Date: 20090707

Docket: T-1702-08

Citation: 2009 FC 694

Ottawa, Ontario, July 7, 2009

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

DOUGLAS SMITH

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Smith seeks the judicial review of the 2nd level Fairness Review decision made by the delegate of the Minister of National Revenue (hereinafter the Minister) on October 2, 2008, pursuant to subs. 220(3.1) of the *Income Tax Act*, R.S.C. 1985 c. 1 (5th Supp.).

Background

[2] The Applicant was an employee at Sierra Systems from January 1, 2004 until November 15, 2006. He was informed by his employer in the fall of 2006 that he would be dismissed and paid a sum of $45,000.00 (less statutory deductions of $13,500.00) in addition to his final paycheque.

[3] The Applicant delivered his income tax slips in an envelope to the accounting firm which usually prepares his income tax returns but did not advise his accountants that he had received an extra sum of money from his employer. He asserts that he did not receive the T4A for the $45,000.00 from Sierra Systems, alleging that it was forwarded to an incorrect address or forwarded to the correct address but then stolen or not delivered by Canada Post.[1]

[4] The Minister first assessed the Applicant on May 10, 2007. The undeclared $45,000.00 sum was not calculated into the Applicant's income, nor was the $13,500.00 income tax which had been deducted on said sum taken into account. The balance due was assessed at $1,286.86, which included tax payable of $1,283.69 and arrears interest of $3.17 and this was paid in full by the Applicant.

[5] The Minister reassessed the Applicant on December 10, 2007 to include the $45,000.00 in his income for the 2006 tax year and added the $13,500.00 deducted by his former employer to the income tax already deducted. This resulted in the Applicant owing $8,861.79, which was reduced to $7,578.10 to reflect the sum already paid following the original assessment. An additional amount of $941.29 in arrears interest on this sum was also included.

[1] The Applicant was advised during the hearing that on an application for judicial review, the Court cannot consider any new evidence in this respect, nor arguments that were not presented before the original decision maker (for example: the fact that he was paid $55,000.00 in severance pay, $10,000.00 of which was reported on his T4 and tax deducted at the marginal rate while $45,000.00 was reported on the T4A and tax deducted at below the marginal rate (30%); his state of mind at the time of filing; the fact that his files were packed away in his garage following his move, etc.).

[6] As he had not reported the $45,000.00 in income on his 2006 return, the Applicant was charged an omission penalty (the Penalty) in the amount of $9,000.00 (federal and provincial penalty which are each 10% of the amount that was not reported as income), pursuant to subs. 163(1) of the *Income Tax Act* and s. 80 of the *New Brunswick Income Tax Act*, S.N.B. 2000, c. N-6.001.

[7] On January 2, 2008, the Applicant's accountants submitted to the Canada Revenue Agency (CRA) a "Request for Taxpayer Relief" seeking the cancellation or waiver of the Penalty on the basis of "[o]ther extraordinary circumstances […] taxpayer never received the T4A from his employer". More precisely, it was explained that "Mr. Smith did not intentionally omit the T4A. He was not expecting to receive a T4A, only a T4 which was the normal practice. Sierra Systems deducted 30% withholding tax on the T4A. If the marginal rate of tax was deducted, as with T4, then there would be no tax owing."

[8] A "Taxpayer Relief Provisions Report" was prepared concerning the Applicant's request on March 18, 2008. The Applicant was noted as having an excellent account history and a fair compliance history. It was also noted that the T4A had been issued with the Applicant's correct mailing address and that the Applicant should have known that the $45,000.00 sum would not be reported in his T4 earnings because it was a retiring allowance. Finally, the report noted that this was not the Applicant's first failure to report, in light of the 2003 reassessment for unreported investment income. As there was deemed to be no extenuating circumstances and no attempt to report the omitted income, it was suggested that the Applicant's request be denied. This was agreed

to by the Review Committee on March 19, 2008, and confirmed by the Minister's decision dated April 1, 2008.

[9] On August 27, 2008, the Applicant wrote to the Minister requesting an independent review of the decision not to waive the Penalty. The grounds raised were: (i) that his former employer never mentioned to him that the $45,000.00 to be received was a retiring allowance[2] which would not be reported on his T4; (ii) that he assumed that even if he was missing slips the CRA received copies and would correct any missing amounts on the assessment; (iii) that he did not receive the T4A possibly because of multiple break ins in his new home or because of Canada Post has problems properly delivering mail to their residence on an unmarked lane for which the postal code is often associated to a different city; (iv) that $13,500.00 in tax had been deducted which was not reported on the return and yet the Penalty was assessed as if no tax had been paid at all; (v) that the prior failure cited was for a small amount also unintentionally unreported; and, (vi) that because of the penalties the CRA collected $31,019.39 of his $45,000.00 in severance pay and that such a penalty is excessive punishment for inattention and lack of knowledge of the *Income Tax Act*.

[10] On September 2, 2008, a second review was performed as per the Applicant's request that the Penalty be cancelled. It was recommended that the request be denied. In the summary of facts prepared for this purpose (summary of facts), the $45,000.00 sum was characterised as severance pay, as indicated on the Record of Employment from Sierra Systems. However, it is also noted that

[2] As opposed to severance, as this payment was characterised in his pay slip of November 15, 2006.

there is no record that the Applicant ever made a complaint regarding the missing T4A slip and that despite the move, said slip was prepared with the proper address. Finally, the 2003 omission and the fact that no penalty had been applied at the time as it was the Applicant's "first offence" is mentioned. The summary of facts incorrectly noted that the Applicant had been employed at Sierra Systems for a year and a half.

[11] It was recommended that the request be denied as the Applicant had not provided "any additional information to prove that he was prevented from claiming his income due to extraordinary circumstances." This recommendation was accepted and the Applicant was informed of the Minister's decision by letter dated October 2, 2008. It is this decision which is now subject to judicial review.

The decision and the issues

[12] In said letter, it is indicated that:

> I have carefully considered all of the information available to me including the original request to determine if the Taxpayer Relief Provisions apply. As a result of this review, I cannot conclude that the omission of the retiring allowance income on your 2006 income tax return was due to any extraordinary circumstances that were beyond your control. Therefore, cancelling the penalty would be inappropriate in this case.

[13] The self represented Applicant describes the errors made by the Minister in coming to his decision in an affidavit filed in support of his application as well as at p. 102 and following of his written representations. The Applicant submits that the number of factual errors (referring to the income as "retiring allowance" instead of "severance"; length of employment, etc.) and

irrelevant information (noting the fact that the Applicant never made an employee complaint for having not received the T4A, etc.) contained in the summary of facts shows a biased approach aiming to simply deny relief. What is more, the recommendation simply concludes that no additional information was provided by the Applicant when in fact a number of elements set out in his request were simply not considered, such as his lengthy record of compliance and his complete lack of knowledge of the omission.

[14] He argues that the facts here, including: (i) the fact that the slip may have been stolen or not delivered by Canada Post; (ii) the fact that income was not intentionally omitted; and, (iii) the lack of proportionality between the offence and the fine imposed; should have been sufficient for a proper review to conclude that there existed extraordinary circumstances justifying the omission and, in any event, the Minister had the discretion to grant relief pursuant to para. 24 of the *Income Tax Information Circular IC07-1 Taxpayer Relief Provisions* (the Circular).

[15] Some of the elements raised by the Applicant were not before the decision maker and cannot be considered. For example, the Applicant attacks the accrual of arrears interest on the basis that the CRA had to have known that discrepancies existed at the time of the first assessment as $13,500.00 had been collected in excess of the amounts declared on the return.

[16] Finally, the Applicant argued that insufficient reasons were given in support of the decision.

The standard of review

[17] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), the Supreme Court of Canada established that the first step in assessing the appropriate standard of review is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question." (para. 62)

[18] In *Slau Ltd v. Canada (Revenue Agency)*, 2008 FC 1142, 336 F.T.R. 80, Justice Michael Kelen held, relying on the decision of the Federal Court of Appeal in *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153, 334 N.R. 348, that discretionary decisions taken pursuant to s. 220(3.1) of the *Income Tax Act* are reviewable on the standard of reasonableness. I agree.

[19] Thus, the duty of this Court is to examine "the existence of justification, transparency and intelligibility within the decision-making process" and to determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir*, para. 47)

[20] With respect of questions of procedural fairness (such as inadequate reasons in support of the decision), there is no standard of review as the Court must usually intervene whenever a breach of this obligation is found to have occurred (*Sketchley v. Canada*, 2005 FCA 404, [2006] 3 F.C.R. 392).

Analysis

[21] The Court cannot fault the decision maker for not considering arguments not raised before it. In the present circumstances, it is clear that both the request made by the Applicant's accountants and by the Applicant himself were based on the existence of extraordinary circumstances (i.e. the fact that the T4A slip had not been received) and was assessed on that basis. Also, it must be considered that when the Fairness Committee considered the Applicant's request it had before it not only the summary of facts but also the Applicant's letter of August 27, 2008 and the documentation pertaining to the first review. Furthermore, as the summary of facts clearly focused on the new elements raised by the Applicant in his August letter, there was no need to repeat issues which had already been considered, such as the Applicant's excellent account history and fair compliance history. These elements were all before the decision maker.

[22] There is simply no good reason to believe that the decision maker did not consider all of Mr. Smith's arguments. What is more, he is presumed to have considered all of the evidence before him (*Woolaston v. Canada (Minister of Manpower and Immigration)*, [1973] S.C.R. 102; *Do v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 432, 29 Imm. L.R. (3d) 98, para. 35).

[23] The allegations on which the Applicant insisted the most at the hearing relate to the basis for the Penalty (disproportionate nature of the Penalty, lack of knowledge of the *Income Tax Act*, etc.). The Applicant does not dispute that he did not report the impugned income. Rather, he suggests that he should not be penalized for this omission as he had no intention to avoid paying

his taxes. Also, the Applicant's position really amounts to saying that it is the responsibility of others (his accountant, his former employer, the CRA[3]) to ensure that his reporting is complete and accurate. Such a position is entirely at odds with the principles on which our income tax collection system is based. The fact that the CRA conducts re-assessments is not a license given to Canadians to elude their self-assessment and self-reporting obligations.

[24] As noted by Justice Luc Martineau in *Northview Apartments Ltd. v. Canada (A.G.)*, 2009 FC 74, 2009 D.T.C. 5051, "[i]t is the essence of our tax collection system that taxpayers are sole responsible for self-assessment and self-reporting to the CRA" (para. 11). The Penalty which was assessed in the case of the Applicant seeks to provide a meaningful consequence for failing to diligently self-assess and self-report income to the CRA. Intent is of no relevance in these circumstances, nor is the proportionality of the Penalty to the amount of tax owing as the legislatures have chosen to fix the penalty in relation to the income the taxpayer failed to declare, which is the behavior the penalty seeks to sanction.[4]

[25] Paras. 35 and following of the Circular make it clear that a taxpayer cannot rely on the failure of his agents – his accountants – unless it can be established that the circumstances are so exceptional as to warrant relief despite this principle. In any event, it is not clear at all how the use of accountants by the Applicant is relevant here, given that he failed to advise them or give them

[3] The Applicant contests the interest arrears charged on the basis that: the CRA should have performed its re-assessment earlier; his employer should have deducted the appropriate rate of tax; and, his accountants were the ones who had knowledge of the law.

[4] The alleged fault of the employer is irrelevant. Even if all of the payable tax had been deducted, a penalty could still have been imposed if the income had not been reported.

any information whatsoever with respect to the income reflected in his pay slip of November 15, 2006.

[26] While it is true that the summary of facts contains some inaccuracies (for example, the length of employment at Sierra Systems), the Applicant has not demonstrated how any of them are material to the impugned decision. The Applicant's pay slip dated November 15, 2006 and his Record of Employment from Sierra Systems dated November 11, 2006 both refer to the $45,000.00 sum as severance pay while it is reported as a retirement allowance on the T4A. At the hearing, it was made clear that this distinction has no impact on the Applicant's obligation to report the sum as income or on the rate of tax applicable thereto. Further, the Applicant's length of employment is equally irrelevant with regard to reporting obligations and the calculation of penalties applicable to omissions in this respect.

[27] As for what the Applicant characterizes as irrelevant considerations contained in the summary of facts, particularly the consideration of the fact that he never complained of the missing T4A slip, the Court disagrees with the Applicant's characterization of this consideration as being irrelevant. The Applicant argued that he evidently could not complain of the missing T4A slip since his employer never mentioned he should be receiving one and he is insufficiently knowledgeable with respect to the *Income Tax Act* to have known this on his own. While that may be, the Applicant ought to have noticed that the $45,000.00 sum he received was not reported on his T4 slip and, most importantly, on his income tax return. Had he been diligent in performing his self-assessment obligations, he would have brought this to the attention of his

accountants or his employer and, ultimately, to the CRA. That he neglected to do so is a relevant consideration in the circumstances.

[28] There is no evidence that the decision maker (not the author of the summary of facts) was biased. There is thus no need to consider this issue further.

[29] Having considered all the facts before the decision maker in their context, the conclusion that no extraordinary circumstances prevented the reporting of the impugned income is not unreasonable. Given the basis of the review sought, there was no need to provide more detailed reasons.

[30] The application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed, with costs.

"Johanne Gauthier"

Judge