

Date: 20090123

Docket: T-919-08

Citation: 2009 FC 74

Ottawa, Ontario, January 23, 2009

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

NORTHVIEW APARTMENTS LTD.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Minister of National Revenue (the Minister) denying relief from interest and penalties for a total amount of \$6,101.70 as of March 21, 2008, arising from the reassessment of Northview Apartments Ltd., 1998 to 2002 tax returns under s. 220(3.1) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1 (the Act), one of a set of provisions commonly referred to as “the taxpayer relief provisions”. For the present proceedings and by order of this Court dated July 4, 2008, Mr. Irwin Fineberg, a practicing dentist and president of Northview Apartments Ltd., was authorized to represent the applicant.

[2] On November 29, 2007, the applicant's initial fairness request was allowed in part, and it was granted partial relief from late filing penalties for the taxation years of 1999 and 2000 and the arrears interest and installment interest for the period from November 10, 1999 to December 31, 2001. The applicant invoked death and sickness of its administrators during the relevant period to sustain its request for relief. On November 21, 1997, its then president Polly Namerow passed away. Approximately one year later, Mrs. Charlotte Fineberg succeeded as president of the applicant. Suffering from a brain tumor, she died on March 10, 2001. She was replaced by Mr. Fineberg on January 7, 2002. Meanwhile, Mr. Fineberg underwent surgery to be implanted a Pacemaker. Furthermore, as "a practicing dentist who had been away from the financial details of the company", Mr. Fineberg, as new president invoked finding it "most difficult to arrange and receive reliable professional accounting services." Accordingly, "the sickness of Mrs. Charlotte Fineberg and Dr. Irwin Fineberg" was stated as basis for the partial relief. Nonetheless, the balance of interest and penalties remained payable.

[3] It is the applicant's second fairness request that underlies the decision at issue in this application. To support its second level application, the applicant made several of the same arguments found in its initial fairness request but additionally invoked third-party delay resulting from the "accountants, in possession of the company's prior financial detail [being] the party exclusively qualified to file its tax returns". Moreover, the penalties and interests due were said to "[constitute] yet another hardship so severe as to be considered both excessive and unfair". It appears that no further evidence was presented in support of the second application. Consequently,

by letter dated May 8, 2008, a Minister's delegate, Mr. Gilles Lavergne, refused to provide additional relief from interest and penalties to the applicant, stating that "the corporation [had] not exercised a reasonable amount of care in conducting affairs and [had] not acted quickly to remedy any delay or omission. Under the self-assessment system of taxation, the responsibility for filing a return of income on or before the filing due date rests with the corporation." The applicant now contests Mr. Lavergne's decision.

[4] Subsection 220 (3.1) of the Act, commonly referred to as a taxpayer's relief application, reads as follows:

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.

[5] Subsection 220(3.1) of the Act gives the Minister discretionary authority to waive or cancel all or any part of a penalty or interest otherwise payable under the Act by a taxpayer or a partnership. According to the *Guidelines for the Cancellation or Waiver of Penalties and Interest*, as a general rule, the Minister will grant relief where the default giving rise to the penalty or interest in question is due to: extraordinary circumstances beyond the applicant's control; actions of the Canada Revenue Agency (CRA); or inability to pay or financial hardship. The Minister may also grant relief if a taxpayer's circumstances do not fall within the previously stated situations. (Information Circular IC07-I, *Taxpayer Relief Provisions*, May 31, 2007, paragraphs 23, 24).

[6] Finally, other factors may come into play and possibly limit the amount of interest relief. Thus, the following factors will also be considered when determining whether or not the CRA will cancel or waive penalties and interest: (a) whether or not the taxpayer has a history of compliance with tax obligations; (b) whether or not the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued; (c) whether or not 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 (d) whether or not the taxpayer has acted quickly to remedy any delay or omission. (Information Circular IC07-I, *Taxpayer Relief Provisions*, May 31, 2007, paragraph 33).

[7] When the CRA issues a decision not to grant the taxpayer the relief requested, the Act provides that the taxpayer can request a second level of review to be performed by the CRA. This

second level of review is made by the Director of the relevant district office or taxation centre. In the event that taxpayer relief is refused as a result of a second level of review, then an unsatisfied applicant may apply to the Federal Court for judicial review of the taxpayer relief decision made by the CRA. (Information Circular IC07-I, *Taxpayer Relief Provisions*, May 31, 2007, paragraphs 103-108).

[8] With regards to the filling of a request, the guidelines set forth that taxpayers should provide all relevant information to support their request including any relevant documentation. In cases involving financial hardship (inability to pay), a meaningful payment arrangement which covers at least the tax and the penalty part, if applicable, and full financial disclosure including a statement of income and expenses, as well as a statement of assets and liabilities should be provided.

(Information Circular IC07-I, *Taxpayer Relief Provisions*, May 31, 2007, paragraph 32 (g)). Finally, as to third-party actions, taxpayers are generally considered to be responsible for errors made by third parties acting on their behalf for income tax matters. However, there may be exceptional situations, where it may be appropriate to provide relief to taxpayers because of third-party errors or delays. (Information Circular IC07-I, *Taxpayer Relief Provisions*, May 31, 2007, paragraph 35).

[9] The standard of review applicable to a decision made by the Minister under its discretionary authority to waive or cancel all or any part of a penalty or interest otherwise payable under the Act by a taxpayer is now that of “reasonableness” In *Dunsmuir v. New Brunswick*, 2008 SCC 9, this standard is defined in the following manner:

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[10] Although it is not necessary for every element of the reasoning in the impugned decision to pass a test for reasonableness, the reviewing judge must still be satisfied that the administrative decision-maker made a reasonable decision, on the whole, after fully reviewing the taxpayer's file and taking all the relevant criteria into account.

[11] The applicant raises several arguments justifying a review of the May 8, 2008 decision. Firstly, the applicant submits that the lack of reasoning of the November 29, 2007 decision prevented it from addressing in its second level review application those specific reasons the Minister was to have set out for its denial of full relief. Reasons were provided to the applicant justifying the partial relief, the whole in accordance with the guidelines (Information Circular IC07-I, *Taxpayer Relief Provisions*, May 31, 2007, paragraph 11). Thus, by specifically stating “the sickness of Mrs. Charlotte Fineberg and Dr. Irwin Fineberg” as grounds for its partial relief, the

Minister properly used of its discretion and rejected all other justifications submitted by the applicant. Accordingly, the applicant further emphasized third-party delay as grounds for relief in its second level review application. Moreover, the Minister also rejected said justification. Thus, this Court has steadily refused to accept that a taxpayer's relief application be validly based on the fault of the third party (*Légaré v. Canada Customs and Revenue Agency*, [2004] 5 C.T.C. 44, 2003 FC 1047 at paragraph 10; *Tadross v. Canada (Minister of National Revenue)*, [2005] 1 C.T.C. 201, 2004 FC 1698 at paragraphs 10-11; *Babin v. Canada (Canada Customs and Revenue Agency)*, [2005] 4 C.T.C. 1, 2005 FC 972 at paragraph 12). It is the essence of our tax collection system that taxpayers are sole responsible for self-assessment and self-reporting to the CRA. Thus, it was open to the Minister to conclude that the applicant had been negligent in the conduct of its tax affairs in waiting for more than eight years for a notice from its accountant to ultimately remedy to its failure to comply with its tax reporting obligations.

[12] Furthermore, the applicant submits that the Minister failed to take account of all the evidence in his file. While the May 8, 2008 decision explicitly states that all documentation provided was reviewed, extraordinary circumstances should have been sustained with supporting documentation provided by the applicant, as required by the guidelines. (Information Circular IC07-I, *Taxpayer Relief Provisions*, May 31, 2007, paragraph 32 (g)). Thus, no documentation sustains the applicant's allege financial hardship. Without evidence to that effect, the Minister has no obligation to further enquire on the inability to pay of the applicant. Also, the Report on a Fairness Request dated May 22, 2008 submitted as Exhibit A to Mr. Gilles Lavergne's affidavit further

details the analysis of the applicant's submissions in whole. I fail to see any reviewable error that would affect the result in this case.

[13] Whether or not Mr. Fineberg had multiple oral communications with his accountant, it remains that he satisfied himself by the apparent negligence of the latter during the eight year period in question.

[14] If Mr. Fineberg's version of events is true, perhaps he may have a direct recourse against his accountant; however, this aspect of the claim is separate from CRA's involvement (*Babin v. Canada (Customs Revenue Agency)*, [2005] 4 C.T.C. 1, 2005 FC 1195 at paragraph 21). In this regard, the evidence considered by the decision-maker reveals that Mr. Fineberg had already been contacted by the fiscal authorities in 2002 and 2005 about missing tax returns. The tax returns were eventually filed more than two years after the last time CRA requested compliance with the law. Despite such requests, Mr. Fineberg apparently did not even make a single step to mandate another accountant.

[15] In final analysis, the Court finds the impugned decision reasonable in the circumstances and also dismisses the applicant's argument that there was a breach to the rules of natural justice or procedural fairness.

[16] For these reasons, the present application for judicial review must fail. In the Court's exercise of its discretion, there will be no costs considering the factual situation of this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed, without costs.

“Luc Martineau”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-919-08

STYLE OF CAUSE: **NORTHVIEW APARTMENTS LTD. and
ATTORNEY GENERAL OF CANADA**

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: January 20, 2009

REASONS FOR ORDER: MARTINEAU J.

DATED: January 23, 2009

APPEARANCES:

Irwin Fineberg
(By Federal Court Order dated
July 4, 2008)

FOR THE APPLICANT

Ian Demers

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Not applicable

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