Federal Court Cour fédérale

Date: 20180706

Docket: T-587-16

Citation: 2018 FC 699

[ENGLISH TRANSLATION]

Montréal, Quebec, July 6, 2018

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

YVES DESHAIES

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of the decision dated March 7, 2016, in which the Assistant Commissioner of the Legislative Policy and Regulatory Affairs Branch [Assistant Commissioner] of the Canada Revenue Agency [CRA] refused to recommend to the Governor in

Council the remission of an amount representing taxes, penalties and interest the applicant owed for the 2000 to 2003 taxation years.

II. Facts

[2] The applicant is an urban consultant.

[3] He carries out various projects with numerous municipalities. He is self-employed and is responsible for reviewing urban plans and regulations for cities.

[4] In January 2003, the CRA began the process of auditing the applicant's income tax return for the 2000 taxation year because one of the municipalities with which the applicant had done business had issued a T4A statement of income in the amount of $20,244. The CRA wanted to verify whether the applicant had included that amount in his gross professional income when he filed his tax return. The CRA wrote to the applicant to ask him to provide a breakdown of his professional income. However, the applicant failed to respond to that request.

[5] In March 2003, the CRA then sent him a letter to inform him that income of $20,244 would be added to his tax return. Once again, the applicant did not respond to the letter. The reassessment for the 2000 taxation year was issued in May 2003.

[6] In April 2003, an assessment was issued pursuant to subsection 152(7) of the *Income Tax Act*, RSC (1985), c. 1 (5th Supp.).

[7] In 2004, the CRA initiated a second audit process, this time for the 2001 to 2003 taxation years. The applicant was unable to provide the explanations and documentation the CRA requested.

[8] In March 2005, the CRA issued a letter to inform the applicant of the adjustments that would be made to his professional income for the three taxation years in question to add unreported income. In May 2005, reassessments were issued for the 2001 to 2003 taxation years.

[9] In July 2005, the applicant filed a notice of objection for the 2000 to 2003 taxation years. However, the CRA informed him that it could not accept his objection for the year 2000 because it had been filed outside the prescribed time limit.

[10] The applicant reached an agreement with the CRA to accept the assessments for the years 2001 to 2003, and he agreed to the CRA's proposal to add income for 2002 and 2003. In May 2006, the reassessments were issued for the 2002 and 2003 taxation years, and the applicant did not object to those adjustments.

[11] On September 24, 2006, the applicant paid $9,775 to settle the amount owing for the 2000 taxation year. In April 2007, through voluntary payments and garnishment, the applicant paid the balance of approximately $25,000 in full.

[12] The applicant filed three requests to amend his 2000 to 2003 income tax returns (in 2008, 2010 and 2012). However, the CRA refused to amend the assessments. The applicant was also informed that his request could not be considered under the taxpayer relief provisions.

[13] On January 22, 2014, the applicant sent a memorandum to the Remissions and Delegations Section of the CRA. The applicant requested remission of taxes, penalties and interest for the income added to the 2000 to 2003 taxation years following the CRA's audits.

[14] The applicant explained in his request that the CRA had taxed some of his income twice because amounts on T4A slips issued by municipalities had already been included in his professional income. The applicant also alleged that he had been unable to amend his income tax returns within the prescribed time limits because of his psychological health.

[15] On October 30, 2015, the memorandum was sent to the Headquarters Remission Committee [Remission Committee] with the recommendation to refuse the applicant's request for remission. During a meeting on November 5, 2015, the Remission Committee evaluated the applicant's request for remission and unanimously agreed not to recommend remission. A letter reporting that decision was then sent to the Assistant Commissioner of the Legislative Policy and Regulatory Affairs Branch of the CRA.

III. Decision

[16] On March 7, 2016, the Assistant Commissioner also refused to recommend remission to the applicant for the 2000 to 2003 taxation years.

[17] The Assistant Commissioner first presented an overview of the context of the file and the various audits the CRA performed. He then explained why he did not recommend remission. The decision was based essentially on the following:

> [TRANSLATION] I am writing to inform you that a remission could not be recommended in your file.
>
> In January 2012, you filed a third request to amend your 2000 to 2003 income tax returns, that time under the taxpayer relief provisions. However, for the same reasons as those provided in 2008 and 2010, no amendment could be made to the assessments. In order to assess whether you could be entitled to a reduction in interest and penalties on the basis of financial hardship, CRA officials asked you for financial information. Because you did not respond to that request, no relief was granted.
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> In addition, I considered all relevant factors to determine whether it would be just, reasonable or in the public interest to recommend a remission.
>
> However, you were unable to provide, as requested several times, documentation supporting your claim of mental health issues severe enough to prevent you from requesting amendments to your tax returns within the prescribed time limits.
>
> According to the information in your file, you have had many opportunities to provide evidence to support your amendment requests for the 2000 to 2003 taxation years during audits and the evaluation of your objections. It is important to note that, when your objections were being evaluated, you stated that you agreed with maintaining the assessments issued in May 2005 and with the proposal to add income for the 2002 and 2003 taxation years.
>
> It is reasonable to conclude that the failure to provide the CRA with the requested information and to take steps to object to the assessments within the prescribed time limits was not owing to circumstances outside your control.
>
> I based my decision not to recommend remission in your file on a review of the circumstances of your case, the associated information and the Remission Committee's evaluation.

[18] That decision is the subject of this application for judicial review.

IV. Issue in dispute

[19] This case raises just one issue: is the Assistant Commissioner's decision reasonable?

[20] The standard of review applicable to the Assistant Commissioner's discretionary decision on tax remission is that of reasonableness (*Waycobah First Nation v. Canada (Attorney General)*, 2011 FCA 191, at paragraph 12 [*Waycobah First Nation (FCA)*]). This is a question of mixed fact and law and calls for considerable restraint (*Axa Canada Inc. v. Canada (National Revenue)*, 2006 FC 17, at paragraphs 24–25). The Governor General in Council's authority under subsection 23(2) of the *Financial Administration Act*, RSC (1985), c F-11 [FAA] is discretionary in nature, and remission of taxes is clearly an exceptional measure (*Waycobah First Nation v. Canada (Attorney General)*, 2010 FC 1188, at paragraph 47 [*Waycobah First Nation (FC)*]).

V. Relevant provisions

[21] Subsection 23(2) of the FAA is relevant in this case:

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	**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.

interest to remit the tax or penalty.

VI. Submissions of the parties

A. *Submissions of the applicant*

[22] The applicant states that he experienced professional and financial difficulties between 1995 and 2005, which would explain why he has been negotiating with the CRA since 2003, when the CRA audits began. According to the applicant, the CRA has handled his file in a disengaged and detached way. The applicant also states that since he started working with municipalities, they have not always prepared a T4A slip, and he nevertheless reports all of his business income in his tax returns. The applicant argues that the assessments established by the CRA should be vacated. The CRA apparently failed to follow its guidelines, which clearly indicate that in addition to the four factors, other grounds may be just as valid in granting a positive recommendation.

[23] The CRA refused to meet with the applicant, despite his requests. The CRA has met with him only once since 2003, which apparently violated the principle of natural justice. As a result, the applicant filed an application with the Office of the Taxpayers' Ombudsman. However, the CRA has still not met with the applicant following the Ombudsman's intervention. In short, the applicant is arguing that the CRA's conduct violates the Taxpayer Bill of Rights, RC17, namely with regard to his right to receive entitlements and to pay no more than what is required by law.

B. *Submissions of the respondent*

[24] The respondent argues that the Assistant Commissioner's decision is reasonable. According to the Minister, the applicant could have avoided being doubly taxed if he had not neglected to exercise his rights. Contrary to the applicant's claims, the respondent argues that the double taxation does not result from unintended results of the legislation. The Federal Court of Appeal has previously concluded that the Assistant Commissioner had the discretion to refuse to recommend a remission after the prescribed time limits, even in the case of payment of taxes in error (*Twentieth Century Fox Home Entertainment Canada Ltd. v. Canada (Attorney General)*, 2013 FCA 25, at paragraphs 11–12).

[25] The respondent also argues that the applicant's assessments for the 2000 to 2003 taxation years were established after the CRA had sent notices to the applicant, and he had failed to respond. The respondent points out that the applicant even had the opportunity to dispute these assessments by notice of objection and through an appeal to the Tax Court of Canada. The applicant's notice of objection for the 2000 taxation year was filed out of time. The applicant's notice of objection for the 2001 to 2003 taxations years made no mention of the CRA's requests for explanations and information. The applicant also agreed to the assessments from May 19, 2005, and to the addition of income for the years 2002 and 2003. The respondent argues that an assessment is considered valid and binding unless it is amended or vacated by objection or appeal before the Tax Court of Canada, which was not the case here.

[26] Lastly, the respondent argues that the applicant is not experiencing extreme financial hardship, as it is established in CRA guidelines. The applicant is not experiencing a financial setback coupled with extenuating factors. The applicant has not demonstrated that he has a psychological health issue that placed him in a situation where he could not amend his income tax returns within the prescribed time limits.

VII. Analysis

[27] For the reasons that follow, this application for judicial review is dismissed.

[28] The Court does not agree with the applicant's claims that CRA officials breached their duty of procedural fairness. "The *Financial Administration Act* does not specify the procedure to be followed by a Minister in arriving at a recommendation, allowing the Minister to choose the procedure to be followed" (*Waycobah First Nation (FC)*, above, at paragraph 52).

> [54] Moreover, a decision to recommend or not to recommend remission is very different from a judicial decision, since it involves a considerable amount of discretion and requires the consideration of multiple factors. In addition, the remission of tax is an exception to the general principles of taxation law and it clearly does not amount to a right for the person affected, even if it can obviously have a significant impact on that person's life. When considered together, these factors militate for a duty of fairness at the lower end of the scale.
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> (*Waycobah First Nation (FC)*, above.)

[29] The Court finds that the Assistant Commissioner's decision is reasonable. The Assistant Commissioner considered the CRA remission guidelines appropriately in addition to having

considered other relevant factors, such as the applicant's history of non-compliance with the requirements for filing income tax returns.

[30] The CRA guide sets out four circumstances where remission can be recommended:

> - Extreme hardship;
>
> - Financial setback coupled with extenuating factors;
>
> - Incorrect action or advice on the part of CRA officials;
>
> - Unintended results of the legislation.
>
> (CRA Remission Guide, at page 10.)

[31] In this case, the CRA officials examined the guidelines, and the Assistant Commissioner did not err in applying the guidelines to his decision not to recommend remission. Moreover, the Assistant Commissioner did not fetter his discretion by basing his decision on the CRA policy because he diligently considered other relevant circumstances related to the applicant's file, such as his compliance history, credibility, situation, age and health (CRA Remission Guide, at page 10).

> [28] It is not unlawful for an administrative decision-maker to base a decision on valid, non-exhaustive guidelines, formulated as a decision-making framework to promote principled consistency in the exercise of a discretion. However, the decision-maker cannot treat guidelines as if they were law, and exhaustive of the factors that may be considered in the exercise of a broader statutory discretion. In my opinion, this is not what the Assistant Commissioner did.
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> (*Waycobah First Nation (FCA)*, above.)

[32] The Assistant Commissioner did not err in considering the Remission Committee's recommendation to refuse the applicant's request for remission on the basis that the applicant did not demonstrate extreme financial hardship. According to the documentation on file, it was determined that the applicant settled his debt for the 2000 taxation year in September 2006. In April 2007, the applicant also paid the balance owing for the years 2001 to 2003 in full.

[33] The evidence on file also indicates that the applicant [TRANSLATION] "has filed all of his income tax returns since 1999 late except for 2014. The CRA took measures to request that he file his returns for 10 of those years. Moreover, he paid a penalty for late filing for most of those years" (Respondent's Record, memorandum prepared by the Legislative Policy Branch of the CRA and sent to the Remission Committee on October 30, 2015, at page 154). The applicant was then required to pay penalties for negligence and late filing since 1995, and the Assistant Commissioner did not err in considering the applicant's compliance history. It is clear from the CRA Remission Guide that it is a legitimate factor to be taken into consideration (*Waycobah First Nation (FC)*, above, at paragraph 36).

> [TRANSLATION]
>
> **5. Denied requests**
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> The circumstances in which remission is likely not recommended include, among others, that:
>
> - it is reasonable to conclude that the taxpayer was negligent or careless to comply with the law, or simply made a careless decision.
>
> (CRA Remission Guide, at page 15.)

[34] The Court is convinced that the decision was made "taking into account the specific facts" of the applicant's case (*Waycobah First Nation (FC)*, above, at paragraph 47). The following facts from the applicant's file were also considered in refusing to recommend remission:

> 1. The applicant agreed with the assessments the CRA issued in May 2005 and to the proposal to add income to his returns for 2002 and 2003;
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> 2. The applicant did not object to the reassessments issued in May 2006;
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> 3. Despite requests from the CRA, the applicant did not respond, much less within the prescribed time limits;
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> 4. The applicant filed requests to amend his income tax returns out of time;
>
> [TRANSLATION]
>
> 5. Even with an extension of time granted in a letter dated December 20, 2004, the applicant was unable to provide the explanations and documentation the CRA requested;
>
> 6. However, the applicant has retained the services of a tax professional since 1997;
>
> 7. The applicant was unable to provide (despite requests from the CRA) documentation to support his claim of mental health issues severe enough to prevent him from requesting amendments to his tax returns within the prescribed time limits;
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> 8. The applicant did not provide a complete medical report in response to the CRA's request. However, he provided receipts for psychological consultations in 2010 and 2011.

[35] Although in *Sutherland* (below), there was documentation to support the applicant's health problems, the Court nevertheless determined that it was reasonable for the Minister of National Revenue to find that the applicant "had allowed an extraordinary period of time to elapse before taking steps to rectify her tax situation and that she should therefore not qualify for

Fairness relief" (*Sutherland v. Canada (Canada Customs and Revenue Agency)*, 2006 FC 154, at paragraph 21 [*Sutherland*]).

[36] "The remission of a tax is clearly an exceptional measure that the Governor in Council may grant when the collection of the tax is considered unreasonable or unjust, or when it would otherwise be in the public interest to grant the remission" (*Waycobah First Nation (FC)*, above, at paragraph 30). In light of all of the evidence on file, the Assistant Commissioner did not arrive at that conclusion in this case.

VIII. Conclusion

[37] For all of these reasons, the Assistant Commissioner's decision is reasonable, and the Court's intervention is not warranted in this application. The decision falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47).

JUDGMENT in T-587-16

THIS COURT ORDERS that the application for judicial review is dismissed. There is no question of importance to be certified.

Obiter

Considering that the applicant likely doubly paid his taxes for the 2000 to 2003 taxation years, and considering the applicant's mental health status during that period, the Court suggests that the CRA try to mitigate this taxpayer's situation to the extent possible.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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