

Federal Court



Cour fédérale

Date: 20240131

Docket: T-545-23

Citation: 2024 FC 159

Ottawa, Ontario, January 31, 2024

PRESENT: Madam Justice Walker

BETWEEN:

ANDRE BRAND

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Brand seeks the Court's review of a decision by the Minister of National Revenue (Minister) to refuse his second request for relief from arrears interest imposed under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (*ITA*) in respect of undeclared income for the 2019 taxation year. The refusal is set forth in a letter from the Minister's delegate dated March 7, 2023 (the Decision).

[2] Mr. Brand's request for taxpayer relief was made in reliance on subsection 220(3.1) of the *ITA*, a provision that permits the Minister to waive or cancel all or a portion of any penalty or interest otherwise payable by a taxpayer. Subsection 220(3.1) is one of a number of taxpayer relief provisions in the *ITA* intended to moderate the application of its many rigid requirements. Broadly stated, these provisions permit the Minister to provide discretionary relief to taxpayers who, through personal misfortune or circumstances beyond their control, could not comply with their federal income tax obligations. A Minister's delegate is an employee of the Canada Revenue Agency (the CRA) who is authorized by the Minister to make decisions under subsection 220(3.1).

[3] I will grant this application for judicial review because the CRA's Decision fails to address two important elements of Mr. Brand's request, specifically the CRA's contributing errors and Mr. Brand's description of the hardship suffered due to his omission of unanticipated investment income from his 2019 tax return.

[4] I commend both Mr. Brand and Me Turcotte, counsel for the Respondent, for their concise arguments and candid responses to my questions. I also commend Me Turcotte's professionalism and cooperative approach in this matter.

I. Overview

[5] Mr. Brand filed his tax return for 2019 on time on May 25, 2020. He and his wife were not living at home at that time due to the COVID-19 pandemic and Mr. Brand indicates that he did not have access to the majority of the tax slips he would normally receive by mail. Rather, he

downloaded all available reporting slips from his CRA 'My Account' using a TurboTax application and filed the tax return from a remote location.

[6] On June 4, 2020, the CRA issued a notice of assessment for Mr. Brand's 2019 taxation year based on the information in his return as filed.

[7] At the time Mr. Brand prepared his 2019 tax return, certain T5 slips from RBC Investors Service Trust (the RBC T5 Slips) did not appear in his My Account with the result that the income reflected on those T5 slips, which was substantial, was not included in the return. The RBC T5 income had accumulated over 10 years in an RBC dividend securities investment account. Mr. Brand later learned from RBC that the full amount of accrued income became taxable in the 2019 year due to a legislative change.

[8] On December 10, 2021, the CRA sent Mr. Brand an unreported income letter that stated its records indicated he was in receipt of investment income in 2019 that had not been fully reported (the Unreported Income Letter). The CRA requested a completed copy of Mr. Brand's Worksheet for the tax return and all T3 and T5 slips and/or other documents used to calculate reported investment income. According to the Unreported Income Letter, a spreadsheet listing the T3 and T5 income slips then on file with the CRA was enclosed (the Spreadsheet). However, the Spreadsheet is not included as an attachment to the copy of the Unreported Income Letter in either Mr. Brand's or the Respondent's record, and Mr. Brand affirms it was not included with the letter he received.

[9] Upon receipt of the Unreported Income Letter, Mr. Brand contacted the CRA. He was advised to verify his income tax return against his My Account. Mr. Brand did so and confirmed that the T3 and T5 slips he used to prepare his 2019 tax return in 2020 corresponded with the data in My Account.

[10] On June 23, 2022, the CRA issued a Notice of Reassessment for Mr. Brand's 2019 taxation year that included the income from the RBC T5 slips. The omitted income represented approximately 75% of Mr. Brand's total net income for 2019. Arrears interest was charged on the amount reassessed but no penalty was imposed because it was Mr. Brand's first income omission from his tax returns in the prior four years.

[11] Mr. Brand submitted a first request for interest relief pursuant to subsection 220(3.1) on June 14, 2022 but the Minister denied the request on November 23, 2022 (the First Relief Decision).

[12] On December 2, 2022, Mr. Brand requested a second review of the interest imposed in respect of the unreported 2019 RBC income (Second Request), stating that:

- He contacted RBC after receipt in June 2022 of the Notice of Reassessment and was informed that the unreported income derived from a long-term RBC mutual fund that matured in 2019. The fund was originally designed to produce dividends but the nature of fund income changed due to a change in law, with the result that income in the fund was converted from dividend to interest income (a T5 and not a T3 slip).
- Mr. Brand had opted not to receive annual statements from RBC. If he had known of this RBC income, Mr. Brand would have sought investment advice to redistribute the tax burden.

- Mr. Brand relied on the CRA to provide all required tax documents via My Account, noting that the CRA encourages taxpayers to use the download facility to ensure no relevant income information is missed.
- The RBC T5 slips were not posted in My Account at the time Mr. Brand prepared and filed his 2019 return. In fact, as of the date of his Second Request (December 2, 2022), the RBC T5 slips were not in My Account.
- If the CRA had received the missing T5 slips in February 2020 (as it states), the CRA was responsible for making them accessible via My Account.
- In order to pay the over \$70,000 of arrears interest assessed, Mr. Brand and his wife were required to cash the underlying investments at the worst time possible. Although 70 years of age, they continue to work part-time to ensure they remain self-sufficient.

[13] Mr. Brand emphasized in concluding his Second Request that there was no intention on his part to omit the RBC T5 slips.

II. Decision under review

[14] The Minister's delegate first emphasized that Canada's tax system is one of self assessment in which each taxpayer bears responsibility for accurately complying with their obligations under the *ITA*, including the obligation to file a complete tax return that discloses all of the taxpayer's income for the applicable year. The Minister's delegate then stated:

Our records show that you filed the tax return on May 25, 2022[2][*sic*], and the T5 slips for RBC Investor Services Trust, which were omitted in initial filing, were processed in the system on February 24, 2020. It shows that the T5 slips omitted were available on time from the CRA with valid addresses displayed, yet we have no record of a conversation between you and a CRA representative regarding the missing slip. Moreover, the omitted income represents more than 75% of your total net income.

[15] The Minister's delegate was unable to conclude that Mr. Brand was prevented from reporting the RBC investment income and, therefore, relief for the arrears interest charged was not warranted.

III. Issues and Standard of Review

[16] Mr. Brand raises a number of specific points in his submissions, all of which centre on the practical availability of the RBC T5 Slips in light of the COVID-19 pandemic and the CRA's conduct. In essence, Mr. Brand's arguments question whether the Decision was reasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25 (*Vavilov*); see also *Carpenter v Canada (Attorney General)*, 2020 FC 753 at para 20; *Bertone v Canada (Revenue Agency)*, 2023 FC 278 at para 16).

[17] My role is to assess the reasons given in the Decision and consider whether the Minister's delegate applied the relevant law to the facts of the case in a rational and coherent way that justifies the conclusion reached (*Vavilov* at paras 86, 95). If so, I must give deference to the Decision made and not substitute my own analysis and conclusion. Conversely, if there are serious shortcomings in the Decision such that it does not reflect the required degree of justification, intelligibility and transparency, I must set aside the Decision and remit Mr. Brand's case for reconsideration (*Vavilov* at para 100).

IV. Legislative background

[18] Subsection 220(3.1) of the *ITA* permits the Minister to waive or cancel any penalty or interest otherwise payable by a taxpayer. The Minister must take into account all relevant

considerations in determining whether to grant taxpayer relief pursuant to the subsection and must base their decision on the purpose of the provision, that of fairness (*Canada v Guindon*, 2013 FCA 153 at para 58).

[19] The CRA has developed administrative guidelines that inform the exercise of the Minister's discretion. Although the Minister may not improperly restrict their discretion when making a decision, the guidelines in Information Circular IC07-1R1 *Taxpayer Relief Provisions* (the Circular) are a useful starting point. Paragraph 23 of the Circular sets out the circumstances that may warrant relief:

23. The minister of national revenue may grant relief from penalties and interest where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation or requirement:

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

[20] Paragraph 24 of the Circular recognizes that the guidelines are not binding in law and that a Minister's delegate may grant relief if a taxpayer's circumstances do not fall within the categories listed in paragraph 23 (see *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at para 27).

V. Analysis

[21] Canada's income tax regime is built on the principle of self-assessment: each taxpayer is required to conduct their financial affairs in compliance with the *ITA* and all regulations administered by the CRA, including the requirement to file timely and accurate returns. I agree

with the Respondent that this principle is the cornerstone of the Decision and of the individual conclusions drawn by the Minister's delegate after review of Mr. Brand's file.

[22] The Minister's delegate premised their denial of relief from the arrears interest imposed on the 2019 unreported RBC income on three conclusions drawn by the CRA agent (the Agent) assigned to assess Mr. Brand's Second Request. The Agent's analysis, conclusions and recommendation are set out in a Taxpayer Relief Fact Sheet (the Fact Sheet). The reasons for the Agent's recommendation that the Minister's delegate deny Mr. Brand's Second Request were:

1. Mr. Brand had exercised "somewhat" reasonable care in conducting his tax affairs. In addition to the omission of the RBC T5 income in 2019, Mr. Brand missed instalment payments in 2016, 2018 and 2021 and omitted income of \$8,500 (approx.) from his 2014 tax return. The Agent noted the unreported income letter sent to Mr. Brand on December 10, 2021 but does not acknowledge that the Spreadsheet listing the T3 and T5 slips on file with the CRA was not attached to the letter.
2. Mr. Brand was not prevented from meeting his obligations to file a complete tax return by circumstances beyond his control. The Agent acknowledged Mr. Brand's argument that the RBC T5 Slips were not available in My Account. Nevertheless, the RBC T5 Slips were processed in the CRA systems and available by February 24, 2020, three months before Mr. Brand filed his 2019 tax return.
3. The omitted income represented more than 75% of Mr. Brand's total net income, a significant amount which he should have noticed when filing the return.

[23] In turn, the Minister's delegate gives the following explanations for denying relief:

- A. Mr. Brand filed his 2019 tax return on May 25, 2020, while the RBC T5 Slips were processed in the system on February 24, 2020. Those Slips were available on time from the CRA with valid addresses displayed, "yet we have no record of a conversation between you and a CRA representative regarding the missing slip".
- B. The omitted income represented more than 75% of Mr. Brand's total net income for the year.
- C. Mr. Brand was not prevented from reporting his income in full in 2019 and, therefore, relief for the arrears interest charged is not warranted.

[24] Mr. Brand does not dispute his responsibility to file accurate tax returns but argues that, in the context of his request for relief and the principle of fairness, the Minister's delegate failed to consider the exceptional circumstances engendered by the COVID-19 pandemic and the CRA's own role in his omission of the income reflected on the RBC T5 Slips. Mr. Brand prepared and filed his 2019 tax return remotely in reliance on the information in his My Account, the use of which is encouraged by the CRA. Mr. Brand argues that his ability to file an accurate return was compromised by the CRA's failures (1) to make available the RBC T5 Slips in My Account, and (2) subsequently, to include the Spreadsheet referenced in the Unreported Income Letter. These failures, coupled with the automatic reinvestment of the income by RBC, meant that he had no knowledge of the income and no way to mitigate the consequences of its inclusion in income between 2019 and 2022.

[25] The Minister's delegate made no error in focussing their consideration of the Second Request on the importance of Mr. Brand's obligations to file complete and accurate tax returns but the principle of self-assessment is not in every case a complete response to a taxpayer request for relief. In the present case, there is no reference in the Fact Sheet or in the Decision to the guidelines that provide a framework of analysis for CRA agents and decision makers assigned to respond to taxpayer requests for relief. In fact, neither the Minister's delegate nor the Agent tasked with review of the Second Request addressed either of Mr. Brand's arguments regarding the CRA's errors in managing his file or the hardship occasioned by the imposition of arrears interest on an omission from his 2019 tax return that the Respondent accepts was unintentional. These arguments raised two of the three factors identified as relevant in paragraph 23 of the Circular.

[26] I find that the Decision is not transparent or justified against the relevant facts and the principle of fairness that underlie subsection 220(3.1) of the *ITA* for the following reasons.

[27] First, I find that the failure by the Minister's delegate and the Agent to consider the impact of the CRA's errors on Mr. Brand's ability to mitigate the unanticipated inclusion in his 2019 income of a significant sum is a reviewable error that alone warrants the Court's intervention.

[28] The parties' records establish two CRA errors that contributed to the arrears interest in question and to the period of time during which the interest accrued. First, the Respondent does not dispute Mr. Brand's evidence that the RBC T5 Slips were not in his My Account both when he prepared and filed his 2019 return in May 2020 and when he re-checked My Account after receipt of the Unreported Income Letter in December 2021. The CRA gives no explanation for the omission of the RBC T5 Slips from My Account. The Agent and the Minister's delegate are silent on this subject and on the effect of the omission on Mr. Brand. They state only that the RBC T5 Slips were available by February 24, 2020, well before the filing deadline. I agree with the Respondent that there is no evidence that the CRA guarantees that documents in My Account are accurate and complete. I also agree that Mr. Brand was responsible for verifying his tax information but, in my view, the Minister's delegate was required to weigh Mr. Brand's responsibility to confirm the accuracy of his reported income against the CRA's error, taking into account the exceptional circumstances of the early months of the pandemic. The process of weighing the strict provisions of the *ITA* against the particular circumstances put forth by a taxpayer is central to the exercise of discretion contemplated by subsection 220(3.1).

[29] Second, it is clear that the CRA failed to append the Spreadsheet of T3 and T5 slips to the Unreported Income Letter. Mr. Brand acted promptly after receipt of the Letter by calling the CRA. The CRA representative instructed him to check his 2019 tax return against the T3 and T5 slips in My Account. Mr. Brand did so. The information in My Account remained consistent with the information included in his 2019 return and he took no action.

[30] The CRA's omission of the Spreadsheet compromised Mr. Brand's ability to address the issue of arrears interest in December 2021. In contrast, the Agent states in the Fact Sheet that Mr. Brand was only "somewhat" attentive to his own affairs because he received the Unreported Income Letter in December 2021 but did not clear the majority of the balance owing in his account until June 14, 2022. Effectively, the Agent's conclusion was that Mr. Brand contributed to the accumulation of arrears interest during the intervening six month period. This conclusion ultimately factored into the Agent's negative recommendation to the Minister's delegate. Again, Mr. Brand had no knowledge of the unreported RBC income or of the arrears interest until after receipt of the Notice of Reassessment on June 23, 2022. The failure by the Agent and the Minister's delegate to consider the CRA's omission of the Spreadsheet therefore undermines the justification in the Decision for the denial of relief.

[31] The Minister's delegate faults Mr. Brand for failure to call the CRA regarding the missing RBC T5 Slips. However, this statement ignores the fact that Mr. Brand did not know of their existence. Further, the Agent and the Minister's delegate rely on the fact that the missing income represented 75% of Mr. Brand's total net income for 2019. In their view, the quantum of the RBC income should have led Mr. Brand to take immediate action. However, Mr. Brand

states that the full amount of the RBC income was automatically reinvested by RBC. In other words, the reference in the Decision to the quantum of the omitted RBC income is a red herring because Mr. Brand did not receive payment of the income out of his investment account. He was not put on notice by a sudden increase in his bank account, for example. In fairness to the Minister's delegate, the record before the Court is ambiguous as to whether the automatic reinvestment by RBC was made clear to the CRA. If that is the case, the Minister's delegate cannot be faulted for their conclusion that the amount of the RBC income should have been noticeable to Mr. Brand as a windfall in his account.

[32] Finally, the Minister's delegate did not address Mr. Brand's submissions in the Second Request regarding the hardship he and his wife suffered due to the addition of arrears interest to what was already a very large tax obligation in 2019. The Agent's failure to take hardship into account is not itself a reviewable error in this case but the oversight contributes to the lack of justification for the Decision.

[33] In summary, the denial of Mr. Brand's request for relief from arrears interest in respect of his 2019 taxation year must be reconsidered. The Decision fails to reasonably explain the reasons for the denial against the factual and legal context of this matter. A different Minister's delegate must weigh (1) the importance of self-assessment to the Canadian tax system and Mr. Brand's reliance on the tax slips posted to My Account without confirming the accuracy of the information he retrieved; against (2) the CRA's failure to download the RBC T5 Slips to My Account and omission of the Spreadsheet from the Unreported Income Letter, Mr. Brand's

personal circumstances at the beginning of the COVID-19 pandemic, and his brief hardship submissions.

VI. Conclusion and Costs

[34] The application for judicial review will be granted.

[35] At the conclusion of the hearing, the parties agreed that the successful party should be entitled to lump sum costs of \$500.00. I see no reason to depart from the parties' negotiated amount and will award costs to Mr. Brand in the agreed amount.

JUDGMENT IN T-545-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. Costs are awarded to the applicant, Mr. Brand, in the lump sum of \$500.00.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-545-23

STYLE OF CAUSE: ANDRE BRAND v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: MONTRÉAL, QUÉBEC

DATE OF HEARING: JANUARY 17, 2024

JUDGMENT AND REASONS: WALKER J.

DATED: JANUARY 31, 2024

APPEARANCES:

Mr. Andre Brand

FOR THE APPLICANT
(ON HIS OWN BEHALF)

M^e Audrey Turcotte

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Montréal, Québec

FOR THE RESPONDENT