeals Officer acknowledged that a request to cancel a gross negligence penalty can be considered under s 220(3.1) of the *ITA* and stated that s 220(3.1) “ties in with the taxpayer relief program to allow for waivers and cancellation of interest and penalties but even then there are limits as to why these can be cancelled or waived”.

[38] It is this statement upon which the Applicant anchors his submission that the Appeals Officer fettered her discretion. His application for judicial review turns on his submission that the Appeals Officer, by this response, confirmed her authority and that the scope of her authority was determined by the Information Circular.

[39] I do not agree.

[40] I note that the Appeals Officer makes no reference to the Information Circular in the decision. Rather, this fettering is said by the Applicant to arise from the following question and answer on written cross-examination of the Appeals Officer on her affidavit:

Q3. You wrote in the January 20, 2022 letter that: *ITA section 220(3.1) ties in with the taxpayer relief program to allow for waivers and cancellation of interest and penalties but even then there are limits as to why these can be cancelled or waived.*

- a. What are the limits referred to?
- b. Where are these limits identified?
- c. If you are or were referring to a document reviewed in writing the letter, please produce it.

A3.

- a. It is subject to the conditions set out in the Information Circular IC07-1R1.
- b. They are identified in IC07-1R1.
- c. IC07-1R1 is attached as Exhibit C to my affidavit

[41] First, it must be noted that the Appeals Officer correctly stated a request to cancel a GNP can be considered under s 220(3.1). That is, the source of power for such a considering request is the legislation. Nor was it an error to state that s 220(3.1) “ties in” with the taxpayer relief program to allow for waivers and cancellation of interest and penalties. Nor am I persuaded that by also stating that “even then” there are limits as to why GNPs can be cancelled or waived, that the Appeals Officer fettered her discretion in addressing the Applicant’s circumstances.

[42] However, even if that last statement were seen as a potential fettering of discretion, as noted above, the Applicant did not submit that he was seeking taxpayer relief on the basis of extraordinary circumstances that engage the fairness purposes that lie behind s 220(3.1). Rather, the Applicant was pursuing objections to his reassessments and sought to have the GNPs waived or cancelled in furtherance of that objective—not as taxpayer relief as such.

[43] This view is supported by other portions of the Appeals Officer's written response to the Applicant's written cross-examination of her on her affidavit. Her affidavit states that she is employed as an appeals officer with CRA, and as such, she was assigned to review the Applicant and Afro Capital Inc.'s notices of objection in respect to the 2014, 2015 and 2016 taxation years. Her affidavit primarily serves to attach the relevant correspondence, described above. It also states that CRA publishes an information circular with respect to the taxpayer relief provisions of the *ITA* and *Excise Tax Act*, which is publically available on its website. A copy of the Information Circular is attached as an exhibit to the affidavit.

[44] When cross-examined about her January 20, 2021 letter, the Appeals Officer was asked if she agreed that the delegation of Ministerial powers under s 220(3.1) of the *ITA* included appeals officers. She agreed that it did. She was then asked if, in her view, that authority was limited. She responded that it is limited in the context of an objection because the tax, interest and penalty amounts are not fully determined until the taxpayer's appeal rights have been adjudicated or expired. When asked whether, in her view, the appeals officer's mandate does not include exercising authority granted by s 220(3.1) of the *ITA*, she responded that an appeals officer may grant proactive interest relief for periods of time where there has been a delay on the part of the CRA in reviewing objections. Further, that requests made pursuant to s 220(3.1) of the *ITA* are directed to and reviewed by one of the designated Tax Relief Centres in Winnipeg or Prince Edward Island and that this information is publically available on the CRA website.

[45] As to the attachment of the Information Circular as an exhibit to her affidavit, the Appeals Officer was asked why it was attached and if the Information Circular limits the

consideration of GNPs by an appeals officer. She responded that it was included because it is the policy that pertains to s 220(3.1) of the *ITA* and that the Information Circular limits a request that is made in respect of an assessment that is under objection or appeal, as a formal written decision will not be issued until the objection or appeal is resolved or until all rights of appeal have expired, referencing paragraph 109 of the Information Circular. In other words, the Information Circular sets out the process CRA follows when a taxpayer requests relief in respect of an assessment that is under objection or appeal. She was asked if the Information Circular confirms that a request may be made by sending a letter to the CRA. She agreed that a letter may be sent to one of the designated Taxpayer Relief Centres in Winnipeg or Prince Edward Island. She added that paragraph 32 of the Information Circular also states that taxpayers should include all circumstances they intend to rely on and all supporting information, facts and reasons. When asked “[d]id the applicant send a letter to the Canada Revenue Agency”, she responded that the Applicant sent several letters in respect of settlement of his notice of objection.

[46] In my view, these circumstances are unlike *Stemijon*, relied upon by the Applicant, as the Appeals Officer did not fetter her discretion by considering only the circumstances set out in the Information Circular. The Appeals Officer was not considering taxpayer relief and therefore did not limit her consideration to the circumstances set out in the Information Circular. She merely noted that s 220(3.1) ties into the taxpayer relief program to allow waivers and cancellation of interest and penalties. She qualified this by stating that, even in that circumstance – which was not the circumstance before her – there were limits as to the reasons why they can be cancelled or waived. Her decision, concerning the Applicant’s notices of objection, was not limited to or restricted by the taxpayer relief circumstances described in the Information Circular.

[47] Rather, in responding to the Applicant's settlement offer made in connection with his objections to the assessments, the Appeals Officer found and advised the Applicant that based on a review of the information on file, she was of the view that the assessment of GNP was justified. While she could not cancel or waive the GNP in order to settle the objection, the route available to the Applicant in that regard was the taxpayer relief program.

Conclusion

[48] In my view, the mere fact that appeals officers, as well as tax relief officers, are listed as Minister's delegates in the *Delegation of Authority Instrument* does not mean that appeals officers must, in every instance, assess at the objection stage whether taxpayer relief is appropriate. On cross-examination on her affidavit, the Appeals Officer confirmed that in circumstances such as where CRA is at fault – for example, when CRA delayed in responding an objection to assessment – appeals officers can grant proactive taxpayer relief. Otherwise, however, the process adopted by CRA as described in the Information Circular is that relief of penalties such as GNPs can be considered under s 220(3.1) when a taxpayer has provided information intended to establish that they meet the requirements for taxpayer relief – that is, exceptional circumstances exist – and this is then assessed by taxpayer relief officers. Here the Applicant did not make such a submission beyond the general statement that paying the GNP was “beyond his reach”.

[49] In short, s 220(3.1) is concerned with taxpayer relief. The Appeals Officer's decision was concerned with reconsidering the Applicant's subject reassessments based on his objection made pursuant to s 165(1) and (3) of the *ITA*. The Applicant had asserted in his objections that the

notices of reassessment were incorrect and also disputed the application of GNPs pursuant to s 163(2) of the *ITA*. In the absence of a request for taxpayer relief, as opposed to a request to cancel the GNPs in order to settle the Applicant's objection, the Appeals Officer was not required to and did not fetter her discretion. Accordingly, her decision was not unreasonable.

Costs

[50] In their written submissions both parties requested costs but neither further addressed the request. Nor did they do so when appearing before me.

[51] Pursuant to Rule 400 (1) of the *Federal Courts Rules*, SOR/98-106, the Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. In exercising that discretion, the Court may consider the factors set out in Rule 400(3), which include: the result of the proceeding; the importance and complexity of the issues; whether the public interest in having the proceeding litigated justifies a particular award of costs; and, any other matter that the Court considers relevant. The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs (Rule 400(4)).

[52] In these circumstances, and as the Respondent has been successful, it is entitled to costs which shall be based on Tariff B, Column III.

JUDGMENT IN T-308-22

THIS COURT'S JUDGMENT is that

1. The appeal is dismissed; and
2. The Respondents shall have their costs based on Tariff B, Column III.

"Cecily Y. Strickland"

Judge

ANNEX A

Income Tax Act, RSC, 1985, c1 (5th Supp.) [ITA]

Part 1 – Income Tax

Division 1

Returns, Assessments, payments and Appeals

False statements or omissions

163(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty ...

Objections to assessment

165 (1) A taxpayer who objects to an assessment under this Part may serve on the Minister a notice of objection, in writing, setting out the reasons for the objection and all relevant facts,

.....

Duties of Minister

(3) On receipt of a notice of objection under this section, the Minister shall, with all due dispatch, reconsider the assessment and vacate, confirm or vary the assessment or reassess, and shall thereupon notify the taxpayer in writing of the Minister's action.

Part XV - Administration and Enforcement

Administration

Minister's duty

220 (1) The Minister shall administer and enforce this Act and the Commissioner of Revenue may exercise all the powers and perform the duties of the Minister under this Act.

...

Delegation

(2.01) The Minister may authorize an officer or a class of officers to exercise powers or perform duties of the Minister under this Act.

...

Waiver of penalty or interest

(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.

Canada Revenue Agency, Information Circular IC-07-1R1, “Taxpayer Relief Provisions” (18 August 2017) [Information Circular]

Introduction

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5. This information circular tells taxpayers about the authority the minister of national revenue has under the Income Tax Act to grant taxpayers relief with the legislative provisions described in 9. This circular also explains how a taxpayer asks for relief, including the proper information and documentation needed to support such a request, and outlines the administrative guidelines the CRA will follow in making a decision whether to grant or deny relief based on a taxpayer's situation.

6. These are only guidelines. They are not meant to be exhaustive and are not meant to restrict the spirit or intent of the legislation.

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Part I

Legislation

8. The legislation gives the CRA the ability to administer the income tax system fairly and reasonably. The CRA does this by helping taxpayers resolve issues that come up through no fault of the taxpayers and by allowing for a common-sense approach in dealing with taxpayers who, because of personal misfortune or

circumstances beyond their control, could not comply with a legal requirement for income tax purposes.

Taxpayer relief provisions

9. A taxpayer can ask for relief under the provisions of the act listed in this paragraph. After consideration of the relevant facts and circumstances of a taxpayer's situation, a delegated official of the CRA (see 17) will decide whether it is appropriate to do the following:

a. waive or cancel penalties and interest under subsection 220(3.1)

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11. The minister of national revenue does not have to grant relief under the taxpayer relief provisions. Each request will be reviewed and decided on its own merit. If relief is denied or partly granted, the CRA will explain to the taxpayer the reasons for the decision.

Who is authorized to make the decision?

17. Subsection 220(2.01) authorizes the minister of national revenue to delegate his/her powers and duties conferred in various provisions of the act to designated officials within the CRA. The officials delegated to use the minister's discretionary authority under the taxpayer relief provisions described in 9 are authorized through administrative instruments. Taxpayers can read these instruments at canada.ca/en/revenue-agency/services/tax/technical-information/delegation-powers-duties-functions.

18. The delegated officials are authorized to review a taxpayer's request for relief and to make a decision whether to grant, partly grant, or deny a request. It is a general administrative practice of the CRA for another CRA official to review a request and prepare a decision report for the delegated official's consideration, including a recommendation on whether or not granting relief is justified. The final decision and notifying the taxpayer in writing of the decision is the responsibility of the delegated official.

Circumstances that may warrant relief from penalties and interest

23. The minister of national revenue may grant relief from penalties and interest where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation or requirement:

- a) extraordinary circumstances
- b) actions of the CRA
- c) inability to pay or financial hardship

24. The legislation does not identify specific situations for which the minister has the authority to waive or cancel penalties and interest. The guidelines in this part of the information circular are not binding in law. They do not give the minister's delegate the authority to deny a request and exclude it from proper consideration simply because the taxpayer's circumstances do not meet a guideline described in Part II of this information circular. The minister's delegate may also grant relief even if a taxpayer's circumstances do not fall within the situations stated in 23.

Extraordinary circumstances

25. Penalties and interest may be waived or cancelled in whole or in part, if they result from circumstances beyond a taxpayer's control. Extraordinary circumstances that may have prevented a taxpayer from making a payment when due, filing a return on time, or otherwise complying with an obligation under the act include, but are not limited to, the following examples:

- a) natural or human-made disasters, such as flood or fire
- b) civil disturbances or disruptions in services, such as a postal strike
- c) serious illness or accident
- d) serious emotional or mental distress, such as death in the immediate family.

Actions of CRA

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Inability to pay or financial hardship

27. It maybe appropriate, in circumstances where there is a confirmed inability to pay all amounts owing, to consider waiving or cancelling all or part of the interest, to enable taxpayers to pay their debt. For example:

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28. Cancelling a penalty based on an inability to pay or financial hardship would not generally be considered, unless an extraordinary circumstance prevents compliance. See 25. However, there may be exceptional situations for which penalties are cancelled, in whole or in part. For example, when a business is experiencing extreme financial difficulty, and enforcement of such penalties would jeopardize the continuity of its operations, the jobs of the employees, and the welfare of the community as a whole, providing relief from the penalties may be considered.

28.1. The CRA will review in detail a taxpayer's financial situation to determine their ability to pay amounts owing and the interest charges that will continue to accrue. A financial review considers such things as:

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Making a request

29. Taxpayers or their authorized representatives should fill out Form RC4288, Request for Taxpayer Relief – Cancel or Waive Penalties or Interest, to make a request. The taxpayer can also make a request by sending a letter to the CRA. Form RC4288 is available at canada.ca/cra-forms or by calling **1-800-959-8281**.

30. For requests made based on inability to pay or financial hardship, individual taxpayers should also fill out Form RC376, Taxpayer Relief Request – Statement of Income and Expenses and Assets and Liabilities for Individuals, to state their financial situation. Taxpayers can also provide a written statement (with the same information as Form RC376) of their financial situation, including supporting documentation.....

False statements or omissions penalty and third-party civil penalties

37. Relief from a false statements or omissions penalty assessed under the act can be considered under subsection 220(3.1). However, since the levy of these penalties indicates a degree of negligence and absence of care and diligence on the part of the taxpayer in knowingly making false statements or omissions in their tax affairs, the cancellation of a false statements or omissions penalty may be appropriate only in exceptional circumstances.

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39. Given the nature of a false statement or omissions penalty or third-party civil penalty, and that, the CRA reviews the facts of a

case before deciding to assess a penalty, it may be more appropriate for a taxpayer to dispute such a penalty by filing a notice of objection within the prescribed time limit. For more information on a taxpayer's right of objection and appeal, see Pamphlet P148, Resolving your dispute: Objection and appeal rights under the Income Tax Act, or go to canada.ca/cra-complaints-disputes.

Requests made while an objection or appeal is in progress

109. A request to cancel penalties and interest on the grounds of extraordinary circumstances or actions of the CRA for an assessment under objection or appeal may be reviewed and the intended decision may be communicated informally to a taxpayer. A formal written decision will not be issued until the objection or appeal is resolved or until all rights of appeal have expired.

110. The following requests for an assessment that is under objection or appeal will generally be put on hold until the outcome of the objection or appeal process is determined or until all rights of appeal have expired:

- to cancel penalties and interest, based on inability to pay or financial hardship under subsection 220(3.1)
- for an adjustment under subsection 152(4.2)
- to accept a late, amended, or revoked election under subsection 220(3.2)

110.1. When the objection or appeal process is done, the CRA will issue a formal written decision to the taxpayer and may ask the taxpayer for a signed waiver of any right to ask for a second administrative review or right to file an application for judicial review of the minister's decision on granting penalty and interest relief.

FEDERAL COURT
SOLICITORS OF RECORD

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NATIONAL REVENUE

PLACE OF HEARING: TORONTO, ONTARIO

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