Federal Court  Cour fédérale

Date: 20190318

Docket: T-734-18

Citation: 2019 FC 321

Ottawa, Ontario, March 18, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JAMES MIOR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, James Mior, seeks judicial review of the decision by the Minister of National Revenue [the Minister], dated March 22, 2018, refusing to exercise discretion pursuant to subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the ITA] to cancel or waive the gross negligence penalty previously assessed against the Applicant [the Decision]. The Decision was made by a delegate of the Minister, a Canada Revenue Agency [CRA] officer.

II. Background

[2] The Applicant was introduced to the income tax preparation firm Fiscal Arbitrators in the winter of 2009 by a work colleague.

[3] The Applicant was advised by Fiscal Arbitrators that they could offer legitimate tax planning services to minimize his income tax in a legal manner.

[4] The Applicant retained Fiscal Arbitrators to prepare and file his 2009 personal income tax return, and paid $500 for this service.

[5] Fiscal Arbitrators filed the Applicant's 2009 return claiming a net business loss of $529,553.50.

[6] By way of letters dated November 8, 2010 and March 24, 2011, the CRA wrote to the Applicant, advising that his 2009 return had been selected for review, and asking for details regarding his business activities. The Applicant responded in letters dated December 1, 2010 and April 18, 2011, but generally did not provide the requested details.

[7] The CRA issued a Notice of Reassessment on July 4, 2011 [the Reassessment], denying the claimed business losses and assessing a gross negligence penalty pursuant to subsection 163(2) of the ITA in the amount of $82,721.90 plus applicable interest.

[8] Upon receiving the Reassessment, the Applicant contacted Fiscal Arbitrators, and Fiscal Arbitrators prepared a Notice of Objection to the Reassessment on the Applicant's behalf.

[9] The CRA denied the Notice of Objection and confirmed the Reassessment.

[10] At this point, the Applicant became aware of the fraud that had been perpetrated by Fiscal Arbitrators. This fraud is evidenced in *R v Watts*, 2016 ONSC 4843, wherein Lawrence Watts, one of the principals of Fiscal Arbitrators, was found guilty of one count of fraud in an amount exceeding $5000, contrary to section 380(1)(a) of the *Criminal Code*, RSC 1985, c C-46, for reporting over $60 million of non-existent business losses on behalf of 241 taxpayers. Mr. Watts received a sentence of six years in prison, and was assessed a fine of approximately $150,000.

III. Decision Under Review

[11] On October 7, 2014, the Applicant made an initial request for taxpayer relief from the gross negligence penalty in the Reassessment. This request was made on the grounds of (1) financial hardship, and (2) extraordinary circumstances, in that the Applicant was victim to a fraud perpetrated by Fiscal Arbitrators.

[12] On January 13, 2016, the CRA informed the Applicant that his initial request was denied. This decision was made on the grounds that: (1) the Applicant had not submitted the financial documentation that the CRA requested, so the CRA could not assess financial hardship; and (2) the penalties and interest levied were a direct result of the Applicant's negligence, and therefore no extraordinary circumstances existed.

[13] On September 26, 2016, the Applicant made a second-level request for relief solely on the basis of the circumstances relating to Fiscal Arbitrators. The Applicant sought to have the penalty assessed against him reduced by 75 percent, from $82,721.90 to $20,680.48.

[14] The CRA subsequently asked the Applicant to explain the justification for a 75 percent reduction. In a letter dated February 24, 2018, the Applicant responded that a 75 percent reduction would uphold the public policy objective of deterring gross negligence, while also reducing the disproportionate harshness of assessing a large fine against victims of fraud.

[15] On March 22, 2018, the Minister denied the second-level request for relief.

[16] The dispositive section of the Decision is reproduced below:

> … Our self-assessment tax system relies on the taxpayer to honestly and completely report their taxable income no matter who prepares their return. You blindly signed your return, claiming a business loss, with the tax protestor prefix "per". Although you were assured that Fiscal Arbitrators methods were legal and above board, the disclaimer you had to of acknowledged and agreed to, stated otherwise. Fiscal Arbitrators' application and agreement disclaimer explicitly states that all information, material, is strictly for educational and private purposes. That the agents, officers, etc….. of Fiscal Arbitrators are not lawyers, attorneys, paralegals, CAs, accountants, tax consultants, or legal counsellors, and that applicants are to hold Fiscal Arbitrators harmless. You should have known something was not right once you received CRA letters. A responsible course of action would have been to seek independent 3rd party advice about a tax preparer not previously known to you.
>
> A taxpayer is also responsible for reviewing and understanding any correspondence received from and/or sent to the CRA. You blindly submitted prepared letters of reply containing meaningless correspondence which did not address the issues raised. In particular, you were aware of these responses dated December 1, 2010 and August 30, 2011.

> Your request to reduce the gross negligence penalty by 75% because the penalty is unduly harsh is a descriptor and not a basis for determining the quantum of the reduction. Paragraph 21 of Information Circular IC07-1R1, "Taxpayer Relief Provisions" cautions that the taxpayer relief provisions should not be used to arbitrarily reduce or settle a tax debt.
>
> We find that your request to reduce the gross negligence penalty by 75% is not based on any criteria.
>
> As you did not take steps that a responsible person would in fulfilling your obligations under the self-assessment tax system, relief of the gross negligence penalty for 2009 is not warranted based on the circumstances…

[17] The Applicant paid the penalty and interest owed. The Applicant now seeks judicial review of the Decision.

IV. Issues

[18] The issues are:

A. Did the Respondent err by not filing a supporting affidavit?

B. Did the Minister fetter her discretion by treating the Guidelines as binding?

C. Did the Minister err by relying on unfounded facts or irrelevant factors?

D. Did the Minister err in denying the Applicant's request for relief?

V. Standard of Review

[19] Discretionary decisions of the Minister under subsection 220(3.1) of the ITA are reviewed on the reasonableness standard (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 20 [*Stemijon*]).

[20] However, a decision that is the product of fettered discretion is *per se* unreasonable, as articulated by the Federal Court of Appeal in *Stemijon,* above, at paragraphs 24-25:

> [24] *Dunsmuir* reaffirms a longstanding, cardinal principle: "all exercises of public authority must find their source in law" (paragraphs 27-28). Any decision that draws upon something other than the law – for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must per se be unreasonable.
>
> [25] In the circumstances of this case, if the Minister did not draw upon the law that was the source of his authority, namely subsection 220(3.1) of the Act, and instead fettered his discretion by having regard only to the three specific scenarios set out in the Information Circular, his decisions cannot be regarded as reasonable under *Dunsmuir*.

VI. Relevant Provisions

[21] Subsection 163(2) of the ITA permits the Minister to assess gross negligence penalties to anyone who knowingly, or under circumstances amounting to gross negligence, assented to or acquiesced in the making of a false statement or omission in a tax return. The introductory words of subsection 163(2) of the ITA state:

> (2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of…

[22] Subsection 220(3.1) of the ITA grants the Minister broad discretion to waive or cancel penalties and interest otherwise payable under the ITA:

> (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.

[23] The CRA has developed administrative guidelines to inform the exercise of this discretion, Information Circular IC07-1R1 - Taxpayer Relief Provisions [the Guidelines].

[24] Paragraph 23 of the Guidelines outline the circumstances that may warrant relief:

> 23. The minister of national revenue may grant relief from penalties and interest where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation or requirement:
>
> (a) extraordinary circumstances
>
> (b) actions of the CRA
>
> (c) inability to pay or financial hardship

[25] Paragraph 25 of the Guidelines detail potential extraordinary circumstances:

> 25. Penalties and interest may be waived or cancelled in whole or in part, if they result from circumstances beyond a taxpayer's control. Extraordinary circumstances that may have prevented a taxpayer from making a payment when due, filing a return on time, or otherwise complying with an obligation under the act include, but are not limited to, the following examples:
>
> (a) natural or human-made disasters, such as flood or fire

> (b) civil disturbances or disruptions in services, such as a postal strike
>
> (c) serious illness or accident
>
> (d) serious emotional or mental distress, such as death in the immediate family

[26] As stated in the Guidelines, the scope of the Minister's discretion is broader than the three specific scenarios set out in the Guidelines (*Stemijon* at para 27).

VII. Analysis

A. *Did the Respondent err by not filing a supporting affidavit?*

[27] A "Certificate Pursuant to a Request Made Under Rule 317 of the Federal Courts Rules" was filed with the Court on May 3, 2018, in which a delegate of the Minister certified that the documents enclosed in the certified tribunal record are true copies of the material requested by the Applicant [the Certificate].

[28] The Respondent's record consists entirely of documents from the certified tribunal record.

[29] The Applicant argues that the Respondent erred by not including a supporting affidavit in their record that exhibited the documents contained in the tribunal record, and therefore denying the Applicant the ability to cross examine. However, Rules 309 and 310 of the *Federal Courts Rules*, SOR/98-106, allow both applicants and respondents to include materials from the certified

tribunal record in their application records without the need to attach the materials to an affidavit (*Cold Lake First Nations v Noel*, 2018 FCA 72 at paras 26, 30).

[30] There is no obligation on the Respondent to file an affidavit if the intent is to rely solely on the Certificate. Moreover, at this late stage of the proceeding, the Applicant is far too late in disputing the nature of the evidence upon which the Respondent relies.

B. *Did the Minister fetter her discretion by treating the Guidelines as binding?*

[31] The Applicant argues that the Minister fettered her discretion by limiting the exercise of her discretion and treating the Guidelines as binding, and therefore finding that the Applicant's request to reduce gross negligence penalties was not based on any criteria. This argument is founded on the following excerpt from the Decision:

> … Your request to reduce the gross negligence penalty by 75% because the penalty is unduly harsh is a descriptor and not a basis for determining the quantum of the reduction. Paragraph 21 of Information Circular IC07-1R1, "Taxpayer Relief Provisions" cautions that the taxpayer relief provisions should not be used to arbitrarily reduce or settle a tax debt.
>
> We find that your request to reduce the gross negligence penalty by 75% is not based on any criteria.

[32] The excerpt above simply states that the Applicant put forward no basis for determining that the quantum of the requested reduction to the penalty should be 75 percent. The Minister did not fetter her discretion.

C. *Did the Minister err by relying on unfounded facts or irrelevant factors?*

[33] The Applicant also argues that the Minister unreasonably relied on twelve unfounded facts in reaching the Decision, some of which overlap, which he alleges are not supported by the evidentiary record. This argument appears to be based on the unfounded evidentiary objection which is dismissed above. Nonetheless, I will address in brief the substantial points argued by the Applicant, which take issue with the following points from the Decision:

a. that the Applicant "blindly signed [his] return, claiming a business loss with the tax protester prefix "per"". This was a reasonable conclusion for the Minister to reach, as (i) the Applicant did sign his return with the prefix "per", (ii) the Applicant stated that he believed the representations of Fiscal Arbitrators, and (iii) the Applicant does not deny that the business losses were fictitious;

b. that the Applicant "had to of acknowledged and agreed to" a standard form agreement used by Fiscal Arbitrators, despite having before her only an unsigned copy of the agreement. This was a reasonable inference for the Minister to make, as the Applicant retained Fiscal Arbitrators;

c. "that the agents, officers, etc., … of Fiscal Arbitrators are not lawyers, paralegals, CAs, accountants, tax consultants, or legal counsellors, and that applicants are to hold Fiscal Arbitrators harmless." This was reasonable, as the Officer was simply referring to language contained in the standard form agreement;

d. that the Applicant should have known something was not right upon receipt of CRA letters, or that the Applicant received CRA letters at all, as assumed in the Decision. The CRA letters of November 8, 2010 and March 24, 2011 are addressed to the Applicant, and the Applicant does not deny that he received those letters. This finding was reasonable;

e. that a responsible course of action would have been to seek independent 3rd party advice. This was a reasonable conclusion for the Minister to reach in light of the circumstances;

f. that the Applicant was aware of the letters written in his name to the CRA dated December 1, 2010 and August 30, 2011. These letters were sent by registered mail from James Mior, and it was reasonable for the Minister to conclude that the letters were from the Applicant; and

g. that the Applicant had a tax debt as of the date of the Decision. This finding is not central to the Decision, and the Applicant offers no explanation for why it was allegedly unreasonable.

[34] The Applicant also argues that the Minister considered irrelevant factors, namely news releases issued by the CRA, as well as a blank standard form agreement employed by Fiscal Arbitrators. The news releases included in the Certificate are not cited in the Decision, and played no central role, if any, in the Minister's analysis. Additionally, the Minister was reasonable to infer that the Applicant would have signed such a standard form agreement, and the Applicant has made no suggestion that he did not sign such an agreement.

[35] I find that the Minister did not unreasonably rely on unfounded facts or irrelevant factors.

D. *Did the Minister err in denying the Applicant's request for relief?*

[36] The Minister's discretion under subsection 220(3.1) of the ITA must be exercised in good faith, in accordance with the principles of natural justice, taking into account all relevant considerations and without regard to irrelevant or extraneous ones (*Edwards v Canada*, [2002]

FCJ No 841 (TD) at para 14 [*Edwards*]). The Guidelines provide examples, but they do not circumscribe the circumstances in which the Minister may choose to exercise discretion (*Stemijon* at para 27).

[37] The Applicant does not dispute the legal correctness of the gross negligence penalty imposed by the Minister under subsection 163(2) of the ITA. Rather, the Applicant argues that, based on the extraordinary circumstances of this case, the Minister should nonetheless have exercised her discretion under subsection 220(3.1) of the ITA, and that this failure was unreasonable.

[38] In particular, the Applicant argues that the Minister unreasonably failed to engage with the evidence that Fiscal Arbitrators had perpetrated a fraud and that the Applicant was a victim of that fraud.

[39] The Applicant also argues that the Minister failed to consider the long term detrimental effects of such an onerous penalty and hardship on the Applicant. However, the Applicant filed no evidence to support any such finding.

[40] The Respondent argues that the Minister's Decision was reasonable, based on two points. First, the Respondent argues that the Minister's Decision was reasonable because the Applicant knew or reasonably ought to have known that the losses on his personal income tax return were false.

[41] Second, the Respondent argues this Court has repeatedly held taxpayers responsible for the actions of those persons appointed to take care of their financial matters (*Fleet v Canada (Attorney General),* 2010 FC 609 at para 29 [*Fleet*]). This principle is founded on the premise that taxpayers are expected to inform themselves of the applicable filing requirements relating to their financial matters, notwithstanding the use of a financial representative.

[42] I find that the Minister was reasonable to deny the Applicant's request for relief, for the reasons that follow.

[43] First, as articulated by the Federal Court of Appeal in *Stemijon,* one of the focuses of subsection 220(3.1) of the ITA is the granting of relief where there are extenuating circumstances beyond the control of the person seeking relief (*Stemijon,* at para 50). In this matter, the Applicant signed his name to a tax return claiming $529,553.50 in fictitious business losses. Additionally, prior to the CRA issuing the Notice of Reassessment, the Applicant received two letters from the CRA requesting further details regarding his business activities, and took no action to question Fiscal Arbitrators as to the validity of the claimed business losses. Common sense must prevail in looking reasonably through either a legal lens or equitable lens, in finding that it defies reasonable logic or credibility that the Applicant was not aware of a bogus claim for a significant business loss claimed in relation to a non-existent business.

[44] There is no doubt that a fraud was perpetrated by the principals of Fiscal Arbitrators. However, the Applicant was also complicit in, or wilfully disregarded, the fraud, at least to some degree. The circumstances in this matter, which led to the gross negligence penalty assessed

against the Applicant, were clearly not circumstances beyond the Applicant's control. While the Minister's discretion under subsection 220(3.1) is broad, and certainly not limited to matters involving circumstances beyond a taxpayer's control, the Applicant's complicity in, or wilful disregard to, the Fiscal Arbitrators fraud supports the reasonableness of the Minister's decision to deny discretionary relief.

[45] Second, the principle expressed in *Fleet*, above, that taxpayers should be held responsible for the actions of those persons appointed to take care of their financial matters, supports the reasonableness of the Minister's choice to not exercise discretion. While the *Fleet* principle should not be treated as a hard and fast rule, particularly in cases where a taxpayer is the unwitting victim of a sophisticated fraudster, in this matter the Applicant was certainly not unwitting; rather, the Applicant's complicity in, or wilful disregard to, the Fiscal Arbitrators fraud suggests that the Minister was reasonable to deny discretionary relief.

[46] Third, contrary to the Applicant's argument, the Decision fully engages with the evidence that Fiscal Arbitrators had engaged in fraud and the Applicant's involvement in that fraud. The Decision is replete with references to the Applicant's complicity in, or wilful disregard to, the fraud, including signing his name to his tax return and failing to meaningfully address correspondence received from the CRA. In light of these actions, it would be difficult to characterize the Applicant as a victim.

[47] Fourth, I agree with the Respondent that notwithstanding counsel's argument on behalf of the Applicant that the Respondent failed to consider the long term hardship of the penalty on the Applicant, no evidence was filed before the Minister to support such a finding.

[48] The Minister's Decision upholds the standard outlined in *Edwards*, above – to exercise discretion under subsection 220(3.1) of the ITA in good faith, in accordance with the principles of natural justice, taking into account all relevant considerations and without regard to irrelevant or extraneous ones.

VIII. Conclusion

[49] This application for judicial review is dismissed. Costs to the Respondent.

[50] At the hearing of this matter, counsel for the Respondent submitted identical bills of costs for both T-734-18 and T-735-18. The matters were argued at the same time, and the written and oral submissions by each counsel were effectively the same. I am willing to accept reasonable disbursements in the amount of $500 for each file, and fees in the amount of $750 for each file.

JUDGMENT in T-734-18

THIS COURT'S JUDGMENT is that

1. The application is dismissed;

2. Costs to the Respondent inclusive of fees and disbursements in the amount of $1250.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-734-18
STYLE OF CAUSE:	JAMES MIOR v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	MARCH 13, 2019
JUDGMENT AND REASONS:	MANSON J.
DATED:	MARCH 18, 2019

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