Date: 20071130

Docket: T-1921-06

Citation: 2007 FC 1255

BETWEEN:

3651541 CANADA INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of the second level Fairness decision of Guy Daigneault, Acting Assistant Director of Montreal Tax Services Office, Enforcement Division, at the Canada Revenue Agency (the Minister's Delegate), refusing to waive the penalties and interest owed by the applicant and its predecessor corporations. The applicant submits that the Minister's Delegate failed to take account of the ongoing health problems suffered by Mr. Friedmann, the individual responsible for filing the applicant's tax returns. The applicant argues that it may be that these health problems were not the cause of his failure to comply with the *Income*

Tax Act, R.S.C. 1985, c. 1 (5th Supp.), (the Act) but that the Minister's Delegate completely failed to address the evidence of ongoing illness after December 2001, and in particular the applicant's submission that Mr. and Mrs. Friedmann "étaient sous l'effet d'une batterie de puissants medicaments qui affectaient grandement leurs capacités."

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[2] Eva and Joseph Friedmann are the sole shareholders, directors, and officers of the applicant and its predecessor corporations, 3531856 Canada Inc. and 3531864 Canada Inc. (the "Predecessor Corporations"). The three corporations owe interest and penalties for the late filing of their 2001-2003 tax returns.

[3] In the fall of 2000, Mr. Friedmann was diagnosed with cancer, and underwent chemotherapy treatments until December 2001. Mr. Friedmann has provided affidavits from his doctors to the effect that his health condition remained poor until the end of 2002. Mr. Friedmann also affirms that he remained on anti-depressants and other medications throughout 2002 and 2003.

[4] During this time, Mrs. Friedmann also suffered from a variety of illnesses. The applicant also notes that Mrs. Friedmann has no knowledge of the business or its financial affairs.

[5] In July 2002, the applicant's accountant sought extensions of time to file the tax returns of the applicant and its Predecessor Corporations.

[6] In April 2004, the applicant contacted the Canada Revenue Agency (the "CRA") to request waiver of the penalties and interests that had accumulated.

[7] On July 23, 2004, the tax returns for the applicant and its Predecessor Corporations were filed.

[8] In September 2004, the CRA informed counsel for the applicant that the request under the Voluntary Disclosures Program was denied on the basis that the disclosure was not actually voluntary. However, on the basis of the Friedmanns' health problems, the file was sent for consideration under the Fairness provisions of the Act.

[9] On March 31, 2006, the CRA wrote to inform the applicant that its request was being denied. It noted that "[a]fter examining the circumstances involved, we note that there were no circumstances beyond your control, which affected the company's ability to file the tax return on time."

[10] The applicant requested a review of this decision. On October 12, 2006, the applicant's request for a waiver of the penalties and interest was again denied.

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[11] The Minister's Delegate relies upon Information Circular 92-2 and the case of *Young v. R.* (1997), 138 F.T.R. 37, 98 D.T.C. 6028, to determine that the question in this application was "de

savoir si les maladies ont empêché les monsieur et madame Friedmann de produire les déclarations de leurs sociétés à temps."

[12] The Minister's Delegate notes that Mr. Friedmann had completed his chemotherapy at the end of 2001, and thus had from six months to three years after the end of his treatment to file the returns in question. The Minister's Delegate also notes that Mr. Friedmann did not ask his accountant to put his affairs in order until the fall of 2003, twenty months after completion of his medical treatment. Furthermore, the corporations in question have always been late in filing their returns.

[13] Finally, the Minister's Delegate contrasts the corporations' tax returns with Mr. and Mrs. Friedmann's individual returns. According to the Minister's Delegate, the Friedmanns' accountant should have had access to all the information required to fill out the tax returns for the corporations in question. Furthermore, the Friedmanns were able to engage in complex fiscal planning and transactions, but apparently did not have time to prepare the tax returns for their corporations, although these were less complex than their personal tax returns.

[14] The Minister's Delegate also denied the applicant's request for relief from the interest and penalties accumulated during the course of the assessment.

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[15] The relevant provisions of the Act read as follows:

220. (2.01) The Minister may authorize an officer or a class of officers to exercise powers or perform duties of the Minister under this Act.	**220.** (2.01) Le ministre peut autoriser un fonctionnaire ou une catégorie de fonctionnaires à exercer les pouvoirs et fonctions qui lui sont conférés en vertu de la présente loi.
[…]	[…]
220. (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.	**220.** (3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

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[16] The applicant submits that the Minister's Delegate erred by taking account of irrelevant considerations and ignoring relevant ones. In particular, the applicant submits that the Minister's Delegate incorrectly concluded that Mr. Friedmann's illness only affected him until December 2001. In addition, the applicant takes issue with the Minister's Delegate's reliance on the fact that the Friedmanns had filed their personal income tax returns on time, and had retained a professional accountant to deal with their finances.

[17] With regard to the standard of review of the Minister's decision under the Fairness provisions of the Act, the Federal Court of Appeal has determined that the applicable standard is that of reasonableness (*Lanno v. Canada (Customs and Revenue Agency)* 2005 FCA 153, 2005 D.T.C. 5245 and *Comeau c. Canada (Agence des douanes et du revenu)*, 2005 FCA 271, 361 N.R. 141). While this standard should be customized to suit the facts and issues of each particular case, I would not find, nor did the parties propose, any reason to deviate from the standard of reasonableness in this case (*Gandy v. Canada (Customs and Revenue Agency)*, 2006 FC 862, 2006 D.T.C. 6510).

[18] Review of a decision on the standard of reasonableness requires that the Court not intervene in a decision unless it is "not supported by any reasons that can stand up to a somewhat probing examination" (*Cartier-Smith v. Canada (Attorney General)*, 2006 FC 1175, 2006 D.T.C. 6707 at para. 19). This can occur, for example, if the Minister has taken account of irrelevant considerations, or failed to take account of relevant considerations.

[19] The Information Circular 92-2, entitled "Guidelines for the Cancellation and Waiver of Interest and Penalties," outlines how the Minister's discretion to waive all or a portion of any interest or penalties payable should be exercised (the Guidelines). Essentially, penalties and interest should be waived when the failure to comply with the Act results from circumstances beyond the taxpayer's control. The Guidelines go on to provide some examples of situations where this may be the case, including in the event of a serious illness or accident, or of serious emotional or mental distress. However, the Guidelines do not have the force of law and cannot fetter the Minister's

discretion (see, for example, *Ross v. Canada (Customs and Revenue Agency)* 2006 FC 294, 289 F.T.R. 160).

[20] The burden lies on the party seeking a waiver of interest and penalties to provide the Minister with the necessary evidence to determine whether the failure to comply with the Act was due to circumstances beyond the control of that party, in this case, due to the illnesses suffered by Mr. Friedmann and his wife (*Young*, *supra*). Evidence which was not before the original decision-maker should not be considered on judicial review (*Ross*, *supra*).

[21] Applying these principles to the present case, I find, on the basis of the information which was before the Minister, that the applicant has failed to show that the decision to refuse to waive the penalties and interest accumulated by the applicant and its Predecessor Corporations was unreasonable. The applicant submits that the Minister's Delegate failed to consider the serious mental and emotional distress the Friedmanns suffered during the relevant period. However, this was never specifically raised before the Minister's Delegate, the focus of the request being on the Friedmanns' illnesses and medication.

[22] The applicant also takes issue with the Minister's Delegate's comparison between the tax returns of the corporations in question and Mr. and Mrs. Friedmanns' personal tax returns, along with the fact that the Friedmanns have an accountant who could have prepared the returns, pointing to *Isaac v. Canada (Attorney General)*, 2002 FCT 410, 218 F.T.R. 314. In that case, the Court quashed the Minister's decision not to waive interest and penalties because the Minister had relied

upon a previous application by the corporation of which the individual applicant had been sole director. According to Madam Justice Heneghan:

> [25] In my opinion, the delegate of the Minister erred in law when she took into consideration these facts [related to the application by the corporation] which are irrelevant to the present application. The application of the Applicant is a different matter than that of the company. . . .

[23] I would not find that this reasoning applies in this case. Mr. Friedmann's ability to deal with other matters, including his ability to file other tax returns, and the possibility that another person could have prepared the returns in question, are relevant considerations in assessing whether it was his illness which prevented him from being able to file those returns. In that context, I do not find that it was unreasonable for the Minister's Delegate to conclude that Mr. Friedmann's health problems were not the cause of his failure to comply with the Act, even if there was evidence to the effect that the Friedmanns were on a number of medications after December 2001. Indeed, there was no medical opinion before the decision-maker that Mr. Friedmann was unable, because of his illness and medications, to file the tax returns of the applicant and its Predecessor Corporations.

[24] The question here is not whether I would have appreciated the factual situation differently, but whether the Minister's Delegate's decision was reasonable.

[25] Finally, the applicant sought cancellation of the interest and penalties which had accumulated during the assessment, and states that the Minister's Delegate relied on paragraph 6(a) of the Guidelines to deny this request, thus fettering his discretion. However, a reading of the Minister's Delegate's decision demonstrates that it was actually the applicant which had relied upon

paragraph 6(a) to seek cancellation of the interest and penalties. Paragraph 6(a) suggests consideration of "processing delays which result in the taxpayer not being informed, within a reasonable time, that an amount was owing." The Minister's Delegate determined that, since the applicant had known since July 2004 that an amount was owing, this paragraph did not apply. The applicant did not raise any other basis for cancellation of the interest and penalties which had accumulated during the assessment. In my opinion, it was not unreasonable for the Minister's Delegate to not consider what the applicant did not raise.

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[26] For all the above reasons, the application for judicial review is dismissed, with costs.

"Yvon Pinard"

Judge

Ottawa, Ontario
November 30, 2007

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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