Federal Court  Cour fédérale

Date: 20160822

Docket: T-1962-15

Citation: 2016 FC 953

Ottawa, Ontario, August 22, 2016

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

JOHN C. HERRINGTON

Applicant

and

CANADA REVENUE AGENCY

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. John Herrington [the Applicant] brings this application for judicial review of a decision made by a Team Leader of the Taxpayer Relief Centre of Expertise, which is part of the Appeals Branch of the Canada Revenue Agency [CRA]. The Team Leader denied the Applicant's request to reconsider the first taxpayer relief decision. In that decision, another CRA

Team Leader denied the Applicant's request for the cancellation of penalties and arrears interest assessed for the 2012 and 2013 tax years, on the basis of a lack of extraordinary circumstances.

[2] In assessing the Applicant's written and oral submissions, I have considered the fact that he is self-represented and that I should allow his pleadings considerable latitude. However, this does not give him any additional rights (*Sauve v Her Majesty the Queen*, 2011 FC 1081 at para 14; aff'd 2012 FCA 287 at para 6). I have also chosen to ignore several unjustified sarcastic and accusatory comments that we find in his Memorandum of Fact and Law and that he made during the hearing towards counsel for the Respondent and towards the Court.

II. Preliminary Remark

[3] The Applicant hereby requests the following remedies: i) relief from penalties incurred in 2012 and 2013; ii) refund plus interest; and iii) $10,000 in expenses related to seeking a judicial review.

[4] However, subsection 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7, provides that on an application for judicial review, this Court only has the power to:

> (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
>
> (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

[5] When applying subsection 18.1(3)(*b*), I am not called upon to exercise the discretion conferred on the Minister by the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], nor to substitute my own decision for that of the Minister. Rather, my review is limited to the manner in which the Minister exercised her discretion (*Sutherland v Canada (Canada Customs and Revenue Agency)*, 2006 FC 154 at para 20.

III. Facts

[6] The Applicant's 2009, 2011, 2012 and 2013 income tax returns were reassessed by the CRA due to omitted investment income. No penalties were levied for the 2009 taxation year as it was the first omission in a four-year period, but the Applicant was assessed $8.51 of arrears interest.

[7] With respect to the omissions in the 2011, 2012, and 2013 taxation years, the following penalties and interest were levied against the Applicant:

- In 2011, the Applicant omitted to declare T3 slips from TD Canadian Money Market Fund and Ishares Global Gold Index Fund, totalling $882.00. The Applicant was assessed $176.40 for omission penalties and $14.06 of arrears interest. The Applicant applied for relief from those penalties and interest under the Taxpayer Relief Provisions. On June 26, 2014, the Applicant's penalties and interest were cancelled.
- In 2012, the Applicant omitted to declare T5 slips from TD Greenline for $2,303.00. The Applicant was assessed $460.40 for omission penalties and $12.03 of arrears interest.
- In 2013, the Applicant omitted to declare T5 slips from TD Greenline for $1,617.00. The Applicant was assessed

> $323.40 for omission penalties and $19.67 of arrears interest.

[8] The Applicant paid the penalties and arrears interest in full, shortly after the issuance of the respective Notices of Reassessment.

[9] However, he subsequently submitted a Request for Taxpayer Relief with respect to the penalties and interest for the 2012 and 2013 taxation years [the "First Level Request"]. The Applicant indicated that there were "other circumstances" justifying his request: his T5 slips for 2012 and 2013 were delivered to his old mailing address, and thus he never received them. He had advised TD Bank of his new address, and TD Bank in turn had sent the address change to TD Greenline, their investment group. However, TD Greenline had not yet updated the Applicant's address on file. The Applicant stated that he had done his due diligence by contacting the CRA on March 3, 2014, to request all of his 2013 information slips. However, a CRA call centre agent later advised him that it did not receive his 2013 T5 slip until March 15, 2014.

[10] A Tax Services Agent prepared a Taxpayer Relief Report, which recommended denying the First Level Request. The Report noted that the Applicant should have been more diligent in reporting all of his income after his 2011 tax return was reassessed and penalties were levied for failure to report income. A CRA Team Leader approved the recommendation to deny the Applicant's First Level Request, and sent the decision letter to the Applicant.

[11] The Applicant made a second Request for Taxpayer Relief (the "Second Level Request"), with respect to the penalties and interest levied for the 2012 and 2013 taxation years. Again, the Applicant stated that there were "other circumstances" justifying his request: TD Bank had confirmed that the address change request it had sent to TD Greenline had been "lost in the mail". The Applicant argued that these circumstances were beyond his control.

[12] A second Tax Services Agent prepared a Taxpayer Relief Report, which recommended denying the Second Level Request. The Report acknowledged that the lost mail was beyond the Applicant's control, but found that these circumstances did not reasonably prevent the Applicant from disclosing all of his income on the initial tax filing.

IV. Impugned Decision

[13] Another CRA Team Leader approved the recommendation to deny the Applicant's Second Level Request, exercising her discretion pursuant to subsection 220(3.1) of the ITA. In her decision letter, the Team Leader agreed with the Applicant that the fact that TD Greenline did not have his updated mailing address was beyond his control. However, she could not conclude that this "reasonably prevented [him] from reporting an accurate and complete income tax return by the respective due date". The Team Leader acknowledged that the Applicant had contacted CRA on March 3, 2014, to obtain his 2013 information slips, but found that "after repeated omissions for similar income, it is reasonable to expect an individual to ensure that the information slips at hand reflects the financial situation."

V. Issues and standard of review

[14] This application for judicial review raises the following issues:

A. *Did the CRA Team Leader err in deciding not to waive or cancel penalties and interest levied against the Applicant?*

B. *Should costs be awarded?*

[15] The standard of review of a discretionary decision of the Minister under subsection 220(3.1) of the ITA is reasonableness (*Canada Revenue Agency v Telfer*, 2009 FCA 23 at para 24). Accordingly, this judicial review is limited to reviewing the manner in which the Team Leader exercised her discretion (*Sutherland* above at para 20).

VI. Analysis

A. *Did the CRA Team Leader err in deciding not to waive or cancel penalties and interest levied against the Applicant?*

[16] The Applicant's Memorandum of Fact and Law does not contain legal arguments. Essentially, the Applicant disagrees with the Team Leader's decision not to waive the penalties and interest. He argues that he was responsible in filing his taxes and that the penalties and interest should be waived due to circumstances that were beyond his control, i.e. the lost mail.

[17] He better articulated his position during the hearing. He blames the Respondent's computer system for not having provided him with advanced warnings that one of the T5 slips

received by the CRA from TD Greenline, which matched his Social Insurance Number, was missing from both his 2012 and 2013 income tax returns. In other words, the Applicant argues that the duty of care the CRA owes Canadian taxpayers (*Leroux v Canada Revenue Agency*, 2014 BCSC 720) includes an obligation to inform them every time a T3 or T5 slip, a copy of which is eventually sent by financial institutions to the CRA, is missing from that taxpayer's income tax return. The Applicant wants to change the ITA and CRA's system so penalties are levied only if a proper warning was provided to the taxpayer.

[18] The focus of subsection 220(3.1) of the ITA is rather whether relief should be granted due to extenuating circumstances beyond the control of the taxpayer that would have prevented him from complying with the ITA (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 50).

[19] I agree with the Respondent that the Team Leader's decision was reasonable.

[20] First, it was reasonable for the Team Leader to conclude that there were no extraordinary circumstances beyond the Applicant's control which prevented him from complying with his obligation to report all of his income when filing his income tax returns. Given the Applicant's similar omissions of investment income in the past, it was reasonable for the Team Leader to expect that he would ensure that the information slips he filed accurately reflected his investment portfolio. The responsibility to include all of a taxpayer's revenue earned during a year belongs to that taxpayer and it cannot be transferred on the CRA just because the latter is eventually provided with a copy of the T3 and T5 slips issued by financial institutions.

[21] Second, the Team Leader considered all representations made by the Applicant in reviewing the Second Level Request, and did not rely on irrelevant considerations. Thus, the Team Leader's decision falls within the range of possible and acceptable outcomes and she rendered a decision that is transparent, justifiable and intelligible (*Dunsmuir v New Brunswick*, 2008 SCC 9).

B. *Should costs be awarded?*

[22] In his Notice of Application, the Applicant asked for $10,000 in costs, but does not specify such an amount in his Memorandum of Fact and Law, in which he asks only for "costs".

[23] The Respondent asks for costs in this application.

[24] I find that costs should be awarded to the Respondent, given the result of this proceeding (Rule 400(3) of the *Federal Courts Rules*, SOR/98-106).

VII. Conclusion

[25] This application for judicial review is dismissed, with costs awarded to the Respondent in the amount of $500, inclusive of all disbursements and taxes.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. Costs are granted to the Respondent in the amount of $500, inclusive of all disbursements and taxes.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1962-15
STYLE OF CAUSE:	JOHN C. HERRINGTON v CANADA REVENUE AGENCY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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