

Date: 20090403

Docket: T-2174-06

Citation: 2009 FC 348

Ottawa, Ontario, April 3, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

DOUG PEDDLE

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Doug Peddle, (the Applicant), has applied for judicial review of the decision of the Minister, as represented by Second Level Fairness Review by Ken Parkes, Director of the Barrie Tax Services Office of the Canada Revenue Agency (CRA). The Minister decided to not exercise his discretion to waive or cancel any further interest or penalties on the applicant's tax liability for the 1993 taxation year, under section 220(3.1) of the *Income Tax Act* 1985, c. 1 (5th Supp.) (the Act).

BACKGROUND

[2] Mr. Peddle, a former employee of Revenue Canada, invested in a teak tree farm in Costa Rica. In 1993, Revenue Canada, now CRA, disallowed his claim for the teak tree farm investment losses of \$8750.00 because the investment was an unregistered tax shelter. Mr. Peddle appealed to the Tax Court of Canada and eventually, with legal assistance, resolved the matter by agreement on October 10, 2003. The Minutes of Settlement filed in the Tax Court accepted his actual investment losses of \$2800.00.

[3] On December 5, 2003, the Minister reassessed the applicant's 1993 tax year in accordance with the Tax Court settlement. The reassessment reduced but did not eliminate the penalties and interest. Mr. Peddle appealed this reassessment of the 1993 tax year on December 23, 2003. In that letter he wrote:

I would like to appeal your 1993 reassessment of my income tax dated, December 5, 2003 for the following reasons:

IC92-1.2.3. apply as was stated several times before as I was disabled and had an emotion time and also my marriage break up in 93 and 94. I still am disabled to date.

[4] On February 2, 2004, Peter Evans, an official with the CRA, answered the Applicant's appeal and stated that according to the Minutes of Settlement no further adjustment or appeal could be rendered for the 1993 tax year.

[5] On February 5, 2004, Mr. Peddle responded stating that his 1993 tax return was late because of the breakdown of his marriage and his disability. Mr. Evans considered this latest letter

as a fairness request and requested more information from Mr. Peddle. The CRA received nothing further and assumed that Mr. Peddle had abandoned his fairness request.

[6] On May 18, 2006, Mr. Peddle wrote to the CRA and asked about the status of the fairness request. On June 9, 2006, Mr. Evans responded and told him that his request for cancellation of arrears interest and penalties would be reviewed by a Fairness Committee based on the information provided.

[7] Mr. Evans summarized for the Barrie TSO Audit Fairness Committee the relevant considerations in the “Recommendation Report – Waiver or Cancellation of Penalty or Interest Under the Fairness Provisions”. He recommended a partial reduction because of Mr. Peddle’s mental difficulties. The Fairness Committee reviewed the Evans Report and the Information Circular 92-2 – Guidelines for the Cancellation and Waiver of Interest and Penalties (IC92-2). The Committee noted that:

Fairness Committee discussed and following points raised: The Minutes of Settlement specified “no further relief shall be granted”. This must include relief of arrears interest. Although Mr. Peddle claimed to be affected by clinical depression it is noted he availed himself of all deductions possible, participated in tax avoidance scheme and aggressively pursued redress through to the level of Tax Court. Request Denied.

[8] On June 30, 2006, the CRA sent a letter to Mr. Peddle informing him that the First Level Fairness Review denied his request for cancellation of penalties and arrears interest relating to the 1993 tax year.

[9] On July 23, 2006, Mr. Peddle responded. His letter was considered to be a request for an administrative review of the First Level Fairness Review decision.

DECISION UNDER REVIEW

[10] The Second Level Fairness Review was performed by Ken Parkes, Director of the Barrie Tax Services Office. Mr. Parkes' Second Level Fairness review is the decision under judicial review. Mr. Parkes agreed with the First Level Fairness Committee decision and the reasons for his decision included the following:

In reaching their decision to deny your request the Barrie TSO Audit Fairness Committee considered several matters, including 1) As outlined in Information Circular 92-2, provided to you by the fairness committee with their previous correspondence, penalties and interest may be waived or cancelled in whole or in part where they result in circumstances beyond a taxpayer's control. This would include a case where a taxpayer was prevented from complying by virtue of serious emotional or mental distress. In your case the non-compliance was the original loss claim for \$8,750, in regard to your investment in the teak farm, on your 1993 tax return. While we do not challenge your statement that you were suffering from severe depression at the time, as a result of a marriage breakdown, we do not regard your illness to be a factor in your decision to invest in the teak farm. 2) Information Circular 92-2 specifies "The following factors will be considered when determining whether or not the Department will cancel or waive interest or penalties:.....(b) whether or not the taxpayer or employer has knowingly allowed a balance to exist upon which arrears interest has accrued." It is noted that you have an ongoing balance on your account, which is accruing arrears interest, and that no arrangements to pay this balance have been made.

In considering all the above factors I conclude that the Barrie TSO Audit Fairness Committee has exercised their discretion in a fair and reasonable matter.

[11] Mr. Peddle objected to the decision. In respect to the above paragraph Mr. Peddle wrote:

Paragraph 4 – In Reachingmade.

You are wrong again; I filed my 1993 tax Late because of emotional distress and marriage break-up (which you don't dispute and acknowledge) and had nothing to do with my investment in Teak Trees. This is what caused the unjustified penalties and interest on those penalties which of course was beyond my control as Ic 92-2-5 (c,d) clearly states.

[12] Mr. Parkes responded stating in part:

You stated that your 1993 Income Tax Return was filed late because of emotional distress caused by the marriage breakdown you were experiencing at that time. While I do not dispute the emotional distress such an event can cause I did note, as part of my review, that for seventeen consecutive years, 1987 to 2003 inclusive, your Income Tax Return was filed after April 30 in each of the applicable filing periods. I can only conclude that other factors, within your control, were responsible for your consistent filing pattern.

ISSUE

[13] Did the Minister's delegate fail to observe principles of procedural fairness or err in law as set out in section 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, in making the Second Level Fairness Decision?

STANDARD OF REVIEW

[14] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraphs 51, 53 and 54, the Supreme Court of Canada stated that questions that will generally attract review on the reasonableness standard include matters of: fact, mixed fact and law, discretion, and policy.

[15] Justice Blanchard, in *3500772 Canada Inc. v. Canada (Minister of National Revenue – MNR)*, 2008 FC 554, at paragraph 25, reviewed the authority with regard to the standard of review

for Fairness reviews in accordance with section 220(3.1), and determined that the standard is reasonableness.

ANALYSIS

[16] Mr. Peddle was self-represented. Mr. Peddle and the CRA provided a record of documentary evidence which has assisted the Court in understanding the history of this case. Mr. Peddle is asking the court to consider his mental difficulties and disability as a reason why the CRA ought to have reduced his outstanding tax debt. He requests this judicial review of the decision of the Minister to not exercise discretion under section 220(3.1) of the Act, in further reducing Mr. Peddle's tax penalties and interest arrears for the 1993 tax year.

[17] Section 220 (3.1) of the Act reads as follows:

Waiver of penalty or interest

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

Renonciation aux pénalités et aux intérêts

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

take into account the
cancellation of the penalty or
interest.

cotisations voulues concernant
les intérêts et pénalités payables
par le contribuable ou la société
de personnes pour tenir compte
de pareille annulation.

[18] Mr. Peddle's correspondence with representatives at the CRA raised the issue of his marital difficulties and disabilities. He claims that he suffered from depression because of marital breakdown and thus should be allowed complete redress for the penalties and interest arrears that continue to accumulate.

[19] Mr. Peddle disagrees with the findings of the First and Second Level Fairness Reviews.

[20] The Respondent submits that although Mr. Peddle's application for fairness relief was based on his claim that he suffered from physical and mental disabilities, he was still able to pursue all possible deductions, participate in the tax avoidance scheme, and aggressively pursue a favourable outcome in the Tax Court.

[21] The Respondent submits that the applicant's depression resulting from marital breakdown was not a factor in his decision to invest in a tax avoidance scheme – the root of his non-compliance. Additionally, the Respondent notes that the applicant did not make any arrangements to pay the ongoing balance and accrued arrears interest on his account.

[22] Furthermore, the Respondent submits that Mr. Peddle ought to be considered knowledgeable about income tax matters because of his past employment at Revenue Canada.

[23] The Respondent submitted that the issue before the Court is whether the Minister failed to observe the procedural fairness or erred in law, as set out in section 18.1(4) of the Federal Courts Act in making the second level decision. The Respondent says the Applicant must not only show there was an erroneous finding of fact but also that the manner in which the erroneous finding was made was done in a perverse or capricious manner without regard to the material before the decision maker. The Respondent takes the position that there has not been any error in the finding of fact alleged and that any error was not determinative of the decision.

[24] In the Record, Mr. Peddle filed a collection of letters and documents. Some were included in Mr. Peddle's affidavit, others were not. Many of the second group of documents, while related to Mr. Peddle's perceived grievance with the CRA, are not directly relevant to this proceeding, a few are. The relevant letters and documents are:

- Letter from John Kowalski, Deputy Assistant Commissioner, Compliance Programs Branch, Canada Revenue Agency May 15, 2007
- Part B 9650-15626 Partial Medical Form by Dr. V. Chapnik August 4, 2000
- Partial Medical assessment by Dr. V. Chapnik, August 4, 2000

These documents were filed by Mr. Peddle but not attested to by affidavit.

[25] The Respondent was asked for its position with respect to the May 15, 2007 letter. The Respondent submitted the documents were not properly before the Court and ought not to be considered.

[26] After completing the hearing and giving the matter some thought, I directed that Mr. Peddle should file the documents referred to by affidavit. Instead he sent a letter requesting advice from the Court, which is something I would not do as it would compromise judicial impartiality. However, Mr. Peddle did file a supplementary affidavit with the documents on January 16, 2009.

[27] Mr. Peddle has little understanding of legal procedure. He is prone to misunderstanding and misinterpreting matters. Indeed, Mr. Evans, who dealt with Mr. Peddle and prepared the recommendation for the Fairness Committee, wrote:

“Although not well documented, I am of the opinion that Mr. Peddle did suffer from mental disorders during 1993 to 1995, as he has asserted. In talking to him it is apparent that he may still suffer from either a speech or cognitive disorder. . . . Should Mr. Peddle’s mental disorder be accepted as factual then here is one more thing to consider. . . . Perhaps his mental disorder interfered with his ability to properly redress our reassessment and, as a result, the process took much longer than usual. I think this may be true and therefore I would recommend at least a partial cancellation of arrears interest for tax year 1993.”

[28] The Respondent objected strenuously, with good reason, to the contents of the affidavit and additional extraneous material Mr. Peddle included in his supplementary affidavit. I agree the Applicant makes scandalous allegations without cause in his supplementary affidavit. The only material that will be considered are the documents specified in my Order. The rest will be redacted from the record.

[29] Turning back to the issue in this judicial review, the significance of the May 15, 2007 letter is the CRA’s acknowledgement of a crucial error. In explaining the Second Level Review decision the Applicant in November 2006, Mr. Parkes wrote:

You stated that your 1993 Income Tax Return was filed late because of emotional distress caused by the marriage breakdown you were experiencing at that time. While I do not dispute the emotional distress such an event can cause I did note, as part of my review, that for seventeen consecutive years, 1987 to 2003 inclusive, your Income Tax Return was filed after April 30 in each of the applicable filing periods. I can only conclude that other factors, within your control, were responsible for your consistent filing pattern. (underlining added)

In the May 15, 2007 letter to Mr. Peddle the CRA Deputy Assistant Commissioner wrote:

You indicate that Mr. Ken Parkes, Director of the Barrie Tax Services Office, did not completely answer your enquiries. In view of your concerns, I asked senior CRA officials to review your file. They inform me that Mr. Parkes wrote to you on August 16, 2006, and again on November 7, 2006. In his letter of November 7, 2006, he incorrectly referred to his letter of August 22, 2006. The statement should refer to Mr. Parkes' letter of August 16, which you subsequently replied to on August 22. In addition, the statement relating to late-filed 1987 through 2003 income tax returns is incorrect. A further review indicates that assessment dates were erroneously used rather than file dates to determine which years were late-filed returns. This review shows that only your 1993, 1994 and 1995 returns were late-filed. I regret any misunderstanding that may have resulted from the previous correspondence, and I apologize for any inconvenience or confusion this may have caused. (underlining added)

[30] The misinformation that Mr. Peddle had filed his tax returns late for seventeen consecutive years is extremely prejudicial. Part of the penalties and interest disputed relates to late filing. I must say that to make a decision based on incorrect, prejudicial information is unreasonable.

[31] When the CRA undertook to conduct a Fairness Review it was doing so under the provisions of that policy. The policy provides that a taxpayer may request such a review based on circumstances beyond their control. Mr. Peddle's disability and marital difficulties underlay his

request. However, when the Fairness Review Committee rejected his request, it did so on the basis of the Tax Court Settlement agreement and Mr. Peddle's prior pursuit of a remedy in Tax Court.

[32] Mr. Peddle asked for a Second Level Fairness Review of the decision, the Second Level Fairness Review confirmed the Fairness Review committee decision without considering whether the Fairness Committee decided in keeping with the CRA legislation and policy.

[33] One aspect of the Review that is troubling is that it does not examine the manner in which the Fairness Committee rejected Mr. Peddle's request and Mr. Parkes' recommendation with respect to Mr. Peddle's mental difficulties. While the Fairness Committee noted Mr. Peddle's claim of clinical depression it rejected that claim because Mr. Peddle pursued a remedy in Tax Court. The notation by the Fairness Committee is not entirely clear but I must say recourse to the courts is something that a taxpayer is entitled to do if they chose. It ought not to be determinative especially when undertaken ineptly as the record discloses. The Second Level Review's failure to address the Fairness Committee's treatment of the Evan's recommendation and its reference to the Tax Court proceedings presents a picture of an incomplete Second Level Review.

[34] An unambiguous error arises in the information before the Second Level Review given the subsequent admission of error by the CRA. I find the information concerning Mr. Peddle's late filings to be incorrect. Again, it is not clear if this information was before the Fairness Committee but I infer it was since it was before the Second Level Reviewer that incorrect prejudicial information purportedly documented 17 years of late filings by Mr. Peddle. In actuality, Mr.

Peddle filed late for three years, in 1993, 1994 and 1995 as he acknowledges and as confirmed in the May 15th CRA letter.

[35] Mr. Peddle is a difficult individual to deal with given his lack of comprehension and his predilection for accusing individuals who do not accept his views on matter. I found that the CRA officials dealing with Mr. Peddle treated him with every consideration as did counsel for the Respondent. Nothing in the evidence before me suggests that the Second Level Review decision maker, Mr. Parkes, was aware the late filing information before him was in error. That error was only realized when a subsequent review was conducted after the Second Level Review decision was made.

[36] Self-represented applicants are often disadvantaged in presenting a case in a legal forum. Notwithstanding Mr. Peddle's difficulties in presenting his case, he has struck upon a significant factual error in the information relied on in his Second Level Fairness Review.

[37] I do not think one would disagree that a decision that relies in part on erroneous prejudicial information is an unreasonable decision even if made in good faith. The CRA relied on its own files and misinterpreted its own information. This negates any good faith argument.

CONCLUSION

[38] I conclude the decision of the Second Level Fairness Review is unreasonable because it was based on an incomplete review and on improper information. Given the brevity of the

Fairness Committee's reasons and the uncertainty about the material before it, it would be better if the fairness request was recommenced with Mr. Evans' recommendations.

[39] The Second Level Fairness Review decision is quashed and the matter is referred back for re-determination by a different decision maker with a direction that this decision is without prejudice to Mr. Peddle renewing his request to a different Fairness Committee should he chose.

COSTS

[40] The applicant is self-represented. While he has been persistent in pursuing his claim over a very long period of time, I do not see this as a matter for the ordering of costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The only materials that will be considered in the supplementary affidavit of Doug Peddle filed January 16, 2009 are the documents specified in the earlier Order of December 4, 2008. The rest of the affidavit will be redacted from the record.
2. The application for judicial review is granted and the matter is referred back for re-determination by a different decision maker.
3. No costs are awarded.

“Leonard S. Mandamin”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT:
AND JUDGMENT** MANDMIN, J.

DATED: APRIL 3, 2009

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Bobby Sood FOR RESPONDENT

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