Federal Court  Cour fédérale

Date: 20210304

Docket: T-1899-19

Citation: 2021 FC 202

Ottawa, Ontario, March 4, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

LLOYD SIMMONS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] In his 1998 tax return, Lloyd Simmons claimed a charitable deduction of $1,000,000 for having donated units in an investment fund to his former school. The Canada Revenue Agency ("CRA") assessed the tax return as filed and Mr. Simmons received a refund of $471,688. However, as a result of a reassessment, in April 2002 the CRA disallowed $750,000 of the charitable deduction. This resulted in Mr. Simmons owing the CRA $462,250 on his 1998 taxes.

[2] Mr. Simmons filed an objection to the reassessment but he agreed to have it held in abeyance until a test case in the Tax Court of Canada concerning the same type of charitable deduction as he had claimed was decided. The test case was ultimately settled on the basis of an agreed upon valuation for the charitable donation that was 60% of the value that had originally been claimed. Meanwhile, Mr. Simmons had not made any voluntary payments on the amount owing and interest had continued to accumulate on the unpaid balance.

[3] On behalf of the Minister of National Revenue ("the Minister"), the CRA offered to resolve the objection on the same terms as the test case but Mr. Simmons never responded to the offer. Consequently, in August 2008, the CRA went ahead and allowed the objection in part, increasing the allowable charitable deduction by $200,000 to a new total of $450,000. While this reduced the amount owing, a significant balance remained.

[4] Mr. Simmons did little to reduce his 1998 tax debt and interest continued to accumulate on it. In late December 2014, he sought taxpayer relief from the arrears interest. A similar request with respect to a smaller amount owing for his 2008 taxes was added subsequently. On March 27, 2017, the CRA granted Mr. Simmons partial relief for the period from January 1, 2010, until December 31, 2010, based on his medical condition during that time. Otherwise, the request was rejected.

[5] Mr. Simmons applied to this Court for judicial review of this decision (Court File No. T-636-17). The application was heard by Justice Barnes on February 13, 2018, and judgment was reserved. Before a decision was issued, on March 7, 2018, Mr. Simmons discontinued the application for judicial review on the basis of a settlement he had reached with the respondent whereby his request for relief from the arrears interest would be reconsidered by the CRA.

[6] On December 5, 2018, the CRA denied the request for relief for interest relief once again. Mr. Simmons requested that the CRA review the request again. In a decision dated October 25, 2019, the CRA again refused to cancel the arrears interest.

[7] Mr. Simmons has now applied for judicial review of the latest denial of his request for taxpayer relief. He contends that the decision is unfair and unreasonable. For the reasons that follow, I do not agree. This application for judicial review will therefore be dismissed.

II. BACKGROUND

A. *The Charitable Donation*

[8] The charitable donation in question arises from a gift of units Mr. Simmons had purchased in Northern Star Hedge Fund to his former school.

[9] Under an investment scheme offered by the fund, investors like Mr. Simmons would purchase trust units in the fund valued at $1,000. Investors could purchase up to a total of 1,000 units. They would provide a 25% cash down payment and take out a 20-year non-interest

bearing loan for the remaining 75% of the cost of the units purchased. The cash payment (less sales expenses and professional fees) would be turned over to an investment company to invest in commodities futures.

[10] Tax relief for the investors would come from donating their units to a registered charity and then claiming a deduction for the value of the units donated. Significantly, investors would claim the full value of $1,000 per unit as a charitable deduction despite it having cost them only one quarter of that amount in the year of the purchase and donation.

[11] Mr. Simmons purchased 1,000 units of Northern Star Hedge Fund with a total value of $1,000,000. He provided a cash down payment of $250,000. He then donated the units to his former school and claimed a deduction for a charitable donation valued at $1,000,000 on his tax return. This resulted in him receiving a refund for the 1998 taxation year of $471,688.

B. *The 2002 Reassessment*

[12] Concerns had arisen within the CRA regarding whether Northern Star Hedge Fund was being used for impermissible tax avoidance purposes. The charitable deduction claim made by Mr. Simmons (and by others) therefore came under scrutiny.

[13] Under subsection 118.1(1) of the *Income Tax Act*, RSC 1985, c. 1 (5th Supp.) ("*ITA*"), deductions for charitable gifts are limited to the fair market value of the gifts. Following a reassessment of Mr. Simmons's gift of Northern Star Hedge Fund units, the CRA concluded that the fair market value of the donation was $250 per unit and not $1,000 as had been claimed. The

CRA arrived at this figure by examining three factors: (a) the cost to the individual investors in the fund; (b) the fair market value to the charities at the time of the donation; and (c) the fair market value to the next prospective purchaser in the openly traded public market place.

[14] As a result of the reassessment, $750,000 of the original deduction was disallowed. This, in turn, resulted in Mr. Simmons owing the CRA $462,250 in relation to his 1998 taxes. In the meantime, Mr. Simmons had invested the refund he received in a gravel company.

C. *Mr. Simmons's Objection and the Test Case*

[15] Mr. Simmons filed a timely objection to the reassessment. However, he agreed to have the objection held in abeyance until the case of another taxpayer who had also claimed a charitable donation of Northern Star Hedge Fund units was determined by the Tax Court of Canada. For its part, the CRA agreed to suspend collection action pending a decision in the test case. The CRA also advised Mr. Simmons, however, that interest would continue to accumulate on the unpaid balance of his reassessment. He could avoid further interest charges by making voluntary payments on his account. In the event that his objection was successful, any disputed amount would be repaid to him plus interest.

[16] The other case was eventually settled in October 2006 on the basis that a deduction of $600 per donated unit of the fund would be allowed.

[17] On several occasions in 2007, the CRA extended an offer to Mr. Simmons to settle his objection on the same basis as the test case (i.e. at $600 per donated unit of the fund) but he did

not respond. Consequently, the CRA went ahead and conducted a new fair market value assessment of the donation. It concluded that the fair market value of the units Mr. Simmons had donated was $450 per unit as opposed to $250, as had been determined in 2002. As a result, in August 2008 the CRA allowed the objection in part and credited an additional $200,000 for the donation on Mr. Simmons's 1998 tax return for a total permissible deduction of $450,000. While this adjustment reduced the amount Mr. Simmons now owed on his 1998 taxes, it did not eliminate it. The debt remained outstanding and interest charges continued to accumulate on it.

D. *The Requests for Taxpayer Relief*

[18] Section 220(3.1) of the *ITA* gives the Minister broad discretion to "waive or cancel all or any portion of any penalty or interest otherwise payable under this Act." In practice, this discretion is exercised on the Minister's behalf by officials with the CRA. Since 2005, relief may be claimed only with respect to the ten years preceding the request.

[19] The process for requesting relief and the factors that the CRA considers in determining such requests are set out in a CRA Information Circular. (The current version of this circular is *IC07-1R1 Taxpayer Relief Provisions* (dated August 18, 2017).) Broadly speaking, in determining whether to grant a request to waive or cancel interest charges, the CRA will consider, among other things, whether the charges arose from circumstances beyond the taxpayer's control (e.g. serious illness or accident), the actions of the CRA (e.g. any undue delay on the CRA's part in resolving an objection or an appeal), and the taxpayer's inability to pay or the financial hardship that would be caused by collecting payment. The CRA will also consider the conduct of the taxpayer, including whether they have a history of voluntary compliance with

tax obligations, whether they knowingly allowed a balance to exist, whether they exercised a reasonable amount of care with respect to their tax affairs, and whether they acted quickly to remedy any delays or omissions on their own part.

[20] Beginning in December 2014, Mr. Simmons (with the assistance of counsel) submitted a series of requests for relief of interest charged for the 1998 tax year. He eventually added a request for relief in relation to a smaller amount owing for the 2008 tax year. It is not necessary for present purposes to set out each request and decision in detail. The first CRA review (dated August 11, 2015) refused the request. The second CRA review (dated March 29, 2017) allowed the request in part based on Mr. Simmons's medical condition during the year 2010. Mr. Simmons sought judicial review of this decision but that application was discontinued on the basis that the Minister would reconsider the request for relief. The ensuing third CRA review (dated December 5, 2018) refused the request. Mr. Simmons requested another review by the CRA based on errors he said had been made in the third review. The fourth review (dated October 25, 2019) again denied the request for relief. This last decision is the subject of the present application for judicial review.

E. *The 2018 CRA Review*

[21] As noted, pursuant to the settlement of the previous judicial review application, Mr. Simmons discontinued that application and the Minister agreed to reconsider the request for relief. Mr. Simmons was represented on the application for judicial review by a lawyer, Jeff Pniowsky. Mr. Pniowsky had submitted the requests for relief on behalf of Mr. Simmons and he continues to act for him. The respondent Attorney General of Canada was represented on

the previous application for judicial review by Penny Piper, counsel with the Department of Justice.

[22] There are three indications in the record on this application for judicial review of the basis upon which the previous judicial review application was settled. One is in a letter dated March 13, 2018, from Ms. Piper to Mr. Pniowsky (a copy of which was sent to the CRA). Ms. Piper writes the following:

> The respondent's decision [to refer the matter back to the Minister for redetermination] was based on Justice Barnes' comments at the hearing held on February 13, 2018, in Winnipeg, Manitoba. At the end of the proceedings, Justice Barnes suggested that the parties meet afterwards to determine if financial resolution could be reached, and he made these comments despite his previous acknowledgement that the Canada Revenue Agency cannot accept a "compromised settlement" of a tax debt. Due to the nature of the proceedings, and as Justice Barnes seemed to have other concerns, a referral back to the Minister was the only recourse.

[23] Ms. Piper also notes in her letter that Mr. Simmons would be permitted to make additional submissions on or before 30 days from the filing of the notice of discontinuance of the application for judicial review. (That notice had been filed on March 6, 2018.)

[24] It appears from the record that Ms. Piper enclosed a copy of the originating Notice of Application for Judicial Review filed by Mr. Simmons in T-636-17 with her letter.

[25] The second indication of the basis upon which the previous application for judicial review was settled is in a letter dated April 9, 2018, from Mr. Pniowsky to the CRA in which he

provided submissions in support of the renewed request for relief. Mr. Pniowsky opens his letter with the following:

> We write further to the Crown's letter dated March 13, 2018 and the resolution reached between the parties in the above-noted Federal Court application in which the respondent has agreed to refer the applicant's request for cancellation of interest in relation to this 1998 and 2008 tax years back to the Minister of National Revenue for re-determination. This resolution was reached following the hearing of the application held on February 13, 2018 and Justice Barnes' concluding admonition to the parties recommending that the parties meet to determine if a settlement can be reached as there is "risk on both sides". On re-determination, we request that the Minister consider all of the materials previously filed in support of the initial taxpayer relief request and second review request, as well as the additional submissions contained herein.

[26] The third indication is a statement from Mr. Pniowsky in a letter dated January 15, 2019, that, when he agreed to discontinue the judicial review application, he had expected that there would be a *bona fide* reconsideration of the request for relief. This letter will be considered further below.

[27] As noted, in his submissions in connection with the reconsideration, Mr. Pniowsky requested that the decision maker consider all of the materials previously filed. Presumably this was intended to signal that Mr. Simmons still relied on all the grounds advanced previously in support of his request for relief.

[28] From the beginning, the request for relief was based on three primary factors: (1) Mr. Simmons's earning capacity had been adversely affected by illness during the relevant period; (2) there was undue delay by the CRA in taking until 2008 to finally determine the

allowable value of the charitable donation, during which time Mr. Simmons's financial position had changed for the worse; and (3) paying the amount owing when it was assessed would have caused Mr. Simmons financial hardship (although current financial hardship was not being claimed). Mr. Simmons was partially successful on the basis of health considerations during the 2010 year. However, none of the other factors had been found to be sufficient to warrant relief. Nevertheless, as Mr. Pniowsky indicated, Mr. Simmons continued to rely on them in the reconsideration.

[29] The additional submissions provided in the letter of April 9, 2018, related to interest relief that had been granted to participants in other leveraged donation programs. According to Mr. Pniowsky, in "most of these instances, the Minister has offered to cancel all of the interest from the date of the audit reassessment." He provided examples of offers to settle objections in three other cases on terms that were more favourable than the CRA's ultimate valuation of Mr. Simmons's donation. While none of them concerned Northern Star Hedge Fund donations, Mr. Pniowsky submitted that "the principle of fairness dictates that taxpayers in similar circumstances ought to be treated similarly." In a follow-up letter to the CRA dated December 4, 2018, Mr. Pniowsky reiterated this submission and provided a fourth example of a leveraged donation program that the CRA had valued more favourably than Mr. Simmons's donation.

[30] As of November 2018, when the matter was being reconsidered, the balance owing was $819,499. This consisted of taxes for 1998 and 2008 totalling $229,250 and arrears interest of $590,249.

[31] The request for relief was refused again in a letter dated December 5, 2018. In summary, the CRA concluded that relief was not warranted for the following reasons:

- There were no delays in processing the 2002 objection by the CRA from the date Mr. Simmons agreed to have it held in abeyance until the date it was resolved.

- Mr. Simmons's illness in 2010 would not have affected his ability to meet his obligations for the 1998 and 2008 tax years, which were due and owing prior to the illness.

- Mr. Simmons had sufficient assets to address the arrears balance on the account.

- Mr. Simmons failed to take actions that would have reduced the arrears interest (e.g. by making voluntary payments or by accepting the offer to settle his objection in 2007). Instead, he "knowingly allowed the balance to increase year after year."

- Finally, with respect to other leveraged donation programs, the decision letter stated that "interest relief for each donation program is decided based on how the taxpayers were assessed and how they benefited from the arrangement. The specifics vary from program to program. In the case of the Northern Star Hedge Fund, the fair market value used by the agency was determined by a valuation report prepared by the internal valuation section. That is not the case in all leveraged donation programs."

[32] By letter to the CRA dated January 15, 2019, Mr. Pniowsky requested that the matter be reviewed again because of "obvious errors" in the December 5, 2018, decision. In particular, he contended that the decision maker had erroneously considered that the Federal Court had circumscribed the scope of the review.

[33] Mr. Pniowsky's concern evidently arises from the following statement in the December 5, 2018, decision letter: "According to correspondence received from the Federal Court, your citing of the delay by Appeals was not considered in the second review and neither were the corporation financial records in relation to the taxpayer's financial situation." The decision maker had then gone on to explain why corporate financial records were irrelevant to Mr. Simmons's personal income taxes and, as noted above, to find that there had been no delay on the part of the CRA in the handling of the 2002 objection.

[34] It is not clear from the record what the decision maker means by "correspondence received from the Federal Court."

[35] In any event, Mr. Pniowsky elaborated upon his concern as follows in his January 15, 2019, letter:

> Based on our discussions with crown counsel it appears that you mistook a letter from Federal Justice as being directions from the court itself. In so doing you have taken the opposite approach from that suggested by the court. We had an understanding that bona fide efforts to resolve this matter would be taken following the court's warning that there was a real risk to both parties. Rather than engaging in bona fide attempts at resolution you have done the opposite by restricting your areas of review so as to justify zero movement on the part of the Crown.
>
> Aside from this approach being the opposite of the very purpose of the discontinuance, and assuming this matter was simply converted into another review absent context (which we do not admit is the proper approach), you are bound to consider all relevant factors relevant to our client's request for relief in any event. There is no justiciable basis to arbitrarily limit your review and omit facts that are obviously relevant to our client's inability to pay at the relevant time or the circumstances which brought this to your attention.

[36] Nothing in the record sheds any light on Mr. Pniowsky's reference to his discussions with Crown counsel. There is no indication of who exactly he spoke to or why he had concluded that the decision maker had mistaken a letter from the Department of Justice (presumably the March 13, 2018 letter from Ms. Piper – see paragraph 22, above) as "directions from the court itself."

[37] In response to Mr. Pniowsky's letter of January 15, 2019, the CRA undertook another review of Mr. Simmons's request for relief.

[38] In connection with this fourth review, by letter dated January 25, 2019, the CRA requested the following additional information from Mr. Simmons:

- A completed income and expenses, assets and liabilities form.
- Three of his most recent account statements from each of his banks.
- Profit and loss statements and balance sheets for the last two fiscal years.
- Any additional information to assist in the review.

[39] Mr. Pniowsky responded to this request by letter dated March 21, 2019, writing the following to the CRA official responsible for the review:

> As you acknowledged over the phone, this is a continuation of a matter that originated in the Federal Court as a means toward resolution, as described in previous correspondence, which file materials have been passed onto you. As you know, we are not claiming financial hardship currently, but based on the circumstances as they existed at the time the debt arose, as more particularly described in the Federal Court hearing. Your query is

> continuing a pattern, whereby the Minister is focusing on areas we are not advancing, while ignoring areas which we specifically say justify relief, with an apparent intention to deny any relief.
>
> What was promised to be a process of mutual bona fide resolution, has turned out to be the opposite. We have also just learned that the Minister has taken advantage of these pretenses by issuing a statutory garnishment (Requirement to Pay) directly against our firm, which is attached hereto. We intend to seek redress back at the Federal Court. Please send us (our office and not only our client) your final decision.

[40] While Mr. Pniowsky alludes to "the circumstances as they existed at the time the debt arose, as more particularly described in the Federal Court hearing," he did not provide any further information to the CRA concerning what had been said at that hearing about those circumstances or by whom. (I note parenthetically that the Requirement to Pay mentioned by Mr. Pniowsky was withdrawn subsequently by the CRA.)

[41] No further submissions or information was provided to the CRA before the decision was made on the fourth review.

III. DECISION UNDER REVIEW

[42] By letter dated October 25, 2019, the CRA denied Mr. Simmons's request for relief from interest arrears.

[43] The decision letter begins by setting out the relevant factors identified in the Information Circular (cf. paragraphs 18 and 19, above) but also notes that the guidelines are not intended to be exhaustive and that each relief request must be reviewed and decided on its own merits in

keeping with the purpose of section 220(3.1) of the *ITA*. The letter also notes that this purpose is summarized in paragraph 8 of the Information Circular. That paragraph provides as follows:

> The legislation gives the CRA the ability to administer the income tax system fairly and reasonably. The CRA does this by helping taxpayers resolve issues that come up through no fault of the taxpayers and by allowing for a common-sense approach in dealing with taxpayers who, because of personal misfortune or circumstances beyond their control, could not comply with a legal requirement for income tax purposes.

[44] After briefly summarizing the history of the 1998 and 2008 tax assessments and the arrears interest, the decision letter then explains why the request for relief was denied. I would summarize the reasons given as follows:

- With regard to the taxpayer's conduct and management of his tax affairs, Mr. Simmons had allowed the debt to exist for more than 10 years. He had not taken any steps to address the outstanding balance. He had ignored his tax obligations despite being advised by the CRA that interest would continue to accumulate. He had not exercised reasonable care with respect to his tax obligations, nor had he complied voluntarily with those obligations. (While not mentioned in the decision letter, the Taxpayer Relief Fact Sheet that was prepared for the decision maker notes that over the time the interest has been accumulating Mr. Simmons has had access to assets which he chose to use for other purposes rather than meeting his tax obligations.)

- There was no delay by the CRA in resolving the objection to the 2002 reassessment.

- The CRA had offered to settle the objection on the same basis as the Northern Star Hedge Fund test case but when Mr. Simmons failed to respond to that offer, the CRA went

ahead and determined the objection on the basis of a fresh assessment of the fair market value of his donation.

- Offers to settle other donation programs were made based on reviews of the particular circumstances of those programs. In any event, those offers to settle were contingent on the taxpayers signing waivers, which Mr. Simmons had not done in his own case.

- Since Mr. Simmons was not relying on financial hardship, this was not considered.

[45] In the result, cancellation of the arrears interest was not approved.

IV. STANDARD OF REVIEW

[46] There is no issue that the substance of a decision refusing taxpayer relief should be reviewed on a reasonableness standard. Reasonableness is now the presumptive standard of review, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10). There is no basis for derogating from this presumption. I also note that it was well-established long before *Vavilov* that reasonableness is the appropriate standard of review for decisions concerning taxpayer relief: see *Canada Revenue Agency v Telfer*, 2009 FCA 23 at para 24. Among other things, this standard reflects the highly discretionary nature of decisions on requests for relief under section 220(3.1) of the *ITA*.

[47] Reviewing administrative decisions on a reasonableness standard "aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the

constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law" (*Vavilov* at para 82).

[48] The exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). Consequently, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96).

[49] Reasonableness review is a deferential form of review. The reasonableness standard is meant to ensure that "courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13).

[50] The reviewing court should focus on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). Where the decision maker has given reasons for the decision, a reviewing court should begin its inquiry "by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov* at para 84, internal quotation marks omitted). On review, "close attention" should be paid to a decision maker's reasons; they "must be read holistically

and contextually, for the very purpose of understanding the basis on which a decision was made" (*Vavilov* at para 97).

[51] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The reasonableness standard "requires that a reviewing court defer to such a decision" (*ibid.*). A court applying this standard "does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible outcomes that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem" (*Vavilov* at para 83).

[52] The burden is on the applicant to demonstrate that the decision is unreasonable. He must establish 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" (*Vavilov* at para 100).

V. PRELIMINARY ISSUE

[53] The respondent "takes issue" with several documents attached as exhibits to the affidavit in support of the application for judicial review, arguing that they should be given "limited or no weight." More particularly, the respondent objects to the Court considering the following:

a) the transcript of the February 13, 2018, hearing of the previous application for judicial review (with the exception of pages 86 to 89 of that transcript) [Exhibit A to the affidavit of Colleen Da Costa sworn January 20, 2020];

b) a letter dated March 2, 2018, from Mr. Pniowsky to Ms. Piper confirming his interest in continuing to discuss the settlement of the judicial review application [included in Exhibit B to the Da Costa affidavit];

c) a joint letter dated March 2, 2018, to the Federal Court from Ms. Piper and Mr. Pniowsky confirming that a settlement had been reached and that a Notice of Discontinuance would be filed with the Court [included in Exhibit B to the Da Costa affidavit];

d) an email dated April 9, 2018, from Ms. Piper to Mr. Pniowsky's law firm noting that the Department of Justice had closed their file in the matter and should no longer be copied on correspondence sent to the CRA [included in Exhibit B to the Da Costa affidavit];

e) an email dated December 4, 2018, from Ms. Piper to Mr. Pniowsky's law firm reiterating that the Department of Justice should no longer be copied on correspondence sent to the CRA [included in Exhibit B to the Da Costa affidavit];

f) the applicant's Application Record on the previous application for judicial review (Court File No. T-636-17) [Exhibit D to the Da Costa affidavit].

[54] As the respondent correctly notes, the general rule, subject to certain exceptions, is that only material that was before the original decision maker is admissible on an application for judicial review: see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 17-20; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 13-28; and *Sharma v Canada (Attorney General)*, 2018 FCA 48 at paras 7-9.

[55] Applying this principle, I would make the following determinations with respect to the documents listed above:

a) I agree with the respondent that only pages 86 to 89 of the transcript of the hearing of the application for judicial review may be considered. They provide background and context to the references in material that was before the decision maker to comments made by Justice Barnes at the conclusion of the hearing. The balance of the transcript was not put before the decision maker and it does not fall within any of the recognized exceptions. As a result, I will not consider it in assessing the reasonableness of the decision. It should not have been included in the Application Record.

b) While little turns on it, I am prepared to accept the March 2, 2018, letter from Mr. Pniowsky to Ms. Piper as background and context to the resolution of the earlier application for judicial review.

c) Similarly, the joint letter from Ms. Piper and Mr. Pniowsky to the Federal Court dated March 2, 2018, can be considered as background and context (although again, little turns on its contents).

d) The email from Ms. Piper dated April 9, 2018, is simply irrelevant.

e) The email from Ms. Piper dated December 4, 2018, is also irrelevant.

f) The applicant's Application Record from T-636-17 is over six hundred pages in length. Much of it is immaterial or irrelevant to the present application, even if most of the documents were before the decision maker because they were part of the applicant's earlier requests for relief. Other parts of that Record – crucially, the applicant's

> Memorandum of Fact and Law – were not before the decision maker and do not fall within any recognized exception that would permit their consideration on this application. In his written submissions on the present application, counsel for Mr. Simmons purports to adopt and rely upon his submissions in the previous application for judicial review. This misconceives the nature of this application for judicial review, which is of a different decision and which, as a general rule, must be based on the record before the decision maker. Consequently, in assessing the reasonableness of the October 25, 2019, decision, I will not consider the earlier Memorandum of Fact and Law or anything else in the Application Record from the previous application for judicial review that was not before the decision maker. To the extent that Mr. Pniowsky maintains that his previous submissions form part of the context for the reconsideration, they should have been put before the decision maker. On the other hand, anything in the earlier Application Record that was before the current decision maker may be considered on this application. I hasten to add, however, that a better way should have been found to put that material before the Court on the present application instead of reproducing *holus-bolus* the Application Record from a different application for judicial review.

VI. ANALYSIS

[56] In a nutshell, Mr. Simmons's principal argument on this application is that it was unfair of the CRA to have him discontinue his earlier application for judicial review only to reach the same result as before on the reconsideration. As I understand his position, he does not complain about the *process* followed by the CRA in a sense that relates to the requirements of procedural fairness. Rather, his objection is to the substance of the decision. He maintains that the CRA

should have reached a different decision on the reconsideration. Thus, as I see it, his complaint about unfairness is simply another way of saying that the decision is unreasonable. More particularly, Mr. Simmons contends that the decision is unreasonable when viewed in the context of the previous application for judicial review and its discontinuance.

[57] I do not agree.

[58] There can be no doubt that the circumstances that led to the reconsideration of the request for relief after the 2017 decision was challenged on judicial review are pertinent to the reasonableness of the decision that was ultimately made on that reconsideration. However, contrary to Mr. Simmons's submission, the decision is not unreasonable when viewed against that background. This background is summarized in paragraphs 21 to 29 and 32 to 41, above. Mr. Simmons places significant emphasis on the fact that he agreed to settle his previous application for judicial review but then ended up no further ahead. However, the record relating to that settlement fails to demonstrate that the ultimate decision is unreasonable.

[59] On the record before me, all counsel for the respondent committed to in settling the first application for judicial review was to refer the matter back to the Minister for reconsideration. This is exactly what happened. Mr. Simmons would reasonably have expected that this would be a *bona fide* reconsideration. Indeed, this expectation was clearly expressed on his behalf in correspondence from Mr. Pniowsky to the CRA (see paragraphs 35 and 39, above). However, the mere fact that the CRA reached the same conclusion on the reconsideration as it had reached previously does not entail that the reconsideration was not *bona fide*, that the CRA approached

the matter with a closed mind, or that the reconsideration was in any other way contrary to the terms upon which the earlier application for judicial review was settled. The decision maker provided a reasoned explanation for why the request for relief was denied. Mr. Simmons had not been able to point to any flaws in the decision maker's reasoning that could call the reasonableness of the decision into question.

[60] The reasonableness of a decision must be assessed in light of the constraints imposed on the decision maker by the legal and factual context of the decision (*Vavilov* at para 90). In the present case, there is no indication in the record of any constraint on the decision maker's discretion over and above those which apply in every such request for relief – namely the terms of section 220(3.1) of the *ITA* and the guidelines in the Information Circular. The result was explained in these terms in the decision letter. Further, while Mr. Simmons may have hoped for a different result on the reconsideration, there is nothing to suggest that he was induced to discontinue his earlier application for judicial review by a representation that the reconsideration would lead to a different outcome. Ms. Piper's letter of March 13, 2018, did not purport to direct the CRA to reach any particular result on the reconsideration (which she would not have had the legal authority to do in any event). Mr. Pniowsky's follow-up correspondence with the CRA did not suggest that Ms. Piper had stated the terms upon which the judicial review application was settled incompletely or inaccurately. And, most assuredly, Justice Barnes's comments from the bench at the conclusion of the previous judicial review hearing did not purport to direct the CRA decide the matter differently.

[61] Counsel for Mr. Simmons urges me to presume that he must have had a good reason to have discontinued the previous application for judicial review. Even if this is true, I must decline his invitation to speculate about matters that were not before the decision maker and are not established on the record before me.

[62] Counsel for Mr. Simmons also submits that the decision is unreasonable because the decision maker did not address the argument that relief was warranted because of the impact of Mr. Simmons's illness on his earning capacity and, further, that the arrears interest had accumulated because it would have caused Mr. Simmons hardship to meet his obligations in a timely way given financial setbacks he had experienced in the past.

[63] I am not persuaded that this omission renders the decision unreasonable. While it is true that the decision letter is silent on these points, it is equally true that the submissions made by counsel for Mr. Simmons in connection with the reconsideration (in April 2018 and again in March 2019) do not address them either (apart from the boilerplate statement that all previous materials were being relied upon). The request for relief has a lengthy history. The latest decision is not unreasonable simply because it did not address arguments made at some earlier point in that history, especially when those arguments had already been rejected by the CRA (in the March 29, 2017, and December 5, 2018, decisions) and the submissions on the request for reconsideration did not provide any substantive reasons to think that the earlier determinations were in error. The review of an administrative decision cannot be divorced from the history of the proceedings (*Vavilov* at paras 91 and 94).

[64] In summary, I am not persuaded that the decision fails to meaningfully account for the central issues and concerns raised by Mr. Simmons in the reconsideration (cf. *Vavilov* at paras 127-28). Read in the context of the history of the requests for taxpayer relief, including the previous application for judicial review, the decision to deny the request for relief is justified, transparent and intelligible.

VII. CONCLUSION

[65] For these reasons, the application for judicial review of the October 25, 2019, decision denying the request for taxpayer relief is dismissed with costs.

JUDGMENT IN T-1899-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review of the decision dated October 25, 2019, denying the request for relief under section 220(3.1) of the *Income Tax Act* is dismissed with costs.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1899-19
STYLE OF CAUSE:	LLOYD SIMMONS v ATTORNEY GENERAL OF CANADA

HEARING HELD BY VIDEOCONFERENCE ON DECEMBER 15, 2020 FROM OTTAWA, ONTARIO (COURT) AND WINNIPEG, MANITOBA (PARTIES)

JUDGMENT AND REASONS:	NORRIS J.
DATED:	MARCH 4, 2021

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