

Federal Court



Cour fédérale

**Date: 20190527**

**Docket: T-1344-17**

**Citation: 2019 FC 742**

**Ottawa, Ontario, May 27, 2019**

**PRESENT: Madam Justice Elliott**

**BETWEEN:**

**JOSEPH BIFANO**

**Applicant**

**And**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The Applicant, Joseph Bifano [Mr. Bifano] is seeking judicial review of a decision by M. Khanifar [the Minister's delegate], the Team Leader of the Taxpayer Relief Centre of Expertise, Appeals Branch of the Canada Revenue Agency [CRA] in which Mr. Bifano's second level request for taxpayer relief from penalties and interest relating to unpaid payroll remittances during the 2006 payroll year was refused on July 31, 2017 [the Decision].

[2] Mr. Bifano was assessed pursuant to subsection 227.1 of the *Income Tax Act*, RSC 1985, c 1 5<sup>th</sup> Sup [ITA] in his capacity as a Director of the company Highmark Development Inc. [Highmark] which had been late to submit or had not submitted monthly payroll remittances during 2005 and 2006.

[3] Mr. Bifano applied for judicial review on August 30, 2017. He seeks to have the Decision varied and asks that the taxpayer relief request be granted, resulting in cancellation of the full interest and penalty he owes. He also seeks his costs.

[4] Mr. Bifano alleges the Minister's delegate made an unreasonable decision in that she improperly fettered her discretion and failed to consider sufficiently the personal, extraordinary circumstances he put forward.

[5] For the reasons that follow, this application is dismissed as the Decision is reasonable. The determination falls within the range of possible, acceptable outcomes based on the facts and law.

## II. **Background Facts**

[6] Highmark was incorporated on April 12, 2005 to carry on the business of excavating and logging. The payroll account for which ITA remittances were not made was created in June 2005. Beginning in 2006, Highmark began to experience financial difficulties. Mr. Bifano was a director of Highmark from inception until March 30, 2007.

[7] On March 20, 2008, the CRA issued a Notice of Assessment for Director's Liability in the amount of \$275,787.73 against Mr. Bifano for unpaid payroll remittances which were assessed against Highmark for the taxation years 2005-2007.

[8] In May 2008, Mr. Bifano's son, Nata, died in a farming accident.

[9] At some point in time, Highmark declared bankruptcy. On November 30, 2009, Highmark was dissolved as a corporation.

[10] At the time of the Decision, Mr. Bifano had no assets in his own name; he lived and worked on a large dairy farm owned by a company.

### III. **The First Request for Taxpayer Relief**

[11] A first level request for taxpayer relief from the Director's Liability Assessment was submitted by Mr. Bifano to the CRA on October 1, 2012. The appropriate section within the CRA received it on March 20, 2013. The request sought cancellation of \$33,726.24 assessed for the failure to remit as well as cancellation of interest and penalties of \$94,116.60. The stated grounds for relief were medical/emotional distress, financial hardship/inability to pay and other circumstances.

[12] On December 5, 2014, Mr. Bifano received a response from the CRA denying his request on the basis that there was no apparent causal connection between the events claimed and his inability to meet his tax obligations. In addition, he had not demonstrated that the financial

hardship/inability to pay took place over a prolonged period of time and involved an inability to provide necessities of life.

[13] In considering whether such inability existed, the CRA takes into consideration household income, basic living expenses and capacity to borrow. The compliance history of the taxpayer is also taken into account. It was noted that Mr. Bifano's compliance history was poor.

IV. **The Second Request for Taxpayer Relief**

[14] On October 11, 2016, Mr. Bifano filed a second level request for taxpayer relief with the CRA. He sought relief from interest and penalties because of financial hardship/inability to pay and death/accident/serious illness/emotional or mental distress.

[15] As part of the second level request, Mr. Bifano was required to explain why he disagreed with the first level decision. A CRA information form enclosed with the relief request form explained the kind of reasons that might support a second review.

[16] In his second level request, Mr. Bifano strongly disagreed with the interpretation by the first level decision-maker of his circumstances and their conclusions on his ability to pay. That interpretation had resulted in the first level decision maker being "unable to conclude that Mr. Bifano [sic] was prevented from complying with his tax obligations, as a result of the presented circumstances or due to financial hardship/inability to pay."

[17] In terms of his ability to pay, Mr. Bifano indicated he had a lack of personal assets or current income sufficient to allow him to borrow money. The farming corporations over which

he was a trustee for shareholders could not borrow money as they were subject to banking covenants to pay debts and expenses. They would be unable to borrow money to pay off any debt not directly related to the operation of the farming business and, even if they were able to obtain financing, Mr. Bifano as a trustee did not have the legal authority to compel or require payment from the company.

[18] Mr. Bifano stated that while he was a director of Highmark, all liabilities were paid in a timely manner and the debt arose from actions taken by a subsequent director.

[19] Mr. Bifano alleged that the refusal of the first request did not take into account the stress and emotional trauma he occasioned when his marriage ended with a separation agreement in December 2005 and then in 2006 and 2007 Highmark experienced significant financial difficulties culminating in its bankruptcy. In addition, it failed to take into consideration the death of his son, Nata, in May of 2008.

[20] In addition to stating that Mr. Bifano personally was in compliance with his tax filing and payment obligations, it was submitted that he was not involved in the corporate operations at the time it came to his attention that the payroll remittances had not been paid. He claims to have made repeated attempts to settle the debt with the CRA but was denied. Mr. Bifano said that he was always willing to pay the original amount owing if the interest and penalties were removed. As such, he believed he had not been negligent or careless and had acted quickly to remedy the situation.

V. **The Decision under Review**

[21] On July 31, 2017, the Minister's delegate denied the second level request for relief on the basis that the director of a corporation has an ongoing obligation to ensure payroll remittances are received by the CRA on the dates they were due. The Decision stated that at the time that Mr. Bifano was a director, all the 2005 remittances were late and a large portion of the 2006 remittances were not paid at all.

[22] The Minister's delegate identified that under subsection 220(3.1) of the *ITA* the CRA has discretion to waive or cancel all or any part of penalties or interest which may have resulted due to circumstances beyond the taxpayer's control, actions of the CRA, a taxpayer's inability to pay, or financial hardship. It was also acknowledged that relief requests which do not fall within any of those situations may be granted.

[23] On the merits of the request, the Minister's delegate acknowledged that while going through a divorce and running a business that was experiencing financial struggles would be difficult, it did not explain how he was prevented from making the payroll remittances. He had filed the T2 corporate income tax return on time for the 2005 tax year and the Minister's delegate found that it was reasonable that he would have been able to make the monthly payroll remittances during that period.

[24] Acknowledging that Mr. Bifano suffered serious emotional and mental distress after his son died, the Decision stated that in considering a request for relief it must be clear that the circumstances prevented Mr. Bifano from complying with his obligations. The payroll

remittances were due throughout the year 2006 and Mr. Bifano had twice been made aware of the amount owing, including in March 2008 which was before the death of his son in May 2008.

[25] With respect to the submission that Mr. Bifano had repeatedly attempted to settle the debt, it was noted that there was no provision in the *ITA* for the CRA to accept settlement offers; they could only do so if there was a formal proposal under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

[26] Turning to financial hardship, it was noted that Mr. Bifano did not have any financial commitments as everything was paid for him. Any money he did earn would have been available to make payments on the tax debt. In December 2016, his bank statements showed a deposit of \$25,000 although the income and expense form he had submitted did not show any income. The Minister's delegate found that the income which Mr. Bifano had reported on his tax returns between 2006 and 2016 would have allowed the tax debt to be addressed in a reasonable amount of time.

[27] The Decision concluded with the standard acknowledgement that if Mr. Bifano felt the discretion had not been properly exercised, he could apply for judicial review. It also gave the standard advice that daily compound interest would continue to be charged on any unpaid balance.

## VI. **Issues and Standard of Review**

[28] There are two issues in this application for judicial review:

1. Was the Decision reasonable?

2. In arriving at the Decision, did the Minister's delegate fetter her discretion?

[29] There is no disagreement that the standard of review applied to the Minister's discretionary decision under subsection 220(3.1) of the *ITA* is reasonableness: *Stemijohn Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 20 [*Stemijohn*]; *Canada Revenue Agency v Telfer*, 2009 FCA 23, at paras 24-28.

[30] Exercises of the Minister's discretion are aided by administrative guidelines known as the Taxpayer Relief Guidelines [the Guidelines]. At the time of the issues in this matter, the Guidelines were set out in the CRA Information Circular IC07 – 01 dated May 31, 2007.

[31] If there is a fettering of discretion as a result of the Minister's delegate only having regard to the specific scenarios set out in the Guidelines and not to the provisions of subsection 220(3.1) of the *ITA*, then the Decision is unreasonable: *Stemijohn* at para 25.

[32] Applying the reasonableness standard, the Court can only intervene if it is persuaded that the decision was unreasonable in that it lacked justification, transparency or intelligibility, or that the outcome did not fall within the range of possible, acceptable outcomes that are defensible in light of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

[33] If the reasons, when read as a whole, “allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met”: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Nfld Nurses*].



VII. **The Taxpayer Relief Provisions of the ITA**

[34] Subsection 220(3.1) of the *ITA* provides that, on application by the taxpayer within a fixed timeframe, the Minister has the discretion to waive or cancel all, or any portion, of any penalty or interest otherwise payable.

[35] There are three specific situations addressed in the Guidelines which may justify relief from penalty and interest. They are set out in paragraph 23 of the Guidelines:

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

[36] If relief is requested based on any of the situations enumerated in paragraph 23, then the factors set out in paragraph 33 of the Guidelines are to be considered when determining whether to cancel or waive penalties and interest. The factors are:

- whether the taxpayer has a history of compliance with tax obligations;
- whether the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued;
- whether 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
- whether the taxpayer has acted quickly to remedy any delay or omission.

[37] The Guidelines reiterate at paragraph 24 that the Minister has broad general power to grant relief under subsection 220(3.1) even if the taxpayer's situation does not fall within the provisions of paragraph 23.

[38] Extraordinary circumstances, referred to in paragraph 23, are described in paragraph 25 as being circumstances beyond a taxpayer's control. A short, non-exhaustive list of examples is provided:

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

[39] In paragraph 27, the Guidelines outline factors for consideration when faced with a confirmed inability to pay and tasked with deciding whether to waive or cancel interest in whole or in part. Paragraph 28 indicates that cancelling a penalty based on inability to pay or financial hardship is generally not considered unless extraordinary circumstances (as outlined in paragraph 25) prevented compliance. But relief might be warranted if enforcement of the penalty would threaten the continuation of a business, jobs of the employees, and the welfare of the community as a whole.

[40] By indicating the kind of information that is expected to accompany a relief request, paragraph 32 gives guidance to a taxpayer on how to support their request. For example, the taxpayer should include all the circumstances set out in paragraph 23 together with a complete and accurate description of the facts and reasons in support of the relief claimed. They should also provide all relevant documentation, full financial disclosure, and an explanation of how the circumstances affected the taxpayer's ability to meet their obligations.

[41] If financial hardship is a ground for relief, then a meaningful financial payment plan is also recommended to accompany the request together with a statement of income and expenses, as well as assets and liabilities.

### VIII. **Was the Decision Reasonable?**

#### A. *Mr. Bifano's position*

[42] Relying on *Nfld Nurses*, Mr. Bifano says that when the reasons are examined in their entirety, the outcome does not appear to be reasonable.

[43] Specifically, Mr. Bifano disagrees with the way in which the Minister's delegate considered both his divorce and the death of his child. He feels there was only cursory reference made to the emotional and mental distress he suffered and those facts were important enough that they should have formed the basis of whether or not to grant him taxpayer relief. He alleges it was unreasonable to refuse any kind of relief in light of the tremendous emotional and mental distress from which he suffered. He stresses that some relief should have been given for the circumstances in which he found himself.

[44] For example, it appears from the Decision that the fact that he could start and continue to run a business during that period indicated that he should have been able to comply with the remittance requirements. But for Mr. Bifano, such an approach did not take into account the effect of his divorce. He also submits that the death of his son was not sufficiently considered as it was mentioned only twice in the underlying Fact Sheet Report.

[45] During the hearing of this matter, Mr. Bifano objected that the tone of the Decision indicated how the discretion was not properly exercised. The wording of the Decision and the accompanying Taxpayer Relief Fact Sheet were characterized as bordering on cruel.

[46] In particular, it was said that the Minister's delegate referred to the death of Mr. Bifano's son as "difficult" and "unfortunate." He asks that the Court take judicial notice that there is nothing worse than the death of a child which he describes as a soul destroying event.

[47] The Minister's delegate is said to have determined that no relief should be granted to Mr. Bifano just because the tax debt was created before the death of Nata.

[48] Mr. Bifano submits that by failing to consider properly the full emotional impact on him of Nata's death, the Minister's delegate failed to show mercy or justice and did not display common sense. It was submitted that this was the purpose of providing the Minister with such wide discretion in subsection 220(3.1) to recognize that personal misfortune or circumstances beyond a taxpayer's control may arise and there should be a mechanism to provide relief from strict applications of the ITA. In support, he relies upon *Kaiser v Minister of National Revenue*, [1995] 2 CTC 329 at para 8 [*Kaiser*]:

The purpose of this legislative provision is to allow Revenue Canada, Taxation, to administer the tax system more fairly, by allowing for the application of common sense in dealing with taxpayers who, because of personal misfortune or circumstances beyond their control, are unable to meet deadlines or comply with rules under the tax system. The language used in the section bestows a wide discretion on the Minister to waive or cancel interest at any time. To assist in the exercise of that discretion, policy guidelines have been formulated and are set out in Information Circular 92-2.

[49] These same words, including the reference to common-sense, are found at paragraph 8 of the Guidelines, somewhat paraphrased.

[50] Overall, Mr. Bifano's submission is that the Minister's delegate did not reflect upon the lasting effects a divorce can have on an individual nor the devastating impact of the death of his son. Rather, the events were treated in a perfunctory manner. He submits that no parent should need to provide extensive proof to the CRA of the distress they suffered by the loss of their child.

B. *The Minister's position*

[51] The Minister submits that Decision was reasonable as Mr. Bifano did not meet the onus to prove that he was prevented from complying with his tax obligations and there were no circumstances which would justify granting him relief.

[52] Under the *ITA*, the Minister is granted broad discretion to waive or cancel penalties and interest. The administrative guidelines which inform the exercise of the Minister's discretion were considered as were the facts set out in the Taxpayer Relief Fact Sheet.

[53] The Minister says that the record shows Mr. Bifano is a businessman who is associated with 11 Canadian corporations through which he is involved in various farming operations. He knowingly allowed interest to accrue on his debt despite receiving letters from the CRA advising him about the interest. By transferring his shares to family members, the Minister says that Mr. Bifano has arranged his affairs in a manner designed to frustrate the ability of the CRA to collect on the debt.

[54] The Minister noted that the tax debt arose during 2006. Nothing prior to Nata's death prevented Mr. Bifano from making the monthly remittances on time or addressing the outstanding balance owing to the CRA. While he made several promises to pay, he never made any payment; he only offered to pay if all the interest and penalties were first cancelled.

[55] The Minister points out that Mr. Bifano personally had a history of non-compliance. He knowingly allowed interest to accrue in spite of letters from CRA advising him it would accrue. He did not make a voluntary payment. On several occasions he said that he was arranging a loan and would pay his debt if the amount owing for interest and penalties was cancelled. Each such time it was explained to Mr. Bifano that the officers with whom he was dealing had no authority to make a settlement.

[56] The Minister submits that the delegate reviewed the representations made by Mr. Bifano, made a determination that falls within the range of possible, acceptable outcomes on the evidence and reasonably concluded that there were no grounds for interest relief.

### C. *Analysis*

[57] Judicial review of a decision taken by the Minister's delegate under subsection 220(3.1) is not an appeal. It is a review of a discretionary decision to provide, or in this case, not to provide, exceptional relief to provisions of the *ITA*. There is no obligation on the Minister's delegate to reach any particular conclusion, nor can such relief be claimed as of right: *Jenkins v Canada (Revenue)*, 2007 FC 295 at para 13.

[58] In reviewing a decision of the Minister's delegate made under subsection 220(3.1) of the *ITA*, it has been held that "[t]he Court's role is not to reweigh the evidence ... but rather to examine if the Minister's Delegate 'properly considered the evidence before him and that the decision was not based on considerations irrelevant or extraneous to the statutory purpose'": *Easton v Canada (Revenue Agency)*, 2017 FC 113 at para 43 [internal citations omitted].

[59] Under the Guidelines, Mr. Bifano bore the onus of providing all relevant information to support his request for relief. He must show there was a causal relationship between the occurrence of an event and the failure to comply with his *ITA* obligations.

[60] The underlying record that informed the Decision included the following: the Taxpayer Relief Fact Sheets for both the first and the second relief requests; the ACSES Diary computer printout from July 2006 to July 2017 for the Highmark payroll account and for the period from January 2016 to February 2016 for Mr. Bifano's T1 account; and other CRA database information on transactions, assessment details and payments involving Highmark, Mr. Bifano and his former wife, Carol Bifano as well as correspondence between the CRA and Mr. Bifano. A number of notes to file outlined conversations and interactions between CRA representatives and Mr. Bifano or others acting on his behalf, including his accountant and lawyer.

[61] This information, as well as other documents found in the Certified Tribunal Record, forms part of the underlying record which may be consulted during this review, if necessary, to understand the reasons for the Decision and assess the reasonableness of it: *Stemijohn* at para 37.

[62] Other than the statements made in his two requests for taxpayer relief, Mr. Bifano put no evidence before the Minister's delegate to substantiate his claim that he was prevented from

making his payroll remittances or that he could not address the related penalty and interest charges.

(1) Mr. Bifano's Divorce

[63] The Minister's delegate accepted that going through a divorce and running a business that was experiencing financial struggles was difficult. She noted though that it did not explain how Mr. Bifano was prevented from making his payroll remittances. The evidence was that following his divorce, Mr. Bifano was able to file his corporate tax return on time. The Minister's delegate concluded that it would have been reasonable for Mr. Bifano to make all the payroll remittances on time as well. However, the monthly remittances for 2005 were late and many of the 2006 remittances were not made at all.

[64] There is nothing in the Certified Tribunal Record to substantiate the impact of Mr. Bifano's divorce on his ability to address his tax remittances. No causal connection was drawn by Mr. Bifano.

[65] To the contrary, there is evidence in each of the first and second Taxpayer Relief Fact Sheets that Mr. Bifano was able to carry on business and make profits following his divorce in December 2005.

[66] The first Taxpayer Relief Fact Sheet, dated December 3, 2014, found that the claimed impact of Mr. Bifano's divorce was inconsistent with other information on file. The Highmark GST returns for 2005 were filed only slightly late and the 2006 returns were filed on time or late by several weeks. Total revenue, reported on the T2 returns for the corporation was significant.



[67] During a field visit on February 9, 2012 to Mr. Bifano's address, a collections officer noted it was a very large dairy farm with a residential home, 7 or 8 very large farm buildings and a very busy/active farm operation. Two trucks and several pieces of newer farm machinery were listed, which the officer valued at approximately \$200,000.

[68] The second Taxpayer Relief Fact Sheet, dated July 31, 2017, indicates in a note that Mr. Bifano's ex-wife, Carol Bifano, appears to live with him on the farm property. On February 3, 2012, she said she was his spouse. On August 27, 2012, the note indicates that "the lady said her name was Carol but was evasive when questioned further." The note concludes by saying that the address information for both of them is the same.

[69] Mr. Bifano failed to show a causal connection between his divorce and his failure to comply with his payroll remittance obligations under the *ITA*. The determination by the Minister's Delegate that his ability to address other tax matters in 2005 and 2006 meant he would have also been able to make the payroll remittances on time was reasonable.

(2) The Emotional Distress of Nata's Death

[70] Mr. Bifano objects to the way his son's death was characterized in the Decision as being "unfortunate" and "difficult." He says the decision is, therefore, repugnant on its face. A review of the Decision shows that it does not refer to Nata's death as either unfortunate or difficult. The Decision acknowledges that Mr. Bifano "experienced serious emotional and mental distress after the passing of [Nata]." There is, however, a reference in the Second Taxpayer Relief Fact Sheet that the death of Mr. Bifano's son "is a very difficult situation to deal with."

[71] Mr. Bifano submits that he should not need to provide extensive proof to the CRA that he was distressed by the loss of his son. He asks the court to take judicial notice of the impact that the death of Nata had on him. He also says that the Minister's delegate made an unreasonable decision that was devoid of compassion and common sense.

[72] The Court takes no issue with Mr. Bifano's statement that the loss of a child is something from which a parent may never recover; it is without question emotionally devastating. Undoubtedly, Mr. Bifano and his family still live today with the pain of Nata's death.

[73] Mr. Bifano refers the Court to a passage in *Augustus v Gusset*, [1996] 3 SCR 268 which involved the negligent death of a 19-year-old child who was shot in the head and killed by a police officer. In addressing the issue of how to assess non-pecuniary damages to compensate the parents for their loss, Madam Justice L'Heureux-Dubé said at paragraph 47:

It is not hard to understand that the death of one's own child is in all respects an extremely distressing, indeed even traumatizing, event. The suffering that accompanies this unnatural event has no equivalent in intensity aside from the immeasurable joy that can result from the birth of a child. Such suffering is so acute that it seems impossible even to assess its monetary terms.

[74] An elaboration of the criteria for such assessment was provided in paragraph 49, where Madam Justice L'Heureux-Dubé cited the New Brunswick Court of Appeal decision in *Maceral v Nightingale*, (1991) 121 NBR (2d) 319:

[ . . . ] Grief is very personal and intimate but there is an inner element common to all which is not easy to perceive. The tangible manifestations are very subjective and often unreliable. The parade of long faces is not always a true indicator of the broken heart. The psychological evidence will be important to establish the objective process of grief, but it will have a mitigated value when dealing with the individual.

[. . .]

[. . .] In my view, in order to assess grief it is incumbent on the trial judge to hear evidence from the person who suffered the grief. All parents will sustain grief on the death of their children, but as pointed out by Dr. Fleming, the degree of pain will vary with the relationships and personalities of the parents and other factors such as stresses, supportive friends and family, religious and cultural background. A case by case approach is inevitable in my judgment. Such an assessment invites the description of the pain, mental anguish or other sequelae, which by necessity will require some probing into a survivor's feelings and the impact that death has had on his or her life.

[Emphasis in original]

[75] The impact of the death of a child is a highly personal, unpredictable and individualized experience. It is not something for which the Court is able to take judicial notice.

[76] Mr. Bifano says that the Minister's delegate did not grapple with the impact of the death of his child when reviewing what occurred after 2008. He alleges that it was handled in a perfunctory manner.

[77] What was the evidence with which the Minister's delegate failed to grapple?

[78] With respect to Mr. Bifano's divorce, financial hardship and the impact of Nata's death, the reasons submitted on behalf of Mr. Bifano in support of granting the second review were as follows:

The taxpayer also experienced extraordinary circumstances that directly affected the taxpayer's ability to satisfy this tax obligation. Ms. Belanger's letter only took into consideration the taxpayer's financial hardship/inability to pay and did not address medical/emotional distress that the taxpayer was under throughout this period of time. These circumstances included the divorce from his wife Caroline Bifano in December 2005; the extreme financial

difficulties and ultimate bankruptcy experienced by Highmark Developments Ltd. in 2006 and 2007 and the amount of time and energy that the taxpayer devoted to this; as well as the tragic death of the taxpayer's son in a farming accident in May 2008. These events led to the taxpayer experiencing serious emotional and mental distress during the period in which the director's liability was assessed in the accumulation of the associated interest and penalties. The taxpayer continues to be affected to this day by these horrific and unfortunate events.

[79] The Minister's delegate could not grapple with the impact of Nata's death without first receiving evidence leading in that direction. Contrary to the Guidelines, Mr. Bifano failed to set out how Nata's death affected his ability to address his ongoing tax obligations.

[80] There is no supporting evidence in the Certified Tribunal Record to show that Mr. Bifano's need for taxpayer relief was causally related to his divorce or his son's death. There is no medical or psychological statement concerning his own health nor is there any report outlining the impact of Mr. Bifano's divorce and/or his son's death on his ability to function.

[81] The evidence that is in the record is to the contrary. Mr. Bifano was able to start and run a business during the time of his divorce and to make his personal tax filings. Following Nata's death, there were corporate re-organizations and he and his representatives were negotiating to obtain a bank loan to pay the remittances in full provided the interest and penalties were waived or forgiven.

[82] Mr. Bifano noted that his director's liability assessment was issued at approximately the same time as Nata's accidental death occurred. His first assessment letter was received shortly after Nata's death. The proximity in time between the assessment being issued and the death of

Nata approximately two months later was not shown by Mr. Bifano to contribute to his failure to pay interest and penalty charges.

[83] The Minister's delegate was not required to ask Mr. Bifano whether he had any supporting evidence to substantiate his statements that the effect of his divorce, failed company and death of Nata, whether taken individually or cumulatively, caused his non-compliance.

[84] To obtain relief for mental distress, it must be shown that there is some causal connection between the distress and an inability to act: *Dort Estate v Canada (Minister of National Revenue)*, 2005 FC 1201 at para 23. That connection was not shown by Mr. Bifano.

[85] The Minister's delegate considered all the reasons put forward by Mr. Bifano for taxpayer relief based on Nata's death and reasonably addressed them. The Decision is reasonable in that respect.

(3) Mr. Bifano's allegation of Financial Hardship

[86] Mr. Bifano says he is in financial hardship. He has a lack of personal assets and income, so he cannot personally borrow funds. Although he is a trustee for certain shareholders of various farming corporations, he is not able to borrow money from one corporation to pay a debt that is not directly related to the farming business.

[87] A recurring theme in the notes in the Certified Tribunal Record is that Mr. Bifano advised the collections department of the CRA that he would obtain financing to pay but, he never did. There are extensive notes to file made by the CRA officers in connection with their attempts to

obtain information and collect payment from Mr. Bifano. Several times over the course of the last ten years he indicated to the CRA that he would pay the amounts owing for the original remittances by borrowing money but he would not do so unless the interest and penalty was cancelled.

[88] There is a note in the record indicating that in March of 2016, there was a conversation with Mr. Bifano's accounting firm to the effect that his representative was confident that he would agree to pay the principal debt in six months. However, on April 27, 2016, a fax was sent to the CRA by Mr. Bifano's lawyer advising that it did not make sense for Mr. Bifano to submit a payment of \$200,000 for a number of reasons, including that it would hurt cash flow and, if matters wound up in court, the money would be needed for that purpose.

[89] The documents Mr. Bifano provided to the CRA indicated that he did not have any financial commitments for matters such as utilities, mortgage, rent or credit cards as they were paid for him. As a result, it was concluded by the Minister's delegate that any money Mr. Bifano did earn would be available to make payments on the outstanding debt. It was also noted that although he had reported no income, Mr. Bifano's bank statement showed a deposit of \$25,000 in December 2016 and that together with other income he had reported his tax returns from 2006 to 2016 could have been applied to his tax debt.

[90] With such evidence in the file, it was reasonable for the Minister's delegate to find that Mr. Bifano had not shown financial hardship.

IX. **Did the Minister's Delegate Fetter Her Discretion?**

[91] Mr. Bifano acknowledges that, given the scope of subsection 220(3.1) of the *ITA*, the Minister's delegate had the discretion to grant the requested relief.

[92] He submits, however, that relief was denied in this case because his request did not fit squarely within the three scenarios set out in the Guidelines. He also alleges that, in general, the claims were denied because they did not meet the rigid thresholds for relief established by the CRA. On that basis, he alleges that the Minister's delegate fettered her discretion.

[93] If the Minister's delegate did fetter her discretion, then the Decision is not reasonable for that reason.

[94] Mr. Bifano says that the Minister's delegate fettered her discretion in her assessment of his financial hardship. He points to her phrasing in the Decision that "the CRA views financial hardship as the prolonged inability to provide necessities such as food, clothing, shelter and reasonable non-essentials" as being a restrictive view of what constitutes financial hardship or an inability to pay.

[95] Mr. Bifano relies on this Court's decision in *Gandy v Canada (Canada Customs and Revenue Agency)*, 2006 FC 862 to say that the above-noted extract from the Decision shows that unless Mr. Bifano could prove he met the CRA's definition of financial hardship he would not qualify for relief.

[96] I disagree. Citing the Guidelines' definition of "financial hardship" does not alter the fact that the Minister's delegate considered and applied other factors, such as the \$25,000 deposit in December 2016, in determining that Mr. Bifano did not show financial hardship. The Minister's delegate was aware of the breadth of her discretion under the Guidelines and the *ITA*.

[97] In *Stemijohn*, it was found that the Minister had limited his discretion as the decision letter failed to mention the scope of the Minister's discretion under the legislation. While there was a reference to Taxpayer Relief Legislation, the Court of Appeal found that, by saying he would be guided by the three specific scenarios set out in the Information Circular, the Minister's consideration was improperly limited to the three scenarios.

[98] That is not the case presently under consideration. Here, the Minister's delegate clearly sets out that her discretion to waive or cancel all or part of any penalties or interest comes from subsection 220(3.1) of the *ITA*. After acknowledging the three scenarios in the Guidelines, she confirms that relief requests which do not fall within those situations may also be granted.

[99] The analysis of Mr. Bifano's claim of financial hardship involved the assessment of a number of factors. Mr. Bifano's disagreement with how the Minister's delegate exercised her discretion does not mean she exercised it improperly. Nor does it show that she fettered her discretion.

## X. **Conclusion**

[100] When determining Mr. Bifano's request for taxpayer relief, the Minister's delegate fairly and properly considered the evidence before her, exercised her wide discretion in good faith, and



did not base the Decision on considerations that were irrelevant or extraneous to the statutory purpose.

[101] Mr. Bifano refers to *Kaiser* saying that he did not receive mercy and justice nor did the Minister's delegate apply common sense when considering his personal circumstances. That submission overlooks important words in the previous extract from *Kaiser* at paragraph 8:

The purpose of this legislative provision is to allow Revenue Canada, Taxation, to administer the tax system more fairly, by allowing for the application of common sense in dealing with taxpayers who, because of personal misfortune or circumstances beyond their control, are unable to meet deadlines or comply with rules under the tax system.

[Emphasis added]

[102] The underlined words "because of" recognize the requirement that there be a nexus between the misfortune or circumstances of a taxpayer and their inability to comply with the *ITA*. As previously stated, Mr. Bifano has not shown any such connection.

[103] The Guidelines and the instructions on the Request for Relief form set out the kind of information to be provided with the request for relief. Mr. Bifano, who was represented throughout by an accounting firm and a law firm, provided very little to support his request. The Minister's delegate based the Decision on the information received from Mr. Bifano and notes in the CRA records. There was no obligation to seek more, or better, information from Mr. Bifano.

[104] Interestingly, in *Kaiser* the Minister's decision was not set aside, even though the taxpayer was treated differently than other taxpayers in the same position. This was in part due to

the principle established in *Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2 (at page 7) which applies equally to Mr. Bifano:

It is [. . .] a clearly-established rule that courts should not interfere with the exercise of discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with the responsibility.

[105] Whether Mr. Bifano's grounds for relief are considered individually or cumulatively, the problem is that without showing causal connections between the events he raises and his failure to pay the interest and penalty charges, Mr. Bifano did not meet his onus to show his circumstances were deserving of penalty and interest relief as set out in subsection 220(3.1) of the *ITA* and addressed in the Guidelines.

[106] The Decision is reasonable. It is transparent, intelligible and justified as it permits Mr. Bifano and this Court to understand why the determination was made not to grant the relief he sought.

XI. **Disposition**

[107] For all the foregoing reasons, Mr. Bifano's application is denied.

[108] The Respondent is entitled to costs in such amount as may be agreed to by the parties. If the parties are unable to agree as to the amount of such costs within 21 days of the date of this judgment, either party shall thereafter be at liberty to apply for an assessment of costs in accordance with the *Federal Courts Rules*, SOR/98-106.

**JUDGMENT IN T-1344-17**

**THIS COURT'S JUDGMENT is that:**

1. This application is denied.
2. Costs to the Respondent in such amount as may be agreed to by the parties. If the parties are unable to agree as to the amount of such costs within 21 days of the date of this judgment, either party shall thereafter be at liberty to apply for an assessment of costs in accordance with the *Federal Courts Rules*, SOR/98-106.

"E. Susan Elliott"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1344-17

**STYLE OF CAUSE:** JOSEPH BIFANO v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** WINNIPEG, MANITOBA

**DATE OF HEARING:** JUNE 4, 2018

**JUDGMENT AND REASONS:** ELLIOTT J.

**DATED:** MAY 27, 2019

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