

Federal Court



Cour fédérale

Date: 20210114

Docket: T-1310-19

Citation: 2021 FC 54

Ottawa, Ontario, January 14, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

SEAN SHEA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Sean Shea is a retiree. He requests tax relief from interest, as well as a reduction in the amount of tax arrears owing, due to financial hardship and advanced years.

Canada Revenue Agency, on behalf of the Minister of National Revenue, denied his request, twice. Mr. Shea, who is self-represented, therefore seeks judicial review of the CRA's July 18, 2019 second review decision.

[2] The main issue for consideration is whether the CRA's second review decision to deny the Applicant's tax relief request was reasonable. I am not persuaded that the CRA's second review decision is unreasonable. For the reasons that follow, I therefore dismiss this application for judicial review.

[3] Below, I deal first with preliminary evidentiary issues, followed by a summary of the parties' evidence. My analysis then begins with the applicable legal principles in this matter, followed by the application of those principles to the relevant facts in evidence.

II. Preliminary Evidentiary Issues

[4] Mr. Shea's record contains his own affidavit dated September 12, 2019 in addition to various correspondence with the CRA and certain of his financial records not attached as exhibits to his affidavit. As part of its record, the Respondent filed the affidavit of Amy Lall dated October 4, 2019. She is a CRA Quality and Program Assurance Officer who had carriage of Mr. Shea's file for collection. Neither affiant was cross-examined on their affidavit nor did either party challenge the admissibility of the other party's affidavit. I nonetheless have considered the admissibility of these affidavits.

[5] Affidavits authored after the date of the decision generally are not admissible on judicial review; the record before the Court should reflect the record before the decision maker:

Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22 [*Access Copyright*] at para 19; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 17. This is so because the administrative tribunal, not the

reviewing Court, is tasked with the finding of facts; the Court thus must avoid engaging in fact finding on the merits of the matter that comes before it for review: *Delios v Canada (Attorney General)*, 2015 FCA 117 [*Delios*] at para 42. Affidavits submitted on review that simply attach the record before the decision maker, without commentary, aid the Court in this regard.

[6] Exceptions to this general rule may arise in situations that are not inconsistent with the respective roles of the administrative decision maker and the Court: *Access Copyright*, above at para 20. In the case before me, I find that the “general background” exception is applicable to the parties’ affidavits but only in respect of “non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker”: *Delios*, above at para 45.

[7] Regarding Mr. Shea’s affidavit, the first paragraph confirms his age and that he is a retired employee of Ontario Power Generation. Paragraphs 1.1 to 1.3 and accompanying exhibits confirm his net pensions for the 2018 tax year. Because these exhibits on their face form part of CRA’s records, I find on balance paragraph 1 is admissible. Paragraphs 2.1 to 2.6 and accompanying exhibits are inadmissible, however, because on their face they post-date the July 18, 2019 second review decision and only serve to confirm what CRA already considered, namely, that Mr. Shea reported a monthly deficit after expenses. I view the closing text of paragraph 2, as well as paragraphs 3-5 to be more factual than not, with minimal commentary (such as “I was very generous when...”) and so, I am prepared to admit them.

[8] Regarding Ms. Lall's affidavit, I find that for the most part, it represents a factual account of CRA's communications with Mr. Shea regarding his tax liability and CRA's collection efforts, with two exceptions. First, I find heading B represents a conclusion, which in my view is not supported by paragraphs 6-15 which follow it. Second, paragraph 9 contains information that may, or may not, have been conveyed to Mr. Shea during Ms. Lall's July 4, 2018 telephone call with him; it is not stated either way. As such, I view paragraph 9 to be more in the nature of commentary and, therefore, I find it inadmissible.

III. Summary of Parties' Evidence

[9] There are evidentiary gaps in the records of both parties. Below is a summary of the more salient evidence.

[10] According to Ms. Lall, Mr. Shea's net income of \$776,309 was comprised primarily of capital gains from the sale of properties. His income tax debt for the 2017 taxation year was \$379,964.78 as of September 18, 2019. In addition to the latter amount, an undated "Debit Balance Breakdown" attached as an exhibit to Ms. Lall's affidavit also shows "T1 Penalty and Interest" for the tax year 2017 in the amount of \$32,070.89, for a total outstanding balance of \$412,035.67.

[11] The amount of \$379,964.78, however, is in contradistinction to the amount of \$395,785.87 specified in a legal warning letter to him dated June 21, 2018 from Ms. Lall. Both parties provided a copy of this letter. Ms. Lall's affidavit states that Mr. Shea's 2017 tax return was assessed on May 3, 2018 and reassessed on December 10, 2018. Ms. Lall's affidavit is

silent, however, about whether the income tax debt of \$379,964.78 resulted from such reassessment. In any event, according to Ms. Lall, Mr. Shea has not made any voluntary payments toward his tax debt.

[12] Ms. Lall further states that as a result of her June 21, 2018 legal warning letter, Mr. Shea contacted her by telephone on July 4, 2018 and allegedly proposed to pay down the tax debt by paying \$1,500 per month. Ms. Lall informed Mr. Shea that he must make full financial disclosure for any payment arrangement longer than 6 months. Mr. Shea allegedly was unwilling to provide any financial documentation but he indicated he would sell one of his remaining properties to make payment in full.

[13] They spoke again on October 18, 2018. Mr. Shea allegedly indicated that the attempted sale of a cottage did not go through but that he had other investments and properties. Before the latter conversation, however, Mr. Shea filed a notice of objection dated July 11, 2018 to the demand for \$395,785.87 and a supporting letter of the same date in which he requested a tax reduction, and relaxation or waiver of the interest, because he is a financially overextended pensioner relying on three pensions to survive. The supporting letter indicates that bank statements are attached. I further note, however, that Mr. Shea's record does not contain copies of the attachments to the letter. In any event, the supporting letter concludes, "I have every intention to pay my tax owing **even if I take a loss on my investment** as quickly as possible."

[Emphasis added.]

[14] In response to Mr. Shea's request for relief, CRA issued its February 4, 2019 relief decision for the tax year 2017 denying his request for three reasons: (a) he advised CRA he was able to make monthly payments of \$50,000 toward his tax liability; (b) he made contributions totalling \$57,094 to a tax free savings account; and (c) he had capital gains of \$764,595 that year. The relief decision, by S. Carroll, Team Leader, Taxpayer Relief Centre of Expertise, Appeals Branch, clarifies that CRA is only able to review the penalty and interest amounts, not the entire amount owing. Further, it defines "financial hardship" as "the prolonged inability to afford basic necessities such as food, clothing, and shelter and reasonable non-essentials." Both parties produced a copy of the relief decision. The monthly amount of \$50,000, however, is in contradistinction to Ms. Lall's description of Mr. Shea's proposal on their July 4, 2018 call to pay down his tax debt by \$1,500 per month. Ms. Lall's affidavit is silent regarding the discrepancy. The relief decision is clear, however, that because of the perceived ability of Mr. Shea to pay \$50,000 per month, his TFSA contributions and capital gains in the 2017 tax year, S. Carroll was unable to conclude that Mr. Shea was unable to meet his tax obligations because of financial hardship or inability to pay.

[15] The relief decision further indicates that if Mr. Shea believed the decision was not fair and reasonable, he could request a second independent review by another official. Mr. Shea made such a request, received by CRA on March 12, 2019. A copy of the request is an exhibit to Ms. Lall's affidavit. In his request, Mr. Shea disputes that he indicated to CRA's collection department he could pay \$50,000 per month because his expenses outweighed his income. He also indicates that the February 4, 2019 relief decision did not reflect the line of credit he had to pay off in connection with the sale of the property that resulted in the capital gains for the 2017

tax year. He reiterates his request for reduction of taxes and waiver of interest owing. Mr. Shea further states, “I can pay taxes owing to Revenue Canada[;] **I do have some assets** [and] have been disposing of them to meet my financial commitments and **I will do the same to pay for taxes owing**, hopefully a reduced reasonable amount.” [Emphasis added.] CRA acknowledged the request in a letter to Mr. Shea dated April 4, 2019, a copy of which Mr. Shea produced.

[16] On March 13, 2019, Ms. Lall sent a second legal warning letter to Mr. Shea. Both parties produced a copy of the letter which indicates that, by this time, Mr. Shea owed \$401,823.69 due immediately. Absent payment in full or a response within the stipulated 14-day period, Mr. Shea could face legal action. Mr. Shea allegedly contacted Ms. Lall again, this time on March 27, 2019, and indicated that he planned to sell one of his assets but needed more time. Ms. Lall replied that he had until April 19, 2019 to make a payment of \$10,000 to CRA which he did not do.

[17] CRA acknowledged Mr. Shea’s request for a second review on April 4 2019 and sent him a follow up letter dated May 27, 2019 requesting financial documentation. The follow up letter indicated that absent the requested documents, CRA would decide the matter based on the information it had. Only Ms. Lall produced a copy of this letter.

[18] The second review – relief decision for the tax year 2017, is dated July 18, 2019 and both parties produced a copy. The July 18, 2019 second review decision is by K. Yeo, Team Leader, Taxpayer Relief Centre of Expertise, Appeals Branch. Similar to the February 4, 2019 relief decision, it clarifies that CRA is only able to review the penalty and interest amounts, not the

entire amount owing. Having completed a second, independent review of the facts and circumstances of the case, the CRA denied the request again. The second review decision is discussed in greater detail below in my analysis.

[19] Regarding the admissible parts of Mr. Shea's affidavit, he points to the necessity of selling assets on a monthly basis to "keep abreast of [his] financial commitments." He provides no information, however, about the assets sold. He requests a reduction of the taxes owing and an arrest of the daily compounded interest adding an approximate \$22,000 to the taxes owing to CRA.

[20] Mr. Shea's affidavit also mentions that the sale of properties prior to the tax year 2017 enabled him to make generous charitable donations totalling \$55,000. He describes some of the charitable activities in which he has engaged since he retired. Mr. Shea further alleges hardship by reason of CRA's alleged blocking of his old age pension for one year, confiscation of monies and freezing of bank accounts. He reiterates his proposal to pay CRA \$1,500 per month and the possibility of increasing that amount in the event of a financial windfall. In his written and oral submissions, Mr. Shea further indicates that he offered a lien to be placed on his cottage to secure the taxes owing in the case of non-payment or his death. At the hearing before me, the Respondent's counsel indicated that the latter offer was not recorded and that it may have been made in passing. No evidence was provided, however, contradicting that Mr. Shea made the lien offer.

IV. Standard of Review and Role of the Court

[21] The presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. While it is a robust form of review, Courts should intervene only where necessary. To avoid judicial intervention, the decision must be transparent, intelligible and justified in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, at para 99. A decision may be unreasonable if the decision maker fundamentally misapprehended or overlooked relevant evidence: *Vavilov*, at para 126. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[22] When reviewing the reasonableness of a decision maker's decision, it is not the role of the Court to formulate a substitute decision. The Court's focus in a reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. It bears emphasizing that "[t]he role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves": *Vavilov*, at para 83. More contextually, "on judicial review the Court is not to determine whether the penalty or interest should have originally been imposed, but rather whether the decision not to cancel the penalties or interest was reasonable": *Neyedly v Canada (Attorney General)*, 2020 FC 678 at para 75, citing *Chekosky v Canada (Revenue Agency)*, 2019 FC 841 at para 39.

V. Analysis

a) *Applicable Legal Principles*

[23] Although Mr. Shea's request for tax relief does not specify any applicable statutory provision, I agree with the Respondent that subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c I (5th Supp) [ITA] applies in the circumstances. This provision, reproduced in Annex A, gives the Minister of National Revenue [Minister] discretion to grant interest and penalty relief to taxpayers within prescribed parameters. The guidances found in Information Circular IC07-1R1, "Taxpayer Relief Provisions," dated August 18, 2017 [Guidelines] aid the Minister's exercise of discretion (as delegated to the CRA). The Guidelines describe the overarching purpose of the ITA is to enable the CRA to administer the income tax system fairly and reasonably. The CRA thus may help taxpayers by granting interest and penalty relief in the following types of situations: (1) extraordinary circumstances beyond a taxpayer's control, such as natural or human-made disasters, serious illness or accident; (2) actions of the CRA, such as processing delays and errors; and (3) taxpayer's inability to pay or financial hardship. Regarding alleged inability to pay or financial hardship, the Guidelines indicate that the CRA will review a taxpayer's financial situation in detail, including such things as the following: income and expenses, assets and liabilities, the ability to borrow funds and sell assets, and actions and efforts to pay amounts owing.

[24] The Guidelines are non-binding; while they provide examples, they are not meant to limit the circumstances in which the CRA may choose to exercise its broad discretion: *Mior v Canada (Attorney General)*, 2019 FC 321 at para 36, citing *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 27. Because the granting of relief is discretionary, and not as of

right, this points to a more deferential standard of review: *Lanno v Canada (Customes & Revenue Agency)*, 2005 FCA 153 at para 6. That said, the discretion must be exercised in good faith, according to the principles of natural justice, with regard to all relevant and unique circumstances to the particular taxpayer, and without regard to irrelevant ones. In other words, each case must be decided on its own merits: *Edwards v. Canada (Customs and Revenue Agency)*, 2002 FCT 618 at para 14, citing *Kaiser v. Minister of National Revenue*, (1995) 93 FTR 66 at para 69.

b) Application of Legal Principles to Relevant Facts

[25] I find that the CRA reasonably gave Mr. Shea several opportunities to provide additional details and information regarding his particular financial situation. The CRA acknowledged that the information Mr. Shea provided about his income and expenses resulted in a monthly deficit after expenses. His own statements, however, in his notice of objection and request for a second independent review, suggest that there is more to his financial situation than he has disclosed: “I have every intention to pay my tax owing **even if I take a loss on my investment** as quickly as possible;” and “I can pay taxes owing to Revenue Canada[;] **I do have some assets** [and] have been disposing of them to meet my financial commitments and **I will do the same to pay for taxes owing**, hopefully a reduced reasonable amount.”

[26] It is clear that the February 4, 2019 relief decision was influenced by the perception of Mr. Shea’s ability to pay \$50,000 per month to meet his tax liability, as it was the first of three reasons for declining to find financial hardship or an inability to pay. While Ms. Lall’s evidence confirms Mr. Shea’s offer to pay \$1,500 per month, her affidavit is silent about the origin of the

figure of \$50,000. I find, however, the second review decision is more focused on Mr. Shea's ability to pay or financial hardship in relative terms to the interest arrears, rather than on what Mr. Shea offered in the way of a payment plan or arrangement.

[27] After noting the CRA did not receive the information requested in its May 27, 2019 follow up letter to Mr. Shea, the second review decision states, "I have considered you reported a monthly deficit after expenses; however, I have not determined an inability to pay or that payment of the arrears interest may cause financial hardship." The second review decision then acknowledges Mr. Shea's statement that he did not advise the CRA collections department that he could not pay \$50,000 per month as noted in the February 4, 2019 relief decision. The second review decision also acknowledges Mr. Shea's statement that the first review did not consider the line of credit that would need to be paid upon sale of the property. Having acknowledged these statements, the decision maker, K. Yeo states, "however, you have not provided the value of your assets including the value of the property." The decision maker then refers to Mr. Shea's July 4, 2018 and March 27, 2019 communications with CRA and Mr. Shea's indications that: he has assets he will dispose of to pay the taxes owing; he has more than one property; he would sell one of them to pay the taxes owing in full; and he needed more time to do so.

[28] I find, in other words, the decision maker's focus is on Mr. Shea's overall financial picture, about which Mr. Shea was less than forthcoming, and not on what he proposed to pay. Although Mr. Shea provided information about his income and expenses, I further find it was not unreasonable, in light of Mr. Shea's own statements above, that CRA would seek additional information along the lines mentioned in the Guidelines to assess his ability to pay or financial

hardship, such as assets. The May 27, 2019 follow up letter to Mr. Shea requested documentation regarding both assets and liabilities, in addition to income and expenses.

[29] The second review decision concludes: “Taxpayers who are capable of acquiring funds to pay their tax arrears, are expected to do so. ...As you indicate you can pay your tax arrears by selling assets, I have not determined an inability to pay or financial hardship.” Based on Mr. Shea’s own statements, and absent additional details regarding his assets and properties in particular, in my view this conclusion also is not unreasonable in the circumstances.

VI. Conclusion

[30] The Applicant has not met his onus of establishing that the CRA’s July 18, 2019 second review decision is unreasonable. I therefore dismiss this judicial review application.

[31] At the hearing before me, both parties indicated that they do not seek costs; thus, no costs are awarded.

JUDGMENT in T-1310-19

THIS COURT'S JUDGMENT is that:

1. This judicial review application is dismissed.
2. No costs are awarded.

"Janet M. Fuhrer"

Judge

Appendix A: Relevant Provisions*Income Tax Act, RSC 1985, c 1 (5th Supp)*

<p>Minister's Duty</p> <p>220(1) ...</p>	<p>Fonctions du ministre</p> <p>220(1) ...</p>
<p>Waiver of penalty or interest</p> <p>(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.</p>	<p>Renonciation aux pénalités et aux intérêts</p> <p>(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.</p>

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1310-19

STYLE OF CAUSE: SEAN SHEA v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO (VIA VIDEOCONFERENCE)

DATE OF HEARING: NOVEMBER 9, 2020

JUDGMENT AND REASONS: FUHRER J.

DATED: JANUARY 14, 2021

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