

Federal Court



Cour fédérale

Date: 20100622

Docket: T-1770-09

Citation: 2010 FC 673

Ottawa, Ontario, June 22, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ALLAN LAUGHLIN OSBORNE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S. 1985, c. F-7, of the decision made on October 8, 2009 by the delegate of the Minister of National Revenue (“the Minister”), D.B. Gibson, wherein it was determined that cancellation of the interest and penalty requested by the applicant was not warranted and that the original decision denying the applicant’s request for taxpayer relief should stand. The applicant acted on his own behalf in this proceeding.

[2] In his refusal letter, pursuant to subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (“the *Act*”), D. B. Gibson, Director of the Nova Scotia Tax Services Office, Canada Revenue Agency (CRA), advised the applicant that his request for waiver of interest and penalties charged on his account for the 2001, 2003, 2004, and 2006 taxation years was denied.

Background

[3] Mr. Allan Osborne, the applicant, is a resident of Eastern Passage, Nova Scotia and is a long-time lobster and herring fisherman. The applicant suffers from degenerative disc disease in his lumbar spine which has made it difficult for him to fish in recent years.

[4] When Mr. Osborne became unable to fish due to severe back pain, his son used the applicant’s boat, equipment and lobster license. Mr. Osborne sold his lobster license to his son in 2006 but continues to own the boat in which his son fishes. He has other assets including several vehicles and a trailer home which he shares with his current partner. He now receives a modest income from his share of a fish quota and funds from a First Nation of which he is a member.

[5] The applicant says he is not good with paperwork and had relied on an accountant to look after his tax returns for many years, as she did for other fishers in his area. He says he was audited on several occasions over the past years without difficulty as the accountant looked after those matters for him. His problems with CRA began with the 2000 tax year.

[6] As time passed, his annual returns were not filed or were filed late, Mr. Osborne was assessed for imputed income and penalties were imposed when the tax was not paid. Mr. Osborne says he trusted his accountant when she told him he didn't owe any taxes and that she would resolve matters with CRA. That was, unfortunately, not done and interest accrued on the unpaid tax debt. CRA began collection activities in 2004. Mr. Osborne eventually borrowed funds to pay the tax debt outstanding but not the penalties and interest.

[7] Mr. Osborne wrote to CRA on October 24, 2008 to request waiver of the penalties and interest on the ground of financial hardship.

[8] In his request, Mr. Osborne identified the amounts owing as relating to an audit of his 2000 and 2001 taxation years. He claimed the audit did not reflect the true tax payable for those taxation years as he had not earned the income for which the tax was assessed. His medical problems prevented him from fishing on a full time basis. He acknowledged that there may have been some discrepancies due to actions he took, such as moving money and assets around to protect them. During the hearing Mr. Osborne indicated that this was due to the failure of his prior marital relationship.

[9] On June 24, 2009, Betty Walsh, a Taxpayer Relief Officer, prepared a report entitled "Taxpayer Relief Package Request for First Review" in which she recommended that the applicant's request for relief for the 2001, 2003, 2004 and 2006 taxation years be denied on the basis of financial hardship because the applicant would not enter into a payment arrangement,

would not borrow from the bank, had over \$200,000 worth of assets and received a regular income from the lease of his fishing boat and license.

[10] By letter dated August 27, 2009, the applicant requested a second independent review of his account. In that second level request, the applicant discussed the audit of his 2001 taxation year and again disputes the income ascribed to him in the audit.

[11] On September 11, 2009, Colleen Mott, Taxpayer Relief Officer, signed a memorandum entitled “Taxpayer Relief Package Request for Second Review” in which she agreed with the first recommendation and recommended that the applicant’s second request be denied. It was noted that the total penalty and interest which was charged for 2001, 2003, 2004 and 2006 is \$22,871.21 which included gross negligence penalties of \$4,921.65 on undeclared income for the 2001 taxation year.

[12] On October 8, 2009, Donald Gibson, Director of the Nova Scotia Tax Services Office, CRA, advised the applicant that his request for waiver of interest and penalty charged on his account for the 2001, 2003, 2004 and 2006 taxation years was denied. Mr. Gibson noted that the applicant had a history of non-compliance associated with his account and that he had been in constant contact with Collections since November 23, 2004. It was also noted that the applicant had continued to accumulate assets during the time he had a tax debt and that he had sufficient equity in the assets to satisfy the debt.

The Decision Under Review

[13] Mr. Gibson, acting as the Minister's delegate declined to waive the federal and provincial omission penalties (gross negligence penalties) and associated interest assessed to the applicant's personal income tax account for the 2001, 2003, 2004, and 2006 taxation years. Mr. Gibson denied the applicant's request on the basis of a review of the applicant's tax situation in relation to the reasonableness of care exercised in the administration of his affairs under the self-assessment system, and in applying the taxpayer relief provisions of the *ITA*, the delegate considered that Mr. Osborne's financial hardship was not such that would warrant the cancellation of the penalty and arrears of interest.

[14] The letter dated October 8, 2009, constitutes Mr. Gibson's reasons for decision:

Canada Revenue Agency / Agence du revenu Canada
Nova Scotia Tax Services Office
Halifax NS B3J 2T5

October 08, 2009

Account Number: 109 004 903

ALLAN OSBORNE
45 NANCY OSBORNE LANE
EASTERN PASSAGE NS B3G 1H6

Dear Mr. Osborne:

Re: ALLAN OSBORNE
Account number: 109 004 903

We are writing in response to your letter dated August 27, 2009, requesting an administrative review of our decision concerning the interest and penalty charged on the above account for the 2001, 2003, 2004 and 2006 taxation years.

In your letter you indicated that you have questions in regards to the audit conducted, and that the penalties and interest on the account are causing you financial hardship.

We have completed the review of your submission in relation to the taxpayer relief provisions of the "Income Tax Act" (*ITA*).

Information Circular IC07-1 “Taxpayer Relief Provisions” is available for your reference on our Website at the following address: www.cra-arc.gc.ca/forms or by calling toll-free 1-800-959-2221.

After considering all the circumstances of your case, we remain of the opinion that cancellation of the interest and penalty is not warranted and that the original decision to deny your request should stand. Furthermore, interest will continue to accrue until the account is paid in full.

A review of all the circumstances of this case, including your most recent submission, has failed to substantiate that you were prevented from complying with the filing and remitting requirements due to factors beyond your control or due to actions of the Agency, or that payment of the liability in its entirety would cause undue hardship.

In applying the taxpayer relief provisions off the Act (s), the CRA must consider whether or not the individual:

- has a history of compliance with tax obligations;
- knowingly allowed a balance to exist;
- exercised a reasonable amount of care; and
- acted quickly to remedy any delays or omissions.

You have a history of non-compliance associated with this account. Your personal income tax account has been in Collections since November 23, 2004, with Collections being in constant contact with you since that time. Legal actions had to be taken by Collections and no voluntary payments were made by you until recently.

The taxpayer relief provisions give the Minister the discretion to cancel or waive all or part of any penalty or interest payable. This is the case if the penalty or interest has resulted from extraordinary circumstances, is due mainly to actions of the Canada Revenue Agency (CRA), or if there is an inability to pay.

We would like to point out that the taxpayer relief provisions empower Agency officials to make discretionary decisions pertaining to the forgiveness of interest when taxpayers apply.

Any questions you have regarding the audit conducted will have to be discussed with Audit. In regards to your financial situation, you have continued to accumulate assets during the time you had a tax debt, and you have sufficient equity in assets.

If you feel that discretion was not properly exercised during our review of your request for relief, you can apply to the Federal Court for a judicial review within thirty (30) days of the day you received this letter. For more information on the judicial review process and how to apply, phone the Registry of the Federal Court at 426-3282. This information is also available at the Federal Court Web site: http://www.fct-cf.gc.ca/index_e.html.

Thank you for bringing your concerns to our attention. While we appreciate your position, we regret that we cannot grant the relief requested. We invite you to contact D. MacLeod of Revenue Collections, at 426-6522, to discuss any questions which you may have regarding this letter.

Yours sincerely,

D.B. Gibson
Director
Nova Scotia Tax Services Office

Issue

[15] The sole issue raised by the parties in their submissions is the following:

Was the decision of the Minister's delegate not to waive or cancel penalty or interest on the applicant's tax liability unreasonable?

Analysis

[16] The standard of review applicable to the exercise of the Minister's discretion under subsection 220(3.1) of the *Income Tax Act* is reasonableness: *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] F.C.J. No. 71, at para. 2.

[17] In *Sandler v. Canada (Attorney General)*, 2010 FC 459, [2010] F.C.J. No. 541, Justice O'Reilly indicated that this Court "can overturn the Minister's decision under the fairness provision only if it was unreasonable, in the sense that it falls outside the range of possible acceptable outcomes based on the facts and the law," citing: *Telfer*, above, at para. 25.

[18] Mr. Osborne has now paid the outstanding tax debt but seeks waiver of the interest and penalties totalling \$23,897.94 as payment of this amount of money would cause him financial

hardship. While I have sympathy with the situation in which he now finds himself, I agree with the respondent that Mr. Osborne has not advanced any grounds upon which the decision of the Minister's delegate could be set aside.

[19] The difficulty with this matter is that Mr. Osborne did not take personal responsibility for his tax affairs until recently and placed undue reliance on a third party, his accountant, to deal with them. He says he passed the notices that he received from CRA to her and relied on assurances he received from her that he did not owe the tax, penalties and interest. There is no evidence in the record from the accountant. In any event, Mr. Osborne's tax obligations were his personal responsibility and could not be delegated to someone else to resolve, particularly after CRA began collection actions.

[20] In my view, the Minister's delegate observed the principles of procedural fairness and did not err in the sense contemplated by subsection 18.1(4) of the *Federal Courts Act* in making the decision. The delegate considered the facts before him, acted in good faith and did not rely upon irrelevant or extraneous factors. Unfortunately for the applicant, I am unable to find grounds upon which this Court can grant relief in the delegate's decision.

[21] I would note that the information provided by the applicant to CRA in his request letters identified significant assets and few liabilities. Also, the applicant further demonstrated that his monthly income, while modest, exceeded his monthly expenses. On that basis, I have to agree with the respondent that it was open to the Minister to determine that the payment of the penalties and

interest owed by the applicant would not cause him financial hardship: *Affidavit of D.B. Gibson, paras. 5(a) and 5(b), Exhibits "B" and "C"*.

[22] I also take into consideration that the applicant stated in his second request for waiver of penalty and interest dated August 27, 2009 that he did not make any attempt in the past to set up a payment arrangement for his debt because he did not believe that the debt was his. In that same letter, the applicant admits that he is forgetful, lax when it comes to getting paperwork done on time and was unaware that his taxes for the 2003, 2004, 2005, 2006, 2007 and 2008 taxation years were not filed on time: *Affidavit of D.B. Gibson, para. 5(f), Exhibit "G"*.

[23] I note that Mr. Osborne sold his lobster license to his son in 2006 and continues to own his boat and home. I also consider that Mr. Osborne ignored his debt pursuant to the *Income Tax Act* for four (4) years while abdicating responsibility for his tax affairs to a third party. I appreciate that Mr. Osborne went through a dispute with his ex-wife. However, this does not justify the applicant's attempt to hide his assets.

[24] I adopt the statement of the Federal Court of Appeal in *Telfer*, above, at para. 40, finding that the Minister did not act unreasonably in the course of deciding not to give the taxpayer what would effectively be an interest-free loan:

40 The above considerations, as well as the unstructured nature of the Minister's statutory power under subsection 220(3.1), militate against a court's subjecting the decision-making process to close scrutiny. Despite the Minister's statutory duty to consider a taxpayer's Notice of Objection "with all due dispatch" (subsection 165(3)), it will require circumstances more compelling than those in the present case to persuade a reviewing court that the Minister acted unreasonably in the course of deciding not to give to a taxpayer what would effectively be an interest-free loan.
[My Emphasis]

[25] As was stated by Justice Hughes in *McCracken v. Canada*, 2009 FC 1189, [2009] F.C.J. No. 1486, at para. 19, “where the Minister's extraordinary discretion is being invoked, broad latitude must be offered to the Minister,” citing *Telfer*, above, at paras. 33-34.

[26] Given the above facts based on the information submitted to the decision maker, the decision to deny waiver of penalty and interest fell within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[27] I am not persuaded that the decision lacked the degree of “justification, transparency and intelligibility” required by the unreasonableness standard of review: *Telfer*, above, at para. 41.

[28] I find that the Minister’s delegate decision to deny waiver of penalty and interest in this case was not unreasonable. Accordingly, I must dismiss the application.

[29] There is no request for costs and none will be awarded. I expect that the respondent will attempt to work out a payment arrangement with the applicant prior to taking further collection action.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. There is no award of costs.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1770-09

STYLE OF CAUSE: ALLAN LAUGHLIN OSBORNE
and
THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: June 15, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** MOSLEY J.

DATED: June 22, 2010

APPEARANCES:

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FOR THE APPLICANT
(self-represented litigant)

Caitlin Ward

FOR THE RESPONDENT

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