Cour fédérale  Federal Court

Date: 20140922

Docket: T-1039-13

Citation: 2014 FC 890

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 22, 2014

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

PIERRE GILBERT

Applicant

and

THE MINISTER OF NATIONAL REVENUE
(CANADA REVENUE AGENCY)

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application for judicial review filed by Pierre Gilbert (the applicant) of a decision rendered by Antonio Almeida, [Officer] of the Canada Revenue Agency [the CRA], who granted him interest relief for the period from May 21, 2012 to May 15, 2013.

[2] The applicant is unhappy with the Officer's decision, who reduced the amount of interest, but did not cancel it entirely.

II. BRIEF SUMMARY OF THE FACTS

[3] The applicant and his spouse were the sole proprietors and shareholders of Sécovac Inc. [Sécovac] from the moment it was incorporated in 1996, until it was struck off the register in May 2000.

[4] In order to understand the position of the parties, a brief description of the three notices of assessment issued to the applicant by the Minister of National Revenue will be helpful.

[5] The first of these notices of assessment was established on June 6, 2002, pursuant to section 160 of the *Income Tax Act*, RSC 1985, c 1 (5th Suppl.) [ITA]. It was with regard to a dividend payment by Sécovac to the applicant, at a time when Sécovac owed a tax debt to the Minister of National Revenue [notice of assessment under 160].

[6] The applicant challenged that notice of assessment before the Tax Court of Canada [the TCC], which allowed his application in part. However, the Federal Court of Appeal [the FCA], called upon to intervene, re-established the notice of assessment under section 160 in its entirety. The Supreme Court of Canada [SCC] refused the application for leave to appeal filed by the applicant.

[7] The second of these notices of assessment was established on June 21, 2004, for the 1999 taxation year, under paragraph 39(1)(*c*) of the ITA. In that notice, the CRA refused an allowable business investment loss [ABIL]. The applicant had requested that a loss be carried over to 1999 for amounts paid in 2001 and for this to be credited to Sécovac [notice of assessment under paragraph 39(1)(*c*)].

[8] The third of these notices of assessment was also established on June 21, 2004, for the 2000 taxation year, pursuant to subsection 15(1.2) of the ITA. In that notice, the CRA added $814,894 to the applicant's income, which corresponded to the amount received by Sécovac between 1996 and 2000 from a commercial loan [notice of assessment under subsection 15(1.2)].

[9] On September 17, 2004, the applicant filed notices of objection to the notices of assessment under paragraph 39(1)(*c*) and subsection 15(1.2), which were received by the CRA on November 1, 2004. The CRA then informed the applicant that interest would continue to accrue regardless of the notice of objection and that he could still make payments towards his debt.

[10] On November 13, 2007, the CRA confirmed the notice of assessment under paragraph 39(1)(*c*), thereby reaffirming the assessment for the 1999 taxation year.

[11] In addition, the CRA allowed, in part, the applicant's notice of objection for the 2000 taxation year, vacated the notice of assessment under subsection 15(1.2), replacing it with a notice of reassessment in which an amount of $85,981 was added to the applicant's income. The

CRA argued that the amounts referred to in that notice of assessment needed to be included in the applicant's income as a shareholder loan, taxable under subsection 15(2) of the ITA [notice of assessment under subsection 15(2)].

[12] On April 24, and July 16, 2009, the TCC upheld the validity of the notices of assessment under paragraph 39(1)(*c*) and subsection 15(2) respectively. The applicant has not challenged those TCC decisions before the FCA.

III. REQUESTS FOR RELIEF UNDER SUBSECTION 220(3.1) OF THE ITA

[13] Following the denial of the first request for relief on March 22, 2011, the applicant submitted a second request for relief on May 20, 2011. This second request sought the cancellation of the interest accrued with regard to the notice of assessment pursuant to subsection 15(2). The applicant alleges that there was an error and an undue delay attributable to the CRA; he further alleges that the auditor acted in bad faith. On September 21, 2012, he filed additional submissions. He is arguing that the three notices of assessment are invalid.

[14] The Officer prepared a report recommending that relief be granted, and that report was subsequently approved by the Taxpayer Relief Committee of the CRA's Tax Services office, whose decision was mailed on May 15, 2013.

[15] This second request for relief, and the claims made therein, are in regard to the 2000 taxation year, that is to say, the notice of assessment pursuant to subsection 15(2), as indicated

by the Officer at page three of his decision: [TRANSLATION] "the second request for relief is dated May 20, 2011, and September 21, 2012. It concerns the year 2000."

[16] The Officer granted relief for the 1999 and 2000 taxation years. In this case, the applicant contends that the three aforementioned notices of assessment are invalid. Similarly, the respondent refers to two notices of assessment when he asserts, at paragraph 22 of his memorandum of fact and law:[TRANSLATION] "[o]n May 20, 2011, the applicant submitted a second request for relief (the 2nd request for relief) wherein he sought the cancellation of interest owed with respect to assessments 15(2) and 39(1)(c) …" Thus, although the request giving rise to the impugned decision in the present case was with regard to the notice of assessment pursuant to subsection 15(2), the parties submitted arguments whose scope goes beyond the outcome of this decision.

[17] In the present case, I will respond to the arguments of the parties, as they have been presented, and I will make reference to the three aforementioned notices of assessment. However, the outcome would not have been different had the analysis been restricted to the assessment pursuant to subsection 15(2).

IV. THE IMPUGNED DECISION

[18] In his decision, the Officer examined the delays incurred at each stage of the processing of the applicant's file. Upon completing his review, he granted the applicant interest relief for the period from May 21, 2012, to May 15, 2013. He considered the delay to be excessive and

attributable to the CRA. According to the Officer, none of the other delays or any error could be attributed to the CRA.

[19] In addition, the Officer concluded that the TCC had upheld all of the assessments challenged by the applicant and that he had lacked diligence by deliberately letting interest accrue on his tax debt. The Officer further noted that no other relief could possibly have been granted under subsection 152(4.2) of the ITA.

V. ISSUE

[20] The only issue here is the following:

- Did the CRA err in allowing the second request for interest relief only in part?

VI. STANDARD OF REVIEW

[21] The decision to allow the applicant's request for relief in part must be reviewed on a standard of reasonableness. Indeed, Justice Boivin recently affirmed as much in *Amoroso v Canada (Attorney General)*, 2013 FC 157 at para 50:

> The standard of review to apply to a Minister's discretionary decision to cancel interests owed is that of reasonableness (*Lalonde v Canada (Revenue Agency)*, 2010 FC 531 at paras 27-30, [2010] FCJ No 638 (QL); *Telfer v Canada (Revenue Agency)*, 2009 FCA 23 at para 24, [2009] FCJ No 71)QL); *Jim's Pizza (1980) Ltd v Canada (Revenue Agency)*, 2007 FC 782 at para 3, [2007] FCJ No 1052 (QL) [*Jim's Pizza*]). The Minister's decision to waive or cancel interests is a discretionary one, and as such this Court must show deference and be "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190

> [*Dunsmuir*]). As pointed out by the respondent, the Minister's discretionary power to cancel interests is an exceptional relief (*Jim's Pizza*, above, at para 13).

VII. APPLICANT'S ARGUMENTS

[22] In the applicant's view, the impugned decision is unreasonable.

[23] He primary argument is that the Officer failed to consider certain facts and elements proving that the notices of assessment under paragraph 39(1)(*c*) and subsection 15(2) are invalid because they were established on the basis of erroneous facts. Furthermore, he claims that the notice of assessment under section 160 is also invalid, and that the CRA's decision to issue this notice of assessment was an abuse of power, given that the applicant was no longer a shareholder in Sécovac.

[24] In essence, the applicant contends that the Officer ought to have agreed to waive the interest in order to compensate for the actions of CRA representatives, which he alleges were marked by bad faith and deception in addition to being knowingly misleading.

[25] With respect to the assessment under paragraph 39(1)(*c*), the applicant asserts that the Officer ought to have considered the argument according to which he would not have initiated the present legal proceedings had the CRA informed him that he could not declare an ABIL, as his company had been struck off the register on May 5, 2000. Moreover, regarding the notice of assessment pursuant to subsection 15(2), the Officer should have taken into account the fact that Sécovac's being struck off the register resulted in the expiration of the time limit for claiming interest, as the applicant was no longer a shareholder in Sécovac.

[26] In addition, considering that the notice of assessment under subsection 15(1.2) – subsequently replaced by the notice of assessment pursuant to subsection 15(2) – had been issued on the basis of misrepresentations, an amount equivalent to three and a half years' interest was unduly added to the notice of assessment pursuant to subsection 15(2).

[27] Lastly, in his calculation of the interest the Officer purportedly failed to take into account the various payments made by the applicant and his spouse with regard to their tax debt.

VIII. RESPONDENT'S ARGUMENTS

[28] The respondent contends that the Officer's decision is reasonable, for the three reasons that follow.

[29] First, the respondent submits that the applicant's goal in this proceeding is to have the interest he owes cancelled by asserting that the notices of assessment on which the interest is based are invalid. However, those notices of assessment were upheld by the TCC, whose decision has the authority of a final judgment and is *res judicata*. The applicant is therefore attempting to have his notices of assessment cancelled indirectly. A judicial review proceeding before the Federal Court is not an appropriate vehicle; the applicant had the onus of proving that the notices of assessment were incorrect before the TCC. As for the issue of the business having been struck from the register, the applicant was cognizant of this fact and should have raised the issue before the TCC when he had the opportunity to do so. Furthermore, the mere fact that a company has been struck from the register does not automatically entail the cancellation of the notices of assessment for its shareholders.

[30] Second, the respondent submits that none of the delays in the processing of the applicant's request for relief can be attributed to the CRA, including the proceedings before the TCC, and that the applicant failed to provide evidence of any such delay. Indeed, it was up to the applicant to hasten the hearing of his case before the TCC. As such, the CRA cannot be held responsible for the length of processing time.

[31] Third, the respondent submits that the applicant made a conscious decision to maintain an outstanding balance with the CRA, having been informed that interest continued to accrue on his tax debt despite the filing of notices of objection to the notices of assessment under paragraph 39(1)(*c*) and subsection 15(2).

[32] In addition, the respondent is requesting that the Court award costs on a solicitor-and-client basis in its favour due to the frivolous and abusive nature of the proceeding initiated by the applicant.

IX. ANALYSIS

[33] The application for judicial review will be dismissed for the reasons set out below.

[34] It appears the applicant is clearly trying to do indirectly what he cannot do directly, namely, challenge once again the validity of the notices of assessment issued to him.

[35] The Minister's power to grant the relief sought is set out in subsection 220(3.1) of the ITA :

Income Tax Act, RSC 1985, c 1 (5th Supp)	*Loi de l'impôt sur le revenu,* LRC 1985, c 1 (5^{e} supp)
PART XV ADMINISTRATION AND ENFORCEMENT	PARTIE XV APPLICATION ET EXÉCUTION
Administration	Application
[…]	[…]
Waiver of penalty or interest	Renonciation aux pénalités et aux intérêts
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.

A. *The applicant's principal argument cannot succeed*

[36] In support of his request for relief, in his memorandum and again at the hearing of this application, the applicant submits that the Officer's decision is incorrect because he failed to

recognize the invalidity of the three aforementioned notices of assessments. However, as the respondent indicated in his memorandum, these notices of assessment had been examined and confirmed. Indeed, the TCC confirmed the notice of assessment under subsection 15(2) on July 16, 2009 (*Gilbert v Canada* (*Minister of National Revenue)*, 2009 TCC 328) and the notice of assessment under paragraph 39(1)(*c*) on April 24, 2009 (*Gilbert v Canada (Minister of National Revenue)*, 2009 TCC 102. The FCA upheld the legality of the notice of assessment under section 160 on April 4, 2007 (*Gilbert v Canada (Minister of National Revenue)*, 2007 FCA 136) and the SCC refused the application for leave to appeal (*Gilbert v Canada (Minister of National Revenue)*, [2007] SCCA No. 274).

[37] In other words, these notices of assessment are, for application of law purposes, valid. Neither the Officer nor the Court may reassess these notices or make a judgment as to their validity. That task is for the TCC (*Canada (Minister of National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250).

[38] The applicant had an opportunity to challenge the validity of the notices of assessment issued to him. He had the onus of persuading the TCC of the merits of his claims, but was unable to do so. This Court cannot support or encourage a new collateral attack (see, for example: *City of Toronto v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63 at paras 33 and 34).

[39] The conclusion appears evident, given that each notice of assessment deemed to be invalid by the applicant was confirmed, including the one made pursuant to subsection 15(2), on which his second request for relief was based.

[40] Lastly, the applicant criticizes the Officer for having failed to consider the prejudice caused to him by notices of assessment that were in his view invalid; he further claims to have been the victim of harassment and deception, and accuses the CRA and its representatives of bad faith. There is nothing in the evidence to support such a conclusion.

B. *The Officer's decision is reasonable*

[41] The Officer's decision is reasonable. The CRA was not responsible for any undue delay other than the one it acknowledged responsibility for. The applicant knowingly allowed an outstanding balance to exist, on which interest was accruing.

[42] The Officer granted relief for the period from May 21, 2012, to May 15, 2013, a period he described as excessive. The applicant provided no evidence that would suggest that any other delays were attributable to the CRA, whether in the processing of the initial audit, notices of objection or requests for relief.

[43] The Officer's decision to partially allow the application for interest relief falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47) and as a result, the intervention of the Court is not warranted.

C. *Order as to costs*

[44] It is appropriate that an award of costs be made against the applicant in this matter.

[45] The respondent is claiming costs against the applicant on a solicitor-client basis. Despite the applicant's inflammatory language, the Court disagrees with this proposal, as it not likely to have the desired deterrent effect. Thus, the Court orders the applicant to pay a lump sum of $10,000, as this sum is nearest to what would be owing based on the highest scale of Tariff B of the *Federal Courts Rules*.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed;

2. The applicant is ordered to pay the respondent $10,000 in costs.

"Martine St-Louis"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1039-13
STYLE OF CAUSE:	PIERRE GILBERT v MINISTER OF NATIONAL REVENUE (CANADA REVENUE AGENCY)
PLACE OF HEARING:	MONTRÉAL (QUEBEC)
DATE OF HEARING:	JUNE 2, 2014
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	SEPTEMBER 22, 2014

APPEARANCES:

Pierre Gilbert	REPRESENTING HIMSELF
Stéphanie Coté	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Pierre Gilbert Montréal, Quebec	REPRESENTING HIMSELF
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT