

Date: 20090218

Docket: T-1501-07

Citation: 2009 FC 183

Edmonton, Alberta, February 18, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

RAINER KNIE

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Rainer Knie (the “Applicant”) seeks judicial review of the decision of the Minister of National Revenue (the “Respondent”) to deny waiver of interest and penalties pursuant to subsection 220(3) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the “Act”). The decision was set out in a letter dated July 12, 2007, to the Applicant.

[2] The Applicant argues that the Minister, through his delegates, committed reviewable errors in denying his relief. First, he submits that the Minister failed to consider all relevant facts as to the

existence of “extraordinary circumstances”, relative to the 1996 to 1998 tax years, in denying his request for relief. Further, he argues that the Minister failed to take into account his current personal situation in denying the relief sought.

[3] The Applicant says that an error by his former accountant, who is now deceased, gave rise to incorrect attribution of salary. He says that monies that he advanced to a corporate entity, by way of a loan, were incorrectly treated as a salary by the accountant. Interest and penalties accumulated when the Applicant failed to pay the income tax that was assessed relative to the salary in question.

[4] The Respondent submits that he acted reasonably and properly in deciding to positively exercise his statutory discretion to waive interest and penalties. He submits that the factors identified in Information Circular Number IC07-1 (the “Guidelines”) were considered, as required, in reaching this decision to deny waiver of interest and penalties. He argues that no error was committed in the exercise of the statutory discretion.

[5] Subsection 220(3.1) of the Act gives the Respondent the discretion to waive interest and penalties, in whole or in part, and provides as follows:

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

(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

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.

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.

[6] A decision made pursuant to this provision is a discretionary one, reviewable on the standard of reasonableness: see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 51.

[7] The Guidelines inform the exercise of the statutory discretion, in particular paragraphs 23, 25, 33 and 35.

[8] Paragraph 23 identifies three circumstances where relief from penalties 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

[9] Paragraph 25 identifies circumstances that may be considered to be extraordinary, as follows:

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.

[10] Paragraph 33 identifies the factors to be taken into account in making a 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.

[11] Finally, paragraph 35 addresses the relevance of third-party actions, as follows:

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.

[12] Having regard to the evidence contained in the Certified Tribunal Record, that is, the evidence that was before the Minister's delegate and having regard to the applicable standard of review, I am not persuaded that any reviewable error has been demonstrated.

[13] The record shows that the Applicant has a history of non-compliance with satisfying the requirements to file his tax returns and to make payments in respect of his tax liabilities. The evidence is sparse about the errors of his former accountant and in any event, the errors of a third party do not automatically yield a positive exercise of the statutory discretion.

[14] There is also little evidence about the Applicant's current financial circumstances. The onus lies on him to submit evidence that is sufficient and relevant for the decision-maker.

[15] In view of all the circumstances as documented on the record and having regard to the relevant jurisprudence, I am satisfied that there is no basis for judicial intervention and this

application for judicial review is dismissed. In the exercise of my discretion pursuant to Rule 400(1) of the *Federal Courts Rules*, SOR/98-106, there is no order as to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed, no order as to costs.

“E. Heneghan”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1501-07

STYLE OF CAUSE: RAINER KNIE v.
THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: February 16, 2009

REASONS FOR JUDGMENT: HENEGHAN J.

DATED: February 18, 2009

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