Federal Court of Appeal | Cour d'appel fédérale

Date: 20120216

Docket: A-178-11

Citation: 2012 FCA 58

CORAM: **SHARLOW J.A.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

IAN SPENCE

Appellant

and

CANADA REVENUE AGENCY

Respondent

Heard at Calgary, Alberta, on February 16, 2012.

Judgment delivered from the Bench at Calgary, Alberta, on February 16, 2012.

REASONS FOR JUDGMENT OF THE COURT BY: SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT
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SHARLOW J.A.

[1] Subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), gives the Minister the discretionary power to waive or cancel penalties. Mr. Spence made a request under that provision for the waiver of a penalty imposed on him under subsection 163(1) of the *Income Tax Act*. The Minister refused to cancel the penalty. Mr. Spence applied to the Federal Court for judicial review of that decision. His application was dismissed. (2011 FC 426). Mr. Spence now appeals to this Court.

[2] The decision under appeal is the second Federal Court decision in this matter. When the Minister first refused Mr. Spence's request, Mr. Spence applied successfully for judicial review of that decision (2010 FC 52), and the Minister was ordered to reconsider. The Minister did so and, in a letter dated March 18, 2010, notified Mr. Spence that his request for a cancellation of the penalty was denied.

[3] The decision letter also states the reasons for the decision. As we read those reasons, the Minister was influenced primarily by the following factors. (1) It is the responsibility of the taxpayer to ensure the correctness of his return, even if it is prepared by someone else. (2) The available evidence indicates that Mr. Spence signed the return in question, certifying its correctness, and there is no evidence that he was prevented from reviewing his return before signing it. (3) The initial assessment notice issued to Mr. Spence disclosed that the amount of income assessed was approximately $22,000, substantially less than his actual income for the year, which was approximately $60,000. Mr. Spence ought to have noticed this discrepancy and taken corrective steps, but failed to do so before the underreporting was detected by the Canada Revenue Agency.

[4] As indicated above, Mr. Spence's application for judicial review of the reconsideration decision was dismissed, and Mr. Spence now appeals to this Court.

[5] In an appeal from a decision of the Federal Court disposing of an application for judicial review, this Court will not intervene unless the judge chose the wrong standard of review, or chose

the correct standard of review but did not apply it correctly: *Canada Revenue Agency v. Telfer*, 2009 FCA 23. In this case, the judge correctly determined that the standard of review is reasonableness (*Telfer*, at paragraph 25; *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153, at paragraph 7). Thus, the Minister's decision must stand unless our review of the Minister's decision, as well any reasons given and the record upon which the decision is based, leads us to conclude that the decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at paragraph 47).

[6] Counsel for Mr. Spence argues on a number of grounds that the judge did not correctly apply the reasonableness standard of review. Having considered his written and oral submissions, we can detect no error on the part of the judge that warrants the intervention of this Court. It is not necessary to recount the judge's entire analysis. It is enough to say that we are all of the view that his reasons are based on a thorough review of the Minister's decision and the record, and a sound appreciation of the relevant facts and the scope of the Minister's discretion.

[7] Counsel for Mr. Spence placed considerable reliance on *Stemijon Investments Ltd. v. Canada*, 2011 FCA 299 (sometimes referred to as "Canwest"), in which this Court provided, at paragraph 56, some guidance on the content of letters expressing reasons for a discretionary Ministerial decision. We do not take this paragraph as setting out any new principles relating to the sufficiency of reasons. Nor do we accept that the failure on the part of the Minister to follow the

suggested guidance would, in itself, be fatal to the validity of a decision or a basis for finding it to be unreasonable.

[8] Counsel for Mr. Spence also strongly emphasized the harshness of the penalty in this particular case, noting that an official involved in reviewing the request for relief also considered it harsh. The amount of the penalty was approximately $7,000, but the assessment that took into account the unreported income as well as the available credits resulted in less than a $200 change to Mr. Spence's net tax liability. We have no doubt that the Minister was aware of these facts. However, we are unable to say that the amount of the penalty, considered against all the relevant circumstances, is such a compelling factor in Mr. Spence's favour that it renders the Minister's decision unreasonable, particularly in light of the amount of the unreported income compared to Mr. Spence's total income.

[9] For these reasons, the appeal will be dismissed with costs.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-178-11
STYLE OF CAUSE:	Ian Spence v. Canada Revenue Agency
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	February 16, 2012
REASONS FOR JUDGMENT OF THE COURT BY:	(SHARLOW, DAWSON, TRUDEL JJ.A.)
DELIVERED FROM THE BENCH BY:	SHARLOW J.A.

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