Federal Court  Cour fédérale

Date: 20190605

Docket: T-656-17

Citation: 2019 FC 787

Ottawa, Ontario, June 5, 2019

PRESENT: Madam Justice Elliott

BETWEEN:

TIMOTHY SHEA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Timothy Shea [Mr. Shea] seeks judicial review of a decision by Christine Fortin, a Team Leader with the Taxpayer Relief Division at the Shawinigan Taxation Centre [the Minister's delegate] of the Canada Revenue Agency [CRA]. The Minister's delegate communicated her decision to Mr. Shea in a letter dated April 7, 2017 [the Decision]. The Decision partially allowed Mr. Shea's reconsideration request for taxpayer relief from penalties and interest with respect to his 2003-2010 taxation years.

I. **Preliminary Issue**

[2] The CRA is not a proper party under rules 303(1) and (2) of the *Federal Courts Rules*, SOR/98-106. Therefore, the Attorney General of Canada shall be the only party named as a respondent. The style of cause is amended accordingly.

II. **Background**

[3] In this review Mr. Shea, who is self-represented, is only challenging the results of the 2003 tax year. He seeks to overturn interest charges of $26,536.39 which have accumulated since 2004 when his return was filed.

[4] Specifically, Mr. Shea says that for tax year 2003 he underwent an audit that lingered for an inordinately long time due to slow responses by the CRA. He says but for that, he would not owe the interest because he would have used his allowable business investment loss [ABIL] to negate it.

[5] Mr. Shea's personal audit was secondary to an audit of TES Computers Inc. [TES], a company of which he was a shareholder. Mr. Shea's 2003 and 2004 T1 returns were reassessed during an audit of TES for its tax years 2002 and 2004. Mr. Shea had shareholder benefits added to his returns and his self-employment business expenses were disallowed.

A. *The July 2006 Reassessment*

[6] On July 5, 2006, as a result of the audit, Mr. Shea was reassessed for his 2003 tax return. The reassessment added income and commission totalling $202,347 to his return. This resulted

in revised provincial and federal taxes plus a negligence penalty and interest on the tax arrears totalling almost $154,000.

[7] According to the CRA Statement of Account for the period from June 14, 2004 to November 26, 2013 [Statement of Account], as of July 5, 2006 Mr. Shea owed $156,016.98 for his cumulative unpaid income taxes, Canada Pension Plan [CPP] remittances and arrears of interest and penalties. This amount was before a reassessment of his 2004 income tax return which added another $4,872.22 to the balance owing by Mr. Shea as of July 5, 2006.

[8] On July 27, 2006, Mr. Shea objected to the audit reassessments. On February 12, 2007, Mr. Shea was advised that his objection was unsuccessful. He appealed that decision to the Tax Court of Canada [TCC] in May 2007.

B. *The September 2009 Reassessment*

[9] On September 8, 2009, there are two entries on the Statement of Account.

[10] First, the CRA added interest arrears to Mr. Shea's balance owing. Mr. Shea then owed a total of $202,127.14 for all the tax years from 2003 onward, up to September 8, 2009.

[11] Next, the CRA appeals division reassessed Mr. Shea's 2003 income, and reduced it by $112,431. Consequently, the taxes owed by Mr. Shea were reduced and the related interest and penalty charges were reversed in the combined total amount of $137,918.04.

[12] At the end of the day on September 8, 2009, the total balance owing by Mr. Shea to the CRA for all tax years to that date was reduced from $202,127.14 to $64,209.10.

[13] Mr. Shea's appeal to the TCC was officially withdrawn on September 29, 2009.

[14] That, however, was not the end of Mr. Shea's 2003 tax interactions with the CRA.

C. *ABIL and the May 17, 2012 Reassessments*

[15] On June 8, 2011, Mr. Shea filed a request to carry back an ABIL from his 2006 tax year to his 2003 tax year.

[16] The 2006 tax year was reassessed by the CRA audit on May 17, 2012. This resulted in a deduction of $118,520 which was $100,033 more than Mr. Shea's total income in 2006.

[17] Mr. Shea's 2003 taxes were then reassessed on May 17, 2012 to carry back and apply the ABIL of $100,034. After the ABIL was applied, Mr. Shea's tax payable for 2003 was reduced by $43,041.08. His interest arrears charges were reduced by $1,889.28 for a total reduction of $44,930.36.

[18] The net result, as of May 17, 2012, was that for the 2003 tax year Mr. Shea owed the CRA $12,270.92 instead of the 2006 reassessed amount of $153,894.90.

III. **The First Level Request for Taxpayer Relief**

[19] Unsatisfied with the result of the May 17, 2012 reassessment, Mr. Shea filed a First Level Request for Taxpayer Relief. He sought a waiver of the interest charged to him between the 2003 and 2010 tax years. Mr. Shea believed that the CRA should not have charged him interest on the taxes that he owed before he filed the ABIL. He believes delay by the CRA in addressing his tax situation caused the problem.

[20] According to the Decision, on July 22, 2013, the Appeals Division of the CRA granted partial relief to Mr. Shea by cancelling interest that had accrued between November 1, 2004 and April 1, 2005 because of the audit team's delay. This is the only information in the record with respect to the First Level Request for Taxpayer Relief.

IV. **The Second Level request for Taxpayer Relief and the Decision under Review**

A. *Mr. Shea's Request and Supporting Documentation*

[21] Mr. Shea made a Second Level Request for Taxpayer Relief on September 12, 2016. In his request, Mr. Shea asked for a waiver of all interest charged for the 2003 to 2010 tax years. His grounds for relief were stated to be that the CRA's errors and delays adversely impacted his 2003 tax assessment.

[22] Mr. Shea submitted to the Minister's delegate his own summary sheet using numbers from the Statement of Account. He detailed various tax and CPP assessments and his payments and credits from 2003 to 2010. He also submitted the Statement of Account.

[23] Mr. Shea's summary sheet showed that his remittances up to April 30, 2011 (the 2010 tax year) were $73,974.48. His corresponding assessments for tax and CPP totalled $52,697.71.

[24] Therefore, by his calculation, the CRA owed Mr. Shea $21,276.77 at the time of his 2010 tax year assessment.

[25] Mr. Shea maintains that if he had been properly assessed, in a timely manner, he could have filed his ABIL claim years earlier. As he put it "it is extremely unfair and illogical to delay

telling me I owe you money, then tell me I owe you interest on that money, when if I had been informed properly and timely, I would have been able to negate almost all of it."

B. *The Taxpayer Relief Fact Sheet and the Decision under Review*

[26] The taxpayer relief provisions are found in subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*] which provides that with respect to interest and penalties, on application by a taxpayer, the Minister has the discretion to waive or cancel all or any portion of any penalty or interest which is otherwise payable. The exercise of such discretion by the Minister's delegate is in turn guided by provisions set out in guidelines established by the CRA in Information Circular IC07-1 [the Guidelines].

[27] The Taxpayer Relief Fact Sheet [Fact Sheet] is a background document that summarizes for the Minister's delegate relevant facts related to the request for relief. It also addresses the factors and considerations set out in the Guidelines and makes a recommendation.

[28] In Mr. Shea's case, the Fact Sheet indicated that he owed interest arrears of $29,366.39 for the 2003 to 2010 tax years at the time of the relief request in September 2016. His claim that he had paid a total of $73,974.46 and was only assessed a total of $52,697.17 was acknowledged as was the fact that he believed the CRA owed him the difference of $21,276.77.

[29] Notices of reassessment were issued on May 17, 2012 for tax years 2003, 2004, 2006 and 2010. As previously discussed, the balance owing for the 2003 tax year was $12,270.92 as of May 17, 2012 after the ABIL was applied.

[30] The Fact Sheet recommendation was that the interest arrears between February 8, 2013 and July 19, 2013 be cancelled for the 2010 tax year because the CRA had taken no action to process Mr. Shea's objection during that period.

[31] It was also recommended that the remaining interest for the 2003 to 2006 and 2010 tax years should be charged because the CRA Appeals Department had already granted relief for unreasonable delay in processing the audit.

[32] With respect to the 2003 tax year, which Mr. Shea still disputes, the Fact Sheet states that the file at the TCC for the appeal of the 2003 and 2010 tax years showed delays were not caused by the CRA. Several instances of delay were caused by Mr. Shea not promptly providing documentation requested by the CRA. It was concluded that there was no indication of undue delay caused by the CRA during those time periods.

[33] The Fact Sheet also pointed out that subsection 161(7) of the *ITA* says that interest owed by a taxpayer is calculated on the tax payable before a loss carry back is taken into consideration. The reduction to Mr. Shea's tax payable was deemed by subsection 161(7)(b)(iv) to have been applied 30 days after the date he made his request. Since the ABIL request was received on June 8, 2011, it was concluded that interest was correctly charged prior to the ABIL being applied.

[34] Based on the reasons above, the Decision did not deviate from the recommendations made in the Fact Sheet.

V. **Issues and Standard of Review**

[35] Mr. Shea raises the issue of undue delays by the CRA in processing his tax returns, particularly in completing the audit.

[36] Related to Mr. Shea's claim of delays by the CRA is his objection that had the returns been processed in a more timely manner he would have been able to make his ABIL claim in 2006. That would have removed almost all the interest charged against him.

[37] Both of these issues raise the question of whether the Decision was reasonable. That determination includes reviewing whether the Minister's delegate reasonably exercised the Ministerial discretion in the Guidelines.

[38] The standard of review applied to the discretionary decision of the Minister's delegate under subsection 220(3.1) of the *ITA* is reasonableness: *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 20 [*Stemijon*]; *Canada Revenue Agency v Telfer*, 2009 FCA 23, at paras 24-28 [*Telfer*].

[39] Applying the reasonableness standard, the Court can only intervene if it is persuaded that the decision was unreasonable in that it lacked justification, transparency or intelligibility, or that the outcome did not fall within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

[40] If the reasons, when read as a whole, "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range

of acceptable outcomes, the Dunsmuir criteria are met": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Nfld Nurses*].

[41] Judicial review of a decision taken by the Minister's delegate under subsection 220(3.1) is not an appeal. It is the review of a discretionary decision to provide, or in this case, not to provide, exceptional relief to provisions of the *ITA*. There is no obligation on the Minister's delegate to reach any particular conclusion, nor can such relief be claimed as of right: *Jenkins v Canada (Revenue)*, 2007 FC 295 at para 13 [*Jenkins*].

[42] In reviewing a decision of the Minister's delegate made under subsection 220(3.1) of the *ITA*, it has been held that "[t]he Court's role is not to reweigh the evidence … but rather to examine if the Minister's Delegate 'properly considered the evidence before [her] and that the decision was not based on considerations irrelevant or extraneous to the statutory purpose": *Easton v Canada (Revenue Agency)*, 2017 FC 113 at para 43 [internal citations omitted].

VI. **The Taxpayer Relief Provisions of the *ITA***

[43] Subsection 220(3.1) of the *ITA* provides that, on application by the taxpayer within a fixed timeframe, the Minister has the discretion to waive or cancel all, or any portion, of any penalty or interest otherwise payable.

[44] There are three specific situations addressed in the Guidelines that may justify relief from penalty and interest. They are set out in paragraph 23 of the Guidelines:

(a) extraordinary circumstances;

(b) actions of the CRA; and

(c) inability to pay or financial hardship.

[45] Mr. Shea relies on paragraph 23(b) of the Guidelines and says that actions of the CRA warrant the granting of his application for relief.

[46] Actions of the CRA that may qualify for relief from penalties and interest are set out in paragraph 26 of the Guidelines. Mr. Shea points to processing delays set out in paragraph 26(a) and undue delays in resolving an objection or an appeal or in completing an audit set out in paragraph 26(f) as being applicable to his situation. These provisions are as follows:

> **Actions of the CRA**
>
> 26. Penalties and interest may also be waived or cancelled if the penalty and interest arose primarily because of actions of the CRA, such as:
>
> (a) processing delays that result in the taxpayer not being informed, within a reasonable time, that an amount was owing;
>
> [. . .]
>
> (f) undue delays in resolving an objection or an appeal, or in completing an audit.

[47] When relief is requested based on any of the situations enumerated in paragraph 23, the factors set out in paragraph 33 of the Guidelines are to be considered when determining whether to cancel or waive penalties and interest. The factors are:

- whether the taxpayer has a history of compliance with tax obligations;
- whether the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued;
- whether the taxpayer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system; and
- whether the taxpayer has acted quickly to remedy any delay or omission.

[48] The Guidelines reiterate at paragraph 24 that the Minister has broad general power to grant relief under subsection 220(3.1) even if the taxpayer's situation does not fall within the provisions of paragraph 23.

VII. **Analysis**

A. *Mr. Shea's Memorandum and Affidavit*

[49] The Respondent has objected to two paragraphs in Mr. Shea's Memorandum of Fact and Law and portions of his affidavit that contain information that was not before the Minister's delegate. Those paragraphs have not been taken into account in this analysis.

B. *Reasonableness of the Decision*

(1) Were the delay allegations reasonably assessed in the Decision?

[50] Mr. Shea produced in his Memorandum of Fact and Law a summary of key time periods involved in his 2003 tax return. He claims it demonstrates that his audit was inordinately long.

[51] By Mr. Shea's calculation, from September, 2004 to July 29, 2009 the CRA took 48 months and two weeks – just over 4 years – to process his 2003 tax return. His participation, including responding to queries, filing his objection and filing his appeal to the TCC consumed 10 months and one week.

[52] The Respondent submits that the Minister's delegate reasonably found the delays by the CRA were not excessive and some of them were substantially attributable to Mr. Shea.

[53] The Fact Sheet indicates that on February 24, 2005 Mr. Shea was asked to provide additional information. He provided some of it approximately six months later, on August 17, 2005. More information was requested on December 12, 2005 and provided on February 6, 2006.

[54] Mr. Shea's notice of objection was filed on July 27, 2006. Additional information was requested by the CRA on January 8, 2007 and the decision letter was sent on February 12, 2007.

[55] The Fact Sheet indicates that a review of the file at the TCC indicated there were several instances of delay caused by Mr. Shea. He was asked for documentation on May 28, 2008. He provided it on September 30, 2008, February 2, 2009 and June 19, 2009 respectively.

[56] Based on the foregoing, it was concluded in the Fact Sheet, and accepted by the Minister's delegate, that "there is no indication that there was undue delay caused by the CRA during these periods."

[57] Despite Mr. Shea's urging, I am not persuaded that the Minister's delegate unreasonably exercised her discretion on the issue of delays.

[58] The passage of an extended amount of time is not necessarily the same as a "delay". Periods of apparent inactivity on each side of this matter do not mean that nothing was being done to move matters forward.

[59] The question raised is: what amount of time is the Minister permitted to take in order to fully and properly assess a tax return?

[60] Subsection 152(1) of the *ITA* sets out the requirement that the Minister assess a tax return:

152. (1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine	152. (1) Le ministre, avec diligence, examine la déclaration de revenu d'un contribuable pour une année d'imposition, fixe l'impôt pour l'année, ainsi que les intérêts et les pénalités éventuels payables et détermine :
(a) the amount of refund, if any, to which the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year; or	a) le montant du remboursement éventuel auquel il a droit en vertu des articles 129, 131, 132 ou 133, pour l'année;
(b) the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.	b) le montant d'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année.

[61] In *Ficek v Canada (Attorney General)*, 2013 FC 502 [*Ficek*], this Court has opined on the statutory requirement that the Minister must take steps with all due dispatch to examine a taxpayer's return, assess the tax payable together with any interest and penalties and then determine the amount of refund or tax payable, if any. Mr. Justice Phelan conducted a review of the jurisprudence on this question, then he concluded that:

> [19] The term "with all due dispatch" was thoroughly canvassed in *Jolicoeur v Minister of National Revenue*, [1960] CTC 346, 60 DTC 1254 (Ex Ct). The essential conclusions are that term is the equivalent of "with all due diligence" or "within a reasonable time" and that there is no fixed time period for the performance of the duty to assess.

> [. . .]
>
> [21] Other decisions such as *Merlis Investments Ltd v Minister of National Revenue*, (2000), [2001] 1 CTC 57, 2000 DTC 6634 (Fed TD), and *Rodmon Construction Inc v R* , [1975] CTC 73, 75 DTC 5038 (Fed TD), confirm that same basic interpretation which provides the Minister with reasonable discretion in the timing of assessment. However, the discretion is not unfettered, it must be reasonable and for a proper purpose of ascertaining and fixing the liability of the taxpayer (*J Stoller Construction Ltd v Minister of National Revenue*, [1989] 1 CTC 2171, 89 DTC 134 (TCC)).

[62] The onus was on Mr. Shea to show that the time that the CRA took to assess his 2003 tax return was excessive. Mr. Shea pursued the steps available to him to challenge the reassessments. He objected to the audit reassessment. He appealed that negative result to the TCC. He subsequently availed himself of a loss carryback by claiming an ABIL in 2006 as result of which he obtained a significant, but not total, reduction in the tax payable for 2003.

[63] The steps Mr. Shea took and those pursued by the CRA in response and in fulfilling its statutory mandate each took time to initiate and complete.

[64] Mr. Shea's timeline shows that the CRA took four years to follow its process while he took less than one year. Mr. Shea's chart stops at July 29, 2009. At that point, he had not filed his claim to apply his 2006 ABIL to his 2003 tax year. It was the critical step that eliminated most of the remaining income, thereby retroactively reducing his tax payable. Mr. Shea did not take that step until June 8, 2011— almost 2 years after the last date on his timeline.

[65] Mr. Justice Phelan confirmed in *Ficek* that the time within which an assessment must be completed, including the extent of any investigation, is not fixed. Every case is factually

different so the time taken to complete an assessment must be reasonable on the particular facts of each case.

[66] On review of the Decision and the underlying record, I am satisfied that the Minister's delegate took into consideration the issues Mr. Shea raised regarding the length of time taken by the CRA to process his 2003 return to finality.

[67] I am equally satisfied that in arriving at that decision the Minister's delegate reasonably exercised her discretion. She did not consider extraneous or improper factors and there is no evidence that the objective of the process was anything other than to ascertain and fix the tax liability of Mr. Shea for the year 2003.

(2) Interest and the ABIL claim

[68] The other side of Mr. Shea's case is that had his 2003 audit reassessment proceeded in a more reasonable timeline he would have been able to file for and claim the ABIL earlier, thereby reducing or eliminating the interest and penalty charges. He adds that since, in effect, he did not owe any taxes he should not be liable to pay interest and penalties.

[69] The Minister points out that the interest owing by Mr. Shea for tax year 2003 was reduced by $44,755.98 on September 8, 2009 in the reassessment which followed his withdrawal of the TCC appeal.

[70] I note that additional interest arrears of $1,889.28 were reversed in the 2003 reassessment on May 17, 2012.

[71] The Respondent submits that the interest relief Mr. Shea received was reasonable because, although Mr. Shea's ABIL was allowed, interest had legally accrued on the amount owing in accordance with subsection 161(7)(b)(iv) of the ITA which requires the loss to be applied 30 days after the day the request for the loss carry back was made on June 8, 2011.

[72] The Respondent argues that Mr. Shea could have filed his ABIL claim before the end of the appeal process instead of filing it two years after the appeal was resolved. If he had filed earlier, then he would have owed less interest.

[73] Mr. Shea's response was that until the 2006 reassessment was made in May 2012, thereby producing a loss in 2006, he could not file his ABIL claim because it requires a loss in order to be valid.

[74] Mr. Shea has focused on the outcome and his perception that it was unfair to him that after all is said and done he owes very little tax but has a bill for penalty and interest which is compounding daily. In his request for taxpayer relief, he put the issue this way:

> I was also assigned significant arrears interest charges during the time CRA claimed I owed all this money and was subsequently corrected. A significant part of those interest charges still remain and are the reason for the discrepancy. I am effectively being charged, and continue to be compounded for money you now very clearly acknowledge I never should have owed.

[75] Mr. Shea it is not being entirely accurate when he says that he did not owe any taxes for his 2003 tax year. The May 17, 2012 assessment indicates that his taxable income, after applying his ABIL claim, was $41,730.

[76] After applying his pre-existing tax credits, Mr. Shea owed income tax of $9,905.29 for the year 2003. That amount of tax was based on his final revised taxable income without any interest charges or other charges.

[77] Mr. Shea did not file his request to carry back the 2006 ABIL on September 8, 2009 when his taxes were significantly reassessed. He waited until June 8, 2011 to file his claim. The effective date under subsection 161(7) for the computation of interest on the outstanding amount of tax payable by Mr. Shea was therefore July 8, 2011.

[78] As I calculate it, by not filing his ABIL claim in September 2009 Mr. Shea allowed another 668 days of compound interest to be added to his tax debt. This could not be attributed to the CRA. It was purely a choice made by Mr. Shea.

[79] The final amount of tax owing by Mr. Shea as of May 17, 2012 was $12,270.92. That is only $2,365.63 more than the May 17, 2012 final revised amount of tax owing for the 2003 tax year.

[80] Mr. Shea was advised in writing by the CRA that he did not have to pay any disputed tax amount but, arrears interest would continue to accumulate. He was advised that he could reduce or avoid interest charges by making a payment on his account and that the CRA would pay interest on any amount it refunds if the objection is allowed.

[81] Mr. Shea did not pay the $2,365.63. There is no evidence that he paid any of the $12,270.92 tax owing for 2003. That was Mr. Shea’s choice. He was aware of the possible financial impact. He freely made the choice.

VIII. **Conclusion**

[82] The onus was on Mr. Shea to show the Decision is unreasonable.

[83] Based on the record and the jurisprudence, the Minister's delegate could reasonably find there was no delay by the CRA justifying relief from interest.

[84] If the Decision was based on incorrect facts, it would be unreasonable.

[85] Mr. Shea's argument that he could not make his ABIL claim any earlier than he did is a disputed fact. It is neither correct nor incorrect.

[86] The Minister's delegate was fully aware of Mr. Shea's argument which is recited in the Fact Sheet. She did not accept it.

[87] This Court owes deference to the Minister's delegate as a specialized decision-maker. I find that the Decision is not based on an incorrect fact.

[88] The outcome of the Decision was to deny Mr. Shea's request for cancellation and waiver of all penalties and interest owing under the *ITA* with respect to the income tax he was assessed for the 2003 tax year. That conclusion is within the range of possible, acceptable outcomes defensible on the facts and law.

[89] Mr. Shea can see why the conclusion was reached. The reasons are justified, transparent and intelligible. They meet the *Dunsmuir* criteria.

[90] The Decision is reasonable. The application is denied, without costs.

JUDGMENT in T-656-17

THIS COURT'S JUDGMENT is that the application is denied, without costs.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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