Federal Court  Cour fédérale

Date: 20200609

Docket: T-147-18

Citation: 2020 FC 678

Ottawa, Ontario, June 9, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

KEITH NEYEDLY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Keith Neyedly (the Applicant) seeks judicial review of a decision made by the Canada Revenue Agency (CRA) dated December 19, 2017, denying most of the relief he requested in a fairness claim in relation to penalties and interest that were imposed due to an omission in his 2005 income tax return. As the dates make evident, this case has a lengthy history.

[2] The Applicant says that the decision to deny most of his fairness claim is unreasonable. Essentially, the Applicant made a claim for relief under the Taxpayer Bill of Rights as well as section 241 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*]. He argued that he never

intended to deceive the CRA about his 2005 income and he relied on professional auditors and legal counsel to complete his business tax return and to deal with the CRA. He asked for relief from penalties and interest because the CRA audit process took too long, CRA officials made several mistakes and some were not professional in their dealings with him, and his rights under the Taxpayer's Bill of Rights were not respected. The decision on his fairness request only accepted that a small part of the delay was caused by the CRA and therefore cancelled the interest charged for that period. The decision denied the other relief he requested.

[3] The Applicant submits that this is unreasonable, and he seeks judicial review of the decision to deny his claim for relief. It will be helpful to review the history of this matter before analyzing the arguments of the parties.

[4] As I explained to Mr. Neyedly at the hearing, an application for judicial review in this Court involves many technical legal questions, which can perplex even experienced counsel. This is a highly technical area of the law, as is the law relating to income tax.

[5] I have carefully considered the submissions of the parties concerning the decision to refuse most of the relief the Applicant sought under the tax fairness provisions, as well as the jurisdiction of this Court and the impact of the prior settlement of the appeal before the Tax Court of Canada. In the reasons that follow, I will describe the background to the matter, set out the issues to be dealt with, and explain my conclusions on each question.

I. Background

[6] In 2005, the Applicant started to sell used boats. He did not, however, report any income or expenses relating to this business in his 2005 income tax return. This case relates to the consequences that have flowed from that omission.

[7] The Applicant filed a personal income tax return for 2005, but he says that the accountant he hired to complete and file his 2005 income tax return for the business did not file it in a timely way. As a result, his tax return for that year was assessed without any consideration of the business, and he received a refund of $2,521.61.

[8] In 2007, a CRA auditor advised the Applicant that his 2005 tax return was being audited. In February 2008, the CRA assigned a new auditor to work on the Applicant's file. Between then and July 2008, there were several exchanges of information and a meeting was held with the Applicant's father. In August 2008, the auditor sent a proposal letter to the Applicant. A final audit adjustment letter was sent to the Applicant on September 18, 2008, which lead to the issuing of a Notice of Reassessment on October 14, 2008, indicating that the Applicant's taxable income was increased to reflect $66,632 of business income that had not been reported. As a result, the Applicant's taxable income increased from $22,581 to $88,332, and the CRA indicated that the Applicant would be subject to penalties for failing to report the income, commonly known as gross negligence penalties, pursuant to subsection 163(2) of the *ITA* as well as the *Manitoba Income Tax Act*, CCSM c I10.

[9] On January 9, 2009, the Applicant's lawyer filed a Notice of Objection to the reassessments. On June 24, 2009, the Applicant's accountant submitted a loss carry-back request

to the CRA, asking that his non-capital losses from the 2006 taxation year be applied to reduce his taxable income for 2005. A series of exchanges ensued in 2010, leading to a March 29, 2011, letter from a CRA Appeals Officer indicating that the Applicant's taxable income for 2005 would be reduced by $3,825 because an additional capital cost allowance was recognized. However, the loss carry-back request was not accepted.

[10] The Applicant then filed a Notice of Appeal to the Tax Court of Canada, contesting the March 29, 2011 reassessment that refused the loss carry-back request. On April 27, 2011, another request for a loss carry-back was sent to the CRA, and the Applicant's lawyer followed up on this by letter to the Department of Justice (DOJ) in February 2012.

[11] On February 28, 2012, DOJ counsel advised the Applicant's lawyer that the CRA was prepared to allow the loss carry-back. On August 28, 2012, the Applicant and the CRA signed Minutes of Settlement prior to the hearing of the appeal by the Tax Court. Pursuant to the settlement, a reassessment was completed on October 5, 2012, applying the non-capital loss from 2006 to the 2005 tax year, thus reducing the Applicant's taxable income to $52,128. The loss carry-back was applied as of the date the Applicant filed his 2006 tax return.

[12] On November 11, 2013, the Applicant filed an application for taxpayer relief, seeking cancellation of the penalties and interest that were imposed with respect to the 2005 taxation year on the grounds of delay by the CRA. This application was denied on August 11, 2015, and the Applicant was advised that he could request a second independent review.

[13] On May 11, 2017, the Applicant requested a second review of his request for taxpayer relief, again seeking cancellation of the penalties and interest for the 2005 taxation year. This

request was partially accepted in a decision dated December 19, 2017. The CRA Audit Manager who considered the Applicant's request found that his file had been dormant between September 7, 2007, and February 12, 2008, because of a change in auditors, and therefore cancelled the arrears interest for that period. The decision denied the Applicant's other requests for relief. This is the decision that is the basis for this application for judicial review.

[14] One final procedural matter should be noted. The Applicant represented himself during this hearing. He had brought a motion requesting that his father represent him because he had helped the Applicant throughout this process with the CRA, and is therefore familiar with the files. This request was denied on May 14, 2018, because Rule 119 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] does not permit a party to be represented by anyone other than a lawyer, and the Applicant had not established any exceptional circumstances that would call for the exercise of any residual discretion by the Court (*Erdmann v Canada*, 2001 FCA 138).

[15] During the hearing of this application, the Applicant presented his case but his father was present to assist him with the details, and several breaks were taken to permit the Applicant and his father to discuss matters.

II. Issues and Standard of Review

[16] The Applicant raises several concerns arising from the CRA's treatment of his claims about his 2005 income tax return, including:

a. that he was not treated professionally, courteously, and fairly, as required by the Taxpayer Bill of Rights, and in particular that there has been excessive delay in handling

the audit, that the CRA failed to take into account his reliance on professional auditors and lawyers, and that several auditors did not treat him in a professional manner;

b. that the Respondent CRA failed to protect his property and lost key files relating to the audit of his return, contrary to section 241 of the *ITA*.

[17] Because of these flaws in the process, the Applicant requests that expenses in the amount of $49,862.58 that were reflected in the lost documents be allowed; that additional expenses of $5,187.50 be allowed since they were denied for no given reason, and that the full amount he has paid for his 2005 taxation year, in the amount of $46,247.64, together with interest, should be refunded.

[18] The Respondent contends that the Applicant's requests should be denied, because:

a. this Court does not have jurisdiction to review the Applicant's income tax reassessment;
b. the matter is *res judicata* because the Applicant is bound by the settlement he reached relating to his appeal to the Tax Court of Canada;
c. if the Court decides to review the second level review decision to deny the Applicant's request for taxpayer relief, that decision is reasonable.

[19] I would reformulate the issues to reflect the key issues in dispute between the parties:

A. What is the decision being challenged, and does this Court have jurisdiction to review it?
B. Is the dispute *res judicata*, meaning that it should not be reviewed because of the settlement?
C. Was the second level review decision dated December 17, 2017, reasonable?

[20] The Respondent noted a technical legal question relating to the proper Respondent in this proceeding, which was resolved at the hearing on consent of the Applicant. The style of cause is therefore amended, with immediate effect, to name the Attorney General of Canada as respondent in this case.

[21] The first thing to be resolved in this case is to identify the decision being challenged, and that is primarily a factual question. The next question is whether this Court has jurisdiction to review it, and this is a matter of law. Related to this, the issue of whether *res judicata* applies, which is really an argument that the Applicant's claim in this Court should not be considered because of the settlement of the Tax Court matter, is also primarily a question of law, and it was not raised or dealt with by any prior decision-maker.

[22] The third issue is whether the taxpayer fairness decision should be overturned, and this is to be reviewed applying the standard of reasonableness. This was determined in previous cases (*Canada Revenue Agency v Slau Limited*, 2009 FCA 270 at paras 26-27), and is consistent with the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[23] It is difficult to sum up what is meant by the idea of "the standard of review" in a few words. In simple terms, it refers to how a court is to approach its task in conducting a judicial review. Perhaps the easiest starting point is to compare it with an appeal. In most cases, a party bringing an appeal wants the appeal court to reverse the decision because it reached the wrong result. This is called "correctness" review, for obvious reasons. An appeal court is not to re-hear the entire case, and usually does not overturn findings of fact. The real focus of most appeals is

on the law that governs the case, and on that point, the appeal court simply steps into the shoes of the original decision-maker, and decides the question.

[24] In contrast to this, judicial review is usually more limited, because Parliament has assigned the task of making the first decision to an administrative decision-maker and has not put an appeal provision in the legislation. This is a signal that courts are generally to give deference to this first-level decision, and only to reverse it if the decision is unreasonable. Courts must be vigilant to ensure that decisions are made in a procedurally fair way, and that the decision-maker has applied the right law to the right facts, but this does not permit the court to overturn a decision just because it thinks the result was wrong, because it is not the court's decision to make. Parliament (or a provincial Legislature) have assigned that task to someone else. In order to respect that choice, the law says that judicial review involves a more limited assessment.

[25] The Supreme Court of Canada recently explained how review under the reasonableness standard is to be conducted, in *Vavilov* (judgment rendered December 19, 2019), and it applied this framework soon after in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 (judgment rendered December 20, 2019) [*Canada Post*].

[26] There are many dimensions to reasonableness review as set out in these decisions. The most important guideposts for this case are that the review must begin with the reasons for decision, and assess whether the decision-maker applied the right law to the important facts of the case, and whether its chain of reasoning is internally coherent and rational. Put another way, the relevant law and the key facts of the case establish the space within which the decision must be made (*Vavilov* at paras 84-85, 99; *Canada Post* at para 31). If a review indicates that the

decision-maker went outside of that box, by applying the wrong law, or not taking into account the most important relevant facts, then the decision may be found to be unreasonable.

[27] In addition, the process of analysis must show that the decision is justified. This includes whether a reviewing court can follow the internal logic of the decision and understand how the decision-maker came to its conclusion (*Vavilov* at paras 81, 85). One way of describing this was set out by Justice Donald Rennie in *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, when he stated that a reasonable decision is one where a reviewing court can "connect the dots on the page [so that] the lines, and the direction they are headed, may be readily drawn" (cited with approval in *Vavilov* at para 97). If there are no dots, or their direction is not clear, then the decision may well be found to be unreasonable. Another way to describe it is to stand back and ask whether the decision-maker's reasoning "adds up" (*Vavilov* at para 104).

[28] With this background, and having identified the issues and the approach to reviewing them, I now turn to the arguments advanced by the parties.

III. Analysis

A. *What is the decision being challenged, and does this Court have jurisdiction to review it?*

[29] The starting point for an application for judicial review is the actual decision that is under review. In this case, the question takes on added importance, because some matters involving the *ITA* or the *Excise Tax Act*, RSC 1985, c E-15, can only be reviewed by the Tax Court of Canada.

[30] The Respondent argues that the substance of the Applicant's case seeks to set aside the reassessment of his taxes done after the settlement of his appeal before the Tax Court. It argues

that this Court cannot review tax assessments because the Tax Court has exclusive jurisdiction to hear appeals relating to assessments of income tax and GST.

[31] The Respondent's argument is based on legislation and case law. Subsection 169(2) of the *ITA* provides that a taxpayer can appeal an assessment of "tax, interest, penalties or other amounts payable" to the Tax Court of Canada. Sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*FCA*] set out the general rule that this Court can hear applications for judicial review from any "federal board, commission or other tribunal" and this would generally include decisions made by CRA. However, Parliament has included an exception to this general rule in section 18.5. The relevant part of this provision states: "Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the… Tax Court of Canada… from a decision or an order of a federal board, commission or other tribunal… that decision or order is not, to the extent that it may be so appealed, subject to review [by the Federal Court]."

[32] Based on this legislation, it has been decided that this Court has no jurisdiction to review tax assessments, since they can be appealed to the Tax Court (*Canada v Addison & Leyen Ltd*, 2007 SCC 33 at para 8). The flip side of this is that the Tax Court has exclusive jurisdiction to hear appeals relating to assessments of income tax (*ITA*, subsection 169(1); *Tax Court of Canada Act*, RSC 1985, c T-2, section 12; *Canada v Roitman*, 2006 FCA 266 at paras 19-20, leave to appeal denied: SCC No 31634 [*Roitman*]).

[33] As a further indication of Parliament's intention that there should be limits on the ways in which a taxpayer can challenge an assessment, subsection 152(8) of the *ITA* states:

Assessment deemed valid and binding	**Présomption de la validité de la cotisation**
152 (8) An assessment shall,	**152 (8)** Sous réserve des

subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.	modifications qui peuvent y être apportées ou de son annulation lors d'une opposition ou d'un appel fait en vertu de la présente partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée être valide et exécutoire malgré toute erreur, tout vice de forme ou toute omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.

[34] Based on these statutes and decisions, the Respondent argues that the Applicant's case should be dismissed. It points out that the Applicant started this proceeding by filing and serving a Notice of Application for Judicial Review, in which he asks for "Cancellation of penalties [of] $17,384.54 and interest charges of [$]13,411.21 on personal income tax of $9114.78 [*sic*] that was incorrectly assessed by the auditors." The Respondent says that only the Tax Court can consider whether the penalties and interest are appropriate.

[35] I am not persuaded that the Applicant's entire case should be dismissed.

[36] The Respondent is correct that this Court cannot review the assessment of taxes, penalties, or interest, since these can be appealed to the Tax Court of Canada and therefore fall within the exception in section 18.5 of the *FCA* (*Chekosky v Canada (Revenue Agency)*, 2019 FC 841 at para 32 [*Chekosky*]; *Roitman* at para 19). To the extent that the Applicant asks for such a review, it cannot be done by this Court.

[37] In addition, the Applicant has advanced several arguments relating to the conduct of the audit process. He argues that the auditors made unreasonable decisions to accept and then deny

certain claims, that they did not treat him professionally, and that there was undue delay in conducting the audit, which caused the interest to accumulate. Many of these concerns also involve matters that cannot be raised in this Court, since they challenge the results of the assessment of the Applicant's taxes, penalties, and interest owing (*Chekosky* at paras 34-35). The appropriate recourse for the Applicant is to appeal to the Tax Court, which is precisely what he did, and his appeal included all of these complaints.

[38] There is no dispute, however, that this Court can hear a judicial review of a decision relating to a claim for taxpayer relief pursuant to subsection 220(3.1) of the *ITA* (*Chekosky* at para 30; *Cybernius Medical Ltd v Canada (Attorney General)*, 2017 FC 226 at para 27). The Applicant's Notice of Application includes specific references to the taxpayer relief decision dated December 19, 2017, to deny his request for cancellation of the gross negligence penalties, and the interest that has accumulated, and he argues that his rights under the Taxpayer Bill of Rights have not been respected.

[39] In my view, the decision to deny the Applicant's request for relief is the subject matter of this application, and this falls squarely within the jurisdiction of this Court. Both parties have addressed this in their written and oral submissions and there is no unfairness in considering it. In view of this, and in light of the fact that the Applicant represented himself in this proceeding, it is in the interests of justice to consider this aspect of the claim (see the discussion in *Chekosky* at para 30).

B. *Is the dispute res judicata, meaning that it cannot be reviewed because of the settlement?*

[40] In view of my finding on the first issue, it is not necessary to discuss this question in great detail, because the request for taxpayer relief that forms the core of this case was not addressed in the settlement.

[41] The Respondent argued that the Applicant's entire claim was *res judicata* because it was dealt with in the settlement reached between the parties in the Tax Court. Although the actual terms of settlement are not in the record before me, there are several references to it, including in the December 19, 2017 Refusal Decision, which describes it in this way:

> Upon receiving the Notice of Reassessment for adjustments recommended by the Appeals division, you furthered your Appeal to the Tax Court of Canada… Prior to a formal hearing at the Tax Court level, you entered into an agreement and Signed Minutes of Settlement with the Department of Justice. In the Minutes of Settlement, it was agreed to allow the application of a non-capital loss from the 2006 year against income in the 2005 year. Upon application of this loss, it was agreed by you that no further Notice of Objections or challenges to the year would occur. The Notice of Reassessment allowing the loss application was issued on October 5, 2012. Following this, a signed Notice of Withdrawal to the Tax Court objection was received on October 19, 2012.

[42] Based on this settlement, the Respondent submits that the Applicant's claim is *res judicata* and should therefore be dismissed.

[43] The legal doctrine of *res judicata* can be quite technical, but its purpose can be summarized very simply: the law seeks finality in disputes, for the good of both parties and the wider society. Where two parties to a dispute go through a trial and get a decision that is not appealed, the decision becomes final and binding and that should put an end to the argument between those parties. The same holds true if the parties decide to settle their case before or

during the trial. It is in no one's interests to allow disputes to be re-litigated in some other form. To avoid this, the law says, essentially, "enough is enough" (see: *Angle v MNR*, [1975] 2 SCR 248; *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44; and *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19).

[44] Turning to the facts of this case, I agree with the Respondent that, to the extent the Applicant's request for relief in this application for judicial review simply repeats matters asserted in the appeal that was settled, it is *res judicata* and there is no basis to exercise my discretion to deal with the claim. It is worth noting in this regard that the Applicant was represented by counsel in the Tax Court appeal, and entered into the settlement having had the opportunity to obtain legal advice about the consequences of resolving the matter rather than continuing with the appeal.

[45] While the Applicant may think this is unfair, it is the law. He might see it differently if the shoe was on the other foot – if he had succeeded in having all of the penalties and interest erased through the settlement, and then the Respondent brought a new claim in this Court, seeking a remedy for the same matters. If that had happened, the Applicant would rightly claim "enough is enough," and that the case should be dismissed because his prior claim was settled once and for all.

[46] Based on the settlement that was reached between the parties during the appeal to the Tax Court, I agree with the Respondent that the doctrine of *res judicata* applies to bar some aspects of the Applicant's claim.

[47] As with the first issue, however, this is not the end of the matter, because the Applicant's claim for taxpayer relief is not covered in its entirety by the settlement, and so the doctrine of *res judicata* does not bar him from obtaining relief in this Court. Based on my finding on the first issue, this aspect of the Applicant's claim must still be considered.

C. *Was the second level review decision reasonable?*

[48] The analysis in reasonableness review begins with the decision, which in this case is the second level taxpayer relief review decision dated December 19, 2017. The following summary captures the key elements of the decision letter:

- The decision concerns the Applicant's request for the cancellation of false statements or omissions penalties and arrears of interest for the 2005 taxation year;
- Under Canada's self-assessment system of taxation, the onus is on the taxpayer to file complete and accurate returns. The taxpayer relief legislation is meant to address the situation of taxpayers, "who through no fault of their own were unable to comply with the legislation";
- Relief from penalties or interest may be warranted when they result from "extraordinary circumstances," including actions of the CRA, an inability to pay or financial hardship, or other circumstances beyond the taxpayer's control;
- The request for relief in this case is based on repeated delays in completing the audit of the 2005 tax year and multiple requests to have a business loss carried back from the 2006 tax year to the 2005 tax year;

- Some delay was caused by the transfer of the file from one auditor to another, and the file was dormant from September 7, 2007, to February 12, 2008. Therefore the interest for that period is cancelled;
- Concerning the penalties for false statements or omissions, the Applicant's 2005 tax return did not indicate he was engaged in any business, and did not include any financial statements for the business. During the audit, it became clear that significant sales occurred and expenses were incurred by the business, resulting in a determination that $66,632 of net business income should have been reported on the Applicant's 2005 tax return. This is what gave rise to the penalties;
- The Applicant filed a Notice of Objection, which resulted in a reduction of $3,825 to both his taxable income and to the amount subject to the gross negligence penalty. A notice of reassessment was issued to reflect this adjustment;
- The Applicant then filed an appeal to the Tax Court of Canada, including the issue of the gross negligence penalties. Prior to a hearing of the appeal, the matter was settled and the CRA agreed to allow the loss carry back from the 2006 to the 2005 tax year. The Applicant agreed that no further Notice of Objection or challenges to the 2005 tax year would occur;
- A review of the file indicates that the Applicant's return for the 2006 tax year was filed on October 23, 2009. Pursuant to subparagraph 161(7)(b)(ii) of the *ITA*, the loss carry-back must be applied as of the date of the filing of the return, and this is what was done in this instance. "Therefore, the reduction to the 2005 taxes payable and the associated arrears interest has been allowed at the earliest time possible";

- Applying the guidance on Taxpayer Relief Provisions set out in *Information Circular IC07-1R1 Taxpayer Relief Provisions* [IC07 Guideline] at paras 11 and 37, the Audit Manager concludes, "After reviewing the facts of your case, I do not consider that your circumstances prevented you from meeting your tax obligations and your request for the cancellation of the *false statements or omissions* penalty and associated interest has been denied."

[49] The Respondent acknowledged that the Taxpayer Relief Decision Report shows the background analysis that underpins the letter and forms part of the decision under review. This is a more detailed memorandum that covers much of the same ground as the letter, but includes more specific and detailed references to the history of the matter, and in particular the full chronology of the case.

[50] At the outset of the analysis of this issue, it is worth repeating what the Supreme Court of Canada has said about reasonableness review under the *Vavilov* framework: "This Court's role is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post* at para 2). That is the framework I must apply to assess the Applicant's claim about the second level review decision.

[51] My analysis in this case begins by setting out the legal framework, then explaining the nature of the Applicant's challenge to the decision, followed by considering whether the decision explains the dismissal of his claim based on a coherent chain of reasoning that shows that the decision-maker applied the right law to the facts.

[52] The Applicant sought relief under subsection 220(3.1) of the *ITA*, which permits the Minister to waive or cancel any penalty or interest otherwise payable under the *ITA*:

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 the 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 cotisation voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

[53] A useful summary of the legal framework and operational guidance that applies in this case was set out by Justice Elizabeth Walker in *Chekosky* at paras 42-43:

> [42] In determining whether to grant taxpayer relief pursuant to subsection 220(3.1), the Minister must take into account all relevant considerations and base her decision on the purpose of the provision, that of fairness (Canada v Guindon, 2013 FCA 153 at para 58). The CRA has developed administrative guidelines that inform the exercise of the Minister's discretion. Although the Minister may not fetter her discretion in making a subsection 220(3.1) decision, the guidelines set out in *Information Circular IC07-1 Taxpayer Relief Provisions* (the Circular) are a useful starting point. Paragraph 23 of the Circular outlines 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

> [43] Paragraph 24 of the Circular recognizes that the guidelines are not binding in law and that a Minister's delegate may grant relief if a taxpayer's circumstances do not fall within the categories listed in paragraph 23 (*see, Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at para 27). Extraordinary circumstances are those beyond the taxpayer's control and include serious illness (paragraph 25 of the Circular).

[54] In his application for judicial review and submissions at the hearing, the Applicant argued that the decision should be overturned on two main grounds:

1. Under the Taxpayer Bill of Rights, because
    a. The auditors did not treat him "professionally, courteously and fairly," but rather were confrontational, combative and in one case aggressive in accusing him of theft – an accusation which was proven to be false; furthermore, an auditor denied an expense claim for no reason;
    b. The auditors did not respect his right to complete, accurate, clear, and timely information: by ignoring that the audit was initially launched on a cash basis rather than an accrual basis; by excessive time delays throughout the process thereby causing him to incur substantial legal costs; and by failing to acknowledge and accept that he put his trust in several professional accountants and it was beyond his control that they did not perform their duties as required,

and that this constituted extraordinary circumstances which should entitle him to relief;

2. Under section 241 of the *ITA*, because the CRA auditors lost certain of the Applicant's documents pertaining to additional expenses of $49,862.58, and therefore he could not prove that he was entitled to this amount. He also argues that $5,817.50 of expenses were not accepted.

[55] As noted earlier, the Applicant's arguments about the unfairness of the audit process cannot be reviewed in this case. The process leading to the reassessment of his taxes, and the accuracy of those reassessments, are only subject to appeal to the Tax Court, and the Applicant and the Respondent settled his appeal. This cannot be re-opened here. Instead, the focus of this analysis is whether the decision to refuse to cancel the penalties and arrears interest is reasonable.

[56] The Applicant argues that he was treated unfairly by the CRA. The audit team did not allow his additional expenses and did not provide any reason for doing so. The auditors also failed to protect his property and the loss of documents resulted in the Applicant's lawyer at the time not being able to defend his claims for allowable business expenses.

[57] The Applicant argues that the CRA, particularly the audit team, was confrontational and combative, and one particular auditor was extremely aggressive and accused the applicant of being dishonest. This is in breach of the Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer (RC17) which states that a taxpayer has the right to "be treated professionally, courteously and fairly."

[58] He also argues that the CRA failed to provide "complete, accurate, clear, and timely information" as required by the Taxpayer Bill of Rights. The audit team ignored the fact that the audit was being done on a cash basis instead of an accrual basis for almost four years – until the March 29, 2011, reassessment. It took 18 months to receive the audit reassessment, 24 more months for the CRA to reply to the appeal, and a further 30 months before the loss carry back was rightfully approved. It also took 44 months to process the Applicant's first application to the Fairness Board. The Applicant notes that several CRA officials apologized for the delays in treating the applications for taxpayer relief.

[59] The Applicant states he has not yet received the tax adjustment allowed by the Fairness Board in its December 19, 2017 decision.

[60] Finally, the Applicant maintains that he did not make a false statement or submission in his return, and if he did, it was inadvertent. His first accountant did not file the 2005 tax return in a timely manner and also delayed filing the 2006 return. The Applicant states he cooperated fully with his accountants, providing all necessary materials, and it was beyond his control that the professionals he hired did not perform their duties as entrusted. The Applicant argues that these are extraordinary circumstances that were not considered by the CRA in its decision. He also says that the official who handled the review told his father that they did not consider any of the information supplied by him in his review.

[61] The Respondent submits that the decision is reasonable and was based on a thorough review of all of the information. The decision-maker followed the law and the administrative guidelines in refusing to exercise the discretion to waive or cancel penalties or interest. Although the audit and then the processing of the Applicant's objections has taken a long time, the

Respondent argues that a significant portion of this delay is due to the Applicant and his representatives, including the fact that the Applicant switched accountants and lawyers during this period, which caused some of the delay.

[62] For the following reasons, having reviewed the documents filed in the record and the submissions of the parties, I find that this decision is reasonable within the framework set out in *Vavilov* and *Canada Post*.

[63] The "tax fairness" provision that is found in subsection 220(3.1) of the *ITA* has as its purpose to allow a more fair administration of the tax system by providing discretion to a Minister's delegate to cancel penalties or waive interest due to personal misfortune or circumstances beyond the taxpayer's control (*Tywriwskyi v Canada (Attorney General)*, 2004 FC 542 at para 29). In doing so, all relevant considerations must be taken into account and the decision must be based on fairness. While the IC07 Guideline provides a useful starting point, it is not binding in law and relief may be granted even if the taxpayer does not fall within the categories provided (*Chekosky* at para 43).

[64] The IC07 Guideline sets out the three examples of situations in which this may occur: extraordinary circumstances, actions of the CRA, and inability to pay or financial hardship. There is also discretion to grant relief for other reasons.

[65] In this case, I agree with the Respondent that there was no basis to consider inability to pay or financial hardship, and the case does not fit into the extraordinary circumstances category since there is no issue relating to a serious illness or serious emotional and mental distress, civil disturbances, or natural or human-made disasters, which are examples of extraordinary

circumstances given in the Guideline. The Applicant's complaints fit more properly within the category of "actions of the CRA," which includes "processing delays that result in the taxpayer not being informed within a reasonable time that an amount was owing," delays in providing information and undue delays in resolving an objection or an appeal.

[66] The decision accepts that the Applicant's file lay dormant at the CRA from September 7, 2007, to February 12, 2008, and cancelled the arrears interest that had accumulated for that period. However, the Applicant points to other delays that are not acknowledged, including the time taken for the first taxpayer relief review, and the further 24-month period for the second review. He says that it is unfair that this matter has been "hanging over his head" for nine years, and that during this period he has incurred significant expenses.

[67] In addition, the Applicant argues that the delay in accepting the loss carry back has resulted in him incurring greater interest, since the effect of the loss carry back would have been to reduce the amount of taxes he owed. He says that there is no explanation for the failure to accept the claim when it was first submitted, and that it is unreasonable that he had to make four requests before the CRA accepted this claim.

[68] Dealing first with the loss carry back, the decision applies the law to the facts and concludes that the claim was allowed and that it was back-dated to the earliest date possible under the law. I can find no basis to interfere with this finding. It was reasonable to refuse a request for relief because the decision about when to give effect to the loss carry back simply followed the law. Although the Applicant argued that he thought that the settlement would go back to the date of the 2005 return, that is not what the law provides and the Applicant was represented by legal counsel at the time of entering into the agreement.

[69] The Applicant's tax return for 2006 gave rise to the claim for a loss carry back, but it was not filed until October 23, 2009. The Applicant blames his advisors for this delay, but the law is clear that errors attributed to third parties are not considered extraordinary circumstances justifying relief (*Kotel v Canada (Attorney General)*, 2013 FC 1015 at para 65; *Tremblay v Canada (Attorney General)*, 2013 FC 1049 at paras 12-13). This is consistent with the IC07 Guideline, which provides at paragraphs 35-36, that taxpayers are "generally considered responsible for errors made or delays caused by third parties acting for the taxpayers for income tax matters." The IC07 Guideline does accept there may be exceptional situations, but on the evidence in the record, there was no basis for such a finding.

[70] On the more general question of delay, I also am not persuaded that the decision is unreasonable. The decision-maker accepts that the Applicant's file was dormant for a period relating to the transfer between two auditors, and cancels the interest during that period. There were other delays in the record, and it appears that some of these were caused by CRA internal processes, and some were caused by the accountants or lawyers retained by the Applicant.

[71] The Taxpayer Relief Decision Report deals with these at some length, and it is not necessary to review each phase of this lengthy process in detail. This Report and the decision letter make clear that the decision-makers assessed the facts in the record, including the first review decision and the Applicant's arguments and evidence. It concluded that some of the delay was solely due to inaction by the CRA, and cancelled the interest associated with that. It also examined the other delays, and concluded that some of this was due to the Applicant and his representatives, and some of it was due to the normal process of assessing a return or dealing with an objection.

[72] The IC07 Guideline provides at paragraph 26 that "[p]enalties and interest may also be waived or cancelled if they resulted mainly because of the actions of the CRA, such as… (f) undue delays in resolving an objection or an appeal, or in completing an audit."

[73] Based on the chronology of events, the Taxpayer Relief decision concluded that the delays in its handling of the audit and objections were not "undue." The 2005 business tax return was not filed in a timely manner. As the Respondent points out, it was not filed until the Applicant was provided with a notice that his return was being reviewed. The 2006 return that gave rise to the loss carry-back claim was also not filed in a timely manner. The audit and dealing with the objections took some time, but this is not the type of extraordinary circumstance that gives rise to taxpayer relief. Furthermore, it is clear that the Applicant's decision to change accountants and lawyers contributed to some of the delay.

[74] Based on my review of the record and the submissions, I find that the decision to deny the Applicant's claim for relief on the basis of delay is a reasonable outcome, and the reasoning is logical and coherent.

[75] It bears repeating that on judicial review the Court is not to determine whether the penalty or interest should have originally been imposed, but rather whether the decision not to cancel the penalties or interest was reasonable (*Chekosky* at para 39). In this case, the evidence shows that the Applicant carried on a significant amount of business activity in 2005 – his business records indicated total sales of approximately $586,000 during the year. He kept records relating to sales and expenses, including records relating to transportation of at least some of the used boats across the border from the United States. Based on this, the CRA concluded that the

Applicant should have known that he was required to submit a tax return relating to his business, yet he failed to do so. This is what gave rise to the imposition of penalties.

[76] In addition, the Respondent points out that the Applicant was repeatedly advised early on in the process that interest would be accumulating, and that he could avoid incurring a larger financial liability by paying the amount due. He was also advised that if it turned out that he was due a refund of all or a part of this amount, the CRA would repay it with interest. The Respondent argues that the Applicant's failure to follow this advice should not now form the basis for a claim of unfairness. The Applicant argued that he simply did not have sufficient funds at that time to pay the amount that was due, and while this may be understandable, it does not give rise to a claim of unfairness in the circumstances of this case.

[77] Overall, I am not persuaded that the Applicant has demonstrated that the decision is unreasonable. Applying the *Vavilov* framework, the decision applies the right law and takes into account the most significant relevant facts. While the decision may not be perfect, it is not so flawed as to be unreasonable. As stated in *Vavilov*:

> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaw relied on by the party challenging the decision is sufficiently central or significant to render the decision unreasonable.

[78] I am not persuaded that the Applicant has demonstrated any flaws in the decision under review that meet this test.

IV. Conclusion

[79] For all of these reasons, the application for judicial review is dismissed.

[80] In reaching this conclusion, I should add that I have some sympathy for the position of the Applicant. Although the law does not allow him to be excused for all of the shortcomings of his professional advisors, he may have a basis for feeling disappointed with the service provided by some of them. In addition, there are some troubling allegations of statements made by some CRA officials along the way, although these have not been specifically tested through cross-examination and no rebuttal evidence has been provided. Finally, this process has gone on for a long time, and it is understandable that the Applicant is frustrated with the length of time it has taken to resolve his various issues. However, while collectively these may generate a degree of sympathy for the position of the Applicant, they do not make the decision reached by the CRA unreasonable.

[81] The Respondent sought its costs in this matter in its written submissions, although it did not press the point in the hearing. In exercise of my discretion pursuant to Rule 400 of the *Federal Courts Rules*, SOR/98-106, and having regard to all of the circumstances of this case, I will not award costs. Each party should bear its own costs of this matter.

[82] As noted earlier, the style of cause is amended, with immediate effect, so that the Attorney General of Canada is the respondent in this matter.

JUDGMENT in T-147-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no award of costs. Each party shall bear its own costs in this matter.

3. The style of cause is amended, with immediate effect, so that the Attorney General of Canada is named as Respondent in this matter.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-147-18
STYLE OF CAUSE:	KEITH NEYEDLY v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	OCTOBER 28, 2019
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	JUNE 9, 2020

APPEARANCES:

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David Silver	FOR THE RESPONDENT

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