

Federal Court



Cour fédérale

Date: 20100212

Docket: T-831-09

Citation: 2010 FC 145

Ottawa, Ontario, February 12, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

M. W. (MAX) TOMASZEWSKI

Applicant

and

**MINISTER OF FINANCE,
CANADA REVENUE AGENCY**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] [33] ... Since deciding what weight to accord to a particular fact is at the heart of exercising discretion, it will normally be difficult to persuade a court that an administrative decision-maker has acted unreasonably in this regard.

(Telfer v. Canada (Revenue Agency), 2009 FCA 23, 386 N.R. 212).

II. Introduction

[2] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C, 1985, c. F-7 of a decision of the Canada Revenue Agency (CRA) denying the Applicant's second-level request for waiver of interest for the taxation years of 1992 to 1995 based on financial reasons as well as his first-level request for waiver of interest for those years based on medical reasons.

III. Background

[3] The Applicant, Mr. M.W. (Max) Tomaszewski, has outstanding tax debts for the taxation years of 1992, 1993, 1994 and 1995. In 2002, the Applicant requested that the Minister of National Revenue exercise discretion pursuant to subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA) to waive the interest that has accumulated on these debts. This initial assessment was considered not properly conducted and the decision to deny the Applicant's request was made on August 29, 2007. The Applicant sent a letter requesting a second review of his relief request on or about December 17, 2008.

IV. Decision under Review

[4] On April 29, 2009 the Tax Services Office of the CRA in Victoria, British Columbia denied the Applicant's request for tax relief.

[5] The CRA denied the Applicant's request on the ground that he is not in a situation of inability to pay his income tax due to financial hardship. In reaching this decision, the CRA noted:

the Applicant had provided signed financial statements showing that his net worth has fluctuated between \$5.5 million and \$14.2 million between 1989 and 2007, statements from various financial institutions showing income ranges from \$100,000 to \$250,000 a year for the last decade, a divorce agreement reached in 2007 showing that the Applicant paid \$1,250,000 to his ex-wife, copies of bank statements from 2007 showing that the Applicant transferred \$100,000 to his bank account in Poland, the Applicant has paid for his daughters to earn a combined total of five university degrees and statements from the Applicant to the effect that he has been supporting his mother and brother in Poland.

[6] In light of the evidence mentioned above, the CRA came to the conclusion that the Applicant has failed to pay his tax debts because he has chosen to engage in other discretionary spending.

[7] The Applicant also applied for relief from interest due to his medical condition of heavy metal toxicity. On April 6, 2009, the CRA issued a first-level decision rejecting the Applicant's request on the ground that while heavy metal toxicity may have psychological effects, it was considered that there was no apparent correlation between any medical condition and his financial health during the period in question or his mental abilities more generally (Exhibit "B" to the Affidavit of Leslie Green).

V. Issues

- [8] 1) Was the Minister's decision to deny the requested waiver of interest on financial grounds unreasonable?
- a. Should this Court engage in a judicial review of the Minister's first-level decision refusing to waive interest for medical reasons?

VI. Positions of the Parties

[9] At the outset the Applicant spoke of the awards which he has won in regard to fourteen properties that he renovated at personal cost to which heritage status had been accorded, adding to Canada's historical prestige. The Applicant then submits the CRA erred by disregarding evidence showing that he has been under personal and financial strain for the past decade. The Applicant submits that he has provided the CRA with evidence of his cash flow difficulties, low credit rating, his divorce in 2007, health issues related to heavy metal toxicity and his support for his mother and brother which renders the CRA's decision unreasonable.

Financial Decision

[10] The Respondents submit that, according to the guidelines contained in Information Circular 07-1 (IC 07-1), the CRA generally examines the taxpayer's history of compliance with tax obligations, whether the taxpayer has knowingly allowed a tax debt to accumulate, whether the taxpayer has exercised reasonable care under the self-assessment system and whether the taxpayer acted quickly to remedy any delay or omission attributable to the taxpayer.

[11] The Respondents submit the CRA came to a reasonable decision in determining the Applicant's circumstances do not warrant a waiver of interest, as the Applicant did not demonstrate financial hardship amounting to an inability to provide the basic necessities of life.

[12] The Respondents specify that the Applicant conducted his affairs negligently under the self-assessment system and knowingly allowed his tax debt to accumulate. In support of this argument, the Respondents note that the Applicant contributed to his Registered Retirement Savings Plan (RRSP) every year between 1992 and 2000, except 1998 instead of reducing his tax debt.

[13] The Respondents argue that material before the CRA demonstrates that the Applicant has had substantial net worth and earning capacity since 1992. The Respondents point to the Applicant's March 1, 2007 Net-Worth Statement showing assets of over \$14,000,000, in addition to statements of earnings between 1989 and 2000 which show annual incomes ranging between \$100,000 and \$200,000.

Medical Decision

[14] The Respondents, nevertheless, contend that the Applicant is entitled to a second-level review of his request for interest relief due to his medical condition and that the matter should be referred to the Minister for reconsideration.

VII. Relevant Legislative Provisions

[15] The Minister of National Revenue has the discretion to waive or cancel interest pursuant to subsection 220(3.1) of the ITA:

Waiver of penalty or interest

(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.

Renonciation aux pénalités et aux intérêts

(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.

VIII. Standard of Review

[16] The Court notes that the waiver of interest under subsection 220(3.1) of the ITA is discretionary. In the case of *Telfer*, above, the Federal Court of Appeal held that the discretionary

standard of reasonableness normally applies to exercises of discretion, such as taxpayer relief requests (*Telfer* at para. 24).

[17] When applying the standard of reasonableness, a court must show deference to the reasoning of the agency under review and must be cognizant of the fact that certain questions before administrative tribunals do not lend themselves to one specific result. As the Supreme Court of Canada explained, reasonableness is concerned mostly with “the existence of justification, transparency and intelligibility within the decision-making process”, as well as “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v. New Brunswick*, [2008] SCC 9, [2008] 1 S.C.R. 190 at para. 47).

IX. Analysis

Financial Decision

[18] CRA officers exercise their discretion to waive interest with reference to the non-binding guidelines issued in IC 07-1 which state that relief may be granted if payment of accumulated interest would cause a “prolonged inability to provide basic necessities” such as food, medical attention, transportation, or shelter (Respondents’ Record (RR) at p. 10).

[19] The IC 07-1 guidelines advise CRA officers to refer to such factors as the taxpayer’s compliance history, whether the taxpayer knowingly allowed a tax debt to accumulate and whether the taxpayer had acted quickly enough to remedy any delay when determining whether waiver is appropriate (RR at p. 11).

[20] In this case, it is clear the Applicant has had a challenging history of compliance in regard to his tax obligations and has knowingly allowed his tax debt to accumulate. The evidence indicates that the Applicant has engaged in relatively significant spending in recent years, including a \$1,250,000 divorce payment to his ex-wife. It is clear from the evidence that the Applicant has carried on his business and personal life within his family context without paying the substantial tax debt that he owes. It is the Court's conclusion that the CRA exercised its discretion reasonably in denying the Applicant's request for waiver. Although the Court duly notes that the Applicant has stated, with examples, that he has done all he could to ward off bankruptcy by attempting to continuously pay his creditors, even if, it be, in small amounts rather than to declare bankruptcy.

Medical Decision

[21] The Court agrees with the Respondents that the Applicant's request for judicial review of the CRA's first-level decision regarding the cancellation of interest due to the Applicant's medical condition is premature. The Applicant is of the view that prior to treatment for his medical condition, certain financial decisions which he made were hasty, and without proper reflection due to confusion caused by his medical condition. If the Applicant believes the first-level request was not made in a fair and reasonable manner, he ought to apply to the CRA to have it reconsidered.

X. Conclusion

[22] The Court concludes that the CRA's decision rejecting the Applicant's request for relief for waiver on the basis of financial hardship is within the realm of reasonableness.

[23] The Court also agrees with the Respondents, in its conclusion, that the matter of the Applicant's application on medical grounds be referred to the CRA for reconsideration and redetermination.

JUDGMENT

THIS COURT ORDERS that

- 1) the Application for judicial review with respect to the request for relief on the basis of financial hardship be dismissed;
- 2) the Application for judicial review with respect to the request for relief on the basis of health reasons be referred to the Minister for reconsideration and redetermination;
- 3) no order as to costs be made as the matter is still to be referred to the CRA for reconsideration and redetermination on medical grounds.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-831-09

STYLE OF CAUSE: M. W. (MAX) TOMASZEWSKI
v. MINISTER OF FINANCE,
CANADA REVENUE AGENCY

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: February 3, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: February 12, 2010

APPEARANCES:

Mr. M. W. (Max) Tomaszewski FOR THE APPLICANT

Ms. Sara Fairbridge FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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