

Federal Court



Cour fédérale

Date: 20101124

Docket: T-398-10

Citation: 2010 FC 1178

Ottawa, Ontario, November 24, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

AMOS CHWAIEWSKY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant taxpayer asks that the Minister of National Revenue's (Minister) decision not to waive or cancel penalties or interest on unpaid taxes be set aside. The Minister's decision is made pursuant to s. 220(3.1) of the *Income Tax Act*.

220. (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a

220. (3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société

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.	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
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[2] The Minister has a policy in respect of this discretionary decision to relieve amounts owing which is based upon (i) extraordinary circumstances, (ii) actions of Canada Revenue Agency, and (iii) inability to pay or financial hardship.

II. FACTUAL BACKGROUND

[3] The Applicant and his wife are joint tenants of a condominium in Winnipeg and a cottage.

[4] The Applicant worked in the construction industry for over 40 years and has his own company Soma Holdings Ltd. (Soma) which had substantial financial assets.

[5] The Applicant claimed that his former accountant failed to make the necessary tax filings for the tax years 2000-2004. When these filings were made and T4 slips issued to the Applicant and his

wife, he became liable for approximately \$150,000 in taxes, penalties and interest. The penalties were based on his gross negligence in failing to file his personal tax returns.

[6] A First Request for relief from interest and penalties was filed in June 2007. The basis for the request was financial hardship (inability to pay) and extenuating circumstances (misplaced trust in his accountant). The request was denied and no judicial review was requested.

[7] On February 20, 2009, the Applicant made another request (Second Request) for reasons of financial hardship and extenuating circumstances. The Second Request was denied and is the subject of this judicial review.

[8] In outlining the reasons for refusal of the Second Request, the Minister referred (*inter alia*) to the following:

- the history of non-compliance, both personal and corporate.
- gross negligence penalties were assessed.
- no meaningful payment arrangements had been made including potential offset of CPP and OAS.
- financial hardship analysis takes into account the financial affairs of everyone in the household.
- net worth of husband and wife was \$273,000 (a disputed point).
- no consideration of arrears was given in respect of a TD Bank loan taken out in June 2009.

Although Mr. Chwaiewsky faces financial challenges, he has the ability to resolve his arrears balance by arranging his financial

matters in order to do so. This would include borrowing against available equity and/or disposing of assets.

[9] In the course of this judicial review, the Applicant included in his Record an affidavit from Mrs. Chwaiewsky to the effect that she would not consent to the sale of the joint properties. This affidavit was not before the Minister's delegate.

[10] The Applicant contends that there are three matters at issue:

1. The standard of review;
2. The unreasonableness and error of law in concluding that the Applicant could sell his joint properties; and
3. The failure to include the TD Bank loan in the making of the Minister's decision.

III. ANALYSIS

A. *Standard of Review/Preliminary Issues*

[11] The standard of review analysis is straightforward. The parties agree, and the Court concurs, that the standard is reasonableness (*Telfer v. Canada (Revenue Agency)*, 2009 FCA 23).

[12] It is also important to bear in mind that this is a highly discretionary matter. The taxpayer is asking for relief from that which Parliament has imposed and which other taxpayers are required to pay (or for which they could be liable). It is in the nature of a privilege but it is not a right.

[13] The affidavit of the Applicant's wife is not admissible. There are no valid reasons advanced for its inclusion, nor has any evidentiary basis been laid. It is self-serving at best and potentially not particularly germane.

B. *Joint Property*

[14] The Applicant submits that the Minister's decision is based on an error of law because he concluded that the Applicant could sell the joint properties and have sufficient funds to pay off the CRA debt. This position is based on the legal principle that a joint tenant cannot claim the whole of the value of the joint property but merely the net interest of that property.

[15] As ingenious as this argument is, and correct as to law, it fails to take the comments in the decision in context. The Minister, in deciding whether to grant relief, is not doing an audit net worth but looking at the general worth of the household. The use of household worth is reasonable – it is rationally connected to the purposes of the exercise of discretion.

[16] The Minister's quoted comments are not a statement of law but a conclusion that the taxpayer has some resources available to address tax arrears. These include but are not limited to sale of the joint properties.

[17] The Minister's conclusion is reasonable in the context in which it was made. It is not a statement of law or a finding on what the net proceeds of the disposal of these assets would be.

C. *Toronto Dominion Bank Loan*

[18] The Applicant argued that the Minister acted unreasonably in not considering this loan in his assessment of ability to pay. The difficulty with this position is that the Applicant never raised the issue of the loan as an aspect of the request for relief.

[19] It is difficult to fault the Minister for concluding that the Applicant gave no consideration to this loan when the Applicant never put the loan in issue.

[20] Finally, the reasonableness of the Minister's decision must also be considered as a whole. A review of the record confirms that the Minister's delegate examined each relevant factor from combined household work, particular circumstances related to supporting an adult daughter to the history of problems with the taxpayer's accounts. It was a careful, thorough, thoughtful and balanced decision.

[21] As a consequence of all of the above, the Court can find no basis for review of this decision.

IV. CONCLUSION

[22] This application for judicial review will be dismissed. The parties had agreed to a costs regime and consequently there will be no costs awarded despite the Respondent's success.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No costs are awarded as the parties have agreed to a costs regime.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-398-10

STYLE OF CAUSE: AMOS CHWAIIEWSKY

and

ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: November 23, 2010

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

DATED: November 24, 2010

APPEARANCES:

Mr. Mark E. Wallace FOR THE APPLICANT

Mr. Cameron G. Regehr FOR THE RESPONDENT

SOLICITORS OF RECORD:

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