Federal Court		Cour fédérale

Date: 20110412

Docket: T-1838-09

Citation: 2011 FC 445

Ottawa, Ontario, April 12, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

ESTATE OF THE LATE
SLOMA ROSENBERG

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision rendered on October 9, 2009, by the Canada Revenue Agency (the CRA) denying relief to cancel the penalties and interest under the Taxpayer Relief Provisions of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) (the ITA).

Factual Background

[2] On June 14, 2003, Mr. Sloma Rosenberg passed away. There was no Last Will and Testament and no liquidator for the Estate. A liquidator for the Estate was appointed on November 3, 2003. The liquidator provided Mr. Rosenberg's accountant with the mandate to prepare the final income tax return for 2003. The said accountant failed to prepare and submit the final income tax return for 2003. He was replaced by Charles Neuhaus.

[3] Disputes arose between the heirs of the Estate which gave rise to judicial proceedings.

[4] On April 21, 2004, the liquidator advised the CRA that the returns would not be filed on time i.e. on April 30, 2004. A cheque of $50,000 was sent to the CRA in order to reduce or avoid the payment of any penalties by the Estate.

[5] The Estate filed the 2003 tax return for the late Mr. Rosenberg on September 22, 2004.

[6] On November 12, 2004, the liquidator sent another cheque in the amount of $500,000 to the CRA to reduce the amount of interest which may have been payable by the Estate for the 2003 taxation year.

[7] On August 4, 2005, the Estate filed a request for voluntary disclosure of revenues for the taxation years 1998 to 2003 regarding sums detained by the deceased in a European bank account which the Estate wanted to repatriate to Canada.

[8] In August 2006, Ms. Helen Price, auditor for the CRA, began an audit of the 2003 taxation year for the Estate. The audit was concluded on December 11, 2008.

[9] On December 13, 2006, the CRA issued notices of assessment for the taxation years ending June 14, 2004 and June 14, 2005. With respect to 2004, penalties of $8,249.70 were assessed as well as interest of $4,782.30. For 2005, penalties of $10,073.13 were assessed as well as interest of $9,445.64.

[10] On July 16, 2007, the Estate sent a request to cancel the late-filing penalties for the taxation years ending on June 14, 2004 and June 14, 2005. On January 30, 2009, a letter was sent by the CRA to the Estate in order to confirm that the penalties had been cancelled for the periods of 2004 and 2005.

[11] On December 12, 2008, notices of reassessment were issued against the Estate for the 1998-2003 taxation years. An amount of $58,289.37 in interest was added to the 2003 taxation year.

[12] On March 18, 2009, a new notice of reassessment was issued by the CRA assessing the Estate late-filing penalties for an amount of $47,851.69 for the 2003 taxation year.

[13] On April 7, 2009, a request was sent to the CRA in order to cancel the penalty for late-filing added by the notice of assessment dated March 18, 2009 concerning the 2003 taxation year. The

same request was made to cancel the interest added for the 2006 taxation year and to cancel the interest and penalties for the 2007 taxation year.

Impugned Decision

[14] On July 14, 2009, Ms. Price prepared a first level recommendation for each of the three (3) taxation years recommending that the relief request be allowed in part regarding the cancellation of part of the interests that were charged for the 2006 taxation year but denied regarding the late-filing penalties for the 2003 and 2007 taxation years.

[15] By letter dated July 21, 2009, the CRA confirmed that the interest for the 2006 Income Tax Return was cancelled for the period from December 2, 2006 to the date of the letter. However, the CRA confirmed that the late-filing penalty with respect to the 2007 tax return would not be cancelled because the Estate had not provided any proof that the return was filed on September 12, 2007 rather than September 13, 2007. Another letter was sent the same day to confirm that the penalty for late filing concerning the 2003 Income Tax Return would not be cancelled.

[16] By letter dated September 9, 2009, the Estate requested a review of the decision rendered on July 21, 2009 by the CRA. In the same letter, it requested a copy of the report giving rise to the agency's refusal.

[17] On September 17, 2009, Mr. Frank Antonacci, Team Leader of the Enforcement Division at the CRA, began a second level review of the Estate's relief request.

[18] On September 25, 2009, Mr. Antonacci called the representative of the Estate who confirmed that the request for a second level review was in respect of the decision of the CRA refusing to cancel the late-filing penalty for the 2003 taxation year.

[19] On October 2, 2009, Mr. Antonacci recommended that the CRA deny the request based on the fact that the Estate had failed to demonstrate circumstances preventing them from filing the 2003 Income Tax Return on time.

[20] In a letter dated October 9, 2009, Mr. Guy Gohier replied to the Estate's letter dated September 9, 2009. He mentioned that there were no extraordinary circumstances justifying the cancellation of the penalty for late-filing. As a result, he concluded that the difficulties that arose between the heirs did not constitute extraordinary circumstances that prevented the tax return from being filed on time.

Relevant Provisions

[21] Subsection 220(3.1) of the *Income Tax Act* states the following :

PART XV	PARTIE XV
ADMINISTRATION AND ENFORCEMENT	APPLICATION ET EXÉCUTION
ADMINISTRATION	APPLICATION
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)	**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

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.	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.

Issues

[22] In this judicial review application the issues are as follows:

A) Did the CRA fail to respect the rules of natural justice by rendering the decision dated October 9, 2009, without giving the chance to the Estate to respond and provide more explanations as to the reasons for the refusal of the request for relief of penalties and interest?

B) Did the CRA err by misapprehending the scope of its discretion authorized by section 220(3.1) of the ITA?

C) Was the decision of the CRA reasonable?

Standard of Review

[23] The Court agrees with both parties that the standard of review which applies to the CRA's decision is reasonableness. Indeed, this Court has recognized that " [t]he standard of review normally applicable to the exercise of discretion is reasonableness (*Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, at para. 24) […]" (*Fleet v Canada (Attorney General)*, 2010 FC 609, [2010] FCJ No. 746, at para 17). A high degree of deference must therefore be awarded to ministerial discretion.

[24] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47, the Supreme Court of Canada held that:

> […] Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[25] With respect to questions raising issues of procedural fairness, it has been well established by this Court that these issues attract the standard of correctness (*893134 Ontario Inc. (cob Mega Distributors) v Canada (Minister of National Revenue - MNR)*, 2008 FC 715, [2008] FCJ No. 897, at para 13).

Analysis

1. *Did the CRA fail to respect the rules of natural justice by rendering the decision dated October 9, 2009, without providing the opportunity to the Estate to respond and provide more explanations as to the reasons for the refusal of the request for relief of penalties and interest?*

[26] The applicant submits that it was denied natural justice because it was not provided with an opportunity to provide further submissions to the CRA prior to the determination of the second level review. The applicant notes that in its letter dated September 9, 2009, the Estate's representative, Ms. Nathalie Elharrar, requested the second level fairness review and also requested that the CRA provide her with the report that gave rise to the first refusal. The applicant asserts that the CRA never

provided her with the report and, as a result, it was denied the opportunity to be heard and to provide its arguments against the first decision.

[27] However, in the Court's view, the applicant was provided with sufficient reasons for the decision to allow it to respond with any relevant arguments at the time it requested the second level review of the decision. Further, the reasoning provided by Mr. Oliverio in his letter dated July 21, 2009, mirrors the first-level recommendation put forth by Ms. Price in her Taxpayer Relief Fact Sheet dated April 9, 2009. Mr. Oliverio's reasoning reads as follows:

> We have noted your comments about the late filing of the return. Also, we have carefully considered the facts of the case and your submission as it relates to the applicable legislation. Our review shows that the complexity of the estate and the legal proceedings undertaken should not have reasonably prevented the filing of the 2003 Income Tax Return on time despite the fact that we agree that the determination of the taxes payable may have been but an estimate. Also we do not find that the fact that an agreement was reached with the Agency as to the determination of the fair market value of the assets at death would justify the cancellation of the penalties.
>
> [Applicant's Record, tab 7, p 37]

[28] Ms. Price's first-level recommendation reads as follows:

> We recognize that the complexity of the file made it very difficult to determine the taxes payable in the final return of the deceased. Therefore we accept that the taxes could be paid late.[…] The 2003-General Income Tax and Benefit Guide in a tax tips recommends the filing of the return even if it cannot be paid immediately in order to avoid penalties. It also recommends that taxpayers should file the tax return even if they are missing information slips.[…]
>
> [Respondent's Record, p 5]

[29] Contrary to the applicant's arguments, the Court believes there are no new elements referred to by Mr. Oliverio which could cause prejudice to the applicant. Although the applicant had not received a copy of the report, the reasoning of Mr. Oliverio's decision was mirrored in the

recommendation. For these reasons, the Court concludes that although it would have been more appropriate for the CRA to provide a copy of the report in accordance with the September 9, 2009 request, the failure to follow-up and provide the report to the applicant cannot be said to be material to the outcome of this particular case. The Court therefore cannot find that, in these circumstances, there has been a breach of procedural fairness.

B) Did the CRA err by misapprehending the scope of the discretion authorized by section 220(3.1) of the ITA?

[30] The applicant submits that the decision of the CRA is unreasonable because it did not properly consider the extent of its discretion. The applicant alleges that the *Taxpayer Relief Guidelines* (Part II)*: Information Circular IC07-1* (Guidelines) should be followed by the CRA when considering whether an applicant should be provided with relief under section 220(3.1).

[31] The Guidelines state the following:

> ***Part II***
>
> **Guidelines for the Cancellation or Waiver of Penalties and Interest**
>
> Circumstances Where Relief From Penalty and Interest May Be Warranted
>
> 23. The Minister may grant relief from the application of penalty and interest where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation or requirement at issue:
>
> (a) extraordinary circumstances
> (b) actions of the CRA
> (c) inability to pay or financial hardship
>
> 24. The Minister may also grant relief 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 where 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 man-made disasters such as flood, or fire;
> (b) civil disturbances or disruptions in services, such as a postal strike;
> (c) a serious illness or accident; or
> (d) serious emotional or mental distress, such as death in the immediate family.
>
> […]
>
> Factors Used in Arriving at the Decision
>
> 33. Where circumstances beyond a taxpayer's control, actions of the CRA, or inability to pay or financial hardship has prevented the taxpayer from complying with the Act, the following factors will be considered when determining whether or not the CRA will cancel or waive penalties and interest:
>
> (a) whether or not the taxpayer has a history of compliance with tax obligations;
> (b) whether or not the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued;
> (c) whether or not the taxpayer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system; and
> (d) whether or not the taxpayer has acted quickly to remedy any delay or omission.

[32] The applicant asserts that the CRA erred when it only considered whether the extraordinary circumstances fell within one of the four examples listed under para 25 of the Guidelines but failed to consider the applicability of para 24. The applicant seems to suggest that the CRA had an obligation to consider para 25 and grant the requested relief on that basis. However, a reading of para 24 of the Guidelines confirms that a wide discretion is granted to the decision maker: "The Minister may also

grant relief if a taxpayer's circumstances do not fall within the situations stated in ¶ 23". [Emphasis added].

[33] The applicant referred to *Nixon v Canada (Minister of National Revenue- MNR)*, 2008 FC 917, [2008] FCJ No 1146 in support of his argument. However, and contrary to *Nixon*, there is no evidence in this case that an exemption was considered under another section of the Guidelines.

[34] There is also no specific indication that Mr. Antonacci did not consider using the residual discretion granted him under para 24 of the Guidelines. Mr. Antonacci clearly considered the reasons provided by the applicant for failing to file the terminal tax return on time. The fact that he chose not to exercise his discretion to cancel the penalty for the late filing does not result in a failure to properly exercise the said discretion.

[35] It is also not clear that Mr. Antonacci fettered his discretion by requiring the extraordinary circumstances of the applicant to fall within one of the four examples listed under para 25 of the Guidelines. Mr. Antonacci merely concludes that (i) the applicant did not adduce any evidence that would justify a departure from the previous report prepared by Ms. Price that (ii) the original request for relief mentioned exceptional circumstances due to conflict between the heirs and, (iii) that these circumstances do not amount to extraordinary circumstances preventing the applicant from complying with the ITA. Finally, the form entitled *Rapport de décision d'allègement pour les contribuables* indicates that para 33 of the Guidelines (Factors Used in Arriving at the Decision) was indeed addressed as part of the decision-making process (Respondent's record at p. 46).

[36] In this regard, and in the absence of a clear error, the Court's intervention is not warranted.

C) Was the decision of the CRA reasonable?

[37] The applicant further asserts that the CRA ignored material facts which resulted in erroneous conclusions. Specifically, the applicant submits that the CRA erred in concluding that the applicant did not exercise a reasonable amount of care, had been negligent or careless in conducting its affairs, and did not act quickly to remedy any delay. The applicant claims that, in reaching such a conclusion, the CRA ignored the following facts:

a) the taxpayer is the estate, not Mr. Rosenberg, and thus the late returns in 2000 and 2001 were not under the control of the liquidator of the estate;
b) the liquidator hired an accountant immediately, the accountant did not deliver the tax return, and a new accountant was mandated as soon as possible;
c) the return was filed as soon as it was prepared despite insufficient information regarding assets;
d) the liquidator sent cheques totalling $550,000 to pay taxes and avoid penalties;
e) conflict between the heirs was not within the control of the applicant; and
f) the audit took 2 years and 3 months and the applicant did its best to come to a settlement with the CRA in order to complete the file and resolve issues.

[38] The applicant submits that by failing to consider these facts, the CRA acted in bad faith.

[39] The applicant further alleges that the CRA did not properly consider other facts in determining whether the applicant's circumstances were extraordinary circumstances that were beyond its control, such as:

a) Mr. Rosenberg suffered from a lengthy illness and, as a result, all his affairs were extremely disorganized;
b) There was no Last Will and Testament and no liquidator for the Estate, although one was appointed as quickly as possible;
c) An effort was made to estimate the tax payable;
d) The tax return for the 2003 taxation year was filed as soon as the representatives of the Estate received all of the information concerning the assets and the income;
e) In the course of its research and review of Mr. Rosenberg's assets, the applicant filed a voluntary disclosure with the CRA in order to ensure that all income would be properly declared; and
f) The Estate's representatives and the representatives of the CRA reached an agreement concerning the diverse evaluation issues.

[40] In light of all this evidence, the applicant asserts that the decision of the CRA was unreasonable.

[41] The Court cannot agree with the applicant's position for a number of reasons. First, the initial submissions made by the applicant in support of its request that the penalty be cancelled were limited. The applicant made reference to the following facts:

a) there were difficulties between the heirs;

b) the Estate was in the process of voluntary disclosure; and

c) an audit was undertaken that lasted 2 years and 3 months, resulting in an agreement between CRA and the Estate concerning the diverse valuation issues.

[42] Also, it is undisputed that the applicant did not make any new submissions prior to the second level review of the decision not to cancel the penalty. Thus, these were the only facts that were properly submitted to the decision-maker for its consideration. CRA cannot be expected to consider facts which were not brought to its attention as an explanation for the late filing of the return or as evidence of reasonable care - e.g. Mr. Rosenberg's illness, the difficulties with the accountant, and the submissions of $550,000.

[43] Also, the Court agrees with the submission of the respondent that the arguments raised by the applicant in its submissions regarding the process of voluntary disclosure and the lengthy audit were irrelevant to the issue of the filing of the tax return and CRA did not err by failing to specifically consider them. The process of voluntary disclosure was not commenced until August 2005, and the Estate had already chosen at that time not to divulge in its terminal tax return the sums detained by Mr. Rosenberg in a European bank. Further, the audit commenced following the filing of the terminal tax return and cannot be considered a factor for the delay in filing the return.

[44] It is noted that when the terminal tax return was finally filed, it still did not reflect the disposition of the assets because the applicant still did not know which assets would be distributed and to which beneficiary. The return was filed with an accompanying letter attesting to this fact:

> "The deceased's tax returns do not reflect the disposition of any of the assets he held at death as there is currently contestation before the courts concerning the estate and therefore it is not certain which assets of the deceased will pass to which

> beneficiary (including the deceased's spouse). An amended tax return will be filled when a determination of this matter has been made."
>
> (Respondent's record at p. 20)

[45] This clearly demonstrates that the applicant was still able to file the tax return on time even though the applicant and the CRA had not yet come to an agreement on the evaluation issues. There is no evidence on file that prevented the applicant from filing its tax return on April 2004 instead of September 2004. This may have affected the applicant's ability to determine the exact amount of taxes payable, but it did not prevent the applicant from filing the return on time. There is no explanation provided neither before the CRA nor before this Court as to why the return could not be filed on April 30, 2004 with a similar letter explaining the absence of information regarding the disposition of assets.

[46] The applicant also failed to explain how these circumstances prevented it from filing the terminal tax return on time, apart from a single sentence stating that the difficulty with the heirs and the process of voluntary disclosure "combined to make estimating the amount of the tax extremely difficult". As noted above, the accountant was in a position to estimate the amount of the tax at the time the terminal tax return was filed in September 2004. Overall, the applicant failed to provide evidence supporting why the terminal tax return could be filed in September 2004 but could not be filed in April 2004, under the same set of circumstances.

[47] Regarding the issues with the accountants, this Court is of the view that it was the applicant's responsibility to diligently ensure that the accountant was discharging his duty in filing the tax return. In *Fleet* at para 29, Justice Crampton affirmed that taxpayers are directly responsible for the actions of the persons appointed to take care of their financial matters, and that taxpayers are expected to

inform themselves of the applicable filing requirements. This Court agrees with Justice Crampton's observations :

> "It is apparent to me that at least part of the reason why Mr. Fleet did not take any of these steps is that he relied on his advisors and became an unfortunate victim of their errors or omissions. However, the law is well established that taxpayers are "directly responsible for the actions of those persons appointed to take care of [their] financial matters" (*Babin v. Canada (Customs & Revenue Agency)*, 2005 FC 972, at para. 19; *Northview Apartments Ltd. v. Canada (Attorney General)*, 2009 FC 74, at paras. 8 and 11; *PPSC Enterprises Ltd. v. Minister of National Revenue*, 2007 FC 784, at para. 23; and *Jones Estate v. Canada (Attorney General)*, 2009 FC 646, at para. 59) and that they "are expected to inform themselves of the applicable filing requirements" (*Sandler v. Attorney General of Canada*, 2010 FC 459, at para. 12)."

[48] In this case, there is no evidence indicating when the applicant noticed that the first accountant had not performed his duty of filing the terminal tax return. To the contrary, the affidavit of Ms. Nathalie Elharrar, the estate representative - more particularly at para 14 and 15 - remains unconvincing in this regard.

[49] Regarding the CRA's consideration of the previous lack of compliance with tax obligations, the only explanation provided by the applicant to the effect that CRA should not have considered these late-filings was because the taxpayer in the present case is the Estate, not Mr. Rosenberg himself. The respondent asserts, and this Court agrees, that such an interpretation would render para 33 of the Guidelines inapplicable in nearly every case involving a taxpayer who has passed away.

[50] In conclusion, the Court reiterates the level of discretion afforded to the Minister of National Revenue and his representatives in determining when a penalty for late-filing should be cancelled. Absent a material error in the CRA's analysis of the applicant's evidence, the Court will not intervene. In this case and for the reasons outlined above, the decision of the CRA was within the

range of possible, acceptable outcomes (*Dunsmuir*) and the CRA did not breach the rules of natural justice in its dealings with the applicant. The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"Richard Boivin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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