Federal Court Cour fédérale

Date: 20241003

Docket: T-2100-23

Citation: 2024 FC 1558

Ottawa, Ontario, October 3, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

ANDREW JOO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of the second level decision of the Minister of National Revenue [Minister] denying the Applicant's request for taxpayer relief of penalties and interest charges [Relief Request] pursuant to section 220(3.1) of the Income Tax Act, RSC, 1985, c. 1 (5th Supp) [ITA]. The penalties and arrears arise from the Applicant's 2008 individual

income tax return that was filed in 2021. The Minister denied the Applicant's Relief Request [Decision].

[2] The Applicant acknowledges that the Decision with respect to his Relief Request is likely reasonable. He recognizes that his late filing arose from his erroneous assumptions, but asks the Court to consider his difficult financial circumstances. He is asking for a third review of his Relief Request.

[3] The Court's role on an application for judicial review is to consider the reasonableness of the decision being challenged. For the reasons that follow, the application for judicial review is dismissed. The Applicant has not demonstrated that the Decision is unreasonable.

II. Background and Decision Under Review

[4] On April 30, 2021, the Applicant filed a batch of income tax returns for the years 2008-2016 and 2019. On August 12, 2021, a notice of assessment was issued notifying him of an outstanding balance owing for his 2008 income tax return. On October 1, 2021, a subsequent notice of reassessment was issued confirming an amount was owing for the 2008 taxation year.

[5] The Applicant did not challenge the amount of income tax debt owing for the 2008 taxation year. The debt was eventually paid off on May 4, 2023, but given the late filing, a significant amount was still owing for arrears of interest that accrued.

[6] On December 30, 2021, the Applicant applied for relief, seeking the cancellation and waiver of the late-filing penalties and arrears interest for the 2008 taxation year. In his Relief Request, the Applicant states that he relied on his practice of calculating his tax obligations for any given year. If his calculations resulted in an amount owing to the Canada Revenue Agency [CRA], he would file a tax return. If not, he would defer filing his tax return.

[7] The Applicant also states that he wrongly assumed that his 2008 income tax return was part of a garnishee order placed by the CRA, where his wages were garnished from April 2009 to June 2011 to satisfy previous outstanding tax obligations. The Applicant explained that in July 2011, he received a statement from the CRA stating that there was no balance owing following a garnishee order for previous tax debt obligations. He considered the matter closed. He also explained that events between 2005 and 2020 prevented him from meeting his tax obligations.

[8] On October 4, 2022, a CRA agent denied the Relief Request [First Review]. In the letter, the First Review agent indicated that they reviewed the Applicant's file and request. This included a review of the tax years 2003-2021, where the agent listed a chronology of thirteen late-filed tax years and the Applicant's history of non-compliance with respect to his tax returns. The agent concluded that the Applicant knowingly allowed a balance to exist upon which arrears interest accrued based on the notice of assessment and reassessment issued to him in 2021, among other things. The agent, when reviewing the tax years 2003-2021, also concluded that the Applicant did not exercise reasonable care in conducting his affairs under the self-assessment system.

[9] The First Review agent acknowledged the Applicant's submissions on the events and circumstances to which he attributed his non-compliance. The agent found that the Applicant did not act quickly to remedy any delay or omission. In consideration of that, the agent noted that the 2008 tax return and payment were due on April 30, 2009. A request to file the 2008 tax year was sent in December 2009 and a demand to file sent in February 2010. The 2008 tax return was filed twelve years late.

[10] The First Review letter also stated that if the Applicant believed that the decision was not fair and reasonable, he could ask for another second independent review with the Taxpayer Relief Program. The letter provided additional information and identified the CRA's "Information Tax Circular IC07-I, Taxpayer Relief Provisions," dated August 18, 2017, [Taxpayer Relief Provisions] that outlines the guidelines the CRA "follows when making a decision." A website address "for more information on taxpayer relief provisions and related forms and publications" was also included.

[11] On December 9, 2022, the Applicant sought a second review of his taxpayer Relief Request, for relief from the increasing late-filing penalties and arrears interest resulting from the 2008 taxation year [Second Review].The Second Review request was made on the same basis as the First Review request.

[12] On December 29, 2022, the CRA sent a letter to the Applicant asking him to provide additional information and documents. This letter explained the definition of financial hardship for the purpose of the Second Review. The Applicant submitted additional documentation and

information. Another CRA agent then completed a second independent assessment, which is a *de novo* review of the Applicant's Relief Request.

[13] On August 30, 2023, the Applicant was advised that further to the Second Review, his Relief Request was denied. The letter outlined that the Decision's scope covered the timeframe for interest that had accumulated since January 1, 2012.

[14] In the Decision, the agent defined financial hardship as "the prolonged inability to afford basic necessities." The agent then stated that an individual's ability to pay is determined, "by looking at other factors such as household income, basic living expenses and the capacity to borrow." The agent concluded that the Applicant had sufficient funds and assets to pay the arrears. He concluded that it was possible for the Applicant to rearrange his finances in such a way as to permit the payment of arrears without causing undue hardship. The letter also listed the factors that the CRA considered in the Taxpayer Relief Provisions.

[15] The Second Review agent stated that a full review of the Applicant's account showed a pattern of non-compliance about his statutory tax obligations, among other things. The agent did not find a connection between the Applicant's non-compliance with tax obligations and a circumstance that was beyond his control. The agent concluded that the Applicant was not reasonably prevented from completing his filing and remitting obligations due to the actions of the CRA or circumstances beyond his control.

[16] The Second Review Decision is the subject of this application for judicial review.

III. Preliminary matters

[17] The following paragraphs address preliminary issues raised by the Respondent.

[18] First, the Respondent wishes to clarify that the correct time period to consider in a taxpayer relief request pursuant to section 220(3.1) of ITA is the 10-year period prior to when the request was made. The Applicant's First Review request was made on December 30, 2021. Therefore, the proper period that the Decision addresses is for interest that has accumulated since January 1, 2012. I accept the Respondent's submission.

[19] Second, the Respondent objects to two exhibits found in the Applicant's affidavit, within the Applicant's Record. The Applicant describes each exhibit as being notes he took of his calls with a CRA agent dated July 27, 2021, and October 26, 2022 [Notes]. The Respondent opposed to the inclusion of these Notes because they were not before the decision maker on Second Review. They should not be considered in assessing the reasonableness of the Decision (*Klopak v Canada (Attorney General)*, 2019 FC 235 at para 20, citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]). However, the Respondent did not object to the Applicant referring to these Notes to refresh his memory during his submissions, if needed.

[20] As I explained to Mr. Joo at the hearing, the general rule is that on judicial review, the Court is limited to the evidentiary record that was before the decision maker. Evidence that was

not before the decision maker and that goes to the merits of the matter before the decision maker is not admissible in an application for judicial review (*Access Copyright* at para 19).

[21] The exceptions to this general rule are (1) evidence that comprises general background in circumstances where the information might assist the reviewing court in understanding issues relevant to the proceeding; (2) evidence that brings attention to procedural defects that cannot be found in the evidentiary record; and (3) evidence that illustrates the complete absence of evidence before the decision maker when it made a particular finding (*Access Copyright* at para 20).

[22] I asked the Applicant how his Notes would meet any of these exceptions. The Applicant indicated that the Notes were intended to demonstrate that he did what was asked of him by the CRA. The Applicant also recognized that the copies of the Notes in the Applicant's Record were mostly illegible.

[23] The Certified Tribunal Record does not contain a copy of the Notes. There is a copy of CRA agents' notes of their communications with the Applicant. However, the dates in the CRA agents' notes and the Notes do not align. The Notes were not before the decision maker and do not respond to any exceptions listed in the *Access Copyright* decision. Therefore, I will not consider the Notes in reviewing the merits of the Decision.

[24] Finally, the Applicant has named "Canada Revenu Agency" as the Respondent. The Respondent asks that the style of cause be amended because the Attorney General of Canada is

the appropriate Respondent. In accordance with Rule 303 of the *Rules*, SOR/98-106, the style of cause shall be amended, with the "Attorney General of Canada" as Respondent.

IV. Issues and Applicable Standard of Review

[25] The issue in the present case is whether the Applicant can demonstrate that the Decision denying his Relief Request was unreasonable.

[26] The presumptive applicable standard of review is reasonableness (Canada (*Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25). It is also well settled that the standard of review with respect to decisions under paragraph 220(3.1) of the ITA, is reasonableness (*Spence v Canada Revenue Agency*, 2012 FCA 58 at para 5 citing *Canada Revenue Agency v Telfer*, 2009 FCA 23). I therefore conclude that the applicable standard of review on the merits of the Decision is reasonableness.

[27] A Court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker. It is "an approach 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. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers" (*Vavilov* at para 13). The decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the

particular decision under review (*Vavilov* at para 90). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125-126).

[28] The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

V. Analysis

[29] Cancellation of interest may be justified where a taxpayer has been unable to deal with their obligations due to delays on the part of the CRA, extraordinary circumstances, or financial hardship (section 220(3.1) of ITA). This request can only be considered only for the ten last calendar years (*Bozzer v Canada (National Revenue)*, 2011 FCA 186).

[30] The Applicant challenges the reasonableness of the Decision, alleging that the CRA's claims were not pursued in a reasonable or timely manner. While he does not dispute the unpaid taxes for 2008, he states it is unreasonable for the CRA to only inform him of this debt more than a decade later.

[31] The Applicant alleges that he never received any notice from the CRA regarding his outstanding 2008 tax return until 2021. This absence of notice by the CRA fulfills the criteria of relief under paragraph 220(3.1) of the ITA. If the CRA had asked him about the 2008 tax returns between 2009 and 2021, he would have responded and filed this tax return. The Applicant also states that while the CRA agent reasonably reviewed his application for relief, he was not aware of the criteria that they applied to it.

[32] The Applicant cites paragraph 26 of the Taxpayer Relief Provisions, that states, "penalties and interest may also be waived or cancelled if they resulted mainly 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 […]". The Applicant contends that CRA's silence in respect of the 2008 tax returns resulted in his not being informed within a reasonable time of the debt he owed. The Applicant puts forward a plea of clemency. He never intended to file his 2008 tax returns late, and acted in good faith throughout this legal process.

[33] The record demonstrated that the CRA did follow up with him on the 2008 tax returns in 2009 and 2010. The CRA also noted that the Applicant contacted the CRA in March 2010 where he advised he would be filing the 2008 tax return. I cannot find that he had no knowledge that his 2008 tax filing was late.

[34] In his submissions to the CRA, he admits that the delay in filing was based on his own incorrect assumptions or oversight. The Applicant relied on his own method of calculating his tax obligations and then determining whether to file on time or not. If his calculations concluded that he owed money, he would file on time. Otherwise, he would wait to file his tax returns. His personal decision to defer tax filings after the annual deadline cannot be attributed to the CRA.

[35] The Applicant also tried to explain why he had paid other creditors before the CRA. While the Applicant was attempting to justify these circumstances, this fact was not contested. As such, the CRA's conclusion that the Applicant chose to pay other creditors before the CRA was not unreasonable.

[36] Furthermore, the Applicant could not clearly explain how his 2008 tax returns could reasonably be included in the CRA's July 2011 notice confirming he satisfied his garnishment payments. Since his practice was to file a tax return for any given year if an amount is owed and defer filing if none is owed, he would have had to make a decision whether or not to file the 2008 tax return by April 30, 2009.

[37] With respect, it was difficult to understand how the CRA's garnishment order would include the 2008 tax return. The Applicant's wrongful assumption between the July 2011 garnishment fulfilment confirmation to his 2008 tax return cannot be attributed to the CRA.

[38] It was therefore open to the agent on Second Review to conclude that the applicable factors in the Taxpayer Relief Provisions were not met. On the basis of the record before the Agent, it was not unreasonable for the CRA to determine that there was no delay on its part under section 26 of the Taxpayer Relief Provisions. In other words, the CRA's actions did not result in the Applicant not being informed, within a reasonable time that an amount was owing with respect to the 2008 taxation year. After the Applicant filed his 2008 tax return in 2021, the CRA promptly issued notices of assessment and reassessment to advise him of the amounts owing for the 2008 taxation year.

[39] With respect to the other factors that were considered in determining whether interest relief is warranted, they are set out in paragraph 33 of the Taxpayer Relief Provisions:

> 33. Where circumstances beyond a taxpayer's control, actions of the CRA, inability to pay, or financial hardship has prevented the taxpayer from complying with the act, the following factors will be

> considered when determining if the minister's delegate will cancel or waive penalties and interest:
>
> a) whether the taxpayer has a history of compliance with tax obligations
>
> b) whether the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued
>
> c) 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
>
> d) whether the taxpayer has acted quickly to remedy any delay or omission

[40] I disagree with the Applicant's arguments that he did not know what the Second Review agent would be applying to his case and made inaccurate assumptions about him.

[41] The First Review decision letter explained that the Applicant could seek a second review and explicitly referenced the Taxpayer Relief Provisions, guidelines and factors that the CRA considers in requests for relief. The Applicant was also informed of the definition of financial hardship in CRA's correspondence to him.

[42] The Applicant recognized that the Decision was "likely reasonable" but is essentially asking the Court to come to a different conclusion than the CRA. The crux of his position was to express disagreement with the CRA's reasons for denying his Relief Request. For example, the Applicant disagreed with the assessment that he knowingly allowed a balance to accrue, or that he did not exercise a reasonable amount of care. He explained why he had to pay other creditors before the CRA or the other financial obligations he had to manage. However, the Applicant's

disagreement with the agent's assessment of evidence does not give rise to a reviewable error. The Applicant did not challenge the facts described in the Decision.

[43] The reasons in the Decision were connected to the evidence in the record, comprising of the Applicant's CRA history and his own admissions. The CRA's records confirmed a history and pattern of voluntary non-compliance in regards to statutory tax obligations. The agent listed the Applicant's late filings for 2008 to 2016 and 2019 income tax returns. The balance for the tax year 2008 was paid twelve years late. There is an outstanding balance for tax years from 2011 to 2014 and 2021. The agent noted that the Applicant failed to submit his 2008 tax return after a request to file and a demand file was issued to him on December 31, 2009, and February 9, 2010. The agent stated that the Applicant had sufficient funds and assets including equity held in his home, savings and investments.

[44] The Decision was responsive to the evidence and the Applicant's submissions while addressing the factors in the Taxpayer Relief Provisions.

[45] The Court is sympathetic to the Applicant's situation. However, judicial review is not an appeal. The Court cannot reweigh the evidence. For a decision to be reasonable, a reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that the analysis within the given reasons could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (*Vavilov* at para 102).

VI. Conclusion

[46] The Decision it meets the hallmarks of reasonableness: it is intelligible, transparent and justified. As such, this application for judicial review is dismissed.

[47] The Respondent withdrew his request for costs at the hearing. No costs shall be awarded.

JUDGMENT in T-2100-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed, without costs.

2. The style of cause shall be amended, with the "Attorney General of Canada" as Respondent.

"Phuong T.V. Ngo"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2100-23
STYLE OF CAUSE:	ANDREW JOO v ATTORNEY GENERAL OF CANADA
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APPEARANCES:

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