Federal Court of Appeal

Cour d'appel fédérale

Date: 20201230

Docket: A-359-19

Citation: 2020 FCA 225

CORAM: **NEAR J.A.**
LOCKE J.A.
MACTAVISH J.A.

BETWEEN:

GEOFFREY BELCHETZ, STEVEN BLACK, LORENZO BRANDIMARTE, CLEMENTE CABILLAN, WAYNE CARMAN, JOYCE DOYLE, TIMOTHY FELTIS, JOSEPH GOTTDENKER, ROBERT HILL, FRANK KOSAR, HENRY KUTZKO, STUART MITCHELL, FRANN RASMINSKY-MITCHELL, JOHN NKANSAH, NARH OMABOE, JAMES RATHBUN, LOUIS SCHEINMAN, HOWARD SIDSWORTH, MICHAEL SLOCOMBE, ROBERT TAUTKUS, GARY THORNTON, EDWARD VALLEAU, and WALTER VOGL

Appellants

and

HER MAJESTY THE QUEEN (as represented by the Minister of National Revenue in her capacity as Minister responsible for the Income Tax Act), CANADA REVENUE AGENCY and THE ATTORNEY GENERAL OF CANADA

Respondents

Heard by online video conference hosted by the Registry on December 7, 2020.

Judgment delivered at Ottawa, Ontario, on December 30, 2020.

REASONS FOR JUDGMENT BY:	MACTAVISH J.A.
CONCURRED IN BY:	NEAR J.A. LOCKE J.A.

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] In the mid-1980s, the appellants invested in a scheme that was ultimately determined to be fraudulent. As a consequence, tax losses and deductions claimed by the appellants were disallowed by the Canada Revenue Agency (CRA). In 2014, the Tax Court of Canada dismissed the appellants' tax appeals.

[2] The appellants also sought relief from the interest that had accrued on their unpaid taxes under the "taxpayer relief" provision contained in subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [*ITA*]. The appellants' request for relief was considered by three different officials within the CRA, and the appellants received some 15 years of interest relief as a result of the first two administrative reviews. The third administrative review determined that no additional interest relief was warranted, and this decision was subsequently affirmed by the Federal Court in a judgment cited as 2019 FC 1034.

[3] The appellants now appeal from the Federal Court's judgment, asserting that the CRA's decision to deny them further interest relief was unreasonable. They say that the CRA official carrying out the third administrative review failed to consider their request for relief in light of a provision in the relevant CRA Information Circular. This provision states that interest may be waived or cancelled if it resulted from processing delays on the part of the CRA that result in the taxpayer not being informed, within a reasonable time, that an amount was owing.

[4] While it is true that the third administrative reviewer did not make express reference to this provision in his decision, it is clear that he considered whether the appellants should receive additional interest relief in light of delays on the part of the CRA in processing the appellants' tax returns. Both the rationale for rejecting the appellants' relief request and the outcome to which it led were reasonable, and no basis has been shown that would warrant this Court's intervention. Consequently, I would dismiss the appeal.

I. Background

[5] The appellants invested in one or more limited partnerships offered by the Overseas Credit and Guaranty Corporation (OCGC) in 1984, 1985 and 1986. These partnerships were held out as providing an opportunity to invest in a luxury yacht chartering business, which had been structured in a manner as to provide very attractive tax advantages and limited personal risk to investors.

[6] OCGC provided investors with yearly loss schedules for the 1984 to 1988 tax years, and investors claimed their proportionate share of these losses as deductions when filing their income tax returns for the years in question.

[7] The CRA began auditing the OCGC scheme in 1986, and in late 1987, the appellants received letters from the CRA advising them that their tax returns were being held in abeyance until completion of the CRA's audit. These letters have been referred to in this proceeding as the "intercept letters". The appellants were advised in the intercept letters that they had the option of

having their tax returns assessed without the deductions in question, and they were asked to contact the CRA's Audit Programs Directorate if they were interested in pursuing this option. None of the appellants did so.

[8] In or around the fall of 1990, the appellants received notices of assessment or reassessment advising them that the OCGC-related losses that they had claimed on their tax returns had been disallowed. The appellants were also advised of the amount of taxes and interest then owing.

[9] Settlement discussions ensued, and a number of investors ultimately settled with the CRA. Other investors objected to, and then appealed, their tax assessments. These appeals culminated in the 2014 decision of the Tax Court dismissing the appellants' appeals: *Garber v. Canada*, 2014 TCC 1, [2014] 4 C.T.C. 2077.

[10] In rejecting the appellants' appeals, the Tax Court found that the yacht chartering business was nothing more than an illusion, and that the OCGC limited partnerships were not engaged in genuine businesses. The Tax Court further found that the investors were innocent dupes who had been induced by misrepresentations to invest in what was in fact a Ponzi-like scheme, with the result that all of the appellants' claimed deductions were disallowed. The principals behind the OCGC scheme were charged criminally and were convicted of fraud in relation to the investment scheme.

a) The First Administrative Review

[11] Some investors (including the appellants) had requested interest relief in 2004 in accordance with subsection 220(3.1) of the *ITA* as it then stood. Subsection 220(3.1) was amended in 2005, limiting the period for which interest relief can be granted to ten years. Because the appellants' requests were filed prior to 2005, the appellants were not restricted as to the period for which the Minister could grant interest relief. The primary basis for relief cited by the appellants was administrative delay on the part of the CRA.

[12] The appellants' requests for relief were held in abeyance, pending the Tax Court's decision with respect to their tax appeals. The requests for relief were reactivated after the Tax Court rendered its decision in 2014, and a member of the CRA's Appeals Division conducted the first administrative review of the appellants' requests for interest relief in 2015. The result of this review was that approximately 14 years of accrued interest was cancelled because of processing delays on the part of the CRA.

[13] Of particular relevance to this appeal is the relief that was granted with respect to the 1985 to 1989 taxation years. Relief was granted for the 1985, 1986 and 1987 tax years for the periods between:

1. January 1, 1988 to December 12, 1988;
2. January 14, 1989 to March 14, 1989;
3. June 15, 1989 to April 25, 1990; and
4. May 1, 1990 to March 14, 1991.

Interest relief was granted for the 1988 taxation year for the period between June 15, 1989 and March 14, 1991, and for the 1989 taxation year for the period between May 1, 1990 and March 14, 1991.

[14] The focus of this appeal is on the Minister's refusal to grant interest relief to the appellants for the entire period from the filing deadline in each of the subject years, starting on May 1, 1985, until the date on which each appellant first received a notice of assessment or reassessment.

[15] The appellants say that they should have been granted relief for this entire period, as it was not until late 1990, when the CRA issued the notices of assessment or reassessment, that they could have known about the large-scale, sophisticated fraud perpetrated by the principals behind the OCGC scheme. Indeed, the appellants say that it was only then that they were made aware of the disallowance of their claimed losses and deductions, and of the amounts that they owed to the CRA as a result of such assessments or reassessments.

b) The Second Administrative Review

[16] Not satisfied with the first administrative review, the appellants sought a further review of their request for taxpayer relief. Amongst other things, the appellants sought relief for the period between May 1, 1985 and the fall of 1990 for which relief had not already been granted. The appellants once again asserted that it was unfair for them to have been charged interest for the period before they had been told how much tax was owing.

[17] The appellants' second administrative review request was granted, in part, with interest relief being granted for various periods between August of 2014 and May of 2017 because of delays on the part of the CRA in the wake of the Tax Court's decision. No additional relief was granted for the period between May 1, 1985 and the fall of 1990. The result of the first and second level administrative reviews was that the appellants received approximately 15 years' worth of interest relief.

[18] While recognizing that it had taken some 30 years from the date of the appellants' income tax assessments to the completion of the Tax Court proceedings, the second administrative review found that no additional relief should be granted to the appellants in this regard. In coming to this conclusion, the decision-maker noted that relief had already been granted to the appellants in the first administrative review for CRA delays in the audit, appeals and Tax Court proceedings.

[19] The second administrative review further found that the intercept letters that were sent to the appellants advised them that they could avoid interest charges by remitting the unpaid amount immediately. The letters did not in fact say any such thing.

[20] The appellants sought judicial review of the decision in the second administrative review in the Federal Court, and the application was subsequently settled without a hearing. In accordance with Minutes of Settlement agreed to by the parties, the appellants' requests for interest relief were to be reconsidered on an expedited basis by a CRA official who had not previously been involved in this matter.

[21] The parties further agreed that this independent review would be limited to consideration of the issue of CRA delay during the audit of the OCGC Limited Partnerships and their investors, during the appeals and objection process and during the litigation before the Tax Court. It was also agreed that the circumstances of individual investors would not be taken into account, but that the reviewer would consider all relevant facts, documents, circumstances and legal arguments that the appellants as a group had presented to the CRA.

c) The Third Administrative Review

[22] A third review of the appellants' request for relief was then carried out by a Minister's delegate in accordance with the Minutes of Settlement. The appellants provided the Minister's delegate with three sets of written submissions, advancing a number of arguments as to why, in their view, additional interest relief was warranted in this case. The record that was placed before the Minister's delegate also included hundreds of documents, as well as the parties' submissions with respect to the first and second administrative reviews, and the first and second decisions themselves.

[23] Each of the appellants' arguments were rejected by the Minister's delegate, who determined that no additional interest relief was warranted in this case. Insofar as the 1985–1990 period relevant to this appeal is concerned, the Minister's delegate found that the appellants' tax returns had been reassessed within the timeframe established by the *ITA*. The appellants had, moreover, been provided with intercept letters as early as 1987, informing them that their 1986 returns were being held in abeyance pending a review of the OCGC limited partnerships. The

CRA had further advised the appellants that they could have their tax returns processed without the deductions claimed, but the appellants had chosen not to pursue this option. As a result, the Minister's delegate found that the accrual of interest over the period in question was not a matter that was beyond the appellants' control.

[24] The Minister's delegate also observed that the delays in the assessment and reassessment of the appellants' tax returns that were attributable to the CRA had been considered in earlier administrative reviews, and that the appellants had already received relief for any period in which the audit was not actively being worked on. Consequently, the Minister's delegate concluded that the appellants were not entitled to any additional arrears interest relief.

II. The Federal Court's Decision

[25] The appellants sought judicial review of the Minister's delegate's decision. The Federal Court subsequently determined that the decision was reasonable, and dismissed the appellants' application.

[26] In finding that the Minister's delegate's decision was reasonable, the Federal Court observed that the sheer quantity of the delays that had occurred in this case did not automatically warrant interest relief. The Court found that the Minister's delegate had conducted a holistic review of all the delays, and had reasonably considered the length of the delays, the fact that certain periods were not appropriate for interest relief, and the fact that other delays had already

been accounted for in the earlier reviews. The Minister's delegate had also had regard to the other considerations raised by the appellants.

[27] The Federal Court also found that there were no circumstances beyond the appellants' control that had prevented them from complying with their obligation to pay their taxes. Had the appellants accepted the offer contained in the intercept letters to have their tax returns assessed without the deductions in issue, they would have received notices of assessment. They could have then objected to the assessments on the basis that they did not include the tax credits and deductions to which the appellants believed they were entitled. If the appellants had paid the taxes owing as stated in the assessments, no interest would have accumulated. If the appellants' objections were ultimately upheld, and the flow-through tax credits and deductions found to be valid, they could have been retroactively granted the credits and deductions with interest, thereby making them whole.

III. Issue

[28] The only issue identified by the appellants is whether the Minister's delegate's decision to deny interest relief for the entirety of the period between the filing deadline for each of the tax years in issue, and the date on which the appellants received their notices of assessment or reassessment was reasonable.

IV. Standard of Review

[29] On an appeal from a decision of the Federal Court sitting in judicial review of an administrative decision, this Court must “step into the shoes” of the Federal Court, and determine whether it appropriately selected and properly applied the standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47.

[30] This Court has previously determined that the “unstructured nature” of the Minister's powers under subsection 220(3.1) of the *ITA* militates against a court subjecting the decision-making process to close scrutiny: *Canada Revenue Agency v. Telfer*, 2009 FCA 23, 386 N.R. 212, at para. 40, leave to appeal to SCC refused, [2009] S.C.C.A. No. 142. Reasonableness is thus the standard of review to be applied in reviewing the exercise of the Minister’s discretion under subsection 220(3.1) of the *ITA*: *Telfer*, above at para. 24.

[31] The Federal Court correctly identified reasonableness as the appropriate standard of review to be applied in this case. In determining whether the Minister’s delegate’s decision was reasonable, the Federal Court applied the jurisprudence governing at the time, namely the Supreme Court of Canada’s decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190. While *Dunsmuir* has since been overtaken by the Supreme Court’s decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, I am not persuaded that the evolution in the jurisprudence would have affected the result in

this case as the Minister's delegate's decision was reasonable under both the *Dunsmuir* and *Vavilov* standards.

V. The Appellants' Argument

[32] The appellants submit that their cases fall squarely within paragraph 26(a) of CRA Information Circular 07-1R1, "Taxpayer Relief Provisions" (August 18, 2017). This paragraph provides that penalties and interest may be waived or cancelled "if they resulted mainly because of actions of the CRA, such as processing delays that result in the taxpayer not being informed, within a reasonable time, that an amount was owing".

[33] The appellants acknowledge that as a result of the intercept letters that they received in late 1987, they were made aware that the OCGC scheme was being audited. However, they contend that it was not until they received their notices of assessment or reassessment in late 1990 that they were told that the losses and deductions that they had claimed were being disallowed, and that a specific amount of tax was owing to the CRA.

[34] The appellants say that contrary to paragraph 26(a) of the Information Circular, the first administrative reviewer erred by failing to grant them interest relief for the entire period between the filing deadline for each of the tax years in issue and the date on which each appellant received a notice of assessment or reassessment.

[35] This error was perpetuated, the appellants say, in the second administrative review when they were once again denied additional interest relief for the period in issue, with no meaningful reasons being provided for disallowing their request for further relief beyond the conclusory statement that “further relief is not warranted”.

[36] The appellants submit that this finding was based upon information that was clearly erroneous. That is, the “Taxpayer Relief Fact Sheet” obtained by one of the taxpayers pursuant to the *Access to Information Act*, R.S.C. 1985, c. A-1, misrepresents what the appellants had been told in the intercept letters. According to this document, the appellants were advised to remit their unpaid taxes immediately so as to avoid interest charges. The appellants submit that the intercept letters that were received by the appellants contain no such advice.

[37] This appeal relates to the third administrative review, and not to the first two reviews. The appellants acknowledge that the error made in the second administrative review as to what they had been told in the intercept letters was corrected in the third level review. They contend, however, that the Minister’s delegate decision was unreasonable, as it did not consider their request for relief under paragraph 26(a) of the Information Circular, a request that they say had not been properly considered in either of the earlier reviews.

[38] According to the appellants, the Minister’s delegate “side-stepped” the issue of CRA delays by focussing on paragraph 25 of the Information Circular, rather than paragraph 26(a). Paragraph 25 provides that relief from interest and penalties may be granted “in whole or in part, if they result from circumstances beyond a taxpayer’s control”.

VI. Analysis

[39] In determining whether to grant taxpayer relief pursuant to subsection 220(3.1) of the *ITA*, the Minister does not have a free hand to do whatever she wants, to act on a whim, or to unthinkingly rubber-stamp an earlier assessment: *Canada v. Guindon*, 2013 FCA 153 at paras. 57-58, aff'd 2015 SCC 41, without discussion of this issue. Courts can, moreover, intervene where a decision has been based on an erroneous finding of fact: *Lalonde v. Canada (Revenue Agency)*, 2010 FC 531 at para. 32.

[40] All relevant considerations must be taken into account, and the decision in an administrative review must be based on the fairness purposes that lie behind subsection 220(3.1) of the *ITA*, as well as the purposes behind the *ITA* generally: *Guindon* (FCA), above at para. 58. The Minister's discretion must also be genuinely exercised, and must not be fettered or dictated by policy statements such as Income Tax Information Circular IC 07-1R1: *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710, at paras 25, 27.

[41] This latter principle is clearly spelled out in paragraph 24 of the Information Circular, which states that its provisions are guidelines only, and that they are not binding in law.

[42] It is evident from a review of the third administrative review that all of the appellants' submissions were taken into account by the Minister's delegate. In his 21-page analysis, the Minister's delegate identified each of the issues that had been raised by the appellants, their submissions with respect to each issue are then summarized, and an analysis is provided

explaining why, in the view of the Minister's delegate, no additional interest relief was warranted in this case.

[43] It is true that the Minister's delegate considered whether the accrual of interest on the appellants' unpaid taxes for the period in issue was due to circumstances that were beyond the taxpayers' control, as contemplated by paragraph 25 of the Information Circular. In concluding that this was not the case, he noted that the intercept letters gave the appellants the option of having their tax returns assessed without the OCGC-related flow-through tax credits and other deductions. He also noted that had the appellants accepted this offer, it would have had the effect of "stopping the clock" on the accrual of interest while the appellants pursued the objection and appeal processes. The Federal Court did not err in finding this aspect of the Minister's delegate's decision to be reasonable.

[44] While no explicit reference was made to paragraph 26(a) of the Information Circular in the Minister's delegate's decision, a review of that decision reveals that the appellants' submissions with respect to processing delays on the part of the CRA were carefully considered by the Minister's delegate. He clearly turned his mind to the question of whether additional interest relief was warranted for the period between the filing deadline in each of the subject years and the date on which each appellant first received a notice of assessment or reassessment.

[45] This is illustrated by the Minister's delegate's comments at page 3 of his decision. There he states that it was reasonable for the CRA to take until October of 1986 to start the audit process, as the CRA would not have been able to determine whether an audit would be required

until the taxpayers' tax returns were filed claiming the OCGC-related losses. The period from May 1, 1985 to October 1986 is one of the periods for which the appellants say they should have been granted interest relief based on delays on the part of the CRA.

[46] The Minister's delegate then refers to the 1987 intercept letters at pages 3 and 4 of his decision, finding that the CRA "did its due diligence in giving taxpayers the option of receiving notification of their balance owing in a timely manner". He later observed that "[w]hile being informed of an audit does not mean taxpayers knew the limited partnership losses in review would be disallowed, my review finds the CRA was diligent in informing taxpayers of their actions relating to the OCGC claims".

[47] The Minister's delegate also noted that the periods that were attributable to delays on the part of the CRA had been considered in the first and second administrative reviews, and that relief had already been provided for the periods during which the audit was not being actively worked on. Interest relief had also been granted for any delays that were attributable to the CRA for the period prior to the appellants' tax returns being assessed or reassessed.

[48] The Minister's delegate ended this section of his analysis by finding that there had been no undue delays on the part of the CRA that warranted additional interest relief for the period in issue beyond that which had been awarded in the first administrative review.

VII. Conclusion

[49] At the end of the day, the Minister's delegate conducted a holistic review of the processing delays that had occurred in this case including the processing delays that had occurred in the 1985–1990 period. He considered the appellants' submissions and explained why he was not persuaded that any additional relief was warranted in this regard. His decision was transparent, intelligible and justified. The Federal Court thus did not err in finding the Minister's delegate's decision to be reasonable, and I would therefore dismiss the appeal.

VIII. Costs

[50] In accordance with the agreement of the parties, I would grant the respondent her costs fixed in the amount of $2,000, inclusive of disbursements and GST.

"Anne L. Mactavish"
J.A.

"I agree.
D. G. Near J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-359-19
STYLE OF CAUSE:	GEOFFREY BELCHETZ, STEVEN BLACK, LORENZO BRANDIMARTE, CLEMENTE CABILLAN, WAYNE CARMAN, JOYCE DOYLE, TIMOTHY FELTIS, JOSEPH GOTTDENKER, ROBERT HILL, FRANK KOSAR, HENRY KUTZKO, STUART MITCHELL, FRANN RASMINSKY-MITCHELL, JOHN NKANSAH,, NARH OMABOE, JAMES RATHBUN, LOUIS SCHEINMAN, HOWARD SIDSWORTH, MICHAEL SLOCOMBE, ROBERT TAUTKUS, GARY THORNTON,, EDWARD VALLEAU, AND WALTER VOGL v. HER MAJESTY THE QUEEN (AS REPRESENTED BY THE MINISTRER OF NATIONAL REVENUE IN HER CAPACITY AS MINISTER RESPONSIBLE FOR THE INCOME TAX ACT), CANADA REVENUE AGENCY AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	DECEMBER 7, 2020
REASONS FOR JUDGMENT BY:	MACTAVISH J.A.
CONCURRED IN BY:	NEAR J.A. LOCKE J.A.

DATED:	DECEMBER 30, 2020

APPEARANCES:

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