Federal Court of Appeal Cour d'appel fédérale

**Date: 2022-08-19**

**Docket: A-310-19**

**Citation: 2022 FCA 147**

**CORAM:** **GLEASON J.A.**
**WOODS J.A.**
**RIVOALEN J.A.**

**BETWEEN:**

**RANDALL BARRS**

**Appellant**

**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 at Toronto, Ontario, on April 25, 2022.
Judgment delivered at Ottawa, Ontario, on August 19, 2022.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: WOODS J.A.
RIVOALEN J.A.

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## REASONS FOR JUDGMENT

## GLEASON J.A.

[1] Over thirty-five years ago, the appellant, Randall Barrs, and several other taxpayers invested in a tax scheme that was found to be fraudulent. The Minister of National Revenue (the Minister) disallowed the losses and deductions claimed by them in relation to the scheme. Several of the investors, including Mr. Barrs, challenged the Minister's reassessments for the

taxation years in which they claimed losses and deductions in relation to this tax scheme, but were unsuccessful (*Garber v. Canada*, 2014 TCC 1, [2014] 4 C.T.C. 2077).

[2] As the matter wound its way through the Canada Revenue Agency (the CRA) and the courts, interest continued to accrue on the taxpayers' outstanding tax debts. Mr. Barrs and several other taxpayers sought relief under subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA) from the obligation to pay accrued interest. The Minister partially granted their requests for relief in a series of decisions. The last of these was issued by a ministerial delegate on April 23, 2018 (the Third Independent Level Review decision).

[3] The appellant and several other taxpayers brought applications for judicial review before the Federal Court to set aside the Third Independent Level Review decision. In the judgment under appeal, reported as *Brandimarte v. Canada,* 2019 FC 1034 (*per* Boswell, J.) [*Brandimarte*], the Federal Court dismissed their judicial review applications.

[4] Mr. Barrs now appeals the Federal Court's judgment in his case to this Court. Several other taxpayers whose applications were also dismissed by the Federal Court in *Brandimarte* also appealed to this Court. In *Belchetz v. Canada (National Revenue),* 2020 FCA 225 [*Belchetz*], this Court dismissed their appeals.

[5] As is more fully discussed below, Mr. Barrs' situation is different in one important respect from those of the taxpayers whose appeals were dismissed in *Belchetz*. The decision in

*Belchetz* is not binding on us in respect of the issue that arises only in Mr. Barrs' appeal because that issue was not considered in *Belchetz*.

[6] For the reasons that follow, I would grant this appeal, without costs, on the terms set out below.

I. Background

[7] To put the issues that arise in this appeal into context, it is necessary to briefly review the factual background.

[8] Commencing in 1984, a number of taxpayers (including Mr. Barrs) invested in limited partnerships that were promoted and marketed by the Overseas Credit and Guaranty Corporation (OCGC) as a vehicle to invest in a luxury yacht chartering business. OCGC promoted the investment as one that would afford investors tax savings by passing on to them flow-through losses, depreciation costs, interest expenses and expenses for professional fees.

[9] In 1986, the CRA began to audit OCGC and many of the taxpayers who bought into one of these limited partnerships.

[10] Commencing in 1987, the CRA sent letters to the investing taxpayers, including Mr. Barrs, advising that their tax returns were being held in abeyance until completion of the CRA's audit. In these letters, the CRA offered the taxpayers the opportunity to have their returns

assessed without including the losses. Mr. Barrs, along with several other taxpayers, including the appellants in *Belchetz*, declined to take up this invitation.

[11] In 1994, the CRA agreed to settle the taxpayers' cases, including that of Mr. Barrs, and then quickly repudiated the agreement. The principal motivation for the repudiation was the Crown's belief that the settlement might prejudice the criminal case against the principals of OCGC. Several years later, the taxpayers applied for relief in the Tax Court on the basis that the repudiation was an abuse of process. The application was denied on the ground that there was no legal basis to provide the relief sought (*Garber v. The Queen*, 2005 TCC 635, aff'd 2006 FCA 177, 60 D.T.C. 6358).

[12] In 2004, a group of the impacted taxpayers, which did not include Mr. Barrs but did include the appellants in *Belchetz*, made a request under subsection 220(3.1) of the ITA for relief from the obligation to pay the accrued interest, while their cases were still pending. Subsection 220(3.1) of the ITA, as it read when they made their applications, placed no time limit on the period in respect of which the Minister could afford relief.

[13] In 2005, subsection 220(3.1) of the ITA was amended to place a ten-year limit on the period during which the Minister may afford relief. At the times relevant to this appeal (as well as currently), subsection 220(3.1) of the ITA provided:

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|---|---|
| 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 | 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 |

| | |
|---|---|
| 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. | 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. |

[14] Mr. Barrs made his request for relief in 2014, after the appeal to the Tax Court was dismissed.

[15] In June 2015, the first-level review officer, who reviewed the relief requests on behalf of the Minister, granted those who had made their relief applications in 2004, relief for interest that had accrued over 168 months or approximately 14 years, reaching back at least in certain cases to the 1985 taxation year. Those, like Mr. Barrs, who made claims after subsection 220(3.1) of the ITA was amended, were granted relief for interest that had accrued over 51 months, reaching back ten years from the date they made their applications. In the post-2004 period, both groups of taxpayers were granted relief in respect of the same months. The first-level review officer determined that partial relief over the ten-year period prior to 2014 was warranted due to delays in the treatment of the taxpayers' relief requests that the officer found were attributable to the Crown during that period.

[16] The taxpayers requested a second review, and, in 2017, a second-level review officer granted all the taxpayers an additional 12 months' relief due to delays that had occurred during the appeal process.

[17] The result of the two reviews was that much greater partial relief was granted to those who applied for relief in 2004. For those, like Mr. Barrs, who applied only in 2014, relief was granted only for 63 months, or a little over half of the ten-year period preceding their relief requests.

[18] Judicial review applications were filed in respect of the second-level decisions but were discontinued after the parties signed Minutes of Settlement. The Minutes of Settlement provided, among other things, that the requests for relief would be remitted for redetermination to a CRA office other than Summerside, P.E.I. (where the original review was undertaken) and to an officer who had not previously been involved in the file. The Minutes of Settlement further provided that the independent third-level review officer would consider the request as a group request and would issue a single decision for the group. In terms of the scope of the review, paragraphs 4 to 6 of the Minutes provided that:

> 4. the applicants agree that the Independent Review will be limited to considering the issue of delay during the audit of the OCGC Limited Partnerships and their investors, during the appeals/objection stage, and during the litigation before the Tax Court of Canada and, subject to paragraph 5 below, all issues raised by the applicants in their Request for a Second Level Administrative Review of their Request for Taxpayer Relief;
>
> 5. the applicants agree that in conducting the Independent Review, the Agency will not be required to consider the individual factors and circumstances as set out in paragraph 33 of Information Circular IC07-l[R1] and will not raise as a ground of relief the Agency's failure to do so should the applicants seek judicial review of the decision rendered by the Agency as a result of the Independent Review;

> 6. notwithstanding the provisions of paragraph 4 and 5 above, in conducting the Independent Review, the Agency will consider all relevant facts, documents, circumstances and legal arguments that the applicants, as a group, have presented to the Agency.

[19] Information Circular IC07-1R1, referred to in paragraph 5 of the Minutes of Settlement, was the CRA circular then in force that set out guidelines regarding the exercise of ministerial discretionary authority under several provisions in the ITA, including subsection 220(3.1). Paragraph 33 of Information Circular IC07-1R1 provided:

> 33. Where circumstances beyond a taxpayer's control, actions of the CRA, inability to pay, or financial hardship has prevented the taxpayer from complying with the act, the following factors will be considered when determining if the minister's delegate will cancel or waive penalties and interest:
>
> (a) whether the taxpayer has a history of compliance with tax obligations
>
> (b) whether the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued
>
> (c) whether the taxpayer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system
>
> (d) whether the taxpayer has acted quickly to remedy any delay or omission.

## II. The Issue that is Different in Mr. Barrs' Case

[20] I turn next to consider, more specifically, the facts that distinguish Mr. Barrs' situation from that of the appellants in *Belchetz*.

[21] The one issue that arises in Mr. Barrs' case that did not arise in the other taxpayers' cases before this Court in *Belchetz* concerns a request for equitable treatment with the group of

taxpayers who received the greater amount of relief because they had applied for relief in 2004, before the ten-year limitation was in place. By the time the appeal in *Belchetz* was heard by this Court, all the taxpayers who made their relief requests in 2014, with the exception of Mr. Barrs, had settled their cases. Thus, Mr. Barrs was and is the only remaining taxpayer pursuing an appeal before this Court to whom the ten-year limitation period in subsection 220(3.1) of the ITA applies.

[22] In terms of the request for equitable relief made on behalf of Mr. Barrs and those taxpayers who had made their relief requests in 2014, counsel submitted to the first-level review officer that additional relief should be granted in respect of the open years (*i.e.*, over the ten-year period during which relief is allowed under subsection 220(3.1) of the ITA) to ensure equity with the taxpayers who had made their requests in 2004. Paragraphs 62 and 63 of the taxpayers' submissions stated:

> 62. The essence of section 220(3.1) of the *ITA* is to provide relief to taxpayers, not based on any principle of tax law, but rather based on the exercise of discretion under all the relevant circumstances. In these submissions we have described the basis upon which the strict enforcement of accrued and daily compounded interest would be unfair.
>
> 63. In the exercise of discretion there is nothing to prevent the Minister from granting relief to those Investors who did not file grandfathered Requests for the 10 years preceding this Request. In order to do justice and so that all Taxpayers are treated equally, it is submitted that once the periods of interest relief are calculated for the grandfathered Investors, an equal amount be credited to the non-grandfathered Taxpayers in the years in which relief can be granted. This will allow the Minister to comply with both the letter of and the spirit of fairness required by section 220(3.1) of the *ITA*.

[23] The first-level review officer rejected this request.

[24] This request was not specifically addressed by the second-level review officer, who found that no additional relief was warranted for this group and that subsection 220(3.1) of the ITA barred relief for interest accrued in taxation years outside the ten years preceding the relief request.

[25] The independent third-level review officer had before him the equitable treatment request made at the first level for those who made their relief requests in 2014. By virtue of paragraphs 4 to 6 of the Minutes of Settlement, the independent third-level review officer was required to consider the request for additional relief in respect of the open years made on behalf of Mr. Barrs and the other taxpayers who made their relief requests in 2014.

[26] The independent third-level review officer declined to afford any of the taxpayers' additional relief. For those, like Mr. Barrs, who had made their relief requests in 2014, the independent third-level review officer stated as follows in the letter decision issued to them:

> We can consider interest relief for any tax year. However, the interest must have been accumulated in the 10 calendar years before the initial request was made. Therefore, this decision is for interest that accumulated since January 1, 2004.

[27] The balance of the decision went on to explain why additional relief was not warranted for either group of taxpayers, based on considerations that applied equally to both groups.

[28] In the more detailed Third Independent Review: Overseas Credit and Guaranty Corporation (OCGC) Taxpayer Relief Report, the independent third-level review officer gave a

fuller explanation of his conclusions. A copy of this report was provided to counsel for Mr. Barrs. In it, the independent third-level review officer considered only one aspect of the claim for equitable treatment made on behalf of Mr. Barrs and others who had made their relief requests in 2014. More specifically, the independent third-level review officer determined that subsection 220(3.1) of the ITA and Information Circular IC07-1R1 prevented the Minister from granting relief in respect of "interest that accrued beyond the 10 years before the calendar year in which the request was made." The independent third-level reviewer determined that, "[a]s a result, [the Minister was] unable to consider the non-grandfathered taxpayers who made relief requests in 2014 in the same fashion as the grandfathered taxpayers who made relief requests in December 2004."

[29] As discussed at paragraph 22 above, counsel submitted in the first-level review that taxpayers, like Mr. Barrs who made their relief request in 2014 should be granted additional relief in respect of the open years to ensure equitable treatment with the other taxpayers who made their requests earlier. The independent third-level review officer failed to consider this submission. Given that relief had been granted during the first two levels of review in respect of only approximately half of the interest that had accrued over the ten-year period preceding 2014, it may have been possible for the Minister to grant additional relief over this period without running afoul of the limitation period in subsection 220(3.1) of the ITA. If greater relief were granted over the open years, the difference in the relative proportion of interest forgiven between the two groups would be lessened. This aspect of the request made on behalf of Mr. Barrs was not considered by the independent third-level review officer.

## III. <u>The Decisions of the Federal Court in *Brandimarte* and of this Court in *Belchetz*</u>

[30] In the judgment under appeal, *Brandimarte*, the Federal Court devoted the bulk of its reasons to issues centred on the various arguments advanced on behalf of all the taxpayers other than the claim for the need for equity between the two groups of taxpayers. The arguments advanced on behalf of all of the taxpayers included allegations regarding responsibility for the delays incurred in reaching a determination on the merits of the reassessments alleged to flow from delay in issuing the notices of reassessment and the unfairness alleged to have been created by the Crown's repudiation of the settlement agreement.

[31] On the issue of inequity in treatment between the two groups of taxpayers, the Federal Court determined that the independent third-level review officer's treatment of the issue was reasonable. The Federal Court confined its consideration of the issue to a discussion of the impact of the ten-year limitation period in subsection 220(3.1) of the ITA. In paragraph 58 of its reasons, the Federal Court stated:

> As to creating equality amongst the Applicants, in my view the Delegate appropriately denied interest relief beyond 10 years for the 2014 Applicants. Under subsection 220(3.1), the Minister no longer has discretion to cancel or waive interest beyond 10 years before a taxpayer's request for relief, regardless of when the underlying tax debt arose (*Bozzer v Canada*, 2011 FCA 186 at paras 12 and 58 to 59).

[32] As already noted, all the taxpayers whose cases were heard by this Court in *Belchetz* had made their claims for relief in 2004. Thus, this Court did not consider whether the Federal Court erred in respect of its treatment of taxpayers' requests for equitable treatment, but did consider

the Federal Court's treatment of all the other arguments advanced on Mr. Barrs' behalf and dismissed the appeal in respect of them.

IV. Analysis

[33] The decision in *Belchetz* is binding on us. However, as *Belchetz* did not deal with a claim for equitable treatment made by a taxpayer who sought relief in 2014, it does not decide whether the Federal Court erred in its assessment of this issue.

[34] In respect of this issue, this Court is required to apply the standard of review applicable to appeals from the Federal Court in judicial review applications. This standard requires us to determine whether the Federal Court selected the appropriate standard of review and, if so, whether it applied it correctly (*Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at para. 12, 462 D.L.R. (4th) 585; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 46, [2013] 2 S.C.R. 559). In essence, we therefore must step into the shoes of the Federal Court and re-conduct the requisite analysis.

[35] The Federal Court was correct in selecting the reasonableness standard of review, which has been firmly settled as being the applicable standard to review ministerial exercises of discretion under subsection 220(3.1) of the ITA (see, *e.g.*, *Belchetz* at para. 30). However, in my view, the Federal Court erred in its application of that standard to the independent third-level review officer's treatment of Mr. Barrs' request for equitable treatment.

[36] In this regard, this Court held in *Bozzer v. Canada*, 2011 FCA 186 at paras. 12, 58–59, [2013] 1 F.C.R. 242, that the limitation period set out in subsection 220(3.1) of the ITA prevents the Minister from granting relief from interest that accrued during taxation years prior to ten years preceding the date the application for relief was made, but does allow for granting relief from interest that accrued during the relevant ten-year period on debts incurred prior to its outset. However, the presence of the ten-year limitation period in subsection 220(3.1) of the ITA is not a complete answer to Mr. Barrs' claim for equitable treatment, and it may be open to the Minister to grant him additional relief from interest that had accrued over the period from 2004 onward, to promote equity with the group of taxpayers who had requested relief in 2004..

[37] Mr. Barrs' claim for equality of treatment is not a frivolous one. In light of the interest rates that have prevailed since the tax debt arose and the way in which interest is calculated under the ITA, Mr. Barrs finds himself faced with an interest bill that far exceeds those of the taxpayers who made their requests for relief in 2004. Yet, they all invested in the same scheme and had their claims for interest relief examined by the same review officers based on the same facts.

[38] Given that the independent third-level review officer failed to engage with the request for greater relief in the open years to ensure equitable treatment, his decision must be set aside. This request was before the independent third-level review officer, yet he failed to meaningfully address it. Failure to engage with an important argument advanced by a party will generally render an administrative decision unreasonable, as was noted by the Supreme Court of Canada in

*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 127–128, [2019] 4 S.C.R. 653.

[39] The determination of whether to afford relief under subsection 220(3.1) of the ITA is a discretionary one, vested in the Minister. Therefore, it is appropriate that this issue be remitted to the Minister for redetermination. In light of the terms of the Minutes of Settlement, the issue should be remitted to a CRA review officer in an office other than Summerside, P.E.I., who has had no previous involvement in these matters.

## V. Proposed Disposition

[40] I would therefore allow this appeal and set aside the Federal Court's judgment in *Brandimarte* as it pertains to Mr. Barrs. I would remit his request for relief to the Minister, in accordance with the foregoing direction as to the officer to whom it is to be remitted, for reconsideration of the request for greater relief over the open years to promote equity between Mr. Barrs and the taxpayers who requested relief in 2004. I would not award costs as the appellant represented himself and indicated during his submissions that he was not pursuing an award of costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Judith Woods J.A."

"I agree.
Marianne Rivoalen J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-310-19 |
| **STYLE OF CAUSE:** | 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 |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | APRIL 25, 2022 |
| **REASONS FOR JUDGMENT BY:** | GLEASON J.A. |
| **CONCURRED IN BY:** | WOODS J.A.<br>RIVOALEN J.A. |
| **DATED:** | AUGUST 19, 2022 |

**APPEARANCES:**

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| Andrea Jackett | FOR THE RESPONDENTS |

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