

Federal Court



Cour fédérale

Date: 20081222

Docket: T-339-08

Citation: 2008 FC 1403

Ottawa, Ontario, the 22nd day of December 2008

Present: The Honourable Orville Frenette

BETWEEN:

CÉLYNE LAFLAMME

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review was filed by the applicant against a decision made on January 28, 2008 by Lucie Bergevin, Director of the Ottawa Tax Services Office of the Canada Revenue Agency. By that decision, the respondent refused to cancel the penalties and interest assessed against the applicant as a result of the late filing of the applicant's income tax returns for the years 2003, 2004 and 2005.

Factual Context

[2] The applicant was a nurse and was married with children. She lived with her husband in St. Albert, Ontario.

[3] At the time, by agreement between the spouses, the applicant looked after the house and children while her husband worked outside the home and handled household business, banking and tax returns.

[4] In 2002, a series of catastrophic events occurred. First, the applicant's husband died suddenly; her mother and father-in-law died the same year. The couple's youngest son became depressed and suicidal. The accountant who had handled their previous tax returns fell ill and died of cancer in 2005.

[5] In 2003, the basement of the couple's house was flooded and infested with rodents that made their way in. After 2002, with no income to live on, the applicant had to find a job, and had to change jobs three times between 2002 and 2005. All of those events and misfortunes caused the applicant to fall into a deep depression, and since 2002 she has been under the care of a psychiatrist and needs to take medication.

[6] The applicant's depression and inability to make the necessary decisions, and the loss of her accountant, prevented her from filing her 2003, 2004 and 2005 tax returns. In addition, she believed that because she had not earned taxable income she was not required to file tax returns.

[7] After the death of her husband, at the urging of the executor of her husband's estate, and with his assistance, she was able to have the tax returns for the years 1999 to 2002 prepared.

[8] It was not until 2007, when her sister France Laflamme came to help her, that she was able to collect the necessary documents and, with the help of a new accountant, was able to file the tax returns for the years 2003 to 2006 and pay the amounts owing, which came to \$33,000 at that time. She then received an assessment totalling \$13,005.02 in penalties and interest on arrears.

[9] Since November 2007 she has been collecting employment insurance benefits for illness, given her psychological condition and inability to work outside the home.

[10] She applied for relief from that assessment based on these extraordinary circumstances and her deeply depressed condition. In support of her application for relief from the assessment, she cited the Canada Revenue Agency's "Taxpayer Relief Provisions". In brief, that circular provides that if a taxpayer falls victim to exceptional circumstances that prevent the taxpayer from satisfying his or her tax obligations, the Minister may grant relief. In spite of the applicant's letters explaining her health problems and requesting relief, Lucie Bergevin, acting on behalf of the Minister, denied the application, in her decision dated January 28, 2008, which reads as follows:

[TRANSLATION] ... I have reviewed your application and I have determined that you failed to act quickly to remedy the delay and failed to meet your tax obligations in the past. As well, there was no error or delay on our part, nor were there circumstances beyond your control that might have prevented you from doing your accounting on time and as required. The penalty for late filing and interest on arrears are therefore upheld.

[11] The applicant is challenging that decision.

Standard of Review

[12] Ministerial discretion under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act), in relation to penalties and interest on arrears, is subject to the reasonableness standard when the issue is a question of fact or of mixed law and fact (see, *inter alia*, *Lanno v. Canada Customs and Revenue Agency*, 2005 FCA 153, 334 N.R. 348; *Kreklewich v. Canada Revenue Agency*, 2007 FC 892, [2007] 5 C.T.C. 145; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190).

Applicable Legislation

[13] Subsection 220(3.1) of the Act reads as follows:

220. (3.1) The Minister may at any time waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by a taxpayer or partnership and, notwithstanding subsections 152(4) to 152(5), such assessment of the interest and penalties payable by the taxpayer or partnership shall be made as is necessary to take into account the cancellation of the penalty or interest.

220. (3.1) Le ministre peut, à tout moment, renoncer à tout ou partie de quelque pénalité ou intérêt payable par ailleurs par un contribuable ou une société de personne en application de la présente loi 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.

[14] The Canada Revenue Agency has adopted and published an information circular entitled "Taxpayer Relief Provisions", No. IC07-1, dated May 31, 2007. Sections 23 to 34 of that circular set out the circumstances in which an application may be made and the factors used in making a decision. The relevant sections are as follows:

¶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.

¶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.

...

¶34. When an extraordinary event (e.g., natural disaster) has prevented a large number of taxpayers from meeting their tax obligations, the Minister may issue a news release to announce that special consideration will be given to providing relief, such as a waiver or cancellation of penalty and interest charges on late tax remittances or late filing of a return. In such cases, taxpayers need to make a request to get relief. CRA news releases on extraordinary events that qualify for relief can be found at www.cra-arc.gc.ca/newsroom/releases/menu-e.html.

[15] Section 23 provides that exceptional circumstances are the basis on which the Minister must exercise his discretion. Section 25 lists the situations that are considered to be exceptional circumstances, such as natural disasters (a flood), serious illness and serious emotional or mental distress (such as a death in the immediate family). Section 34 elaborates on the concept of an extraordinary event (for example, a natural disaster).

Analysis

[16] The facts established by the applicant were not disputed. They were also corroborated in the letter from Dr. Francine Pagé, psychiatrist, dated September 19, 2007, under whose care the applicant has been since 2002. She says that the applicant has experienced exceptional circumstances, both family-related and other, since 2002, that were beyond her control: the loss

of people very close to her and the major stressful events that were added to that between 2002 and 2007.

[17] The directives set out in the circular are not part of the Act and are not necessarily binding on the Department (*Lee v. Minister of Citizenship and Immigration*, 2005 FC 413). However, they are published by the Department to guide the Minister or his delegates. They were developed by the Department to guide it in the exercise of its discretion and enable it to manage the tax system more fairly, by allowing room for common sense to benefit taxpayers who have been victims of misfortune or circumstances beyond their control. Taxpayers in that situation are entitled to the benefit of those directives (*Kaiser v. Minister of National Revenue* (1995), 93 F.T.R. 66; *Jim's Pizza (1980) Ltd. v. Canada Revenue Agency*, 2007 FC 782, [2007] 5 C.T.C. 43; *Construction & Rénovation M. Dubeau Inc. v. Canada Customs and Revenue Agency*, 2001 FCT 1139, 213 F.T.R. 94 [*Dubeau*]).

[18] The applicant submits that she is entitled to the benefit of the tax relief provisions quoted *supra* under both the Act and the principles of fairness, and the rights set out in the Charter of Taxpayer Rights. She argues that she was not in a normal psychological state, capable of making appropriate and timely decisions, having regard to the major depression she suffered as a result of a series of exceptional circumstances. Those multiple circumstances include three deaths of close family members, the depression and suicidal tendencies of her son, income problems and the damage to her house caused by flooding.

[19] The respondent argues that his decision was sound and reasonable because:

- the applicant failed to act quickly to remedy any delay;

- the applicant failed to meet all her tax obligations in the past;
- there were no circumstances beyond the applicant's control that might have prevented her from doing her accounting in a timely manner.

[20] The applicant replies:

- in the past, it was her husband who looked after filing tax returns;
- she could not have done anything before she had assistance from her sister, having regard to her deep depression;
- the circumstances explained earlier, which were not disputed, constitute exceptional circumstances under the Department's own directives, and she should have been given the benefit of those directives.

[21] The fundamental question to be answered here is whether the decision made is reasonable in the circumstances of this case. Does it fall within the range of decisions that could reasonably be justified by the factual evidence (see *Dunsmuir, supra*)?

[22] To solve this dilemma, I believe it is useful to adopt the reasoning followed by Pinard J. in a case that raised the same kind of problems: *Dubeau, supra*. At paragraph 14 of that decision, Pinard J. wrote that in interpreting sections 220 and 227 of the Act, departmental directives or policies regarding cancellation of penalties and interest had to be considered, along with the following factors:

- (a) Relationship of parties involved.
- (b) Date of death.
- (c) Date(s) and nature of illness or accident.
- (d) Explanation as to how the event prevented compliance.
- (e) Explanation as to whether other business obligations were impaired.

[23] Also in that paragraph, Pinard J. added, with respect to departmental policy,

. . . examples of cases where the cancellation of penalties and interest could be justified are provided, including “a serious emotional or mental distress such as, death in the immediate family.”

(Emphasis added.)

[24] In *Dubeau, supra*, the taxpayer cited lengthy absences from work because of his illness and the subsequent death of his son and illness of his own wife. Pinard J. dismissed the application for judicial review because, under the standard of review that applied at that time (i.e. in 2001), which was the patent unreasonableness standard, he could not have intervened. He wrote:

[21] In all of this context, despite all of the sympathy aroused by the misfortunes of Marc Dubeau and his family, the strict standard of judicial review that was confirmed in *Baker v. Canada (M.C.I.)*, [1999] 2 R.C.S. 817, prevents me from intervening. . . .

[25] I am inclined to think, even speculate, that if the reasonableness standard that has applied since *Dunsmuir* had been the standard to be applied, the decision might not have been the same.

[26] In *Case v. Attorney General*, 2004 FC 825, [2004] 4 C.T.C. 71, the application for judicial review of a negative decision by the Minister regarding interest and penalties was dismissed because the applicant had not discharged her burden of proof in that she had been unable to show, in medical terms, that she could not have filed her tax return in a timely manner.

[27] An application for judicial review was dismissed in *Grundy v. Canada Customs and Revenue Agency*, 2005 FC 1312, [2005] D.T.C. 5574, because the failure to file the tax return in question did not result from an event beyond the applicant’s control.

[28] In *PPSC Entreprises Ltd. v. Minister of National Revenue*, 2007 FC 784, [2007] 5 C.T.C.

79, the judge dismissed the application for judicial review because the error by the applicant did not result from circumstances beyond its control.

[29] In *Laframboise v. Canada Revenue Agency*, 2008 FC 196, [2008] D.T.C. 6178,

Judith Snider J. allowed the application for judicial review of a negative departmental decision because the delay in filing a tax return had been caused by the destruction of the taxpayer's home by a fire, in which all of the necessary documents had been destroyed.

[30] In *Nixon v. Minister of National Revenue*, 2008 FC 917, [2008] F.C.J. No. 1146 (T.D..)

(QL), Douglas R. Campbell J. allowed the application for judicial review because the decision-maker had failed to have regard to the fact that the failures to report additional income had been involuntary.

[31] In this case, the uncontradicted evidence is that the applicant was the victim of numerous distressing events between 2002 and 2007: her husband died suddenly in 2002, and her mother and father-in-law died the same year. The applicant's son was depressed to the point that he attempted suicide. The applicant's home was flooded. The accountant who had looked after her affairs and earlier tax returns died of cancer.

[32] All of these catastrophic events left the applicant in a state of deep depression, accentuated by the fact that she was obliged to seek paid employment and that she then had to change jobs three times. According to the applicant and her psychiatrist, she still suffers the effects of that depression today. The consequence was that the applicant was unable to manage her affairs

properly and to make the necessary decisions in relation to her tax obligations in a timely manner.

[33] In my opinion, the combination of these events and circumstances, and the applicant's psychological condition, amply constitute the exceptional circumstances to which the guidelines refer and justify the delay that prevented her from filing her annual tax returns between 2002 and 2005.

[34] This situation falls squarely within the exceptional circumstances beyond the applicant's control referred to in sections 23, 24 and 25 of the provisions quoted *supra*.

[35] Section 25 lists some such exceptional circumstances, although it is not exhaustive:

- (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.

(Emphasis added.)

[36] Section 34 adds special consideration because of exceptional events.

[37] In my opinion, the applicant's situation fits precisely within all those considerations. The only negative factor cited by the decision-maker is that she had previously filed necessary returns late and that she had managed to file them only to settle her husband's estate. That situation was highly exceptional in that it was the executor of the estate who urged or required the applicant to

do those returns and who motivated the applicant even though she was still in a state of deep depression. I find that this should not have been relied on against the applicant.

[38] With deference to the person who made the decision of January 28, 2008, that decision is unreasonable in the exceptional circumstances that occurred and having regard to the applicant's psychological condition.

[39] An analysis of the case law cited *supra* shows that if ever there was a situation that merited tax relief, it is the applicant's in this case, in accordance with the very criteria formulated by the Department of National Revenue.

[40] I must therefore find that the applicant's application is well founded in fact and in law. The application for judicial review will therefore be allowed.

JUDGMENT

The application for judicial review is allowed and the decision made by Lucie Bergevin on January 28, 2008, is set aside.

The application is referred back to another authorized representative of the Minister of National Revenue for consideration in accordance with the reasons set out in this judgment.

The parties will bear their own costs.

“Orville Frenette”

Deputy Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-339-08

STYLE OF CAUSE: CÉLYNE LAFLAMME v. MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: December 10, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** The Honourable Orville Frenette

DATED: December 22, 2008

APPEARANCES:

Célyne Laflamme THE APPLICANT, ON HER OWN BEHALF

Sara Chaudhary FOR THE RESPONDENT

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FOR THE RESPONDENT