Federal Court  Cour fédérale

Date: 20091120

Docket: T-1366-08

Citation: 2009 FC 1195

Toronto, Ontario, November 20, 2009

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

BRIDGETTE CAYER

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This judgment concerns an application for judicial review brought by Bridgette Cayer (the "Applicant") and concerning a decision dated June 9, 2008 of Lucie Bergevin, the Director of the Ottawa Tax Services Office of the Canada Revenue Agency ("CRA"), acting on behalf of the Minister of National Revenue, and denying relief to the Applicant under the fairness provisions of the *Income Tax Act* (the "Act") from interest and gross negligence penalties.

[2] This judgment principally concerns the applicability of the fairness provisions of the Act to gross negligence penalties levied under the Act.

Background

[3] The Applicant does not present a sympathetic case from a taxation perspective. She was engaged from 1999 to 2003 in the business of selling residential properties and made considerable profits as a result thereof. However, the Applicant never declared these profits to the CRA. She was subsequently audited by the CRA and reassessments were made on May 13, 2004 for the 1999 to 2002 taxation years and on May 13, 2005 for the 2003 taxation year. The total owed by the Applicant for these years then amounted to $259,004.

[4] These reassessments for the 1999 to 2003 tax years were comprised of federal and provincial tax and CPP contributions, but also substantial amounts related to gross negligence penalties in a total of $78,246.55 and to arrears interest in a total of $28,984.20. Over time, substantial additional arrears interests were charged against these outstanding amounts.

[5] In order to secure this debt, on May 27, 2004 the CRA issued requirements to pay to various branches of the TD Canada Trust in order to freeze the Applicant's credit line and bank accounts. Nevertheless, the Applicant succeeded in accessing her line of credit in August 2005 when the requirements to pay lapsed for a short period of time. She took $30,000 from the line of credit to speculate on the stock market through an account with a stock broker. This stock broker was served

with a requirement to pay from the CRA which succeeded in collecting $11,486 from the trading account.

[6] The Applicant challenged the reassessments for the 1999 to 2002 taxation years before the Tax Court of Canada, but was unsuccessful. In a decision dated March 15, 2007, Justice Diane Campbell found that the reassessments were justified on the basis that the profits which had been made by the Applicant from the sale of residential properties were income from business and consequently taxable pursuant to the Act. Justice Campbell also affirmed in no uncertain terms the gross negligence penalties assessed in this case, at paragraphs 39 to 41 of her judgment:

> [39] I conclude that penalties are appropriate in this case and the reasons are numerous. The Appellant's history and involvement in previous CRA audit exposed her to the potential tax consequences that can arise in property sales from not properly reporting. She failed to report sales commissions earned at Tamarack Developments Corporation from April to July 1999 and intentionally attempted to conceal this income by requesting that her commissions be paid by one cheque made out to her father which she cashed through his account. She failed to report further commission income in 2000 received from Monarch Homes. She failed to declare income earned on the purchase and sale of shares of Unique Broadband Systems. She did not pay real property taxes until she was required to do so when properties sold. All of these actions, in addition to her former criminal conviction for welfare fraud, point to the Appellant's penchant to earn income but not to pay taxes.
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> [40] Further, in giving testimony, the Appellant was consistently inconsistent and generally tried to blame any discrepancies on other people. There are many instances where in the evidentiary documentation she describes herself as a builder, contractor or self-employed. These documents include the builders warranties, an MLS listing, the occupancy and building permits, banking documentation for vehicle purchases and a direct trading account application. In a number of these documents she listed her income as $70,000 yearly and $7,500 monthly. All this occurred while the Appellant was receiving social assistance. It is remarkable that the Appellant could

> expect to come to Court in light of this evidence and ask that I accept her testimony that she is not a builder.
>
> [41] This is just part of what I would characterize as a pattern of avoidance at best, deception at worst. No one act in this long list has any greater weight than any other. It is when they are all viewed together with the evidence as a whole, that the pattern of intentional and deceptive behaviour is revealed. When asked whether she knew there were tax issues surrounding the building and selling of these homes, she responded "No, not on the way I was doing this" (transcript p. 342, line 14). In my view the Appellant acted intentionally, deliberately and strategically in her attempts to conceal her profits on these properties from the CRA and thus gross negligence penalties under subsection 163(2) are appropriate.

[7] The Applicant appealed this decision to the Federal Court of Appeal. However the appeal was discontinued following a settlement dated May 23, 2008 reached with the Canadian tax authorities. Under this settlement, the Applicant resolved her outstanding litigations in exchange for various considerations. This resulted in new reassessments dated July 18, 2008 under which various substantial tax credits as well as various interest refunds and reversals were applied to the Applicant's account with the CRA. These reassessments consequently affected the total gross negligence penalties levied against the Applicant and credits in a total of $23,987.16 were applied against the gross negligence penalties of $78,246.55, leaving outstanding gross negligence penalties of $54,259.39 to be paid by the Applicant following the settlement.

[8] Consequently, following these reassessments of July 18, 2008, the Applicant owed as of that date an amount of $221,516.12 to the CRA in taxes, contributions, arrears interests and gross negligence penalties.

[9] Concurrently with these court proceedings and related settlement discussions, the Applicant was also pursuing a request for taxpayer relief under the fairness provisions of the Act. She submitted a formal written request for this purpose in September of 2007 seeking the cancellation or waiver of the penalties and interest charges to her account on the basis of CRA delays and financial hardship or inability to pay.

[10] In order to substantiate this taxpayer fairness relief request, the Applicant submitted brief reports from various physicians stating that she has suffered from pronounced major depression symptoms since 1993, and that she was affected by rheumatoid arthritis and other ailments. She also submitted various documents showing she was being pursued in collection by her other creditors. The Applicant also submitted various bills and bank statements as well as a hand written unaudited statement of assets and liabilities and of monthly income and expenses.

[11] The Applicant's taxpayer fairness relief request was granted in part on February 22, 2008 by T. Todd, a Team Leader of the Ottawa Tax Service Office of the CRA (Exhibit B to the affidavit of Janet de Kergommeaux) following a Taxpayer Relief Provisions Fact Sheet and Rationale dated February 21, 2008 (Exhibit F to the affidavit of Janet de Kergommeaux). The decision conveyed was to cancel the arrears interest charges from the date the returns were reassessed for the 1999 to 2003 taxation years, that is to say from May 13, 2004, and to waive future interest charges for these years "until your financial situation improves and while the agreed upon payments are being made and you are compliant in the filing and payment of future tax returns". The late filing penalty assessed on the 2003 tax return was also cancelled. However, the letter also stated that "[d]ue to the

nature of your case, we will not be able to process the arrears interest and the late filing penalty cancellations until payment has been made to the outstanding taxes and remaining penalties". At the hearing of this judicial review application, counsel for the Respondent confirmed that this decision regarding the cancellation of the arrears interest was still valid and that the proper credits would be allocated once the Applicant proceeded to actual payment of the debt owed.

[12] This fairness decision provided a large credit for the Applicant in relation to the arrears interest. However, the February 22, 2008 fairness decision did not address the gross negligence penalties on the basis that taxpayer fairness relief was not available for such penalties.

[13] The Applicant was nevertheless not satisfied with the February 22, 2008 fairness decision, and therefore submitted a second request for taxpayer relief on April 14, 2008. That request was specifically targeting the gross negligence penalties on the same considerations as the first request, save for the addition of emotional or mental distress to the reasons justifying the second request.

[14] This second request was the object of a "Quality Assurance Review" dated May 22, 2008 and prepared by a Senior Program Officer of the Taxpayer Relief & Service Complaints Directorate, Appeals Branch at the CRA (Exhibit R to the affidavit of Janet de Kergommeaux). For reasons which shall be discussed further below, this review recommended that no relief be granted under the taxpayer fairness relief provisions in regard to the gross negligence penalties. The review however recommended that the arrears interest charges for the period prior to May 13, 2004 be considered for additional relief in light of the fact that "[f]rom information in the report and file, it

appears taxpayer has circumstances (both financial and medical) that could warrant further interest relief" (Quality Assurance Review, p. 4, Exhibit R to the affidavit of Janet de Kergommeaux).

[15] The second taxpayer fairness relief request was also the object of a second level fairness report dated June 5, 2007 prepared and approved by two officers of the CRA (Exhibit G to the affidavit of Janet de Kergommeaux). This report recommended that no further relief be provided in the Applicant's case, either in regard to arrears interest relief for the period prior to May 13, 2004 or in regard to the gross negligence penalties.

[16] Subsequently, on June 9, 2008 the decision denying further relief was communicated to the Applicant. Further interest relief for the period prior to May 13, 2004 was denied on the basis that for the tax years 1999 through 2003 the Applicant was carrying on a business and that [f]inancial hardship and incapacity have not been established for this time period". Relief from the gross negligence penalties was also denied on the basis that such penalties can only be cancelled under exceptional circumstances. The decision added that "[e]xceptional circumstances have not been established in this case; therefore, the courts should determine cancellation of these penalties" (Exhibit E to the affidavit of Janet de Kergommeaux).

Position of the parties

[17] The Applicant was self-represented throughout these proceedings except on the date of the hearing, at which time she appointed an attorney to argue her case. In her written memorandum of fact and law, the Applicant explained the facts of her case as she understood them and referred to

the first level fairness decision cancelling the arrears interest for the period of May 13, 2004 onward. The Applicant's written memorandum of fact and law further noted the refusal to cancel the gross negligence penalties on the basis that the first level review could not deal with such matters and to the refusal to grant further relief in the second level review (paras. 16-17 of Applicant's written argument). The Applicant took the position that this second level decision was made in bad faith, ignored relevant facts and considered irrelevant facts thus tainting its outcome. At the hearing of this judicial review, the Applicant's attorney expanded on these arguments.

[18] First, he identified numerous contradictions and errors in the reports leading to the June 9, 2008 decision denying further relief. As examples:

a. the second level fairness report dated June 5, 2007 (Exhibit G to the affidavit of Janet de Kergommeaux) concludes that "[t]he only information provided, with regard to her depression, concerns the 1997 year"; yet the record is very clear that the Applicant had submitted numerous medical reports concluding to a continued state of depression well beyond 1997;

b. this same report states that the Applicant had been charged with gross negligence penalties in prior taxation years 1988, 1989 and 1990; yet the Canada Revenue Agency documentation submitted as Exhibit K to the affidavit of Janet de Kergommeaux shows no such penalties charged to the Applicant for those years;

c. both the first fairness relief decision granting partial relief and dated February 22, 2008 (Exhibit B to the affidavit of Janet de Kergommeaux) and the Quality Assurance Review" dated May 22, 2008 (Exhibit R to the affidavit of Janet de Kergommeaux)

> conclude that the Applicant has circumstances, both financial and medical, that could warrant relief under the taxpayer fairness relief provisions of the Act. Yet the second level fairness report dated June 5, 2007 (Exhibit G to the affidavit of Janet de Kergommeaux), on the basis of the same information, reaches a different and incompatible conclusion: "[f]inancial hardship has not been established".

[19] As far as the Applicant is concerned, these numerous errors and contradictions justify in themselves granting relief pursuant to this judicial review.

[20] In addition, the Applicant argued that no consideration has been given to relief from the gross negligence penalties contrary to the fairness provisions of the Act. Though Information Circular 07-1 provides that the cancellation of gross negligence penalties may be granted under the taxpayer relief provisions in undefined "exceptional circumstances", here no consideration was given to the matter. To support this assertion, the Applicant referred, *inter alia*, to both the first fairness relief decision dated February 22, 2008 (Exhibit B to the affidavit of Janet de Kergommeaux) and to the Taxpayer Relief Provisions Fact Sheet and Rationale dated February 21, 2008 (Exhibit F to the affidavit of Janet de Kergommeaux) which both stated that the "[g]ross negligence penalties should not be waived or cancelled under the fairness provisions". The Applicant argued that this position is contrary to the terms of subsection 220(3.1) of the Act and that this error in law should be reviewed on a standard of correctness by this Court.

[21] The Respondent argued that the Applicant had not established that she suffered financial hardship or an incapacity which would warrant relief. The fairness provisions of the Act confer upon the Minister discretion to waive or cancel penalties and interest payable under the Act. This ministerial discretion is broad, and to facilitate the exercise of this discretion, the Minister has prepared guidelines in the form of Information Circular 07-1 entitled "Taxpayer Relief Provisions". Though the Minister's discretion is subject to judicial review before the Federal Court, the standard of review applicable in such cases is that of reasonableness following the Federal Court of Appeal decision in *Lanno v. Canada (Customs & Revenue Agency)*, 2005 D.T.C. 5245.

[22] The Respondent further argues that this Court is not called upon to exercise the discretion conferred upon the Minister or to substitute its own decision for that of the Minister. The Respondent relied on *Maple Lodge Farms v. Government of* Canada, [1982] 2 S.C.R. 2 and *Barron v. Canada (Minister of National Revenue-M.N.R.)*, (1997), 97 D.T.C. 5121 (FCA), [1997] F.C.J. No. 175 (QL), to support the proposition that this Court's review is limited to the manner in which the Minister exercised his discretion.

[23] The Respondent concluded that the Applicant did not obtain further relief under the fairness provisions as: a) she did not have a physical or emotional incapacity sufficient to warrant interest relief; b) she did not demonstrate circumstances of financial hardship which would justify interest relief; c) the CRA had previously granted partial interest relief; and d) the Tax Court had found that the imposition of gross negligence penalties was appropriate in the circumstances and the Applicant failed to present any reason to waive these penalties. The Respondent argued that these conclusions

were rationally supported, and were made with due observance to the principles of natural justice and procedural fairness. Consequently, the Minister's decision to decline to exercise his discretion to grant relief under the fairness provisions of the Act was reasonable in the circumstances.

[24] In oral argument in regard to the gross negligence penalties, the Respondent added that although the first fairness decision denied the application of the fairness provisions to these penalties, this approach was corrected within the process leading to the second fairness decision. To support this argument, the Respondent referred to the "Quality Assurance Review" dated May 22, 2008 (Exhibit R to the affidavit of Janet de Kergommeaux) which specifically noted the mistake in the first fairness decision and which confirmed that "request for relief of these penalties can and should be considered under subsection 220(3.1)". Therefore, it was argued, consideration for relief of these penalties was given in the second fairness decision. However relief was denied since the Applicant did not submit any evidence of exceptional circumstances which could justify relief from these penalties.

[25] Both the Applicant and the Respondent referred to Information Circular 07-1 concerning the Taxpayer Relief Provisions and found provisions therein supporting their respective positions. Both parties invited the Court to consider this Information Circular.

Legislative provisions and related guidelines

[26] The taxpayer fairness provisions are set out in various subsections of the Act. For the purposes of this judicial review, the pertinent provision is subsection 220(3.1):

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

[27] The powers of the Minister pursuant to subsection 220(3.1) of the Act may be delegated by virtue of subsection 220(2.01) of the Act. It was not in dispute in this case that the officer who made the decision denying the second taxpayer fairness relief request was properly designated to do so on behalf of the Minister.

[28] The gross negligence penalties which are the principal object of the second fairness decision in this case are provided by subsection 163 (2) of the Act, which sets out various formulas to calculate such penalties when they are imposed. The introductory paragraph of the subsection explains the purpose of these penalties:

(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty […]	(2) Toute personne qui, sciemment ou dans des circonstances équivalant à faute lourde, fait un faux énoncé ou une omission dans une déclaration, un formulaire, un certificat, un état ou une réponse (appelé «déclaration » au présent article) rempli, produit ou présenté, selon le cas, pour une année d'imposition pour l'application de la présente loi, ou y participe, y consent ou y acquiesce est passible d'une pénalité […]

[29] For the purposes of the application of the taxpayer fairness provisions of the Act, Information Circular 07-1 dated May 31, 2007 provides guidelines on the discretionary authority of the Minister pursuant to these provisions (the "Guidelines"). These Guidelines are not intended to be exhaustive nor are they meant to restrict the spirit and intent of the legislation. They are however helpful in informing taxpayers, in general terms, what the policy and practices of the Minister will be in exercising discretion under the taxpayer fairness provisions of the Act.

[30] Paragraph 8 of the Guidelines explains the basic purpose of the legislation as 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 statutory requirement for income tax purposes". Paragraph 11 confirms the discretionary nature of these provisions of the Act, but adds that each request for such relief "will be decided and reviewed on its own merits".

[31] Part II of the Guidelines deal with the cancellation or waiver of penalties and interest. Paragraphs 23 and 24 set out the circumstances where relief from penalties and interest may be warranted:

> ¶ 23. The Minister may grant relief from the application of penalty and interest where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation or requirement at issue:
>
> (a) extraordinary circumstances
> (b) actions of the CRA
> (c) inability to pay or financial hardship
>
> ¶ 24. The Minister may also grant relief if a taxpayer's circumstances do not fall within the situations stated in 23.

[32] The first of the three enumerated circumstances for which relief may be granted is "extraordinary circumstances", which are defined in paragraph 25 of the Guidelines as circumstances "that may have prevented a taxpayer from making a payment when due" including but not limited to serious illness or accident or serious emotional or mental distress.

[33] The second enumerated circumstance concerns actions of the CRA. Paragraph 26 of the Guidelines sets out the types of actions contemplated, such as errors in processing and undue delays.

[34] The third enumerated circumstance is inability to pay or financial hardship. Paragraph 27 of the Guidelines sets out circumstances and examples where such relief can be granted in regard to interest charges. However, section 28 of the Guidelines considerably limits the consideration of inability to pay or financial hardship where relief from penalties is being requested. In such cases, only the extraordinary circumstances set out in paragraph 25 of the Guidelines, including serious

illness or accident or serious emotional or mental distress, may result in relief from penalties. However, there may also be some undefined but rare "exceptional circumstances" which may nevertheless justify relief from penalties on the basis of inability to pay or financial hardship.

[35] In the event the circumstances set out in the Guidelines are such as to justify a consideration of fairness relief under the Act, paragraph 33 of the Guidelines enumerates four factors to be considered when determining whether or not to cancel or waive penalties and interest:

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

[36] These enumerated factors render difficult relief from gross negligence penalties under the Act in light of the very nature of such penalties. Indeed, these penalties are imposed when a taxpayer has knowingly, or under circumstances amounting to gross negligence, made or otherwise participated in the making of a false statement or omission in a tax return.

[37] Nevertheless, the terms of subsection 220(3.1) of the Act are clear that the taxpayer fairness relief provisions contained therein apply to "any penalty […] otherwise payable under this Act by

the taxpayer […]" (emphasis added). Consequently, the taxpayer fairness relief provisions may apply to gross negligence penalties. However, according to the Guidelines, "exceptional circumstances" must exist in order to grant such relief. The Guidelines further recommend that gross negligence penalties be disputed through a notice of objection rather than through the taxpayer fairness relief provisions:

> ¶ 37. Relief from a gross negligence penalty assessed under the Act can be considered under subsection 220(3.1). However, since the levy of these penalties indicates a degree of negligence and absence of care and diligence on the part of the taxpayer in the conduct of their tax affairs, the cancellation of a gross negligence penalty may be appropriate only in exceptional circumstances.
>
> ¶ 38. Given the nature of a gross negligence penalty, it is more appropriate for a taxpayer to dispute the assessment of such a penalty by filing a notice of objection. For more information on a taxpayer's right of objection, see Pamphlet P148, *Resolving Your Dispute: Objection and Appeal Rights Under the Income Tax Act* on the CRA Web site.

[38] When, as in this case, an assessment is under objection or appeal, paragraph 109 of the Guidelines indicates that a request to cancel a penalty and interest on the grounds of extraordinary circumstances, such as serious illness or accident or serious emotional or mental distress, may be reviewed and an informal decision communicated to the taxpayer. However the final decision concerning the fairness relief on such grounds will be withheld until the objection or appeal is resolved or until all rights of appeal have expired.

[39] When, however, the request for fairness relief concerns the cancellation of penalties and interest on the grounds of inability to pay or financial hardship under subsection 220(3.1) of the Act,

and the concerned assessment is under objection or appeal, paragraph 110 of the Guidelines state the request “will generally be held in abeyance until the outcome of the objection or appeal process or until all rights of appeal have expired”.

The standard of review

[40] *Dunsmuir v. New Brunswic*k, [2008] 1 S.C.R. 190 at para. 62 established a process for determining the standard of review: “[f]irst, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question”.

[41] The Federal Court of Appeal has determined in *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] F.C.J. No. 71 at paras. 24 to 27, and confirmed again in *Slau Ltd. v. Canada (Revenue Agency)*, 2009 FCA 270, [2009] F.C.J. No. 1194 at para. 27 citing *Telfer*, that the correct standard of review of a discretionary decision of the Minister pursuant to subsection 220(3.1) of the Act is reasonableness. In *Telfer* at para. 24-25:

> **24** Unreasonableness is the standard of review normally applicable to the exercise of discretion: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 51 ("*Dunsmuir*"). Indeed, this Court had previously held in *Lanno v. Canada (Customs and Revenue Agency)*, 2005 DTC 5245, 2005 FCA 153, that unreasonableness *simpliciter* (one of the two deferential standards then applied by the courts) was the standard of review applicable to a decision made under subsection 220(3.1).
>
> **25** When reviewing for unreasonableness, a court must examine the decision-making process (including the reasons given for the decision), in order to ensure that it contains a rational "justification" for the decision, and is transparent and intelligible. In addition, a reviewing court must determine whether the decision

> itself falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir* at para. 47.

[42] However *Telfer* and *Slau* did not address the applicable standard of review in such circumstances where, as is the case here, the Minister is alleged to have committed an error of law by misinterpreting subsection 220(3.1) of the Act in refusing to consider any taxpayer fairness relief in regard to the gross negligence penalties. In *Telfer* at para. 28, the Federal Court of Appeal appeared to indicate that in such circumstances the standard of review may be different.

[43] As noted in *Dunsmuir v. New Brunswick*, *supra* at para. 50, “[a]s important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law”. Moreover at para. 59 of *Dunsmuir*, the Supreme Court of Canada specified that “[t]he tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction” citing from D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf updated July 2007) at pp. 14-3 to 14-6.

Analysis

[44] The decision subject to judicial review in this case dated June 9, 2008 denies relief to the Applicant under the taxpayer fairness provisions of the Act in regard to two matters: a) arrears interest relief for the period prior to May 13, 2004; and, b) gross negligence penalties.

[45] Concerning the arrears interest relief for the period prior to May 13, 2004, as the Applicant's attorney pointed out, there are some inconsistencies in the preparatory reports leading to the June 9, 2008 decision denying relief, particularly in the second level fairness report dated June 5, 2007 (Exhibit G to the affidavit of Janet de Kergommeaux).

[46] However, as noted in paragraphs 9 and 10 of the affidavit of Janet de Kergommeaux submitted by the Respondent, the second fairness report dated June 5, 2007 was but one of the many sources of information available and considered in the decision to deny relief of arrears interest for the period prior to May 13, 2004. Indeed, consideration was given, *inter alia*, to the first taxpayer fairness relief decision under which the Applicant was granted substantial arrears interest relief for the period of May 13, 2004 onward, to the settlement of the litigation which was in some respects favorable to the Applicant, and to the prior egregious conduct of the Applicant towards the taxation authorities and her tax payment responsibilities.

[47] The formulation of the letter of June 9, 2008 conveying the refusal decision to the Applicant was not very detailed, and basically referred to the fact the Applicant was not facing economic hardship during the period prior to May 13, 2004 for which she was seeking arrears interest relief. Nevertheless, read in the context of all the material submitted by the Applicant and taking into account as a whole the various documentation considered and the various reports prepared by the Respondent in processing the second taxpayer fairness relief request, the decision to deny further arrears interest relief for the period prior to May 13, 2004 "falls within a range of possible,

acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir, supra*, at para. 47).

[48] I thus find that the denial pursuant to subsection 220(3.1) of the Act of further arrears interest relief to the Applicant for the period prior to May 13, 2004 was reasonable.

[49] The situation is substantially different when the request for taxpayer fairness relief of the gross negligence penalties is considered.

[50] The decision dated February 22, 2008 granting in part the Applicant's first taxpayer fairness relief request (Exhibit B to the affidavit of Janet de Kergommeaux) denied relief in regard of the gross negligence penalties on the basis that such relief was simply not available for such penalties:

> Inasmuch as gross negligence penalties are only levied in cases of extreme negligence, a taxpayer that has been assessed with this type of penalty would not be a candidate for the receipt of penalty relief under the fairness provisions. Gross negligence penalties that have been assessed should not be waived or cancelled under the taxpayer relief provisions.

[51] This approach is manifestly wrong since, as already noted above, subsection 220(3.1) of the Act clearly provides that the taxpayer fairness relief provided for therein may be applied to <u>any</u> penalties otherwise payable under the Act. This clearly includes the penalties imposed under subsection 163(2) of the Act which are known as gross negligence penalties.

[52] This deficiency was noted in the "Quality Assurance Review" dated May 22, 2008 (Exhibit R to the affidavit of Janet de Kergommeaux):

> Although [the Ottawa Tax Service Office] referenced ADR-03-04 (which indicates these [gross negligence] penalties should not be cancelled under the fairness provisions) in the first report and decision letter as the reason for denying relief, request for relief of these penalties can and should be considered under subsection 220(3.1). However, as noted in the ADR & IC07-1 […], since the levy of these penalties indicates a degree of negligence, cancellation of these penalties may be appropriate **only in exceptional circumstances.** [Emphasis in original]

[53] This statement correctly sets out the scope of subsection 220(3.1) of the Act which clearly can apply to gross negligence penalties. It also correctly states the policy set out in the Guidelines which, because of the very nature of gross negligence penalties, requires undefined "exceptional circumstances" in order to contemplate cancellation of such penalties pursuant to the taxpayer fairness relief provisions.

[54] However, the "Quality Assurance Review" dated May 22, 2008 then goes on to state the following:

> For taxpayer relief consideration of the gross negligence penalties, did exceptional circumstances apply in this taxpayer's case? The taxpayer's main argument against the gross negligence penalties appears to be her disputing that they were correctly charged. Ms. Cayer states she "was not running a business…never held a Tarion builders warranty…never had a GST number and certainly did not have enough experience to build homes for other people." **This issue is clearly for the courts to decide**, as the taxpayer has not provided any details of exceptional circumstances under taxpayer relief that would warrant us cancelling these penalties. [Emphasis in original]

> As noted in paragraph 38 above [of the Guidelines], it is more appropriate for taxpayer to dispute the assessment of gross negligence penalties. Ms. Cayer did object-appeal the assessment of the penalties. In the Tax Court of Canada (TCC) judgment dated March 15, 2007, […] the judge upheld the assessment of the penalties. […] the taxpayer has appealed this TCC decision re 2001 & 2002 tax years to the Federal Court of Appeal. As per update […] taxpayer has until the end of this month [May 2008] to file documents to continue her case with the Federal Court of Appeal re 2001 & 2002 tax years […]

[55] These aspects of the "Quality Assurance Review" dated May 22, 2008 merit some comments. First, it is clear from the record that the Applicant was specifically targeting the gross negligence penalties in her second taxpayer fairness relief request. Second, it is also clear from the record that the grounds claimed by the Applicant for such relief were financial hardship and emotional distress. These matters were clearly set out in the Applicant's second taxpayer fairness relief request dated April 14, 2008 (Exhibit C to the affidavit of Janet de Kergommeaux):

> I disagree with the decision made in the first review because the gross negligence penalties could not be addressed at that level and the interest relief that I received was only an extra year on top of what [S.D.] had already given me.
>
> I am requesting that all the interest and all gross negligence penalties be dropped due to financial hardship and emotional distress.

[56] The financial hardship and emotional distress grounds were expanded upon by the Applicant in the documentation accompanying this second request. Among other grounds for relief, the Applicant noted that she is living on the Ontario Disability Support Program, that she suffers from rheumatoid arthritis and extreme depression, that she has no money, that she cannot pay her mortgage and has trouble feeding and clothing her children, and that her life has been basically

ruined (Schedule A to the affidavit of Janet de Kergommeaux, at pages 36-37 of the Respondent's record).

[57] Consequently, though it is true that the Applicant's main argument against the application of the gross negligence penalty was based on the inappropriateness of these penalties being imposed in the first place, these arguments were then being dealt with in an appeal to the Federal Court of Appeal. However, the Applicant was also pursuing another recourse under the taxpayer fairness relief provisions of the Act based on arguments which did not concern the appropriateness of these penalties but which rather sought their cancellation in light of her financial situation and emotional distress. These are two separate and distinct recourses based on completely different considerations and which were unfortunately melded together in the "Quality Assurance Review" dated May 22, 2008.

[58] It is understandable that the CRA did not wish to grant any taxpayer fairness relief to the Applicant while the challenge to the assessment of the gross negligence penalties was still before the courts. In such circumstances the taxpayer fairness relief request could have been held in abeyance until the outcome of the objection or appeal process or until all rights of appeal had expired. This is not what the "Quality Assurance Review" dated May 22, 2008 recommended. On the contrary, the recommendation concerning the gross negligence penalties stated at page 4 of this Review was rather the following:

> We agree that no relief of the gross negligence penalties be granted via the taxpayer relief provisions. Since the taxpayer has objected-appealed the levying of these penalties, the issue should be resolved

> via the court process. (We recommend that you may wish to advise the taxpayer of this in your decision letter.)

[59] In any event, the appeal process challenging the appropriateness of the gross negligence penalties was resolved shortly thereafter under settlement documents dated May 23, 2008 (Exhibit D to the affidavit of Janet de Kergommeaux). Even though the litigation concerning the assessment was now over, the CRA continued to insist that the taxpayer fairness relief request relating to the gross negligence penalties be dealt with through the courts rather than through subsection 220(3.1) of the Act.

[60] Indeed, after the settlement of the litigation concerning the assessment, the second level fairness report of June 5, 2007 (Exhibit G to the affidavit of Janet de Kergommeaux) dealt with the taxpayer fairness relief request in the following terms (at page 3):

> The Taxpayer has requested that the Gross Negligence Penalties be cancelled. As these penalties are levied in cases of extreme negligence, the cancellation may be appropriate only in exceptional circumstances.
> A Taxpayer may dispute the assessing of such penalties by filing an Objection – the Taxpayer did file an Objection and was not successful in having the penalties cancelled by the Appeals Division. The Taxpayer then applied to the Tax Court of Canada- the judge upheld the Agency's position and found the levying of these penalties to be appropriate.
> Exceptional circumstances have not been provided by the Taxpayer – in this case, the courts should decide if exceptional circumstances were present to warrant cancellation of the Gross Negligence Penalties. [Emphasis added]

[61] This approach was reiterated in the final decision dated June 9, 2008 denying the Applicant's second taxpayer fairness relief request and which is the object of this judicial review:

> Gross negligence penalties can only be cancelled under exceptional circumstances. Exceptional circumstances have not been established in this case; therefore, the courts should determine cancellation of these penalties. [Emphasis added]

[62] The inescapable conclusion here is that the CRA melded together the appeal on the assessment of the gross negligence penalties and the request for taxpayer fairness relief pursuant to subsection 220(3.1) of the Act. The net result of this approach is to have denied the Applicant a proper review of her request under subsection 220(3.1) of the Act by tying the fate of this request to the fate of her appeal on the assessment of the penalty. Yet, as I have already stated, these are two separate and distinct recourses, and different considerations apply to each.

[63] As recently aptly noted by Tardif T.C.J. in *Gilbert v. Canada*, 2009 TCC 102, 2009 D.T.C. 1205 at paras. 43-44, the Tax Court of Canada has no jurisdiction over the taxpayer fairness relief provisions set out in subsection 220(3.1) of the Act (see also *Iszcenko v. Canada*, 2009 TCC 229, 2009 D.T.C. 1150 at paras. 10 and 13).

[64] The considerations which apply in an appeal of an assessment challenging gross negligence penalties are not the same as those which apply in a taxpayer fairness relief request. One deals with the appropriateness of the penalties in light of the conduct of the taxpayer in making a return, the other with exceptional circumstances which may justify the cancellation of the penalties on fairness considerations. These are two different matters and are treated as such by the Act. Indeed subsection

220(3.1) of the Act does not limit or exclude the gross negligence penalties from its ambit. Rather the subsection states that it applies to "any penalty […] otherwise payable under this Act" [emphasis added].

[65] The financial hardship and emotional distress grounds raised by the Applicant to justify her taxpayer fairness relief request for cancellation of the gross negligence penalties may perhaps be insufficient to meet the high standard of "exceptional circumstances" which the Minister has set out in the Guidelines in order to grant relief from such penalties under subsection 220(3.1) of the Act. However, this is an issue to be properly considered and eventually decided by the Minister and not by this Court.

[66] In this case, the Applicant's fairness relief request for cancellation of the gross negligence penalties was not reviewed under subsection 220(3.1) of the Act. This constitutes a refusal to exercise jurisdiction, a failure to follow a procedure which was required by law to be observed or an error in law under the meaning of subsection 18.1(4) of the *Federal Courts Act*.

[67] In light of the mixed success, no costs shall be awarded.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is granted in part; and,

2. the request under subsection 220(3.1) of the Act for the cancellation of the gross negligence penalties assessed in this case is returned to the Respondent for an assessment and decision by another designated representative of the Minister for reconsideration in accordance with these reasons.

"Robert Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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