Federal Court  Cour fédérale

Date: 20180629

Docket: T-1990-17

Citation: 2018 FC 677

Ottawa, Ontario, June 29, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

SULOCHANA SHANTAKUMAR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns a discretionary decision of the Minister of National Revenue (the "Minister") to deny Sulochana Shantakumar's (the "Applicant") request for taxpayer relief. The Applicant asks that the Minister waive late filing and income omission penalties that were assessed on her 2012 tax return. The Applicant avers that she filed her taxes late and omitted some income due to a change in the way that her pension provider issues the T4A slip

(previously paper, now electronic). The Minister, however, following a review of the Applicant's tax history, determined that the Applicant's circumstances do not warrant relief under the taxpayer relief provisions of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) (the "*Act*"). The Applicant now comes before this Court seeking review of the Minister's decision.

II. Preliminary Matter

[2] The Applicant is self-represented. At the hearing of this matter, the Applicant's husband sought to make oral submissions on her behalf and in her presence. The Respondent's counsel noted that the Applicant cannot be represented by a person other than a lawyer. This objection was put to the Applicant's husband, who responded that his wife had some difficulty with her memory, and that he had previously notified the Court of his intent to speak on her behalf.

[3] This issue of representation arises from ss. 119 and 121 of the *Federal Courts Rules*, SOR/98-106 which state the following:

119. Subject to rule 121, an individual may act in person or be represented by a solicitor in a proceeding.	**119.** Sous réserve de la règle 121, une personne physique peut agir seule ou se faire représenter par un avocat dans toute instance.
[…]	[…]
121. Unless the Court in special circumstances orders otherwise, a party who is under a legal disability or who acts or seeks to act in a representative capacity, including in a representative proceeding or a class proceeding, shall be represented by a solicitor.	**121.** La partie qui n'a pas la capacité d'ester en justice ou qui agit ou demande à agir en qualité de représentant, notamment dans une instance par représentation ou dans un recours collectif, se fait représenter par un avocat à moins que la Cour, en raison de circonstances particulières,

n’en ordonne autrement.

[4] The rule is clear: in the normal course, a party appearing in the Federal Court is to be self-represented or represented by a lawyer. However, in *Kennedy v Canada*, 2012 FC 1050 at paras. 12-15, Justice Martineau examined the jurisprudence of the Federal Court of Appeal in determining when a spouse may speak on behalf of a non-represented litigant. Cautioning that his analysis ought not to be taken to create a new exception allowing spouses to act on behalf of a non-represented litigant, Justice Martineau reasoned that, “where the interest of justice and the particular circumstances so require…the Court may exercise its residual discretion to allow an individual to speak at the hearing on behalf of a self-represented individual.” Exercising the Court’s residual discretion and in full consideration of the circumstances before me – including the nature of the matter before me, the Applicant’s advanced age, her presence and consent to have her husband speak on her behalf, and purported challenges concerning her memory – I find that it is in the interest of justice to have the Applicant’s husband give submissions on her behalf.

III. Facts

[5] The Applicant is an elderly woman and a registered nurse by profession. She is a Canadian citizen and looks after her husband and daughter, both of whom are persons living with disabilities. She receives a pension from the Healthcare of Ontario Pension Plan (HOOPP).

[6] The Applicant is in the practice of filing her taxes on time, and she uses a tax preparation service to do so. However, for the 2012 tax year, she filed her taxes late. She completed the return on June 14, 2013, but she did not include her “T4A – Statement of Pension, Retirement

Annuity and Other Income" when filing. The Applicant states that she only omitted this income because she did not receive the T4A slip in the mail, which is how she is accustomed to receiving it. The Applicant filed her taxes in the absence of the T4A, having been advised by her tax preparation service that she could always file an amendment later.

[7] On January 20, 2014, the Canada Revenue Agency (CRA) reassessed the Applicant's 2012 tax return to include the unreported T4A income for that tax year. The CRA accordingly levied a provincial omission penalty of $4,813.10, a federal omission penalty of $4,813.10 and a late penalty of $258.48 for the 2012 tax year.

[8] By way of a letter dated February 6, 2014, the Applicant applied to the CRA for a cancellation of the penalties. The Applicant asserts that she did not obtain the T4A until February 6, 2014, by visiting the HOOPP offices in person. In her request, she attached the contact information for HOOPP, along with a contact name and phone number. Her letter also asks that a revised reassessment be sent to the Applicant such that she could pay her tax liabilities "as soon as possible."

[9] In May and July 2014, the CRA notified the Applicant that there was a balance owing on her account and warned that legal action could be taken to recover the balance. Her wages were eventually garnished in order to recover the debt.

[10] The Applicant's request was sent for the "first-level review" by the CRA. For the sake of brevity, I will not describe the first-level review in detail because it is not the decision that is

before the Court. It will suffice to note that the Minister's delegate advised that the request be denied because the Applicant's unreported income made up a significant portion of her total income, and because HOOPP issued a T4A to the Applicant in 2011. Thus, the Minister reasoned that the Applicant should have been aware of the unreported income, and could have estimated the amount with an accompanying explanatory note. The Minister advised the Applicant of the decision to reject the request for taxpayer relief by way of a letter dated October 8, 2014.

[11] The Applicant claims that she did not receive the first-level review decision. She accordingly called the CRA and it was reissued to her on October 5, 2017. At that time, the CRA also notified the Applicant of her option to reapply for taxpayer relief. She did so by way of a letter dated October 14, 2017. In this letter, the Applicant again explains that the T4A was not reported because HOOPP did not send the slips in the mail, but rather made them available online. The Applicant further asserts that she is a law abiding citizen, a registered nurse, and that she has always filed and paid her taxes. She claims to be embarrassed and disgraced by having her wages garnished, and thus paid the balance of $13,962.02 owing on her account in full by borrowing funds from someone else. Accordingly, she asked that the garnishment be stopped and that her request for tax relief be reconsidered.

[12] On November 23, 2017, a CRA official completed a report, rejecting the "second-level review" of the Applicant's request for taxpayer relief. The report was reviewed by another CRA official, and a Team Leader on the same day. The report reviews the history of the Applicant's tax returns for the 2007-2016 tax years, noting she filed late once, omitted income in three years, and late remitted in six of those ten years (two of which resulted from reassessments). The report

finds that the Applicant allowed interest to accrue on her balances owing, and that collection actions (phone calls, warning letters, garnished wages, etc.) were necessary to recover tax debts. The report also notes that the debt from 2012 return was repaid in full on July 18, 2017, by way of a garnished payment. Finally, the report states that the taxpayer did not submit the additional income from the T4A on her own initiative, but rather that it was the CRA that initiated the reassessment in January 2014.

[13] The report ultimately recommends that the Applicant's request be denied. It notes that the "General Income Tax and Benefit Guide" explains what income is to be included on a return, and what should be done if the taxpayer is missing information – in this case, estimating the income as accurately as possible, and attaching an explanatory note. The report's author further finds that "a review of this case has failed to show the [taxpayer] was prevented from complying with her filing and remitting requirements due to circumstances beyond her control" (Respondent's Record, p. 33).

[14] The Team Leader communicated the decision to the Applicant by way of a letter dated November 29, 2017. She recalls the Applicant's explanation for her late filing, stipulates that the pension income ought to have been estimated, and notes that penalties were not charged for the Applicant's 2011 tax return despite her failure to report some income. She further states that, generally, a request for relief will be granted when there is a "connection between a circumstance beyond the taxpayer's control and the inability to file a complete and accurate return and pay any amount owing by the required due date" (Respondent's Record, p. 37). She nevertheless finds that a review of the Applicant's case did not reveal such circumstances.

IV. Issue

[15] Only one issue arises on this this Application for judicial review: the reasonableness of the Minister's decision to deny the Applicant taxpayer relief.

V. Standard of Review

[16] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para. 62, the Supreme Court of Canada held that when the appropriate standard of review is established in jurisprudence, a full analysis of the standard is unnecessary. This Court has held, and the Federal Court of Appeal has affirmed, that the standard of review applicable to the Minister's decision under s. 220(3.1) of the *Act* is reasonableness: *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299, at para 20; *Canada Revenue Agency v Telfer*, 2009 FCA 23, at paras 24-28.

VI. Analysis

[17] The Applicant's arguments on judicial review are substantially similar to those which she offered in her written requests to the CRA for taxpayer relief. Before this Court, the Applicant clarifies that she prepares her taxes with the assistance of a tax service. She also stipulates that this service advised her to file the tax slips that she had for her 2012 return, and that she could file an amendment once she received her T4A from HOOPP. She also asserts that she has sincerely tried to explain to CRA that she was making earnest efforts to get the T4A slip from HOOPP, in vain, and that she was unable to access the slip online because she is not proficient in the use of computers.

[18] The Respondent argues that the Minister's decision was reasonable, noting that the power to grant taxpayer relief is discretionary, and that this decision involves fact finding and consideration of tax administration policy. The Respondent also underlines that this Court must neither reweigh the evidence nor substitute its own decision for that of the Minister, and that the Court must only intervene on questions of fact that were made in a perverse or capricious manner, or without regard to the material before her.

[19] The Respondent submits that the Minister took into account the Applicant's circumstances, including her tax compliance history, and rendered a decision that is justifiable, transparent, and intelligible. The Respondent asserts that this case is similar to *Northview Apartments Ltd. v. Canada (Attorney General)*, 2009 FC 74. In that case, Justice Martineau found that taxpayers are solely responsible for self-assessment and self-reporting to the CRA, and that intent and proportionality are of no relevance to appeals for taxpayer relief. As in that case, where it was found that a large amount of unreported income ought to have been noticed by the taxpayer, the Respondent contends that the Applicant in this case ought to have known that a significant portion of her income was missing from her tax return. Finally, the Respondent takes issue with the Applicant's allegation that she did not receive a T4A from her employer, stipulating that this is incorrect because it was available electronically.

[20] As an initial observation, I find it extraordinary that three CRA employees were able to review the second-level report and agree with its conclusions on the same date, especially considering that this level of review concerns 10 years of the Applicant's tax history, and presumably involves a detailed review of the documentation that would support the facts relied

upon in establishing her tax history. In spite of this multilayered review process, both minor and more serious errors appear on the face of the second-level report. For example, under "Section II – Date Received in Section" the report is dated October 10, 2017, when the Applicant's letter requesting the second-level review is dated October 14, 2017. While this alone does not constitute a reviewable error, this is a clear mistake: the decision cannot logically predate the Applicant's request for taxpayer relief. Regrettably, this appears to have escaped the three CRA employees involved in the second-level review.

[21] More concerning is my impression that the Minister's review was selective and made without regard to some of the information before her. The second-level report stipulates that the Applicant's outstanding 2012 tax debt was satisfied by way of a "garnished payment" received on July 18, 2017, but does not appear to take into account the fact that the Applicant cleared her entire debt to the CRA by way of a payment of $13,962.02 on September 27, 2017. Under the section of the second-level report that contemplates the "circumstances that prevented the taxpayer from meeting their tax obligations" and whether these circumstances were "beyond the taxpayer's control," the report noted the Applicant's explanation that she had not received the T4A slip, but says nothing of the Applicant's hardship submissions that she is seventy years old, supporting a disabled husband and daughter, and solely responsible for paying the bills. In this respect, this case is similar to Justice Mosely's recent decision in *Takenaka v Canada (Attorney General)*, 2018 FC 347, wherein he found that a failure to consider an Applicant's financial hardship submissions constitutes a reviewable error. I raised the issue of hardship with the Respondent's counsel during the hearing, to which he answered that the Applicant's argument focuses on not receiving the T4A and that she provided no evidence of financial hardship. While

it is true that the core of the Applicant's submissions relate to the non-receipt of the T4A, this fact does not give the Minister license to ignore other possible grounds for relief when exercising her discretion. In my view, the Applicant raised the issue of hardship and if there was a lack of evidence on this point or the Minister was not convinced by it, it was incumbent on her to say so.

[22] Similarly, the Applicant's explanation for her failure to file her taxes on time, and for omitting the T4A income, does not appear to be contested in the report or the decision letter, and yet the decision appears to be exclusively concerned with the limited negative aspects of the Applicant's tax history. Moreover, the Minister does not appear to be concerned with the fact that there are two very different versions of the taxpayer's attempts to resolve the matter: while the Applicant asserts that she tried to resolve the issue through the third party that assists her with filing her tax returns, and then later the CRA, the Minister asserts that the Applicant deliberately evaded CRA collections agents.

[23] I am of the view that, had the Minister considered the totality of the Applicant's evidence, it is possible that she could arrive at a different conclusion. As such, the Minister committed a reviewable error that should be rectified upon redetermination.

JUDGMENT in T-1990-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is remitted to the Minister for redetermination by a different Delegate in accordance with the reasons provided.
2. No costs are awarded.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1990-17
STYLE OF CAUSE:	SULOCHANA SHANTAKUMAR v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 19, 2018
JUDGMENT AND REASONS:	AHMED J.
DATED:	JUNE 29, 2018

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