

Federal Court



Cour fédérale

**Date: 20110406**

**Docket: T-570-10**

**Citation: 2011 FC 426**

**Ottawa, Ontario, April 6, 2011**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**IAN SPENCE**

**Applicant**

**and**

**CANADA REVENUE AGENCY**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] Mr. Ian Spence assembled all the documents he needed to complete his 2006 income tax return and then provided them to H&R Block, instructing them to prepare his return for him. H&R Block completed the return and asked Mr. Spence to come to the office to sign it, before it was sent to the Canada Revenue Agency (CRA), which he did at the end of February 2007. The return stated

that Mr. Spence would receive a refund of \$2,543.08, about what he was expecting. Because he was getting a refund, he did not look over the return before signing it.

[2] Soon thereafter, in early March 2007, Mr. Spence received a notice of assessment which confirmed the amounts in his return, including the \$2,543.08 refund. However, in April 2008, CRA sent Mr. Spence a notice of reassessment which informed him that the amounts in his original return were incorrect. His return failed to include \$36,219.00 in income from 2006, as well as \$9,042.57 in income tax that Mr. Spence had paid at source. With the amounts recalculated, Mr. Spence had received an overpayment of his refund in the amount of \$123.98, which he promptly repaid.

[3] However, the CRA imposed on Mr. Spence penalties and interest amounting to \$7,623.85 for his failure to report income. The amount of the penalty is set at 10% of the amount of income unreported according to the *Income Tax Act*, RSC 1985, c 1 (5<sup>th</sup> Supp), s 163(1) (see Annex A for statutory provisions and other sources cited in this judgment). The penalty applies when a person has failed to report income more than once in a four-year period. Mr. Spence had previously left out a small amount of income in respect of his 2004 return.

[4] Mr. Spence challenged the penalty under the fairness provision of the Act (s 220(3.1)), which permits the Minister to waive or cancel all or any portion of a penalty or interest. He argued that the penalty was disproportionately large, given that he had acted conscientiously to file his return in a timely way. H&R Block conceded that it had made the error and not Mr. Spence. Nevertheless, Mr. Spence's request for relief was denied on the basis that he had not shown that extraordinary circumstances, as described in the applicable Information Circular (IC07-1, *Taxpayer*

*Relief Provisions*) existed in his case. The Fairness Committee of CRA ruled that the “Taxpayer Relief Provisions do not allow for the cancellation of penalties and interest in these types of situations”.

[5] Mr. Spence sought judicial review of that decision and succeeded (*Spence v Canada (Revenue Agency)*, 2010 FC 52). Justice John O’Keefe found that the Committee erred by treating the Information Circular as binding when it really sets out a series of guidelines that apply to the Minister’s overall discretion under the Act. He sent Mr. Spence’s request back to the Committee for reconsideration.

[6] The Committee turned down Mr. Spence again in 2010. It found that it would be inappropriate to cancel the penalty imposed on him because it was his responsibility to ensure the accuracy of his return, even if it was completed by a professional tax preparer. Mr. Spence had two opportunities to correct his return – before signing it, and after receiving his first notice of assessment in March 2007. The omissions would have been clear to him if he had taken the time to look at those documents.

[7] Mr. Spence now seeks judicial review of this second rejection of his request for relief. He argues that the Committee’s decision was unreasonable in his circumstances, especially since he did not conceal any income or gain anything by failing to submit a fully complete tax return. He asks me to overturn the Committee’s decision and return his request to be assessed for a third time.

[8] However, I can find no basis on which to overturn the Committee's decision. I must, therefore, dismiss this application for judicial review.

[9] The sole issue is whether the Committee's decision was reasonable.

## II. Was the Committee's Decision Reasonable?

[10] Mr. Spence argues that the Committee did not consider important facts in his favour, made factual errors, and failed to consider the full range of grounds on which relief can be granted under the Act.

[11] Mr. Spence submits that the Committee did not appear to take into account that:

- he tried to file his return in a timely way, gathered all the necessary documents, hired a professional to prepare his return, relied on that person for the return's accuracy, and that person made errors;
- contrary to the Committee's finding, he had not failed to divulge the unreported income – all of his income was divulged to his tax preparer;
- he made overpayments of income tax, EI and CPP contributions and was entitled to a refund;
- he received a small overpayment of his refund (\$123.98) which he repaid; and
- the penalty represents 5842% of the amount of the overpayment;

[12] Mr. Spence also maintains that the Committee ignored the decision of Justice O’Keefe in his previous judicial review and failed to refer to the arguments and evidence he relied on in his application. Further, he suggests that the Committee overlooked provisions of the applicable Information Circular, which provide that relief may be given to taxpayers for errors by third parties in “exceptional situations”. Finally, Mr. Spence notes that if the Committee had applied s 163(2) of the Act instead of s 163(1), the amount of the penalty would have been \$100.00 or 50% of the overpayment amount, whichever was greater, an amount he says is more proportionate in the circumstances.

[13] I cannot agree with Mr. Spence that the Committee overlooked relevant facts. The Committee’s decision was based primarily on the fact that Mr. Spence had not verified the accuracy of his return before signing it, and had not taken the opportunity to correct the error when he received his first notice of assessment in March 2007. While he had engaged a third party to complete his return for him, it remained his responsibility to ensure that it was accurate and complete. The facts referred to by Mr. Spence would have been well-known to the Committee (especially on its second consideration of his request) and did not derogate from the Committee’s conclusion. There is nothing in the facts Mr. Spence relies on that suggest there were extraordinary circumstances that caused him to overlook the errors in his return, or that prevent him from paying the penalty imposed on him. As for the Committee’s comment that “no attempt was made to divulge the unreported income”, this statement was referring to the point in time after Mr. Spence had received his notice of assessment. There was no suggestion that he had failed to disclose his entire income to his tax preparer.

[14] In addition, the Committee had before it the documents that had been filed on Mr. Spence's original judicial review application. I see no basis for the claim that they were ignored, or that Justice O'Keefe's decision was not applied.

[15] Section 35 of the Information Circular states:

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.

[16] Clearly, the mere fact that a tax return was prepared by a third party does not prevent the taxpayer from seeking or receiving relief. Here, the Committee obviously considered Mr. Spence's application even though it was a third party that prepared his return. However, the Committee concluded that it would be inappropriate to waive the penalty imposed on Mr. Spence in circumstances where he had failed to ensure that his return was properly filled out. The Committee saw nothing exceptional that would justify waiver of the statutory penalty.

[17] With respect to Mr. Spence's argument that he should have been penalized under s 163(2) of the Act, I cannot see how this submission corresponds with the facts of his case. Subsection 163(2) applies where a taxpayer "knowingly, or under circumstances amounting to gross negligence" made a false return. There, the penalty is calculated according to the benefit the taxpayer received. By contrast, s 163(1) is directed to situations where the taxpayer has failed to report income, and the penalty is calculated as function of the unreported amount, whether or not the taxpayer's conduct was willful or negligent. While Mr. Spence may well feel that a \$100 penalty would be more

suitable in his case, Parliament has seen fit to enact a relatively stiff penalty to ensure compliance with Canada's self-reporting tax system. Absent special circumstances, which Mr. Spence has failed to make out, that is the penalty that must be paid.

### III. Conclusion and Disposition

[18] In my view, the Committee's decision was reasonable, in that it was a defensible outcome based on the law and the facts before it. I must, therefore, dismiss this application for judicial review, with costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed with costs.

“James W. O’Reilly”

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Judge



## Annex “A”

*Income Tax Act*, RSC 1985, c 1 (5<sup>th</sup> Supp)*Loi de l'impôt sur le revenu*, LRC, 1985, ch 1 (5e supp)

Repeated failures

Omission répétée de déclarer un revenu

**163.** (1) Every person who**163.** (1) Toute personne qui ne déclare pas un montant à inclure dans le calcul de son revenu dans une déclaration produite conformément à l'article 150 pour une année d'imposition donnée et qui a déjà omis de déclarer un tel montant dans une telle déclaration pour une des trois années d'imposition précédentes est passible d'une pénalité égale à 10 % du montant à inclure dans le calcul de son revenu dans une telle déclaration, sauf si elle est passible d'une pénalité en application du paragraphe (2) sur ce montant.

(a) fails to report an amount required to be included in computing the person's income in a return filed under section 150 for a taxation year, and

(b) had failed to report an amount required to be so included in any return filed under section 150 for any of the three preceding taxation years

is liable to a penalty equal to 10% of the amount described in paragraph 163(1)(a), except where the person is liable to a penalty under subsection 163(2) in respect of that amount.

False statements or omissions

Faux énoncés ou omissions

(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a “return”) filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of \$100 and 50% of the total of

(2) Toute personne qui, sciemment ou dans des circonstances équivalant à faute lourde, fait un faux énoncé ou une omission dans une déclaration, un formulaire, un certificat, un état ou une réponse (appelé « déclaration » au présent article) rempli, produit ou présenté, selon le cas, pour une année d'imposition pour l'application de la présente loi, ou y participe, y consent ou y acquiesce est passible d'une pénalité égale, sans être inférieure à 100 \$, à 50 % du total des montants suivants :

(a) the amount, if any, by which

a) l'excédent éventuel du montant visé au sous-alinéa (i) sur le montant visé au sous-alinéa (ii):

(i) the amount, if any, by which

(A) the tax for the year that would be payable by the person under this Act

(i) l'excédent éventuel de l'impôt qui serait payable par cette personne pour l'année en vertu de la présente loi sur les sommes qui seraient réputées par les paragraphes 120(2) et (2.2) payées au titre de l'impôt de

la personne pour l'année, s'il était ajouté au revenu imposable déclaré par cette personne dans la déclaration pour l'année la partie de son revenu déclaré en moins pour l'année qu'il est raisonnable d'attribuer au faux énoncé ou à l'omission et si son impôt payable pour l'année était calculé en soustrayant des déductions de l'impôt payable par ailleurs par cette personne pour l'année, la partie de ces déductions qu'il est raisonnable d'attribuer au faux énoncé ou à l'omission,

#### Waiver of penalty or interest

**220.** (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.

#### Renonciation aux pénalités et aux intérêts

**220.** (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.

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

**DOCKET:** T-570-10

**STYLE OF CAUSE:** IAN SPENCE v CANADA REVENUE AGENCY

**PLACE OF HEARING:** Regina, Saskatchewan

**DATE OF HEARING:** February 10, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** April 6, 2011

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