Federal Court  Cour fédérale

Date: 20190502

Docket: T-1387-17

Citation: 2019 FC 562

Toronto, Ontario, May 2, 2019

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

1680169 ONTARIO LIMITED

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision of the Minister of National Revenue's Delegate denying the Applicant's request for relief from interest and penalties owed in relation to certain taxation years based on extraordinary circumstances, filed under a taxpayer relief provision. While I am sympathetic to the Applicant's position, that is not the determinant

of the Court's role in review of the decision, which I find to be both fair and reasonable for the reasons set out below.

II. Background

[2] The Applicant, 1680169 Ontario Ltd. [169], is an Ontario corporation. Mr. William Hogg is the sole director, officer and shareholder of 169.

[3] Mr. Hogg was a partner of an investment firm from 2000-2007. He incorporated and utilized 169 as a holding entity for his personal investment in his firm upon receiving tax planning advice from an accountant. That accountant retired in 2007 and his son-in-law took over his practice. Also in that year, Mr. Hogg's employment with his investment firm ceased.

[4] Mr. Hogg subsequently noticed several issues and irregularities with 169's tax returns for fiscal year-end 2009, leading to a breakdown in trust between him and 169's new accountant [the Accountant]. Mr. Hogg requested that the Accountant return the materials relied on to prepare 169's tax returns, however he could only provide 169 with incomplete scanned copies of ledgers and documents. The Accountant also informed Mr. Hogg that his accounting practice no longer possessed the source documentation used to prepare the financial statements and related tax returns.

[5] Mr. Hogg contacted another accounting firm to seek help in reconstructing 169's financial statements and in preparing returns. However, that firm could not prepare returns

without reconstructed financial statements, which could not be prepared without the underlying records.

[6] In 2010, Mr. Hogg undertook to reconstruct fourteen years of financial statements for 169 with the assistance of a new accountant. In November 2012, Mr. Hogg called the Canada Revenue Agency [CRA], indicated that he was not getting his mail and requested that the CRA update the address on file to reflect his address, rather than the Accountant's.

[7] Ultimately, the Minister assessed "failure to file" penalties and arrears interest for 169's 2009-2013 taxation years, as a result of those returns all being filed between January 19 and April 22, 2015, thus all past their due dates.

III. 169's Taxpayer Relief Requests

[8] In June 2015, 169 submitted a first-level request for relief from interest and penalties to the Minister for its 2009-2014 taxation years pursuant to the taxpayer relief provision. The crux of these submissions was an elaboration of 169's reasons for late filing, discussing the series of events that were argued to be beyond 169's control, namely the conduct of the Accountant, absent which the returns would have been filed on time and without taxes owing.

[9] The first-level reviewer noted that the 2014 taxation year was not reviewed, as records indicated that the return had not yet been filed, and recommended the Minister's discretion be exercised to grant 169 partial relief by cancelling arrears interest for the first two taxation years

(2009 and 2010). The relevant part of the January 6, 2017 first-level review decision reads as follows:

> While it is appropriate to grant relief as above, my review has found that further relief is not warranted… A corporation must take a reasonable amount of care and diligence in complying with the requirements. Efforts should be made to avoid or at least minimize the delay in complying or paying amounts due. Any delay or omission must be remedied within a reasonable period of time. If the delay in payment or compliance arose through neglect or lack of awareness on the part of the corporation, the penalty or interest would not normally be cancelled…. Although, the services of a third party may be used to assist in the preparation of returns and payment of remittances, the responsibility to ensure that they are correct and received on time ultimately rests with the taxpayer.

[10] In response to the first-level decision, Mr. Hogg prepared and submitted a second request for taxpayer relief for 169 on April 7, 2017, again seeking the cancellation of interest and penalties on the same grounds. He argued that the outstanding penalties and interest were being applied to periods in which no taxes were owed due to nil returns in light of the assessments that had, by then, been provided by 169. Additionally, Mr. Hogg provided the CRA with an update regarding returns for the 2014 and 2015 taxation years that had not yet been filed at the time that he submitted 169's first-level taxpayer relief request.

[11] The second-level reviewer analyzed 169's request and concluded that discretion should not be exercised to provide 169 with further relief from interest and penalties, noting in her August 2, 2017 refusal letter [Decision] that:

> I have not noted any additional information that would change the original decision and the essential facts remained the same. My review revealed that there were no circumstances beyond your control that would have affected your ability to file and remit as required. I have therefore concluded that relief is not warranted.

[12] In the Taxpayer Relief Fact Sheet – which is comprised of internal background notes that were disclosed for the purposes of this application, and which form part of the Decision – the second-level reviewer agreed with many of the first-level reviewer's conclusions. She considered the factors established by the relevant policy guidelines, as contained in section 33 of Information Circular IC07-1 entitled the *Taxpayer Relief Provisions* [Guidelines]. She concluded that 169 (i) had an excellent record of filing its returns and paying its taxes on time prior to 2009, but that every return from 2009-2013 was late-filed; (ii) as of 2016, knowingly allowed a balance of about $125,000 to exist which had been garnished; (iii) had not exercised a reasonable amount of care regarding the filing of its returns as it continued to use the services of the Accountant until 2012; (iv) waited until 2014 to retain a new accountant; and (v) did not file returns for 2009 to 2013 until 2015. Invoking these factual findings, the second-level reviewer noted that it was ultimately 169's responsibility to ensure that its taxes were filed on time, even where a third-party accountant was involved. She further noted that interest relief had already been granted for the 2009 and 2010 taxation years.

[13] The Minister's Delegate, a Team Leader at the Appeals Branch of the Taxpayer Relief Centre of Expertise at the CRA [Minister's Delegate] concurred with the second-level reviewer's recommendation, and granted partial relief by cancelling arrears interest charged to the 2009 and 2010 taxation years. However, the Minister's Delegate did not recommend further relief for the other years. As a result, the Decision remained unchanged from the outcome of the first-level review.

IV. Issues and Standard of Review

[14] The Applicant, 169, raises two issues: whether the Minister's Delegate breached the duty of procedural fairness, and whether the Decision to deny 169 further relief was reasonable.

[15] This Court has held, and the Federal Court of Appeal has affirmed, that the standard of review applicable to taxpayer relief decisions under subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the Act] is reasonableness (*Shantakumar v Canada (Attorney General)*, 2018 FC 677 at para 16). Findings of fact command a high degree of judicial deference, given the role of the trier of facts at an administrative decision-maker such as the CRA (*Martineau v Canada (Revenue Agency)*, 2018 FC 595 at para 13). On the other hand, the correctness standard applies to issues of procedural fairness (*Langlois v Canada (Attorney General)*, 2018 FC 1108 at para 4).

V. Legislative Provisions

[16] As one of the Act's fairness provisions, subsection 220(3.1) expressly allows the Minister to waive or cancel all or any portion of any penalty or interest payable to the Minister (*Langlois* at para 7). Subsection 220(3.1) of the Act reads as follows:

Waiver of penalty or interest	**Renonciation aux pénalités et aux intérêts**
(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	**(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

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.	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.
[Emphasis added]	[Soulignes ajoutés]

[17] Finally, the Guidelines may assist decision-makers with respect to the taxpayer relief provisions.

VI. Analysis

A. *Did the Minister's Delegate breach the duty of procedural fairness?*

[18] Applicant's counsel emphasized at the hearing that its lead argument was the alleged procedural fairness breach, in that the Minister's Delegate, prior to issuing her Decision, failed to disclose (i) the phone calls between the CRA and the Accountant, after the Applicant claims that it discharged the Accountant; and (ii) her reliance on those calls in making the Decision. The Applicant contends that, had it known about the calls, it could have provided better evidence (such as correspondence, payments, explanations, etc.) demonstrating that it had discharged the

Accountant. The Applicant emphasizes that it was incumbent on the Minister's Delegate to disclose its reliance on the calls, which could have been accomplished through the disclosure of its Taxpayer Relief Fact Sheet, or simply sharing the information regarding these calls with 169.

[19] The Respondent counters that the decision-making process was procedurally fair: there was no duty to disclose the calls or any reliance placed on them, as they were between the Applicant's authorized representative and the CRA. The Respondent further counters that the scope of procedural fairness is minimal, and does not impose a duty to disclose such communications.

[20] I agree with the Respondent that there was no breach of procedural fairness in this case. There is no evidence to support the assertion made in the Applicant's Memorandum of Fact and Law [Memorandum] that the Accountant had been removed as its authorized representative at the time the CRA had the telephone discussions with Mr. Hogg noted in the CRA's ACSES (computer) notes, and referred to in the Decision.

[21] While I recognize that in his affidavit, Mr. Hogg states that there was a "breakdown in trust" between him and the Accountant in 2010, Mr. Hogg's statement in his affidavit that he "had enough of [the Accountant] and decided to find a new accountant" does not constitute an indication that the Accountant's status as the Applicant's authorized representative had been revoked. I find that these statements do not equate to an official breakdown in service. They both lack precision, and any objective or documentary evidence to support them. The CRA was not notified that the Accountant was no longer representing 169, or that its third party

representation had been revoked. Either 169, or its authorized representative, the Accountant, should have advised the CRA, which did not happen at the time. Indeed, the ACSES notes documenting the CRA calls do nothing to reflect a termination of the relationship:

> [The Accountant] said William HOGG makes the pymts and they both are aware of the balance o/s. He says William is just checking all info filed is correct. C/O told [the Accountant] pymt needs to be made and confirmed William makes the payments. C/O called (416.xxx.xxxx) and unable to leave msg.
>
> Cld [the Accountant] and he confirmed the rtns still not filed. He said William HOGG has ok'd them and he will file them in the next two mths. Confirmed William makes the pymts. Cld (416.xxx.xxxx) – unable to leave msg. Cld 416… and left v/m on unidentified a/m. POA: If no reply take l/a.

[22] The censored telephone number noted by the CRA officer in these two entries was that of Mr. Hogg. Based on the totality of the foregoing and other evidence on the record, there is no evidence of notification to the CRA about any change of third party representation.

[23] Rather, all evidence shows that the CRA attempted, in good faith, to follow up with the individual it believed to be the authorized representative, and upon receiving information that Mr. Hogg was preparing the returns and making the payments, made best efforts to contact him. The computer notes indicate various unsuccessful CRA follow-up calls attempting to reach Mr. Hogg during the summer months of 2012. In fact, the Applicant concedes that the Accountant remained the Applicant's authorized representative with the CRA: paragraph 105 of its Memorandum states that 169 and the Accountant "were not in a professional relationship, even if authorizations to communicate with the CRA remained in place" [emphasis added].

[24] Given that the calls in question occurred while the Accountant was the Applicant's authorized representative with the CRA, and there is no evidence that he had been discharged, I conclude that they remained in a principal-agent relationship from the perspective of the CRA. The Courts have recognized that an agent's knowledge is imputed to a principal in two situations: when notice is given to its agent, or when the agent gained the knowledge in the course of his/her duties (*Ottawa Athletic Club Inc (Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672 at para 164). As a result, the Minister's Delegate did not err by failing to disclose the calls between the Accountant and the CRA; the Applicant, without revoking that third party representation, had imputed knowledge of the calls.

(1) *The Content of Procedural Fairness*

[25] The Applicant relies on *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 to assert the CRA denied it a fair process. *Baker* considered the scope and content of procedural fairness in deciding Ms. Baker's rights in the context of a Humanitarian and Compassionate immigration application. The Supreme Court took five factors into account to determine the content of the duty of fairness, summarized in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 [emphasis added]:

1. the nature of the decision and the decision-making process employed by the public organ;
2. the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates;
3. the importance of the decision to the individuals affected;
4. the legitimate expectations of the party challenging the decision; and

5. the nature of the deference accorded to the body.

[26] The content of the duty of procedural fairness in taxpayer relief applications is minimal. The legislation itself offers no prescription regarding the parameters of fairness owed to applicants. The Voluntary Disclosure Program [VDP], is an analogous fairness mechanism which also takes its authority from subsection 220(3.1) of the Act (*Prince v Canada (National Revenue)*, 2019 FC 348 at para 13), and as such is highly discretionary in nature. In *Williams v Canada (National Revenue)*, 2011 FC 766, the applicant was liable for penalties and interest after failing to comply with the requirements of the Act in the context of the VDP. To this end, Justice Rennie (as he then was) stated in *Williams* that "[t]he discretion accorded to the Minister to waive or cancel any penalties imposed is broad, and constitutes exceptional relief from penalties for which taxpayers are otherwise liable to pay under statute" (at para 26). Justice Rennie continued:

> [31] […] I would add that the degree of procedural fairness and the robustness by which the principle is implemented varies with the nature of the interests or rights engaged and with the nature of the discretion. The VDP is a highly discretionary program which, as its object, encourages compliance with important mandatory statutory requirements. Put more bluntly, it is designed to encourage taxpayers to do that which they were required by law to have done in the first place. As such, the criteria governing the exercise of discretion are strict and narrow and the *rights* involved are minimal.
>
> [Emphasis added]

[27] Like the VDP, the relief provision accords the Minister broad discretion to waive or cancel any penalties imposed and constitutes exceptional relief from penalties for which taxpayers are otherwise liable to pay under statute (*Robinson v Canada (National Revenue)*,

2018 FC 825 at paras 84 and 104). Given that the broad discretionary parameters of the taxpayer relief provision are similar to those of the VDP, the rights involved are minimal.

[28] Here, the Applicant asserts that in considering the third *Baker* factor, given the importance of the financial consequences of the taxpayer relief decision, procedural fairness requires that the CRA's discussions with the Accountant fall under the ambit of necessary disclosure by the CRA and therefore, the calls should have been disclosed. They were not.

[29] As previously discussed in the context of *Williams* and *Robinson*, there is not a broad-based procedural right to comment on highly discretionary relief decisions before they are made (see also *R & S Industries Inc v Canada (National Revenue)*, 2016 FC 275 at para 49). Here, I find procedural fairness neither imposed a duty for the Minister's Delegate to disclose the telephone calls in question, nor to set out a "case to meet".

B. *Was the Decision reasonable?*

[30] The Applicant argues that because the Minister's Delegate did not disclose the calls with the Accountant, her reliance on those calls was unreasonable, and as a result, she failed to elicit better evidence, or at minimum, a response from the Applicant. The Applicant further argues that the second-level reviewer failed to meaningfully review the entirety of the Applicant's file, failing to consider the fact that the ACSES notes contained no communication to/from the Accountant or his predecessor between January 2010, and when the impugned calls occurred in March 2012. This, in turn, should have indicated that the Accountant and Applicant were not in

a professional relationship, even if authorization to communicate with the CRA remained in place.

[31] The Respondent counters that this is, at best, a variation of the procedural fairness argument discussed above: the Minister's Delegate considered all the relevant evidence, applied it to the established Guidelines, and exercised its discretion in a defensible manner. The Respondent asserts that the Applicant is merely asking the Court to reweigh the factors considered by the Minister's Delegate in exercising her discretion.

[32] The Respondent contends that the unstructured nature of the Minister's statutory power under the relief provision militates against a Court subjecting the decision-making process to close scrutiny (*Canada Revenue Agency v Telfer*, 2009 FCA 23 at para 40), and that an administrative decision-maker's compliance with unchallenged policy statements and guidelines has been taken to be an indicator – albeit not a conclusive one – of reasonableness (*Canada (Attorney General) v Abraham*, 2012 FCA 266 at para 54). The Respondent contends that here, the Minister's Delegate was under no duty to elicit better evidence from the Applicant.

[33] I find that the Decision was reasonable: in addition to the Respondent's cogent arguments above, I note that the Guidelines state that relief may be granted "where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation": 1) extraordinary circumstances; 2) actions of the CRA; and 3) an inability to pay or financial hardship (at para 23). The Guidelines go on to define "extraordinary circumstances" as "circumstances beyond a taxpayer's control", including (but not limited to) natural disasters, civil disturbances, serious

illness, or serious emotional or mental distress (section 25). While as policy, the Guidelines are not binding and cannot be used to fetter the Minister's Delegate's discretion, they nonetheless play a useful and important role in guiding the exercise of discretion under the relief provision (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 58–60).

[34] Additionally, the discretion to grant taxpayer relief must take into account all the relevant circumstances (*Parmar v Canada (Attorney General)*, 2018 FC 912 at para 61). This Court has steadily refused to accept that a taxpayer's relief application be validly based on the fault of a third party (*Northview Apartments Ltd v Canada (Attorney General)*, 2009 FC 74 at para 11).

[35] Here, the Minister's Delegate took all of the relevant circumstances into account – including the first-level review and follow-up developments – and reasonably concluded that the Applicant's circumstances were not "beyond its control". The Minister's Delegate acknowledged that the Applicant was prejudiced by its Accountant prior to discovering the Accountant's errors and that is why the first- and second-level review supported the partial relief for the Applicant in having its interest arrears cancelled for 2009 and 2010. In doing so, both the first-level and second-level CRA reviews considered the factors contained in the Guidelines, concluding that the Applicant did not exercise reasonable care between the time it discovered the Accountant was not properly doing his job, and the filing of its returns in 2015.

[36] Ultimately, it must be remembered that the onus falls on the applicant to present evidence to substantiate the request for relief, rather than such a duty falling to the Minister (*Pylatuik v Canada (Attorney General)*, 2016 FC 1394 at para 40). Here, the Minister's Delegate reasonably

held that the Applicant provided no additional information that would change the original decision, and found that the essential facts remained the same.

[37] Finally, there is no dispute that the Applicant filed late returns. The record demonstrates that it took the Applicant over four years to file complete and accurate returns after discovering the Accountant's errors. There is no evidence that the Applicant had in fact terminated, revoked, or otherwise discharged the Accountant's authorization or representation. I thus find that the Minister's Delegate reasonably concluded that the Applicant had a duty to file returns in a timely manner, and by taking approximately four years to do so, failed to demonstrate reasonable care.

[38] In sum, it was open to the Minister's Delegate to ultimately decide that this case does not meet the "extraordinary circumstances" threshold. In fact, this Court has held that even when penalties were assessed as a result of accountant error, the Minister is not required to exercise her discretion (*Babin v Canada (Customs and Revenue Agency)*, 2005 FC 972 at para 21). The fact that the Applicant made attempts to remedy the situation by reconstructing financial statements which took a significant amount of time does not render the Decision unreasonable. Indeed, what may appear unfair or unreasonable to the taxpayer does not necessarily translate to unreasonableness under the deferential judicial review standard. As Justice Kane stated in *Parmar*:

> [51] In the present case, Canpar desires and expects fairness. The result of this judicial review will not meet this expectation. The role of this Court is not to determine what is fair, but to determine whether the decision of the Minister's Delegate pursuant to subsection 220(3.1) of the *Income Tax Act* to refuse taxpayer relief is *reasonable* as this term is understood in the realm of administrative law. As noted by the Court in *Takenaka* at para 37:

> The task of this Court on judicial review is not to determine what is fair in the circumstances but whether the Delegate's decision is reasonable in the legal sense of the standard described above. It covers a broad range of outcomes which may subjectively appear to be unfair…

VII. Costs

[39] Both parties seek costs. Costs will be granted to the Respondent under Column III of Tariff B.

VIII. Conclusion

[40] While 169's situation is certainly unfortunate, the Applicant had the responsibility to ensure, in some way, that either it or its representative duly filed its returns. It was also the Applicant's responsibility to revoke its third party representative's authorization when that ceased. While the CRA recommended taxpayer relief for certain years of its relief request, the Minister's Delegate's denial for the other period of its request was reasonable in the circumstances. Moreover, given the minimal duty of procedural fairness owed, I do not find that the Minister's Delegate breached procedural fairness.

JUDGMENT in T-1387-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. Costs payable to the successful party, the Respondent, are to be assessed in accordance with Column III of Tariff B.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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