Date: 20051025

Docket: T-931-04

Citation: 2005 FC 1445

BETWEEN:

FREDERICK COLE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER

PHELAN J.

INTRODUCTION

[1] The Applicant seeks judicial review of the decision by the Minister of National Revenue not to grant interest relief under subsection 220(3.1) of the *Income Tax Act* in respect of delays relating to the 1987-88 tax years' assessment. The Applicant alleges that the delays were caused by the circumstances surrounding the conduct of a Federal Court judge who has since retired.

[2] The 1987-88 tax year assessment was caught up in the 1983 tax year litigation that was then before the Federal Court – Trial Division, as it then was. The delays in resolving the 1983 tax year

assessment due to the judge's alleged conduct are said to have caused the delay in the resolution of the 1987-88 tax year assessments.

[3] Mr. Cole had been denied interest relief. His judicial review of that refusal was granted. The matter was referred back to the Minister for reconsideration. This is the judicial review of that subsequent decision of April 20, 2004 in which some interest relief was granted but not for the extensive period between July 9, 1991 and October 1, 1995.

[4] However, the critical portion of the Minister's decision, and the issue on which this judicial review turns, is the following finding:

> "The delay for the period July 9, 1991 to October 1, 1995 is the result of the 1983 Appeal proceeding through the Tax Court and the Federal Court, Appeal Division. Because the audit in question was a result of the 1983-85 audit, the objection could not be heard until the 1983-85 issue had been resolved. The decision on this issue was reached on October 1, 1995. **Delays experienced as a result of court proceedings are beyond the control of the Agency and are not considered for granting fairness."**
>
> (Emphasis added)

BACKGROUND

[5] Pursuant to s. 220(3.1) of the *Income Tax Act*, the Minister of National Revenue has a discretion to waive or cancel penalty or interest otherwise payable.

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 personnes 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.

[6] The Minister has issued guidelines for the administration of this provision (Information Circular 92-2 – Guidelines for the Cancellation and Waiver of Interest and Penalties dated March 18, 1992). Section 5 of the Circular is important in this instance because it does not restrict interest/penalty relief to only those events which are within the control of the Minister – events over which neither the taxpayer nor the Minister have control may be the basis for "fairness" relief from interest and penalties.

5. **Penalties and interest may be waived or cancelled in whole or in part where they result in circumstances beyond a taxpayer's or employer's control.** For example, one of the following extraordinary circumstances may have prevented a taxpayer, a taxpayer's agent, the executor of an estate, or an employer from making a payment when due, or otherwise complying with the *Income Tax Act*: (a) natural or human-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.	5. **Il sera convenable d'annuler la totalité ou une partie des intérêts ou des pénalités, ou de renoncer à ceux-ci, si ces intérêts ou ces pénalités découlent de situations indépendantes de la volonté du contribuable ou de l'employeur.** Voici des exemples de situations extraordinaires qui pourraient empêcher un contribuable, un agent d'un contribuable, l'exécuteur d'une succession ou un employeur de faire un paiement dans les délais exigés ou de se conformer à d'autres exigences de la *Loi de l'impôt sur le revenu*: a) une calamité naturelle ou une catastrophe provoquée par l'homme comme une inondation ou un incendie; b) des troubles civils ou l'interruption de services comme une grève des postes;

c) une maladie grave ou un accident grave;

d) des troubles émotifs sérieux ou une souffrance morale grave comme un décès dans la famille immédiate.

(Emphasis added)

[7] As a result of a 1983-85 audit, the Applicant was engaged in litigation affecting the 1983 tax year. By May 1991, proceedings had advanced to the stage where a motion was to be heard on May 10, 1991 before Justice Martin to strike portions of the Applicant's Notice of Appeal in respect of the 1983 tax year.

[8] The night before the motion was to be heard Justice Martin was alleged to have engaged in some form of troubling personal conduct. The Applicant failed to file any evidence as to the alleged events or their real impact on his rights. Justice Martin retired from the Bench effective October 24, 1991.

[9] Justice Martin granted the relief requested and struck portions of the Applicant's Notice of Appeal. The Applicant appealed the decision to the Appeal Division of the Federal Court[1]; and there the case sat until settled in 1995.

[1] At the time of those proceedings, the Federal Court of Canada consisted of a Trial Division and an Appeal Division with different judges in each division although judges of one division were *ex officio* members of the other.

[10] In respect of the 1987/88 tax year, on December 23, 1991, the Revenue Canada files contain a notation that the Applicant's Notice of Objection would not be "worked on" because officials were awaiting the results of the 1983 tax year litigation which was then pending before the Federal Court – Appeal Division.

[11] It took from May 22, 1991, when the Notice of Objection for 1987/88 was filed, until March 4, 1998 for the department to issue a Notice of Confirmation – a period of seven years.

[12] During this period of time, despite the efforts of the Minister's counsel to have the appeal heard, the Applicant's counsel refused to do so. The Applicant's position was that the appeal should not be heard because Justice Martin was *ex officio* a member of the Appeal Division and that it was "inappropriate and inadvisable to have the matter heard 'in the same Court' ". The Applicant said he needed guidance from "the Attorney-General of Canada, and perhaps others".

[13] The Applicant did write to the Attorney-General who suggested that any concerns the Applicant might have had about Justice Martin's conduct or its impact on his decision could be dealt with by the Appeal Division. The Applicant was also in contact with the then Minister. However, the Applicant never sought any guidance, direction or order from either division of the Federal Court of Canada.

[14] While the 1983 tax litigation settled in August 1995, the 1987-88 tax years were not settled until October 2001. The Applicant then commenced the "fairness review" process which has culminated in this judicial review.

ANALYSIS

Standard of Review

[15] The Federal Court of Appeal has held, in *Lanno v. Canada (Customs and Revenue Agency)*, [2005] F.C.J. No. 714; 2005 FCA 153, that the standard of review for discretionary decisions made under the fairness provisions of the *Income Tax Act* was reasonableness *simpliciter*.

Court Proceeding Delays

[16] The Minister has taken the position that any of these delays were delays in court proceedings and were beyond the department's control. On that basis, the Minister concluded that the taxpayer was not entitled to relief.

[17] The Applicant has placed a great deal of reliance on the fact that Justice Martin's conduct raised new and unprecedented challenges in the conduct of the 1983 litigation. As such, he says that he could not proceed with that litigation, and, therefore, the 1987/88 years could not be settled. Since these were events beyond the taxpayer's control, he says that he should be entitled to interest relief.

[18] There is nothing in the legislation which restricts interest relief to those circumstances where the events causing delay were within the control of the Agency. While the matter of whether delay was within the control of the Agency would be a relevant consideration, it is not the only criterion for relief.

[19] In the Minister's own guidelines, matters which were beyond the control of either the taxpayer or the Agency (see Guidelines paragraph 5) may still entitle a taxpayer to interest (or penalty) relief. These include natural and human-made disasters, civil disturbances or disruptions in services, serious illness or accident.

[20] There is no reason why delays in court proceedings, depending on the circumstances, could not be considered as a basis for relief. In addition, neither the legislation nor the Minister's policy restricts consideration only to those events within departmental or Agency control.

[21] Although a guideline does not have the force of law and the Minister may depart from the guidelines, there must be a reasonable basis for so doing. No reasonable basis for departing from the Guidelines has been provided.

[22] Therefore, in this instance, the Minister narrowly limited his exercise of discretion and failed to properly consider events which at least, the taxpayer says, were beyond the taxpayer's control.

On this ground alone, the matter should be referred back for reconsideration in light of the Court's comments.

[23] I am reluctant to send this matter back for reconsideration on the basis of this legal error. The Court's comments on the merits of the Applicant's complaint about court delays may be of assistance since the Applicant's complaint is grounded on legal principles applicable to appeal rights.

[24] In my view, the Applicant's concerns about court delays were without foundation in law. Whatever the difficulties Justice Martin may have had, the only real issue was the merits of his decision to strike portions of the Notice of Appeal of the 1983 assessment. His decision was either correct or it was not. The principles applicable to a motion to strike a pleading are well settled and are procedural in nature.

[25] The Applicant's argument, that because Justice Martin was *ex officio* a member of the Appeal Division, the Appeal Division should not hear the appeal, ignores the reality of the structure of the Federal Court. Since different judges would hear the case, being judges who were assigned to the Appeal Division and not the Trial Division, I see no basis for the Applicant's concern.

[26] The Applicant's argument is grounded in bias or reasonable apprehension of bias. If the Applicant is correct, all courts which have a provision in the applicable court statute that bestows *ex*

officio status on judges from another court or division of the same court are tainted by institutional bias. No authority for this proposition has been advanced.

[27] There is no question that Justice Martin would not sit on the appeal of his decision. His *ex officio* status would only become relevant if that status were to be exercised and he was to hear the appeal of his decision.

[28] The Applicant's position also ignores the fact that Justice Martin ceased to be a judge of the Trial Division effective October 24, 1991. Despite that fact, the Applicant still refused to advance his appeal throughout the period from mid-June 1991 until August 1995 when the case was settled.

[29] In my view, no reasonable person reasonably informed of all of the facts and circumstances would have any reasonable apprehension of bias in the judges of the Appeal Division of the Federal Court. (See *Committee for Justice and Liberty v. Canada (National Energy Board),* [1978] 1 S.C.R. 369.)

[30] The Applicant failed to take any steps to obtain guidance from the Court as to how to proceed in these circumstances.

[31] The other reasons given in the evidence for not proceeding with the appeal, such as the fact that the Appeal Division had not sat in St. John's for three years, ignores the fact that that Court will

sit virtually anywhere in the country. The Appeal Division had presided in St. John's in the past and continued to do so when requested. The Applicant made no such request.

[32] This matter of "court delays" is being referred back, despite the infirmities of the Applicant's arguments, because the Minister did not consider the Applicant's conduct or the issue of whether delays not caused by the Respondent could form a basis for interest relief.

Minister's Failure to Act

[33] However, there is a further reason for the Minister to reconsider this interest relief – a reason which is entirely within the Minister's control.

[34] On December 23, 1991, the Minister decided to cease work on the Notice of Objection for the 1987/88 tax year pending resolution of the 1983 tax year litigation. This decision to delay or suspend work was made without the consent of the taxpayer.

[35] The Federal Court of Appeal (sitting in St. John's) decided in *Hillier v. Attorney General of Canada*, [2001] F.C.J. No. 945; 2001 FCA 197, held that the Minister had an obligation to deal with a Notice of Objection "with all due dispatch". On its face the Minister's decision not to work on the 1987/88 Notice of Objection does not comply with "due dispatch" obligation.

[36] The Respondent's argument is that the taxpayer had a right under subsection 169(1) of the *Income Tax Act* to appeal to that Tax Court if 90 days have elapsed from the taxpayer's filing of a Notice of Objection. Therefore, the Applicant had it within its power to overcome the Minister's failure to re-assess or confirm the 1987/88 assessment.

[37] Subsection 169(1) of the *Income Tax Act* read, at the applicable time, as it reads today:

169. (1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either	169. (1) Lorsqu'un contribuable a signifié un avis d'opposition à une cotisation, prévu à l'article 165, il peut interjeter appel auprès de la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation:
(a) the Minister has confirmed the assessment or reassessed, or	a) après que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation;
(b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,	b) après l'expiration des 90 jours qui suivent la signification de l'avis d'opposition sans que le ministre ait notifié au contribuable le fait qu'il a annulé ou ratifié la cotisation ou procédé à une nouvelle cotisation;
but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been mailed to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.	toutefois, nul appel prévu au présent article ne peut être interjeté après l'expiration des 90 jours qui suivent la date où avis a été expédié par la poste au contribuable, en vertu de l'article 165, portant que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation.

[38] Bowie J. of the Tax Court of Canada, in *Shabani v. The Queen* 2004 TCC 235, [2004] 2 C.T.C. 3149, described the provision as "an obscure section of the Act" and one which the Agency did not draw to the public's attention.

[39] Since the law imposes an obligation on the Minister to assess (re-assess or confirm) a tax year's filing with "all due dispatch", it is reasonable to conclude that subsection 169(1) was designed principally for situations where the taxpayer is owed money from the Canadian government and not as a mechanism to force the Agency to issue its assessment for taxes payable.

[40] In my view, subsection 169(1) does not lessen the obligation of the Minister to assess with "all due dispatch". The Minister chose not to act and did so without the taxpayer's consent.

[41] It is evident that the Minister did not consider his own failure to act in reaching his decision to deny interest relief. That failure to consider a material fact warrants Court interference and the setting aside of the Minister's decision. (See *Barron v. Minister of National Revenue*, [1997] 2 C.T.C. 198 at para. 5 (F.C.A.).)

CONCLUSION

[42] Therefore, for these reasons, this decision of the Minister to refuse interest relief will be quashed and the matter referred back for a new review in accordance with these Reasons.

"Michael L. Phelan"

JUDGE