

Federal Court



Cour fédérale

**Date: 20100203**

**Docket: T-207-09**

**Citation: 2010 FC 116**

**Ottawa, Ontario, February 3, 2010**

**PRESENT: The Honourable Mr. Justice Boivin**

**BETWEEN:**

**RODIN LEMERISE**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision by Mario Marchand, Manager of Client Services at the Canada Revenue Agency (the Agency), dated January 15, 2009, denying the applicant's request for relief seeking the cancellation of interest and penalties for the late filing of his income tax return for the 2006 taxation year, under subsection 152(4.2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act).

[2] In the case at bar, the applicant is representing himself.

Factual background

[3] The applicant, Rodin Lemerise, was late in filing his income tax return for the 2006 taxation year. He filed his tax return nearly one year late, on April 14, 2008, when the deadline for filing had been April 30, 2007.

[4] On May 1, 2008, the Agency sent a notice of assessment for 2006 in which interest and penalties were imposed on the applicant for the late filing of his income tax return.

[5] On June 2, 2008, the applicant made a first request for relief seeking the cancellation of the late filing penalty in the amount of \$223.40 and interest on arrears in the amount of \$140.29 from January 2009. The applicant claims he suffers from Attention-Deficit Hyperactivity Disorder (ADHD) and that this condition was the main reason why he was late in filing his income tax return and that this is a situation beyond his control.

[6] On September 5, 2008, the applicant received the Agency's decision advising him that his request for relief had been denied.

[7] On October 24, 2008, the applicant applied to the Agency for a review of the decision dated September 5, 2008. For the purposes of this application, a client services officer at the Agency named Claude Gagnon was tasked with preparing a recommendation for his supervisor, Mario

Marchand. Mr. Gagnon relied on the information and evidence submitted by the applicant, including *Information Circular IC07-1 – Taxpayer Relief Provisions* (Circular IC07-1).

[8] On January 13, 2009, after reviewing all of the documents submitted by the applicant, Claude Gagnon recommended not cancelling the interest and penalties that were the subject of the applicant's request for relief.

[9] On January 15, 2009, Mario Marchand, on behalf of the Minister, informed the applicant that his request had been denied, stating that no extraordinary circumstances had prevented the applicant from filing his income tax return on time.

[10] The applicant is challenging the January 15, 2009 decision.

#### Issues

[11] The only issue in the case at bar is whether the Minister exercised his discretion in accordance with subsection 220(3.1) of the Act in denying the applicant's request to have the interest and penalties cancelled.

#### Relevant legislation

[12] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.):

<b>220.</b> (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	<b>220.</b> (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
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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.

**152.** (4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining, at any time after the end of the normal reassessment period of a taxpayer who is an individual (other than a trust) or a testamentary trust in respect of a taxation year, the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is ten calendar years after the end of that taxation year,

(a) reassess tax, interest or penalties payable under this

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.

**152.** (4.2) Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable — particulier, autre qu'une fiducie, ou fiducie testamentaire — pour une année d'imposition le remboursement auquel le contribuable a droit à ce moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année en vertu de la présente partie, le ministre peut, si le contribuable demande pareille détermination au plus tard le jour qui suit de dix années civiles la fin de cette année d'imposition, à la fois :

a) établir de nouvelles cotisations concernant l'impôt,

Part by the taxpayer in respect of that year; and	les intérêts ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie;
(b) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.	b) déterminer de nouveau l'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année ou qui est réputé, par le paragraphe 122.61(1), être un paiement en trop au titre des sommes dont le contribuable est redevable en vertu de la présente partie pour l'année.

### Standard of review

[13] The Federal Court of Appeal determined that the applicable standard of review for a discretionary decision of the Minister under the fairness provisions of the Act is reasonableness (*Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153, 334 N.R. 348 and *Comeau v. Canada (Customs and Revenue Agency)*, 2005 FCA 271, 361 N.R. 141).

### Analysis

[14] According to the applicant, the Minister's denial shows a lack of understanding about ADHD. The applicant explained that his repeated late filings in previous years were the result of ADHD rather than any negligence or carelessness on his part, because people with ADHD constantly repeat the same mistakes. He explained that he is not a negligent or careless person and

that he has managed to conduct himself very responsibly in his professional life. The applicant claims that neither his testimony nor his doctor's diagnosis was taken seriously by the Minister. According to his claims, the Minister made his decision on the basis of the applicant's past failings and without considering his medical condition.

[15] The applicable rules in matters of taxpayer relief are found in the guidelines of Circular IC07-1. These guidelines do not have the force of law and cannot fetter the Minister's discretion (*Sutherland v. Canada (Customs and Revenue Agency)*, 2006 FC 154, 146 A.C.W.S. (3d) 380 at paras. 16-17), but can be used to facilitate the exercise of his discretion.

[16] Under section 23 of the guidelines, the Minister may grant relief from the application of penalties and interest where certain types of situations exist and justify a taxpayer's inability to satisfy a tax obligation. The types of situations listed include "extraordinary circumstances".

[17] Section 25 of the guidelines specifies that a serious illness or accident may qualify as "extraordinary circumstances" that may have prevented a taxpayer from complying with an obligation under the Act, such as filing a return on time.

[18] In the case at bar, the applicant cited the disorder as grounds in support of his request for relief. He explained that he suffered from ADHD.

[19] In his efforts to obtain a reduction or cancellation of the penalties and interest, the applicant provided information in support of his request, as required by the guidelines. Based on the information provided, the Minister had to determine whether the applicant's ADHD constituted circumstances beyond his control and, if so, whether these circumstances prevented or may have prevented the applicant from complying with the Act.

[20] In support of his request, the applicant submitted a note from Dr. Bernard Lafrenière dated April 8, 2008. The difficulty for the applicant lies in the fact that this letter fails to explain how the state of his health would have prevented him, as an "extraordinary circumstance" (ss. 23 and 25 of the guidelines), from filing his 2006 income tax return within the time allotted by the Act. In fact, the information in the letter is, by and large, quite limited. For example, (i) the letter does not mention what dosage was recommended to the applicant by the doctor; (ii) it does not explain what effects the medication may have on the applicant; (iii) it does not indicate how long the applicant has been on medication; (iv) it does not address the applicant's general health – i.e., why the applicant performs well in some areas of activity and less well in others; and (v) in what way the medication may hamper the applicant in his ability to perform certain tasks, such as filing his annual tax return. In light of the note provided by the applicant, the Court is of the view that it would have been difficult for the Minister to find that the applicant is unable to file his income tax returns within the time allotted by the Act.

[21] In addition, the decision dated September 5, 2008, noted that many of the applicant's prior income tax returns, namely those for the years 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993,

1994, 1995, 1996, 1997 and 2004, had been filed after the deadline. The Court noted that among the factors used in making his decision, the Minister may consider whether or not the taxpayer has a history of compliance with tax obligations (s. 33 of the guidelines).

[22] However, the letter dated September 5, 2008, also shows that between 1998 and 2003, as well as in 2005, the applicant was able to file his returns on time.

[23] Section 32 of the guidelines imposes on the applicant the onus of providing the Agency with all of the relevant information in support of his request for relief. In fact, it is well established that taxpayers who cite their medical condition in support of a request for relief from penalties or interest have the burden of proving that their illness or medical condition was a factor beyond their control and that the interest owed was primarily caused by this factor (*Young v. Canada*, (1997), 138 F.T.R. 37, 76 A.C.W.S. (3d) 447 at para. 19 (F.C.T.D)). Therefore, the burden of proof lay with the applicant and not the Agency.

[24] It is not for the Court to decide whether the Minister was right or wrong, but whether he considered all of the evidence before him in a fair manner so as to determine whether the applicant's failure to comply with the Act was caused by factors beyond his control. The issue is not whether the Court would have rendered a different decision, but rather whether the Minister's decision was reasonable given the applicant's evidence in support of his claim.



[25] Lastly, the applicant submitted that he had three (3) years to file his income tax return. The Court disagrees. In fact, under section 150 of the Act, a return of income must be filed for each taxation year of a taxpayer. The prescribed period of three (3) years under section 64 in the guidelines referred to by the applicant applies instead to cases in which the taxpayer is entitled to a tax refund, which is not the case here.

[26] After examining the record and hearing the parties, the Court is satisfied that the Minister exercised his discretion in good faith and in accordance with the principles of natural justice. The Court finds that the Minister reviewed the evidence before him and that the decision did not rely on considerations irrelevant or extraneous to the statutory purpose (*Maple Lodge Farms v. Canada*, [1982] 2 S.C.R. 2, 44 N.R. 354 at para. 8).

[27] For these reasons, the application for judicial review is dismissed. The Court, in exercising its discretion, has determined that there will be no costs awarded.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that** the application for judicial review be dismissed without costs.

“Richard Boivin”

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Judge

Certified true translation

Sebastian Desbarats, Translator

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-207-09

**STYLE OF CAUSE:** Rodin Lemerise v. The Attorney General of Canada

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** January 27, 2010

**REASONS FOR JUDGMENT:** BOIVIN J.

**DATED:** February 3, 2010

**APPEARANCES:**

Rodin Lemerise FOR HIMSELF

Ian Demers FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

None FOR HIMSELF

John H. Sims, Q.C. FOR THE RESPONDENT  
Deputy Attorney General of Canada