Federal Court  Cour fédérale

Date: 20161219

Docket: T-636-16

Citation: 2016 FC 1394

Toronto, Ontario, December 19, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

GREGORY S. PYLATUIK

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Minister of National Revenue ("Minister"), made by his delegate Ms. S. Desautels, Team Leader, Taxpayer Relief Centre of Expertise, Appeals Branch, Canada Revenue Agency ("Minister's Delegate"), dated March 22, 2016 in respect of the matter of a Taxpayer Relief Application filed by the Applicant on May 19, 2015 pursuant to s 220(3.1) of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) ("ITA").

Background

[2] This application pertains to a request for equitable relief of interest arrears and late filing penalty related to the Applicant's 2006 taxation year. The Applicant was initially assessed for the 2004, 2005 and 2006 taxation years by notices dated April 21, 2005, July 5, 2006, and July 19, 2007, respectively. On June 11, 2009 the Canada Revenue Agency ("CRA") issued notices of reassessment which indicated that the Applicant's taxable income for those years was $1,478,608.00. The Applicant claimed that he had not been contacted by CRA about the audit of the 2004, 2005 and 2006 tax years and that he was not aware of his outstanding tax obligations until he received the notices of reassessment. This was because his father, without the Applicant's knowledge or consent, had utilized the Applicant's social insurance number ("SIN") and other aspects of his identity to conduct transactions and sign documentation. His father was abusive, tyrannical and was feared by the Applicant. He had required the Applicant to provide his tax records to the father's accountant who completed the Applicant's personal income tax returns, including his 2006 return, which the Applicant did not have an opportunity to sign or review. The Applicant's father and his accountant, without the Applicant's consent, also made representations on the Applicant's behalf concerning his income tax returns for 2004, 2005 and 2006.

[3] The total amount of tax and penalties assessed against the Applicant in the notices of reassessment for his 2004, 2005 and 2006 taxation years was $1,072,307.97, which included gross negligence penalties. CRA concluded that the Applicant was a partner with his father in a

farming operation described as G&G Pylatuke Farms ("G&G Farms") and that the Applicant was a shareholder in Wimmer Brook Enterprises, a Saskatchewan corporation.

[4] The Applicant filed notices of objection to the reassessments on September 9, 2009 and notices of appeal to the Tax Court of Canada on April 23, 2012 with respect to his income tax returns for the years 2004, 2005 and 2006. A settlement was reached with CRA pursuant to which the Applicant was found not liable for any part of the tax liability assessed for shareholder loans from Wimmer Brook Enterprises. Although he remains adamant that he was never a partner of G&G Farms, he claims that to resolve matters he agreed to accept a proposal that characterized him as having accepted one half of the tax liability for G&G Farms. The Applicant claims that it is his belief that the Department of Justice was not able to vacate that portion of the reassessments relating to the income from G&G Farms because he had, unknowingly, received the benefit of losses relating to the alleged partnership in prior years.

[5] On September 22, 2014 CRA issued a second reassessment in accordance with the terms of the consent judgment. This fully reversed the first reassessment in respect of the 2004 and 2005 taxation years and partially reversed the reassessment for the 2006 taxation year. The Applicant claims that the second reassessment added $156,739.00 to his taxable income for 2006. The record indicates that the Applicant paid the penalty and interest owing on his 2006 return in full on December 22, 2015.

[6] On May 19, 2015 the Applicant filed an application pursuant to s 220(3.1) of the ITA seeking equitable relief from the penalty and interest flowing from arrears assessed in respect of

his 2006 taxation year. On December 1, 2015 Ms. Darlene Magas issued the first-level decision ("First Level Decision") in response to this application wherein she determined that the arrears interest charged from June 11, 2009 to September 22, 2014 would be cancelled for the 2006 tax year. Those dates corresponded to dates the first reassessment was completed as a result of an audit on June 11, 2009, to the date the final reassessment was completed on September 22, 2014 after the Tax Court of Canada appeal. She declined to grant any further relief.

[7] The Applicant submitted a second-level request for taxpayer relief on January 28, 2016. A second level taxpayer relief report was prepared indicating a review of the request by taxpayer relief officers Ms. Lorraine Leclerc and Ms. Mildred Lewis, and by the Minister's Delegate who issued the second-level decision on March 22, 2016 ("Second Level Decision"). It is that decision which is the subject of this application for judicial review.

Decision Under Review

[8] The Minister's Delegate concluded that further relief was not warranted. Her decision was communicated to the Applicant by letter of March 22, 2016 which states, in part, as follows:

> The gross negligence penalties were previously cancelled and the arrears interest was adjusted for both CRA delay and other circumstances. As was indicated in the first review, the remaining arrears interest represents the interest that accrued on the unwarranted refund, the tax liability that was determined by the Tax Court of Canada from April 30, 2007, to the first reassessment by audit, and the interest that accrued on the balance after the final reassessment was completed. My review concluded that further relief is not warranted.

Relevant Legislation and Guidelines

Income Tax Act, RSC 1985, c l (5th Supp)

220 (1) The Minister shall administer and enforce this Act and the Commissioner of Revenue may exercise all the powers and perform the duties of the Minister under this Act.	220 (1) Le ministre assure l'application et l'exécution de la présente loi. Le commissaire du revenu peut exercer les pouvoirs et fonctions conférés au ministre en vertu de la présente loi.
…	…
(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.

Information Circular IC07-l, entitled Taxpayer Relief Provisions

Circumstances Where Relief From Penalty 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.

Extraordinary Circumstances

25. Penalties and interest may be waived or cancelled in whole or in part where they result from circumstances beyond a taxpayer's control. Extraordinary circumstances that may have prevented a taxpayer from making a payment when due, filing a return on time, or otherwise complying with an obligation under the Act include, but are not limited to, the following examples:

(a) natural or man-made disasters such as, flood or fire;

(b) civil disturbances or disruptions in services, such as a postal strike;

(c) a serious illness or accident; or

(d) serious emotional or mental distress, such as death in the immediate family.

Making a Request

…

32. Taxpayers should include all the circumstances (as listed in 23) that they intend to rely on in their initial request. It is important that taxpayers provide the CRA with a complete and accurate description of their circumstances to explain why their situation should merit relief. To support a request, taxpayers should provide all relevant information including the following, where applicable:

(a) the name, address, telephone number, social insurance number, account number, partnership number, trust account number, and business number or any other identification tax number assigned by the CRA to the taxpayer;

(b) the tax year(s) or fiscal period(s) involved;

(c) the facts and reasons supporting that the interest or penalties were either mainly caused by factors beyond the taxpayer's control, or were as a result of actions of the CRA;

(d) an explanation of how the circumstances affected the taxpayer's ability in meeting their tax obligation;

(e) the facts and reasons supporting the taxpayer's inability to pay the interest or penalties levied, or to be levied;

(f) any relevant documentation such as death certificates, doctor's statements, or insurance statements to support the facts and reasons;

(g) in cases involving financial hardship (inability to pay), a meaningful payment arrangement which covers at least the tax and the penalty part, if applicable, and full financial disclosure including a statement of income and expenses, as well as a statement of assets and liabilities;

(h) supporting details of incorrect information given by the CRA in the form of written answers, published information, or other objective evidence;

(i) where incorrect information given by the CRA is of a oral nature, the taxpayer should give all possible details they have documented, such as date, time, name of the CRA official spoken to, and details of the conversation; and

(j) a complete history of events including what measures were taken (e.g., payments and payment arrangements) and when they were taken to resolve the non-compliance.

Factors Used in Arriving at the Decision

33. Where circumstances beyond a taxpayer's control, actions of the CRA, or inability to pay or financial hardship has prevented the taxpayer from complying with the Act, the following factors will be considered when determining whether or not the CRA will 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 affairs under the self-assessment system; and

(d) whether or not the taxpayer has acted quickly to remedy any delay or omission.

Third-Party Actions

35. Taxpayers are generally considered to be responsible for errors made by third parties acting on their behalf for income tax matters. A third party who receives a fee and gives incorrect advice, or makes arithmetic or accounting errors, is usually regarded as being responsible to their client for any penalty and interest charges that the client has because of the party's action. However, there may be exceptional situations, where it may be appropriate to provide relief to taxpayers because of third-party errors or delays.

Issues

[9] In my view the issues raised by the parties can be framed as follows:

i. Was the Minister's decision unreasonable?

ii. Did the Minister fetter her discretion in the circumstances of this case?

Standard of Review

[10] The parties submit and I agree that the standard of review applicable to discretionary decisions of the Minister is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51 and 53 ("*Dunsmuir*")). More specifically, the Federal Court of Appeal has held that

reasonableness is the standard of review applicable to the exercise of the Minister's discretion under s 220(3.1) of the ITA (*Telfer v Canada Revenue Agency*, 2009 FCA 23 at paras 2 and 24-26, leave to appeal to the SCC denied in 399 NR 391 (SCC); *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 20 ("*Stemijon*")).

[11] As to the standard of review applicable to the issue of the fettering of discretion, both parties acknowledge that post-*Dunsmuir* this too is to be reviewed on the reasonableness standard but point out that the Federal Court of Appeal has been careful to note that the fettering of discretion is always outside the range of possible, acceptable outcomes and therefore is *per se* unreasonable (*Stemijon* at paras 23-25). Justice Mactavish recently summarised the law on this issue in *Gordon v Canada (Attorney General)*, 2016 FC 643 ("*Gordon*") and concluded:

> 28 It is sufficient to state in this case that the fettering of discretion is a reviewable error under either standard of review, and will result in the decision being quashed: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250 (F.C.A.) at paras. 71-73, (2013), 450 N.R. 91 (F.C.A.) ; see also *Stemijon Investments*, above, at para. 23. Simply put, if the Minister's Delegate fettered her discretion, her decision should be set aside regardless of the standard of review applied.

(Also see *Ouedraogo v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 810 at para 12). I agree that this is the current state of the law.

Issue 1: Was the Minister's decision unreasonable?

Applicant's Submissions

[12] The Applicant submits that the Minister's Delegate inconsistently applied the facts as they relate to the extraordinary circumstances beyond the Applicant's control. In particular, that the Minister's Delegate accepted the Applicant's representation that he was the victim of a fraud perpetrated by his father, who used the Applicant's identity for his own purposes and prepared and filed the Applicant's 2006 tax return without the Applicant's knowledge or consent, and then applied these facts inconsistently to the granting of relief for the entire period. The Minister's Delegate's conclusion that the extraordinary circumstances did not apply equally both prior to June 11, 2009 and after September 22, 2014 in respect of his 2006 taxation year was arbitrary and unreasonable. Further, that the Minister's Delegate failed to recognize the long term impacts of the extraordinary circumstance particular to the Applicant (*Guerra v Canada Revenue Agency*, 2009 FC 459 at paras 25-26 ("*Guerra*")).

Respondent's Submissions

[13] The Respondent submits that the Second Level Decision was reasonable because the Applicant admitted that he passed on the responsibility for the preparation and review of his tax returns to a third party, which is not an extraordinary circumstance that impeded his ability to file accurate and timely returns. Further, that the only allegation of fraud that was accepted as an extraordinary circumstance was with respect to the involvement of the Applicant's father in the preparation of his income tax return and it was never accepted that the Applicant was not a

partner in G&G Farms. It would be improper for the Applicant to use the judicial review process to circumvent his liability on the partnership income which was already conceded in the appeal before the Tax Court of Canada.

Analysis

[14] As a preliminary point I note that at the hearing before me the Applicant abandoned and did not address his written submissions concerning a letter from Dr. Judy Moench, regarding his anxiety, and a letter from Lobstick Literacy & Learning Society, regarding his reading comprehension, in support of his claim of an extraordinary circumstance warranting tax relief. Accordingly, the Respondent did not address them in oral submissions and nor do I in these reasons.

[15] Secondly, for ease of reference, the relief provided and denied can be summarized as follows:

i. May 1, 2007 - July 31, 2008

- This period represents the payment due date for the 2006 tax return to the date when interest and penalties were waived by CRA due to its delay;
- Relief was denied by the Second Level Decision.

ii. August 1, 2008 - January 6, 2009

- Prior to the Applicant filing his taxpayer relief application, CRA advised by letter of May 25, 2009, pursuant to s 220(3.1) of the ITA and due to delay caused by CRA, that interest would be waived for the period August 1, 2008 to January 6, 2009. The interest of $212,739.00 otherwise payable was thereby reduced to $25,848.00 in respect of the 2004, 2005 and 2006 tax years.

iii. January 7, 2009 - June 10, 2009

- Relief was denied by the Second Level Decision.

iv. June 11, 2009 - September 22, 2014

- As a result of the settlement of the appeal to the Tax Court of Canada and the second reassessment, the first reassessment in respect of the 2004 and 2005 taxation years was fully reversed and the reassessment for the 2006 taxation year partially reversed. As to the 2006 tax year, interest from June 11, 2009 to September 22, 2014 was cancelled. This period corresponds to the date that the first reassessment was completed to the date of the second reassessment;

- Relief was granted by the First Level Decision and upheld by the Second Level Decision.

v. September 23, 2014 - December 22, 2015

- This represents the period from the date of the second reassessment to the date that full payment was made by the Applicant;

- Relief was denied by the Second Level Decision.

[16] On the issue of the relief sought for the arrears of interest owed, the Second Level Decision stated:

> The gross negligence penalties were previously cancelled and the arrears interest was adjusted for both CRA delay and *other circumstances.* As was indicated in the first review, the remaining arrears interest represents the interest that accrued on the unwarranted refund, the tax liability that was determined by the Tax Court of Canada from April 30, 2007, to the first reassessment by audit, and the interest that accrued on the balance after the final reassessment was completed. My review concluded that further relief is not warranted.
>
> (emphasis added)

[17] Ms. Lewis was cross-examined on her affidavit. She deposed that she was the taxpayer relief officer who conducted the second level review and prepared the Second Level Decision which was signed by the Minister's Delegate. Ms. Lewis agreed that, in the first level review, the circumstances regarding the Applicant's father were not in dispute and that an accommodation was made for that situation by the partial cancelation of some of the interest

arrears. However, she was not satisfied that all of the interest and penalties arose due to circumstances beyond his control. Ms. Lewis was asked about what she meant when she referred to the "other circumstances" in her decision. Her evidence was that the statement "other circumstances" in the second review referred to "circumstances that arose because of his father and the situation that -- that occurred because his father's involvement in the his (*sic*) tax returns, and -- yeah, that's what I meant by 'other circumstances'". When questioned further on whether she felt that these "other circumstances" affected the Applicant's 2006 return, Ms. Lewis stated:

> Yes, I did, in the beginning. It was the arrears interest that accrued -- the -- the accrues -- arrears interest that accrued after that in terms of the remaining arrears interest as it goes on to say that accrued because of the unwarranted refund, the tax liability that was determined by the Tax Court of Canada, and for -- and the interest that accrued on the balance after the final reassessment was completed.
>
> I felt that those other circumstances had -- had long been taken into consideration by the previous cancellation and that no further -- at -- at some point, the taxpayer's responsibility was an issue.

[18] The Applicant submits that once the Minister's Delegate accepted the Applicant's representation that he was a victim of a fraud perpetrated by his father and concluded that it qualified as an extraordinary circumstance, then it was unreasonable to limit relief to the period between June 11, 2009 and September 22, 2014.

[19] Conversely, the Respondent submits that the Minister's Delegate accepted that the Applicant was a victim of fraudulent activity in respect of the preparation of his tax returns but did not accept that he was a victim of fraud in respect of the partnership income. Further, that accepting that the Applicant's father tampered with his 2006 tax return does not preclude the need for the Applicant to review said return and ensure its timely filing.

[20] The reasons in a decision letter should not be examined in isolation and can sometimes be understood based on the record that was before the decision-maker (*Stemijon* at para 37).

[21] In this case, the record confirms that CRA did find that the conduct of the Applicant's father was a circumstance beyond his control. In this regard, the Taxpayer Relief Fact Sheet for the first level review, under the heading "Has the taxpayer exercised reasonable care in conducting their affairs under the self-assessment system? Provide details" includes the following entry:

> An audit was completed to the taxpayer's return and due to circumstances beyond the taxpayer's control, it was found income was not correctly reported and reassessments were subsequently completed to the 2004, 2005, and 2006 tax years with gross negligence penalties assessed.

[22] Under the heading "Describe the circumstances that prevented the taxpayer from meeting their tax obligations. Were they beyond the taxpayer's control?" The entry included that:

> As for the circumstance under the fraudulent activity, these circumstances were beyond the taxpayer's control. The correspondence indicates that the taxpayer's personal information was used by his father and incorrect income was reported on his personal tax return. There is an indication that the taxpayer was not aware of the incorrect returns.

[23] Under the heading "Do the dates and explanations correspond to the event for which the request is made? Explain":

> …
>
> However, due to the circumstances beyond the taxpayer's control, income was incorrectly reported on his 2006 tax return which resulted in a refund. This is evidenced by the fact that the courts vacated all of the penalties as the Minister failed to demonstrate a

> specific quantum of unreported income for either shareholder. Therefore, there was no basis in law to apply penalties to the amounts assessed.

[24] Under "Analysis of All Facts/Factors" the entry reads:

> After a review of CRA records and information provided, there is sufficient information to indicate the taxpayer was not aware of the unreported income. He subsequently objected and appealed to the reassessments as he strongly believed the tax liability created was not his responsibility and the appeal reversed a majority of the initial reassessments.
>
> Therefore, I recommend to cancel the arrears interest charged from June 11, 2009 to September 2014. This period represents the date of the first reassessment completed by audit, up to the final 2006 reassessment completed after the appeal.
>
> However, the information provided does not warrant further cancellation. It is ultimately the taxpayer's responsibility to ensure their tax returns correctly prepared and received by the due date. The taxpayer's initial tax return was assessed a refund which was found to be unwarranted. The taxpayer was also made aware of the balance owing after the final reassessment was completed on September 22, 2014, and has allowed additional interest to accrue on the existing balance.
>
> The remaining arrears interest represents the interest accrued on the unwarranted refund, the tax liability that was determined by the Tax Court of Canada from April 30, 2007 to the first reassessment by audit, and the interest that accrued on the balance after the final reassessment was completed.
>
> …

[25] Ms. Lewis, when subsequently preparing the second level review, accepted that the circumstances surrounding the Applicant's father were not in dispute and were accounted for in the initial decision. What is unclear from the Second Level Decision is why, if it was accepted at both levels that, due to the circumstances beyond the taxpayer's control and without his

knowledge, his income was incorrectly reported on his 2006 tax return, he would be granted relief on that basis for the period June 11, 2009 to September 2014 but not for the period May 1, 2007 to July 31, 2008. And, while s 35 of CRA Information Circular IC07-1 ("Guidelines") states that taxpayers are generally considered to be responsible for errors made by third parties acting on their behalf for income tax matters, it goes on to state "However, there may be exceptional situations, where it may be appropriate to provide relief to taxpayer's because of third-party errors or delays". Given that the Minister's Delegate accepted that the Applicant's tax return had been fraudulently filed due to circumstances beyond his control, it is unclear why this portion of the provision would not have also been taken into consideration.

[26] The Respondent submits that the Minister's Delegate only accepted that the Applicant was a victim of fraud with respect to his father's involvement in preparing his income tax returns but did not accept that the Applicant was a victim of fraud in respect of G&G Farms partnership income. The Respondent refers to Ms. Lewis' testimony on cross-examination as demonstrating this, however, upon review of that testimony I do not agree. None of the referenced excerpts address this distinction.

[27] In this regard the Respondent also points to the taxpayer relief sheet prepared by Ms. Lewis. This states, in part:

> The taxpayer stated that he was not a partner in the farm or a shareholder in the business. His father and the accountant filed his returns without his knowledge or consent. Farming income and losses were reported on the taxpayer's returns since 2001. My review of the file also discovered a cheque dated June 13, 2005, to the Saskatchewan Wheat Pool for chemical in the amount of $4,781.50. It was signed by both the taxpayer and his father. This indicated that the taxpayer was aware of his involvement with the

> farm. I agree that it was ultimately his responsibility to be aware of the income that was reported on his tax returns and to question discrepancies when the notices of assessment were issued.
>
> His role as shareholder of the business was resolved and this income was adjusted to $0.00. However, once the appeals were completed, some of the farming income remained. The taxpayer was responsible for late filing the 2006 return and the arrears interest had already been reduced on two separate occasions due to CRA delay and other circumstances. My review of the information provided for both requests did not support further relief.

[28] Under "Analysis of All Facts/Factors" Ms. Lewis wrote:

> …
>
> The taxpayer maintained he was not a partner in his father's farm and had no knowledge of the audit. He stated that both his father and the accountant were acting without his knowledge, however, no information was provided to dispute his involvement in the farm. Under the self-assessment system it is ultimately the taxpayer's responsibility to file their returns accurately and on time.

[29] First, I point out that the matter at issue was the fraudulent filing of the Applicant's tax returns, which concerned both G&G Farms and Wimmer Brook Enterprises, this was the extraordinary circumstance which was found to be beyond his control. The fraud pertained to the filing in whole, and the evidence does not support that Ms. Lewis was making a separate finding concerning an absence of fraud and G&G Farms. Further, as part of the settlement, the Applicant accepted a tax liability of $156,739.00, for the 2006 tax year arising from the partnership income, he is not now trying to avoid that liability. Rather, because it arose in connection with the fraudulent filing he seeks relief for interest arrears on that basis.

[30] Secondly, although Ms. Lewis acknowledged the Applicant's statement that he was not a partner in the farm and that his father and his father's accountant filed his returns without his knowledge, on the basis of the cheque she concluded that the Applicant was aware of his involvement in the farm and, therefore, it was his responsibility to be aware of the income reported and to address discrepancies when the notices of assessment were issued. That may be so, but Ms. Lewis testified that she accepted that the filing of the returns reporting incorrect income was a circumstance that was beyond the Applicant's control and done without his knowledge. In my view, it is not possible to reconcile that with her finding that relief was not warranted because of the Applicant's responsibility to be aware of the income reported. Further, it appears to ignore that as soon as the Applicant became aware of the reassessment in 2009 he filed notices of objection and filed the Tax Court of Canada appeal.

[31] As stated in *Dunsmuir*, in judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (at para 47). In my view, with respect to the period May 1, 2007 to July 31, 2008, which represents interest accruing from the April 30, 2007 return filing due date to the date of the first assessment, the decision is unreasonable because of the apparent failure to apply the same factual finding in a consistent manner, leading to an arbitrary decision. Nor is the reasoning for taking this differing approach coherent.

[32] That said, the Second Level Decision states that the remaining arrears interest represents the interest that accrued on three separate bases: i) the unwarranted refund, ii) the tax liability that was determined by the Tax Court of Canada from April 30, 2007 to the first reassessment, and iii) the interest that accrued on the balance after the final reassessment. I am unable to determine when the unwarranted refund was received or when it was repaid, however, it was received because of the fraudulent actions of the Applicant's father. The tax liability arising from the consent judgment was reflected in the September 22, 2014 second reassessment. Presumably the Minster's Delegate is suggesting that arrears based on what was agreed as owing on September 22, 2014 are owed from the required return filing date (April 30, 2007) to the first reassessment on June 11, 2009. However, because of exceptional circumstances beyond his control, the Applicant did not become aware of the incorrectly reported income until he received the first reassessment.

[33] As for the period from September 22, 2014 to December 22, 2015, this was the interest that accrued on the balance after the final reassessment was completed. While the Applicant cites *Guerra* for the proposition that a decision is unreasonable for failing to recognize the long-term impact of an extraordinary circumstance, in this case, once the settlement was reached and the second reassessment was issued, the amount owing was no longer in dispute. Interest accruing from that period until the balance and interest were paid was not impacted by the Applicant's father's fraudulent actions.

[34] The Respondent submits that there was no inconsistency in limiting relief from 2009 to 2014 because the fact that the Applicant's father "tampered with" his 2006 tax return did not

preclude the need for the Applicant to review the return and ensure its accuracy, particularly as he was filing returns for his own business. In my view, this fails to acknowledge that the Applicant's unchallenged submission was that his father forced him to provide his tax information, used his SIN number, had his own accountant submit the return which the Applicant did not see, and that his father and the accountant then, without the Applicant's knowledge, made submissions to CRA about the 2004, 2005 and 2006 tax years - all of which appears to have come into play in the settlement agreement. Thus, this is not a simple case of an accountant retained by the Applicant and entrusted by him to file the returns making an accounting error. The Minster's Delegate had already accepted that the Applicant's father's fraudulent activities were an exceptional circumstance beyond his control, yet does not appear to have considered the failure to file an accurate return by the accountant in that context.

[35] I agree with the Respondent that the Minister's Delegate was entitled to weigh the factors in coming to her decision, however, the weighing exercise in this matter failed to consistently address the accepted exceptional circumstances, without an intelligible explanation for doing so, and for that reason the Second Level Decision is unreasonable.

Issue 2: Did the Minister fetter her discretion in the circumstances of this case?

[36] As stated in *Gordon*, while decision-makers are permitted to consider and base their decisions on guidelines, they will fetter their discretion if they treat a guideline as binding. Such guidelines do not have the force of law and therefore cannot be relied upon in a way that limits the discretion conferred on a decision-maker by statute (*Gordon* at para 29). The Applicant submits that the Minister's Delegate fettered her discretion as demonstrated by the testimony of

Ms. Lewis which confirmed that her decision was based exclusively on the Guidelines which she treated as binding and from which she did not deviate. In that regard the Applicant refers to the following exchange:

> **Q.** Insofar as the guideline is concerned, if a factor is not referenced in the guideline as being relevant in determining a taxpayer relief application, you would agree with me that it would be improper for you to consider such a factor in formulating your decision on a file?
>
> **A.** Yes. Yeah -- yeah, it would -- it wouldn't be…
>
> **Q.** Thank you. With respect to Mr. Pylatuik's taxpayer relief application, you confirm that you based your decision exclusively on the basis of the guideline and did not deviate from it?
>
> **A.** Yes.

[37] I am unable to conclude that the Minister's Delegate fettered her discretion based on this exchange. Even if her testimony is read on its face as an admission that she fettered her discretion by strictly following the Guidelines, when her testimony is considered against the wording of the Guidelines, the argument made by the Applicant cannot succeed. The Guidelines contemplate the consideration of situations outside of those specified. In particular, the Guidelines provide examples of extraordinary circumstances that may be considered but specifically state that these circumstances are not limited to such situations. I also note that the Minister's Delegate did consider the Applicant's evidence as it related to his health issues, reading level and fraudulent filing.

[38] The Applicant also asserts that the Minister's Delegate fettered her discretion by failing to contact counsel for the Department of Justice, Mr. Mark Heseltine ("DOJ Counsel") as the Applicant had requested in his application for taxpayer relief. The Applicant states that

DOJ Counsel had first-hand knowledge of the context surrounding the tax settlement. The Applicant submits that Ms. Lewis confirmed under cross-examination that she had not contacted DOJ Counsel and that it can be reasonably assumed that she failed to do so because this action would have been beyond the Guidelines.

[39] However, Ms. Lewis' testimony was that CRA tax relief officers do not contact DOJ counsel to get information, rather, they base their decisions on anything that they can find within the CRA system. When asked if she felt bound by the Guidelines, she replied that she would not say bound, but that she felt that enough information had already been provided and that there was no need to contact the DOJ Counsel. When asked again if the decision not to make contact was motivated by CRA's policies and guidelines with respect to communication with DOJ officials she replied "for the most part" but added the rather troubling statement that there was information given that said that DOJ Counsel was contacted in 2013 and thought that all the arrears interest and penalties should be cancelled, and that this was another reason why she had not contacted him. She also stated that she had never known a taxpayer relief officer to make contact with a DOJ lawyer in such situations and that this was probably the primary reason why she had not done so. Further, that it is the taxpayer's responsibility to provide all of the necessary documents noting that tax relief officers do not contact doctors or other persons to provide support for the taxpayer's request. In my view, this evidence does not support that the Minister's Delegate fettered her discretion.

[40] The Guidelines state that the onus is on the Applicant to present evidence to substantiate the request for relief and there is no provision requiring CRA to comply with requests from a

taxpayer in their application for relief that third parties be contacted to provide support for their claims. If information concerning the context of the settlement was needed the Applicant could have provided affidavit or other evidence from DOJ Counsel or provided the relevant information by some other means. However, I see no basis upon which the Applicant can impute such an obligation on the Minister's Delegate. Rather, as indicated by the jurisprudence, the Applicant bears the burden of providing the Minister with all of the information necessary to demonstrate that there existed circumstances beyond his control in order to justify relief (*Ross v Canada (Canada Customs and Revenue Agency)*, 2006 FC 294 at para 22; *Lemerise v Canada (Attorney General)*, 2010 FC 116 at para 23).

[41] The Applicant also asserts that the Minister's Delegate fettered her discretion by assuming that the Tax Court of Canada has the jurisdiction to consider interest and penalty relief under the ITA. The Applicant states that, based on the responses provided by the Minister's Delegate (by which he presumably meant Ms. Lewis), it would be reasonable to assume that the decision was guided in part on the incorrect assumption that the Tax Court of Canada found no equitable basis to waive or cancel interest and penalties.

[42] The Applicant does not identify what response he refers to in this regard. I note that in the Second Level Decision, the Minister's Delegate references the Tax Court of Canada decision in the context of a specific period of interest arrears. She stated that "as was indicated in the first review, the remaining arrears interest represents the interest that accrued on the unwarranted refund, the tax liability that was determined by the Tax Court of Canada from April 30, 2007, to the first reassessment by audit, and the interest that accrued on the balance after the final

reassessment was completed". This does not suggest that the Minister's Delegate's decision was based on an incorrect assumption that the Tax Court of Canada found no equitable basis to waive or cancel interest nor has the Applicant referenced any other evidence in support of this assertion.

[43] In conclusion, I find that the Applicant has not established that the Minister's Delegate fettered her discretion in reaching her decision that the Applicant was entitled to only partial tax relief. However, this application is granted on the basis that the Second Level Decision was unreasonable for the reasons set out above.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. The decision of the Minister's Delegate is quashed, and the Applicant's request for relief is sent back for redetermination, in accordance with these reasons for judgment.
2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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