

Federal Court



Cour fédérale

Date: 20111216

Docket: T-585-11

Citation: 2011 FC 1490

Ottawa, Ontario, December 16, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

CHARLES DESJARDINS

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Desjardins owes more than \$2 million dollars in back taxes, penalties and interest. More than 70% thereof is for penalties and interest. He requested the Minister to exercise the discretion vested in him by section 220(3.1) of the *Income Tax Act* and waive all penalties and interest otherwise payable for the 1999 through 2007 tax years.

[2] Mr. Desjardins was unsuccessful at the first and second administrative levels, and so has asked this Court, by way of judicial review, to quash the second administrative level decision. It is common ground that the standard of review is reasonableness: see *Cartier-Smith v Canada*

(*Attorney General*), 2006 FC 1175, 2006 DTC 6707; *Russ v Canada (Customs and Revenue Agency)*, 2006 FC 294, 2006 DTC 6196; *3651541 Canada Inc v Canada (Attorney General)*, 2007 FC 1255, 2008 DTC 6021; and *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[3] The Act does not set out the circumstances in which decision makers, on behalf of the Minister, may waive penalties and interest. There is, however, Canada Revenue Agency's Income Tax Information Circular No. IC07-1 entitled *Taxpayer Relief Provisions*, which sets out the procedure and lists some of the non-exhaustive factors which may be taken into account.

[4] Section 23 of the Circular provides that the Minister may grant relief if the taxpayer's inability to pay arose from extraordinary circumstances, actions of the Canada Revenue Agency itself, or inability to pay or financial hardship. If a confirmed inability to pay all amounts owing has been established, section 27 provides that it may be appropriate to consider waiving or cancelling interest in whole or in part in order to enable taxpayers to pay their account. One consideration is if payment of accumulated interest would cause a prolonged inability to provide basic necessities (financial hardship) such as food, medical help, transportation or shelter.

[5] Section 28 goes on to provide that consideration will not generally be given to cancelling a penalty based on an inability to pay or financial hardship unless extraordinary circumstances had prevented compliance, such as natural or man made disasters, civil disturbances or postal strikes, a serious illness or accident, or serious emotional distress. Section 33 enumerates factors to be considered, which are: 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 his or her affairs under the self-assessment system; and d) whether or not the taxpayer has acted quickly to remedy any delay or omission.

[6] Taxpayer relief applications are on two levels. A Canada Revenue Agency Office reviews the initial application and makes a recommendation to the team leader who makes a decision. In this case, the decision was negative. In such cases, the taxpayer may make a second level request. The file is assigned to a Canada Revenue Agency officer who was not involved at the first level. This officer conducts a complete review of the file to date and takes into account any additional information which was submitted. In this case, the file with summary of the officer's recommendation was forwarded to the manager of the Vancouver Island Tax Services Office, who after reviewing the file again denied Mr. Desjardins relief.

MR. DESJARDINS' CASE

[7] At the first level, Mr. Desjardins emphasized serious emotional or mental distress, arising from his then wife's drug addiction, stress arising out of divorce and custody of children issues and mental depression. Although called upon to do so, he provided no medical opinion with respect to his depression.

[8] At the second level, he emphasized inability to pay and financial hardship. He says he is insolvent, and indeed a tax collection officer suggested that since he could never pay off the debt in

its entirety, he should consider bankruptcy. This is not really a viable option for Mr. Desjardins as he earns his living as an officer or director of several British Columbia publicly traded companies. He could not serve in that position as an undischarged bankrupt. Some 35% of his earnings in that capacity has been garnished, which prevents him from paying his current taxes. If interest and penalties were waived, he might be able to pay the tax owing.

[9] The decision under review was made by Richard Soderquist, manager, Revenue Collections Division, Canadian Revenue Agency, Tax Services Office, Victoria. He determined that relief would not be granted for a number of reasons. He was of the view that Mr. Desjardins had not exercised reasonable care in conducting his affairs under the self-assessment system and knowingly allowed a balance to exist upon which arrears interest had accrued. He had an extended history of not filing his returns on time, maintained active investment accounts, contributed to a spousal RRSP while carrying a debt balance, and transferred funds to his current common law spouse while carrying a debt balance.

[10] In addition, his allegations that he was prevented from complying with filing obligations due to circumstances associated with his health were not substantiated. This finding was not strongly contested in Court.

[11] According to Mr. Desjardins, insufficient weight was given to the fact that over the last three years he has filed his returns on time (but has not paid all taxes owing), and notwithstanding garnishment of up to \$9,000 a month because of ongoing excessive interest charges, he has made

practically no headway in reducing his overall indebtedness, which includes sums both before and after the 1999 through 2007 tax years.

[12] Furthermore, in 2008 he made voluntary payments of close to \$300,000. These payments were hardly “voluntary” as they related to an arrangement whereby Mr. Desjardins exercised various stock options 75% of the proceeds of which were applied to his tax.

[13] The second level review had been carried out by a taxpayer relief coordinator, Darren Marr, who in his report recommended that Mr. Desjardins’ relief request be denied. According to Mr. Desjardins, Mr. Marr made a serious error in his analysis. He noted that the taxpayer’s balance owing was \$2,026,723.56 covering various years from 1994 through to 2009. He went on to say that the total interest accumulated for the above period was \$680,011.71 with penalties of \$183,558.53. Those figures are wrong in that they were the accumulated interest and penalties for the years 1999-2007. Of the \$2,026,723.56 owing, the interest portion is actually \$1,193,763.69 and the penalties are \$225,979.07. This led him to refer to the decision of Mr. Justice von Finkenstein in *Dick v Canada (Customs and Revenue Agency)*, 2005 FC 560, 2005 DTC 5241, in which he held under the patently unreasonable standard of review current at the time, that the Agency did not take into account that the penalty and interest owing far exceeded the tax owing, and that Mr. Dick, given his chronic alcoholism, his substance abuse and his age, was unlikely to ever earn the amounts owed.

[14] As Mr. Soderquist had the entire file before him, it cannot be said with any certainty that he was not of the view that the amount owing was primarily for interest and penalties. Even if so, that is only one factor to consider.

[15] Mr. Desjardins is 18 years younger than Mr. Dick. Although his income fluctuates, on his last return he earned more than half a million dollars. Furthermore, he has even more stock options than in 2008 which options generated close to \$400,000. Mr. Desjardins downplayed the fact that between December 2007 and July 2010 he transferred over \$300,000 to his current common-law spouse. This money was then transferred back to him and he lost it all gambling at the River Rock Casino! The Minister's counsel is absolutely correct in saying that Mr. Desjardins' lifestyle choices pay scant heed to the taxman!

[16] His submission that garnishment of wages has prevented him from paying all his taxes on current years is sheer nonsense.

[17] Mr. Desjardins' submission is that he has reformed, and that that is a factor which should have been taken into account in considering his history of non-compliance. That may well be so. However, the facts do not support him. On the plus side, he has been paying about \$9,000 a month through salary garnishment, voluntarily paid almost \$300,000 over and above that amount, and filed his last three returns in time. On the other hand, there is scant reason to believe that he would be paying \$9,000 a month without garnishment, the voluntary payment of close to \$300,000 was not voluntarily at all but arose through an arrangement with the Agency, and although he has filed his returns on time for the last three years, he has not paid all tax owing. Leaving aside a somewhat lavish lifestyle, he gambled away \$300,000 at a casino. Little room for the milk of kindness here.

[18] Section 21 of Information Circular IC07-1 reflects common sense:

21. The ability of the CRA to waive or cancel penalties and interest is not to be used by taxpayers as a way to arbitrarily reduce or settle their tax debt.

21. Les contribuables ne devraient pas utiliser la capacité de l'ARC de renoncer ou d'annuler les pénalités et les intérêts comme un moyen de réduire ou de régler de façon arbitraire leur impôt à payer.

[19] The decision was well thought out and transparent. It is reasonable within the meaning of paragraph 47 of *Dunsmuir*, above. It is not my role to reweigh evidence.

[20] There is an element of gamesmanship here. Mr. Desjardins does not want to go bankrupt as he will lose his livelihood, at least for a while, and the government will get nothing. He says it should compromise. On the other hand, the Minister submits that the integrity of the voluntary self-reporting system is such that she would rather get nothing and let him go bankrupt “pour encourager les autres”.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.
2. Costs in favour of the Minister in the amount of \$4,500, all inclusive.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-585-11

STYLE OF CAUSE: CHARLES DESJARINS v MNR

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: DECEMBER 6, 2011

**REASONS FOR ORDER
AND ORDER:** HARRINGTON J.

DATED: DECEMBER 16, 2011

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