Federal Court of Appeal  Cour d'appel fédérale

Date: 20170809

Docket: A-239-16

Citation: 2017 FCA 167

CORAM: **WEBB J.A.**
SCOTT J.A.
GLEASON J.A.

BETWEEN:

JAMES T. GRENON

Appellant

And

THE MINISTER OF NATIONAL REVENUE
and CANADA REVENUE AGENCY

Respondents

Heard at Winnipeg, Manitoba, on February 15, 2017.

Judgment delivered at Ottawa, Ontario, on August 9, 2017.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: SCOTT J.A.
GLEASON J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20170809

Docket: A-239-16

Citation: 2017 FCA 167

CORAM: **WEBB J.A.**
SCOTT J.A.
GLEASON J.A.

BETWEEN:

JAMES T. GRENON

Appellant

And

THE MINISTER OF NATIONAL REVENUE
and CANADA REVENUE AGENCY

Respondents

REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the judgment of the Federal Court (2016 FC 604) dismissing Mr. Grenon's application for judicial review of the decision of the Minister of National Revenue (Minister) denying him interest on an amount that had been refunded to him in the circumstances as described below.

[2] For the reasons that follow I would allow this appeal.

I. Background

[3] Some time prior to March 7, 2013 Mr. Grenon was reassessed under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the Act). Since the validity of the reassessments is not the issue in this matter there is very little information about the reassessments in the record. However it would appear from the two requirements to pay (that are included in the record and which are each dated February 27, 2014) that Mr. Grenon's outstanding liability under the Act as of February 27, 2014 was in excess of $200 million. There is no dispute that the reassessments which gave rise to this outstanding liability are under appeal to the Tax Court of Canada (Tax Court).

[4] On March 7, 2013, the Minister obtained an order under section 225.2 of the Act (the Jeopardy Order) to take collection action forthwith. This order was obtained on an *ex parte* basis.

[5] Following the issuance of the Jeopardy Order Mr. Grenon withdrew $15 million from his registered retirement savings plan and, on March 27, 2014, forwarded the balance that he received of $12.75 million (after withholding tax) to the Receiver General on account of his tax liability.

[6] By consent order dated July 15, 2014 the Federal Court ordered that "the Jeopardy Order is hereby set aside and vacated".

[7] On October 29, 2014 Mr. Grenon requested that the $12.75 million be refunded to him with interest pursuant to subsection 164 (1.1) of the Act. Following further exchanges of correspondence between Mr. Grenon's representative and representatives of the Minister the funds were ultimately repaid to Mr. Grenon in March 2015, without interest.

II. Decision of the Federal Court

[8] Mr. Grenon applied for judicial review of the Minister's decision to not pay interest on the amount refunded to him. The Federal Court judge found that the decision of the Minister was reasonable based on his view that Parliament's intention was "to treat voluntary payments more generously than involuntary ones" (para. 13 of the reasons).

III. Standard of Review

[9] In this appeal the first question is whether the Federal Court judge identified the proper standard of review and if so whether he applied it correctly *(Agraira v. Canada (Public Safety and Emergency Preparedness*, 2013 SCC 36, [2013] 2 SCR 559, para. 45).

[10] Both parties submit that the standard of review that the Federal Court judge should have applied is correctness, not reasonableness, as the issue was the interpretation of the Act (*Imperial Oil Resources Ltd. v. Canada (Attorney General)*, 2016 FCA 139, 2016 D.T.C. 5057, at paras. 47 and 48). In my view the decision of the Minister was neither correct nor reasonable and therefore, I would allow this appeal regardless of whether the standard of review is correctness or reasonableness. Since the issue in this case is the interpretation of the *Act*, in my view, even if

the standard of review is reasonableness, the range of reasonable statutory interpretations is narrow (*Attorney General of Canada v. First Nations Child and Family Caring Society, et al.*, 2013 FCA 75, 444 N.R. 120, at paras. 14 and 15).

IV. Issue

[11] The issue in this appeal is whether the decision of the Minister to not pay interest to Mr. Grenon on the amount refunded to him should stand.

V. Analysis

[12] The notice of reassessment (or the notices of reassessment) issued in this case reflected the determination by the Minister that the amount of taxes owing by Mr. Grenon exceeded the amounts that had been previously assessed. There is nothing in the record to indicate the number of years for which Mr. Grenon was reassessed or the basis for the reassessment of him other than a reference to a proposal "to assess [Mr. Grenon] under the so-called GARR legislation" in the Jeopardy Order and references to GAAR assessments in the letter from the Department of Justice dated February 26, 2015. GARR and GAAR would be references to the general anti-avoidance rule in section 245 of the Act. As a result of these reassessments interest would have been accruing on the outstanding tax arrears (subsection 161(1) of the Act).

[13] Generally the Minister is prohibited from taking the collection actions described in paragraphs 225.1(1)(*a*) to (*g*) of the Act:

a) during the period within which the taxpayer may serve a notice of objection (subsections 225.1(1) and (1.1) of the Act);

b) if the taxpayer serves a notice of objection, until 90 days after the notice has been sent that the Minister has confirmed or varied the assessment (subsection 225.1(2) of the Act); and

c) if the taxpayer has appealed to the Tax Court, the earlier of the day of the mailing of the decision of the Tax Court or the day on which the taxpayer discontinues the appeal (subsection 225.1(3) of the Act).

[14] However, the Minister may apply *ex parte* to a judge of a superior court of a province or the Federal Court for a jeopardy order under section 225.2 of the Act to take collection action during any of the periods referred to above if there are grounds to believe that collection of the amount owing will be jeopardized by delay. In this case the Jeopardy Order was issued on March 7, 2013. Under the Act, a taxpayer may apply to the Federal Court to review an authorization issued under section 225.2 of the Act. Following that review the judge "may confirm, set aside or vary the authorization" (subsection 225.2(11) of the Act). In this case, by consent order dated July 15, 2014, the Jeopardy Order was "set aside and vacated".

[15] On October 29, 2014 Mr. Grenon wrote a letter to the Receiver General and the Canada Revenue Agency requesting a refund of the $12.75 million plus interest pursuant to subsection 164(1.1) of the Act. In March 2015 the amount of $12.75 million was refunded to Mr. Grenon, without interest.

[16] Subsection 164(1.1) of the Act provides that:

(1.1) Subject to subsection 164(1.2), where a taxpayer	(1.1) Sous réserve du paragraphe (1.2), lorsqu'un contribuable demande au ministre, par écrit, un remboursement ou la remise d'une garantie, alors qu'il a :
(*a*) has under section 165 served a notice of objection to an assessment and the Minister has not within 120 days after the day of service confirmed or varied the assessment or made a reassessment in respect thereof, or	*a*) soit signifié, conformément à l'article 165, un avis d'opposition à une cotisation, si le ministre, dans les 120 jours suivant la date de signification, n'a pas confirmé ou modifié la cotisation ni établi une nouvelle cotisation à cet égard;
(*b*) has appealed from an assessment to the Tax Court of Canada,	*b*) soit appelé d'une cotisation devant la Cour canadienne de l'impôt,
and has applied in writing to the Minister for a payment or surrender of security, the Minister shall, where no authorization has been granted under subsection 225.2(2) in respect of the amount assessed, with all due dispatch repay all amounts paid on account of that amount or surrender security accepted therefor to the extent that	le ministre, si aucune autorisation n'a été accordée en application du paragraphe 225.2(2) à l'égard du montant de la cotisation, avec diligence, rembourse les sommes versées sur ce montant ou remet la garantie acceptée pour ce montant, jusqu'à concurrence de l'excédent du montant visé à l'alinéa *c*) sur le montant visé à l'alinéa *d*):
(*c*) the lesser of	*c*) le moins élevé des montants suivants :
(i) the total of the amounts so paid and the value of the security, and	(i) le total des sommes ainsi versées et de la valeur de la garantie,
(ii) the amount so assessed	(ii) le montant de cette cotisation;
Exceeds	
(*d*) the total of	*d*) le total des montants suivants :

(i) the amount, if any, so assessed that is not in controversy, and	(i) la partie du montant de cette cotisation qui n'est pas en litige,
(ii) 1/2 of the amount so assessed that is in controversy if	(ii) la moitié de la partie du montant de cette cotisation qui est en litige si, selon le cas :
(A) the taxpayer is a large corporation (within the meaning assigned by subsection 225.1(8)), or	(A) le contribuable est une grande société, au sens du paragraphe 225.1(8),
(B) the amount is in respect of a particular amount claimed under section 110.1 or 118.1 and the particular amount was claimed in respect of a tax shelter.	(B) le montant se rapporte à une somme qui est déduite en application des articles 110.1 ou 118.1 et qui a été demandée relativement à un abri fiscal.
(emphasis added)	(soulignement ajouté)

[17] If the amount was refunded under this subsection, then Mr. Grenon would have been entitled to interest on such refund under subsection 164(3) of the Act. Therefore, the issue in this case is whether subsection 164(1.1) of the Act applied.

[18] The Supreme Court of Canada in *Canada Trustco Mortgage Co. v. The Queen*, 2005 SCC 54, [2005] 2 SCR 601, noted that:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose

> on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[19] In this case it is the words "where no authorization has been granted under subsection 225.2(2) in respect of the amount assessed" that must "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". In particular, the issue is how these words are to be read or applied when a subsequent order of the Federal Court has set aside the Jeopardy Order.

[20] In paragraph 23 of the respondents' memorandum of fact and law it is submitted that:

> Where a jeopardy order is set aside by the court, the Minister loses authority to take any further collection action on the strength of the jeopardy order and also for any collection actions already taken. The loss of that authority necessarily means that such actions are undercut and that any amounts collected by such actions must be repaid to the taxpayer.

[21] Although the respondents do not refer to the jeopardy order being annulled, this would appear to be their submission. If the Jeopardy Order was valid until July 15, 2014 (the date of the order setting it aside) and setting it aside only affected the validity of the Jeopardy Order from that date forward, why would amounts collected before July 14, 2014 have to be refunded? If setting aside the Jeopardy Order means that it was as if that order had never been issued, then amounts collected in March 2013 would have to be refunded. This is consistent with the position of the respondents as set out above.

[22] The position of the respondents is consistent with the following statement of the majority of the Supreme Court of Canada in *Singer v. J.H. Ashdown Hardware Co.*, [1953] 1 S.C.R. 252, [1953] 2 D.L.R. 625:

> The words "until set aside" are significant and in general the rule is subject to that condition. In principle I would think that must be so and it has been held that if such a judgment is properly set aside, it is as if it had never existed,--*Goodrich v. Bodurtha* [(1856) 72 Mass. (6 Gray) 323.] referred to by Riddell J. in *Re Harper and Township of East Flamborough* [(1914) 32 O.L.R. 490.], and *Partington v. Hawthorne* [(1888) 52 J.P. 807.] cited in dote (d) in Halsbury.
>
> (emphasis added)

[23] This is also consistent with the definition of "set aside" in Black's Law Dictionary (10th ed.) which is "to annul or vacate". Since to "set aside" means to "annul or vacate" and since the second order provided that the Jeopardy Order was "set aside and vacated", the Jeopardy Order, in this case, would have been annulled and vacated.

[24] This would also be consistent with *Canada (Minister of National Revenue) v. Douville*, 2009 FC 986, 2010 D.T.C. 5017 where the application to review a jeopardy order was granted on October 2, 2009. The Federal Court judge noted the consequences of setting aside this order:

> 25. […]Consequently, this order dated February 1, 2008, is set aside and the collection measures taken under it are declared null and void, with the result that all of the amounts seized further to these collection measures are to be reimbursed to the applicant.

[25] If setting aside the jeopardy order in that case meant that the order was valid until judgment was rendered on October 2, 2009, any collection action taken before October 2, 2009 would still be valid.

[26] As a result, setting aside the Jeopardy Order in this case would mean that subsection 164(1.1) of the Act, should be read as if the Jeopardy Order had never been issued. This would mean that "no authorization has been granted under subsection 225.2(2) in respect of the amount assessed" for the purposes of this subsection. Since Mr. Grenon has appealed the reassessments to the Tax Court and has applied in writing for the refund, the other conditions of this subsection have been satisfied and interest is payable under subsection 164(3) of the Act.

[27] This interpretation is also consistent with the context and purpose of the Act. The reassessments that gave rise to the tax arrears are under appeal. It is not appropriate in this appeal to speculate on the likely outcome of Mr. Grenon's appeal to the Tax Court. Given the limited information in the record with respect to the reassessments and his appeal, it is also not possible to do so in any event.

[28] For the purposes of determining the interpretation of subsection 164(1.1) of the Act, there are three possible final outcomes of Mr. Grenon's appeal to the Tax Court (after any appeals from the judgment of the Tax Court have been decided):

a) Mr. Grenon will be entirely successful and the reassessments will be vacated or the reassessments will be varied to reduce the outstanding liability to nil. For ease of reference, this result will be described as the reassessments being vacated;

b) The reassessments will be confirmed or varied to an amount in excess of the amount refunded to him; or

c) The reassessments will be varied to an amount less than the amount refunded to him.

[29] If he is entirely successful and the reassessments are vacated, it would seem logical that he should receive interest on this amount that should not have been collected at all. As well, if the $12.75 million would have been retained by the federal government and not refunded to him, Mr. Grenon would be entitled to interest on this amount when the reassessments are vacated as this amount would then be an overpayment for the purposes of section 164 of the Act. If he would be entitled to interest on this amount if it is refunded to him following the reassessments being vacated, then it is far from clear why Parliament would have intended that he not receive interest on this amount if it is refunded to him before the reassessments are vacated. In either case, in this scenario, the ultimate determination is that the reassessments are vacated and therefore, the refunded amount was not payable by Mr. Grenon.

[30] If he is not entirely successful on appeal to the Tax Court and he owes more than the amount refunded to him, not only will any interest paid to him on this refunded amount have to be repaid but interest will also be payable on this interest amount (subsection 164(4) of the Act). Therefore, the federal government would be entitled to recover any interest paid on the refunded amount.

[31] If his ultimate liability is less than the amount refunded to him, this is a hybrid of the first two scenarios. He is still required to repay the interest that was paid to him on the refunded amount that is determined to be payable (together with interest on that interest) (subsection 164(4) of the Act). The federal government is therefore entitled to recover any interest paid on the amount that is ultimately payable by Mr. Grenon.

[32] However, to the extent that his liability is reduced to an amount that is less than the refunded amount, there will be a portion of the refunded amount that, based on the subsequent determination by the Tax Court (or on appeal from the decision of the Tax Court) was not payable by Mr. Grenon for the applicable taxation year(s). In my view, since interest would be payable on such overpayment if the amount would have been retained by the federal government until the reassessments are varied, it would not have been the intent of Parliament that Mr. Grenon would be deprived of interest on such overpayment if the amount was repaid to him prior to the reassessments being varied. Since the result of the reassessments being varied is that there would be a portion of the amount that was not payable by him for the taxation years in question, in my view, he should be entitled to interest on the refunded amount. The federal government will still be entitled to recover the interest paid on the refunded amount that, as a result of the appeal, is still owing (together with interest on such interest amount) so the federal government is not prejudiced by paying interest on the amount refunded to him.

[33] Since any interest paid on the amount refunded to him will have to be repaid with interest if the result of Mr. Grenon's appeal is that all or a portion of the refunded amount is still payable, there is no loss to the federal government if interest is paid on the refunded amount, absent any collection concerns. Since the Jeopardy Order was set aside and the amount was refunded to him and no order was sought under subsection 164(1.2) of the Act, presumably there are no collection concerns in this case.

[34] There is a loss to Mr. Grenon if interest is not paid on the refunded amount and he is successful in his appeal in reducing his outstanding liability to less than the refunded amount. In my view, this would support the contextual interpretation that interest should be paid to him on the refunded amount.

[35] As a result, in my view, the interpretation of subsection 164(1.1) of the Act by the Minister in this case that no interest is payable to Mr. Grenon as provided in subsection 164(3) of the Act on the refunded amount is incorrect and unreasonable.

[36] Mr. Grenon has asked for a declaration confirming this as well as an order of *mandamus* requiring the Minister to pay this interest. In *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, this Court set out the principal requirements that must be satisfied before an order of mandamus will be issued. These include a public duty to act and "a clear right to performance of that duty" (para. 45, requirement number 3). In my view, the request for an order of mandamus is premature. Interest was not paid in this case because of the Minister's interpretation of subsection 164(1.1) of the Act. Since this interpretation has been found to be incorrect and unreasonable, it is speculation whether the Minister would still refuse to pay interest. In my view, a declaration should be made that interest is payable. If the Minister should still refuse to pay interest, then Mr. Grenon could seek an order of mandamus. However, the Minister should first be given the opportunity to pay interest based on a declaration that interest is payable.

[37] As a result, I would allow this appeal, set aside the decision of the Federal Court judge and rendering the decision that the Federal Court judge should have rendered, I would allow the

application for judicial review and issue a declaration that the Minister is obligated to pay interest to Mr. Grenon as provided in subsection 164(3) of the Act on the $12.75 million refunded to him. Mr. Grenon is entitled to costs here and in the court below.

"Wyman W. Webb"

J.A.

"I agree
A.F. Scott J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED MAY 31, 2016 NO. T-1013-15 (2016 FC 604)

DOCKET:	A-239-16
STYLE OF CAUSE:	JAMES T. GRENON V. THE MINISTER OF NATIONAL REVENUE AND CANADA REVENUE AGENCY
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	FEBRUARY 15, 2017
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	SCOTT J.A GLEASON J.A.
DATED:	AUGUST 9, 2017

APPEARANCES:

Cy M. Fien Paul K. Grower	FOR THE APPELLANT
Michael J. Lema Rachelle Nadeau	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Fillmore Riley LLP Winnipeg, Manitoba	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENTS