

Federal Court



Cour fédérale

Date: 20210426

Docket: T-25-20

Citation: 2021 FC 364

Ottawa, Ontario, April 26, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

DAVID MICHAEL ALLEN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

**JUDGMENT AND REASONS**

I. **Overview**

[1] The applicant, David Michael Allen, seeks judicial review of a decision made on behalf of the Minister of National Revenue (Minister), refusing his request for taxpayer relief under s. 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*] and s. 281.1(1) the *Excise Tax Act*, RSC 1985, c E-15 [*ETA*].

[2] Mr. Allen was diagnosed with mental illness in the late 1990's. Since 2000, he filed most of his tax returns late, "bulk filing" some of them in 2004 and 2008, and the remainder between November 2017 and January 2018. Mr. Allen's failure to comply with his taxpayer obligations under the *ITA* and the *ETA* resulted in an assessment of late filing penalties, failure to file penalties, and/or arrears interest for Mr. Allen's 2009-2016 personal income tax returns and Goods and Sales Tax/Harmonized Sales Tax (GST/HST) returns.

[3] Mr. Allen requested relief from the assessed penalties and interest for those tax years on the grounds of serious illness and emotional or mental distress, claiming he was unable to comply with his taxpayer obligations due to debilitating mental illness. A first-level decision maker determined that relief was not warranted. Mr. Allen requested reconsideration of the first-level decision. At that time, the assessed interest and penalties totalled just under \$40,000. A second-level review carried out by a different delegate (Delegate) of the Minister concluded it would be inappropriate to waive the assessed penalties and interest, as Mr. Allen did not exercise reasonable care, and he did not act quickly to remedy his tax situation.

[4] On this application for judicial review, Mr. Allen seeks to overturn the second-level Delegate's decision as being unreasonable. He submits that the Delegate erred in exercising discretion to waive interest and penalties by misapprehending the medical evidence. Also, he argues that the Delegate's reasoning is not transparent or logical, and does not justify the conclusion.

[5] For the reasons below, I find that the Delegate's decision is unreasonable. Accordingly, this application for judicial review is allowed.

## II. Preliminary Issue

[6] The respondent submits that "Canada Revenue Agency - Taxpayer Relief Centre" is not the proper respondent on this application, and seeks an order amending the style of cause to name the Attorney General of Canada as the respondent: Rule 303 of the *Federal Courts Rules*, SOR/98-106. I am satisfied that the amendment is appropriate. The style of cause is amended accordingly.

## III. Issue and Standard of Review

[7] Under s. 220(3.1) of the *ITA* and s. 281.1 of the *ETA*, the Minister has broad discretion to waive or cancel all or any portion of any penalty or interest otherwise payable under the relevant provisions of those acts. The sole issue on this application for judicial review is whether the Delegate's decision refusing to waive or cancel all or part of the penalty and interest assessed against Mr. Allen is unreasonable.

[8] Reasonableness review is carried out according to the revised framework for standard of review set out in the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Prior to *Vavilov*, the standard of review applicable to discretionary decisions of the Minister, such as those made under sections 220(3.1) of the *ITA* or 281.1(1) of the *ETA*, was also reasonableness: *Easton v Canada (Revenue Agency)*,

2017 FC 113 at para 41; *Carpenter v Canada (Attorney General)*, 2020 FC 753 at para 20; *Canada Revenue Agency v Telfer*, 2009 FCA 23 at para 24.

[9] Reasonableness review is a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. The focus is on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome: *Vavilov* at paras 83, 86 and 99. A reviewing court must determine whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

#### IV. Analysis

[10] In support of his request for relief, Mr. Allen had filed letters from his family physician, psychiatrist, and social worker, indicating that Mr. Allen experienced significant issues in addressing his tax returns due to the increasingly debilitating nature of his mental health conditions. However, the first-level decision maker was not satisfied that Mr. Allen's condition prevented him from remitting the tax returns in question, and denied Mr. Allen's request on that basis. While recognizing the challenges of his condition, the first-level decision maker found that after over 10 years since beginning treatment in 2007, it was reasonable to expect that Mr. Allen would have mechanisms in place to meet his tax filing obligations. Furthermore, the decision maker stated that Mr. Allen was able to maintain a business and earn a good income, demonstrating an ability to function.

[11] Mr. Allen sought a second-level review, based on the following submissions:

- Mr. Allen’s attending health care professionals indicated that he had significant problems addressing his tax returns over the years due to the often debilitating nature of his mental health conditions;
- Mr. Allen’s condition worsened after the initial diagnosis, and became “increasingly debilitating” such that putting mechanisms in place to ensure tax compliance was “not even fathomable”;
- the statement that Mr. Allen’s business and the income earned from it demonstrated an ability to function was far from the truth—he had to give up on the career that he went to college to pursue, as well as a second career after being on short-term disability and then dismissed from the position, and he survived through the generosity of family and friends who gave him some home construction work;
- in his late forties, Mr. Allen was finally able to function at a reasonable level, but he was diagnosed with coronary artery disease and had to hire an employee to continue operating his construction business;
- Mr. Allen had paid all principal tax amounts owing, with the only amounts outstanding being penalties and interest stemming from a time when he was plagued with debilitating mental illness; and
- Mr. Allen resorted to using his business line of credit to make monthly payments toward the outstanding penalties and interest, and the burden was not only physically and mentally stressful, but could force him to lay off his employee.

[12] Similarly to the first-level decision, the second-level Delegate was not satisfied that Mr. Allen's condition prevented him from remitting the tax returns in question. While acknowledging that Mr. Allen had been dealing with mental health issues that impacted his ability to meet obligations, the Delegate found that "as someone who ha[d] been dealing with these issues for many years", Mr. Allen could have put a mechanism in place to ensure compliance with his tax obligations. The Delegate found that Mr. Allen would have been aware he was having issues filing on time when he bulk filed his tax returns in 2004 and in 2008, and that those events had presented opportunities to put a mechanism in place to ensure future compliance. Similarly, there had been an opportunity to put such a mechanism in place when Mr. Allen opened a GST/HST account in 2008 in order to start filing GST/HST returns for his construction business. In view of Mr. Allen's long history of non-compliance since 2000, the Delegate found that Mr. Allen had not exercised reasonable care or acted quickly to remedy the situation.

[13] Mr. Allen submits that the Delegate erred by concluding it would have been reasonable to put tax compliance mechanisms in place, without having due regard to the medical evidence. He submits the Delegate's decision does not demonstrate an understanding of the nature, severity or degree of his illness, or what could be considered a reasonable action for a person suffering from debilitating mental health concerns. Mr. Allen submits that the Delegate ought to have followed up with the medical professionals for additional information, as invited in the letters.

[14] Furthermore, Mr. Allen asserts that the Delegate's reasoning is not logical or transparent. After accepting that the mental health issues afflicting him for many years impacted Mr. Allen's

ability to meet various obligations in his life, the Delegate illogically leapt to a conclusion that Mr. Allen could have put mechanisms in place to ensure compliance with his tax obligations since he had been dealing with these issues for many years. Mr. Allen argues that the Delegate's decision fails to explain why it would have been reasonable to put mechanisms in place. Also, Mr. Allen argues that the Delegate's reliance on his compliance history was unreasonable, as it coincided with Mr. Allen's diagnosis, and his illness was the very reason he was unable to comply with his obligations for many years.

[15] The respondent submits the Delegate properly considered Mr. Allen's submissions and supporting documentation. The respondent also submits the Delegate understood Mr. Allen's longstanding mental health issues and weighed the resulting challenges against his compliance history, the exercise of reasonable care, and any actions to remedy his tax situation. According to the respondent, it was open to the Delegate to find that after 20 years since the diagnosis, Mr. Allen could have put in place some mechanism to ensure future compliance with his tax obligations, and he had opportunities to do so when he bulk filed tax returns in 2004 and in 2008.

[16] The respondent also submits that the Delegate did not err by failing to contact the medical professionals directly. It was Mr. Allen's onus to demonstrate that his circumstances warranted relief, and to demonstrate how his mental health concerns rendered him unable to file tax returns and make tax payments in a timely manner: *Williamson v Canada (Attorney General)*, 2011 FC 383 at para 29.

[17] While I agree with the respondent that the Delegate did not err by failing to contact the medical professionals directly, in my view, Mr. Allen has established that the Delegate's decision is unreasonable, as the reasons for refusing relief are not sufficiently transparent, intelligible or justified in light of the record.

[18] The Delegate's letter summarizes Mr. Allen's submissions, but does not meaningfully address them: *Vavilov* at para 128. Mr. Allen's central argument was that mental illness rendered him unable to comply with his tax obligations during the period in question. The Delegate acknowledged that Mr. Allen's illness impacted his ability to meet obligations, but concluded that Mr. Allen could have put mechanisms in place to ensure compliance based on the fact that he has been dealing with mental health issues for many years. The Delegate then relied on events that occurred before or shortly after Mr. Allen first began treatment for mental illness in 2007—the bulk-filing of returns in 2004, and again in 2008, as well as Mr. Allen's opening of a GST/HST account in 2008—as examples of opportunities for Mr. Allen to put a mechanism in place to ensure future compliance. In the absence of an explanation, it is unclear how those events would have presented opportunities for Mr. Allen at the time.

[19] Furthermore, the Delegate concluded that Mr. Allen did not exercise reasonable care based on a failure to comply with filing obligations for many years, without addressing Mr. Allen's submissions that the very reason for his many years of non-compliance was the lengthy and debilitating nature of his illness. Mr. Allen stated that his condition worsened after his initial diagnosis, and was volatile over the years. He stated that he was only able to function at a reasonable level “in his late forties”. Mr. Allen filed letters from his attending medical



professionals, written in 2018, that indicated Mr. Allen had significant difficulties addressing his tax returns over the years, and described his condition as “increasingly debilitating” or “often debilitating”.

[20] I do not suggest that it was unreasonable for the Delegate to consider Mr. Allen’s history of non-compliance as part of the review. However, the Delegate did not adequately explain the reasons for expecting Mr. Allen to implement a compliance mechanism prior to the relevant tax years of 2009-2016, and the Delegate concluded that Mr. Allen failed to exercise reasonable care based on a long history of non-compliance without explaining that conclusion in the context of Mr. Allen’s evidence and submissions on the reasons for his years of non-compliance.

[21] Mr. Allen also submits the Delegate erred by failing to consider the financial and emotional hardship of the penalties and interest on him, his business, and his employee. Mr. Allen argues that the first-level decision maker was wrong to find that he was able to maintain a business and earn a good income, demonstrating an ability to function. Mr. Allen states that he should be able to respond to this incorrect assumption with evidence of his precarious financial situation. He seeks to introduce information about his financial position in this application for judicial review.

[22] In my view, the Delegate did not commit a reviewable error by failing to consider financial hardship. I agree with the respondent that Mr. Allen did not raise financial hardship as a ground in support of his request for relief, and that the Delegate was not in a position to consider his future financial concerns at the time of the decision. Also, the newly introduced

information was not before the decision maker, and should not be considered by this Court on judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19; *PPSC Enterprises Limited v Canada (National Revenue)*, 2007 FC 784 at para 16. While it may have been helpful for the Delegate to address Mr. Allen's argument about the first-level finding, the Delegate did not rely on Mr. Allen's business or income as a factor, and Mr. Allen's financial situation is not relevant to the reasonableness of the Delegate's decision.

V. **Conclusion**

[23] For the reasons above, the Delegate's decision denying Mr. Allen's application for relief is unreasonable. This application for judicial review is allowed.

[24] Mr. Allen did not request costs, and no costs are awarded.

**JUDGMENT in T-25-20**

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

1. The Delegate's decision is set aside and the matter returned for redetermination by a different delegate of the Minister.
2. The style of cause is amended to name the Attorney General of Canada as the respondent.
3. No costs are awarded.

"Christine M. Pallotta"

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Judge

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

**DOCKET:** T-25-20

**STYLE OF CAUSE:** DAVID MICHAEL ALLEN v ATTORNEY GENERAL  
OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO BY WAY OF  
VIDEOCONFERENCE

**DATE OF HEARING:** JANUARY 14, 2021

**JUDGMENT AND REASONS:** PALLOTTA J.

**DATED:** APRIL 26, 2021

**APPEARANCES:**

David Michael Allen

FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Acinkoj Magok

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Attorney General of Canada  
Toronto, Ontario

FOR THE RESPONDENT