Dockets: 2015-821(IT)I
2015-825(IT)I

BETWEEN:

LINE DUCHAINE and GILLES ST-YVES,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on August 21, 2015, at Montréal, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the appellants:	Mark Likhten
Counsel for the respondent:	Simon Vincent

JUDGMENT

The appeals from the assessments made pursuant to the *Income Tax Act* for the period from January 1, 1999, to December 31, 2000, are dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 20th day of October 2015.

"Alain Tardif"

Tardif J.

Translation certified true
on this 2nd day of December 2015
Janine Anderson, Translator

Citation: 2015 TCC 245
Date: 20151020
Dockets: 2015-821(IT)I
2015-825(IT)I

BETWEEN:

LINE DUCHAINE and GILLES ST-YVES,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Tardif J.

[1] These are appeals from assessments made based on the provisions of section 160 of the *Income Tax Act* (ITA). The cases are unique in that the interest that accrued after the making of the assessments exceeds the principal amount in the assessments.

[2] The assessments were made following a dividend payment (transfer) by 2858-6246 Québec inc. (Company) to the appellants for the period from January 1, 1999 to December 31, 2000. The parties agreed to proceed on common evidence.

FACTS

- The male appellant and his spouse were shareholders of the Company during the 1999 taxation year.
- During the 1999 and 2000 taxation years, the appellants received amounts as dividends from the Company.
- On February 14, 2005, the Company owed a tax debt of $14,943.88 to the Minister for the 1999 taxation year.

- On February 20, 2014, the respondent assessed the appellants concerning property transferred to a person not dealing at arm's length for the 1999 taxation year; indeed, 2858-6246 Québec inc. had paid dividends to the appellants, who were both shareholders of the Company.

[3] The appellants claim that the Minister did not act with all due dispatch in respect of them when making his assessment under section 160 of the ITA. They therefore raise the following grounds:

- Effect of the 10-year limitation period.
- Lack of vigilance in making the assessments.

[4] First, the legal basis of the assessments is not in dispute except that the appellants argued that they provided services with a value far in excess of the amounts transferred (dividends) that gave rise to the assessments.

[5] The relevance of the argument in relation to the consideration is unfounded; indeed, the case law has established that a dividend cannot be considered a consideration equivalent to salary. In other words, a dividend cannot be considered a valid consideration to challenge an assessment made under section 160 of the ITA.

[6] On the advice of their accountant, they chose the dividend formula instead of the salary formula for the consideration of the work performed on behalf and for the benefit of the Company that made the transfer.

[7] The issue of how dividends must be addressed in a transfer of property subject to section 160 of the ITA is unequivocal and unambiguous. To that effect, the case law is unanimous.

[8] All of the conditions listed in section 160 of the ITA are present. The appellants argue that they were misguided by the person who handled the accounting for the Company that paid the dividends.

[9] On the one hand, that ground is not attributable to the respondent and on the other hand, if the ground were substantiated, the potential liability would be on those who made the error.

[10] The female appellant emotionally explained that she and her spouse had created a disaster restoration company. The Company generally worked with subcontractors. The female appellant and her spouse worked very hard, and, more often than not, without pay.

[11] Business did not go well and there was not much success despite the intensity of the work and the determination to make every effort to grow the business and possibly achieve some profitability.

[12] Despite all efforts, they had to deal with failure after closing the business. The Company, in the course of its operations, paid dividends to the appellants, which gave rise to the notices of assessment made in respect of them.

[13] They made arrangements with Revenu Québec and tried in vain to obtain a settlement with the Revenue Agency; the female appellant stated that she made an offer to settle, which apparently remained unanswered and then suddenly appeared several years later, and the interest that had accrued had considerably increased the assessments.

[14] On these facts, the appellants argue that the assessments should be vacated given the significant lack of vigilance by the Agency in the handling of their files.

[15] Regarding the limitation period set out in subsection 222(4) of the ITA, the limitation period for collection begins on March 4, 2004, and ends 10 years after the day on which it begins, that is, on March 4, 2014.

[16] The Minister made the assessment on February 20, 2014, that is, precisely 12 days before the end of the limitation period.

[17] As stated at the hearing, the limitation period cuts like a knife. The crucial date was March 4, 2014. Before that date, the limitation period had no effect and the debt was still owed to the Minister.

[18] In 2003, in *Markevich v. Canada*[1] (concerning collection and limitation of actions), the Supreme Court of Canada determined that taxpayers are entitled to assessed on their financial situation, which includes their debts owed to the Minister:

[1] *Markevich v. Canada*, 2003 SCC 9.

> 19 The appellant's submission that the rationales for limitation periods militate against their application to tax collection cannot be correct. As noted above, limitation provisions are based upon what have been described as the certainty, evidentiary, and diligence rationales: see *M. (K.)*, *supra*, at p. 29. The certainty rationale recognizes that, with the passage of time, an individual "should be secure in his reasonable expectation that he will not be held to account for ancient obligations": *M. (K.)*, *supra*, at p. 29. The evidentiary rationale recognizes the desire to preclude claims where the evidence used to support that claim has grown stale. The diligence rationale encourages claimants "to act diligently and not 'sleep on their rights'": *M. (K.)*, *supra*, at p. 30.
>
> [Emphasis added.]

[19] The other ground is the Minister's duty to assess with all due dispatch.

[20] First, the assessment was made pursuant to subsection 160(1) of the ITA, which concerns property transferred not at arm's length.

[21] Subsection 160(2) of the ITA clearly states that reassessments based on section 160 of the ITA can be issued "at any time". Thus, no limitation period applies.

[22] Also, the assessment issued under section 160 applies as thought it had been made under section 152:

> 160. (2) The Minister may at any time assess a taxpayer in respect of any amount payable because of this section, and the provisions of this Division (including, for greater certainty, the provisions in respect of interest payable) apply, with any modifications that the circumstances require, in respect of an assessment made under this section as though it had been made under section 152 in respect of taxes payable under this Part.
>
> [Emphasis added.]

[23] In fact, section 152 of the ITA requires the Minister to assess tax with all due dispatch:

> **152. (1)** The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine:
>
> (*a*) the amount of refund, if any, to which the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year; or
>
> (*b*) the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 122.8(2) or (3), 125.4(3), 125.5(3), 127.1(1),

> 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.
>
> [Emphasis added.]

[24] The duty to assess with all due dispatch essentially applies when issuing initial assessments.

[25] Let us now look at how the expression "with all due dispatch" has been interpreted by the courts.

[26] In *Jolicoeur v. Canada (Minister of National Revenue - M.N.R.)*,[2] this Court provided a definition of the expression "with all due dispatch" of subsection 152(1) ITA:

> In my opinion the words "with all due dispatch" have the same meaning as "with all due diligence" or "within a reasonable time". They appear in ss. 46(1), 58(3) and 105(2) of the Income Tax Act and other fiscal statutes. In a legal sense, they are interpreted as giving a discretion and freedom, justified by circumstances and reasons, to the person whose duty is to act. The acts involved are not submitted to a strict and general rule.
>
> [Emphasis added.]

[27] In a judicial review, the Federal Court analyzed the expression "with all due dispatch" from subsection 152(1) of the ITA in *Ficek v. Canada (Attorney General)*.[3] It was decided that the Minister had failed to comply with his duty to assess with all due dispatch, based on, in particular, *J. Stollar Construction*.[4]

[28] In this regard, in *Ginsberg v. Canada (C.A.)*,[5] the Federal Court of Appeal addressed the issue of the Minister's duty to assess with all due dispatch.

[29] In that decision, the Court determined that the assessments were not made with all due dispatch, but that the notice of assessment remained valid even if a long period of time had passed before it was made. In this case, more than one year passed before the notice of assessment was issued. Note that that decision is the current state of the law on this issue.

---

[2] *Jolicoeur v. Canada (Minister of National Revenue - M.N.R.)*, 60 D.T.C. 1254.
[3] *Ficek v. Canada (Attorney General)*, 2013 FC 502.
[4] *J. Stollar Construction*, *supra* note 5.
[5] *Ginsberg v. Canada (C.A.)*, [1996] 3 F.C. 334. Income tax returns were received by the respondent on May 4, 1989, and notices of assessment were issued on December 21, 1990.

[30] More recently, in *Canada v. Addison & Leyen Ltd.*,[6] the Supreme Court of Canada determined that the length of the delay before an assessment is made does not suffice as a ground for judicial review. That decision also specifically dealt with an assessment under section 160 of the ITA:

> …However, in light of the words "at any time" used by Parliament in s. 160 ITA, the length of the delay before a decision on assessing a taxpayer is made does not suffice as a ground for judicial review, except, perhaps, inasmuch as it allows for a remedy like mandamus to prod the Minister to act with due diligence once a notice of objection has been filed….
>
> [Emphasis added.]

[31] Also, it is possible to look at the courts' analysis of the expression "with all due dispatch" from subsection 165(3) of the ITA.

[32] The expression "with all due dispatch" has been interpreted by the courts in the application of subsection 165(3) of the ITA. It is the diligence the Minister must exercise on receipt of a notice of objection.

[33] In *Moledina v. R.*,[7] the issue was whether the Court may grant relief from the interest on assessments because of delays. Justice Bowman of this Court stated that delay in processing a notice of objection is not a ground for vacating an assessment:

> 7 Generally speaking, delay in processing a notice of objection is not a ground for vacating an assessment or, *a fortiori*, for deleting interest. The reason for not granting such relief is not because of a lack of jurisdiction in the Tax Court of Canada — if there is a legal basis for vacating an assessment it is within the Court's power to do so — but because delay is in most instances not a legal basis for attacking an assessment because it lies within a taxpayer's own power to bring the delay to an end.
>
> 8 Under paragraph 169(1)(*b*) of the *Act*, if the Minister has not responded to a notice of objection by reassessing or vacating or confirming the assessment, the taxpayer has a right to appeal to the Tax Court of Canada. It is difficult to imagine why a taxpayer would seek or be granted an extraordinary remedy such as mandamus or some other form of judicial review where the Minister delays in dealing with an objection when there is a clear right of appeal after 90 days. . . .
>
> [Citations omitted.] [Footnotes omitted.] [Emphasis added.]

---

[6] *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, para 10.
[7] *Moledina v. R.*, 2007 TCC 354, paras 7-8, 31.

[34] Recently, in *Ford v. Canada*, the Federal Court of Appeal had to determine whether the Minister could waive any part of the interest as a result of the delay on his part in reconsidering the assessments. The Court's finding was as follows:

> I agree with the statement of Hugessen J.A. in *Bolton* that a taxpayer cannot succeed in having a reassessment that had been previously issued vacated, solely because the Minister has failed to reconsider that reassessment with all due dispatch.
>
> [Emphasis added.]

[35] In that case, it was clearly determined that the assessment could not be vacated because the Minister did not assess with all due dispatch.

[36] First, it must be known that it has been established that the Tax Court of Canada (TCC) does not have the authority to waive interest, but that that authority belongs to the Minister under subsection 220(3.1) of the ITA.

[37] To that effect, subsection 220(3.1) of the ITA states that the Minister has discretion to waive interest.

[38] Thus, in certain decisions, the TCC, which does not have authority to waive interest, has recommended that the Minister exercise his discretion and waive interest.

[39] To that effect, in *Burla v. Canada*, this Court recommended that the Minister waive the interest in question:

> 8 I cannot however ignore the submissions of the Appellant and her spouse. Considering in particular the alleged misinformation they received from certain officers of Revenue Canada and the fact that the late assessment in 1995 completely reversed the position of the Minister in the earlier assessments, I would recommend that the Minister consider positively any application which the Appellant has made or may make pursuant to the fairness package assented to December 17, 1991 and waive any interest claimed. I would further urge the Appellant, if she has not done so, to make an application pursuant to the fairness package.

[40] That was also this Court's recommendation in *Murch v. R.* in a tax rebate case:

> 13 Although this is not binding on the Minister, the Court would like to make a very strong recommendation that the penalty and interest assessed under subsection 280(1) of the Act be waived. The Minister assessed the request of Mrs. Murch and issued the rebate in conformity with his initial interpretation of the Act, which he subsequently decided was not proper. Taxpayers who had received rulings from the Minister confirming the initial interpretation were exempted from having to pay the rebate back to the Minister, as this is the normal practice of the Minister when "rulings" are issued. While it is my understanding here that Mrs. Murch did not apply for such ruling, I think, in fairness, that the amount of the penalty and the interest should be forgiven in these circumstances and that only the amount of the rebate should be paid by the taxpayer.

[41] In another file, this Court also recommended that if an application is made by the appellant to the Minister for a waiver of interest, the application should be granted:

> 12 Regrettably, therefore, the appeal is dismissed. However I would recommend, given the Appellant's agreement not to contest several expenses and considering the fact that there definitely was office and warehouse space in the home for his physician operation, although not actually meeting the strict conditions of section 18(12), I nevertheless would recommend that if an application is made for a waiver of interest that the application be granted.

[42] The same types of recommendations have also been made in cases concerning the *Excise Tax Act*. To that effect, this Court recommended that the penalty be waived in *Isaac v. R.*:

> 16 As set out above, section 280(1.1) of the Act provides that the Minister may waive or cancel interest and penalties payable under section 280, the section under which penalty and interest were imposed in this case. This Court cannot direct the Minister so to do. However, in the circumstances, where the Appellant made an honest effort to conclude the liability by offering more money to Revenue Canada than was owing in tax, I cannot recommend more strongly that the Minister do so in this case.

[43] That was also this Court's recommendation in *Kingsbury v. R.*:

> 14 Section 281.1 of the *Act* provides that the Minister may waive or cancel interest and penalties payable under section 280, the section under which the penalty and interest were imposed in this case. Although the Court cannot direct the Minister to waive or cancel interest, it is strongly recommended, in the circumstances of this case, that he do so.

[44] In *Humber College Institute of Technology & Advanced Learning v. Canada*, this Court determined that if it was incorrect in its initial interpretation, then it would recommend that an application for a waiver of interest be in order.

[45] Furthermore, in *Carpini v. R.*, this Court recommended that the Minister waive the interest because of a delay in the hearing of the case.

[46] Subsection 220(3.1) of the ITA clearly states, however, that the Minister may waive or cancel interest in the 10 years preceding the year of the application.

[47] To that effect, on June 2, 2011, the Federal Court of Appeal rendered a decision in *Bozzer v. Canada* (Minister of National Revenue - M.N.R.). The Court found that the Minister has the authority to waive interest that has accrued in the 10 years preceding an application for relief, regardless of the date on which the tax debt arose.

[48] The Canada Revenue Agency also published a news release on November 21, 2011, that explained the impact of *Bozzer*.

[49] Hypothetically, if the appellant was applying to have interest waived in 2015, he could potentially have all of the interest that had accrued since calendar year 2005 waived.

[50] Because this Court does not have the authority to order the Minister to cancel the interest in question, given the circumstances in the case, I, however, recommend that the Minister exercise his discretion by favourably allowing any potential application from the appellants to have any interest accrued waived. Regarding the appeals, unfortunately they must be dismissed.

Signed at Ottawa, Canada, this 20th day of October 2015.

"Alain Tardif"

Tardif J.

Translation certified true
on this 2nd day of December 2015
Janine Anderson, Translator

CITATION:	2015 TCC 245
COURT FILE NO.:	2015-821(IT)I
STYLE OF CAUSE:	LINE DUCHAINE and GILLES ST-YVES v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	August 21, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice Alain Tardif
DATE OF JUDGMENT:	October 20, 2015

APPEARANCES:

Counsel for the appellants:	Mark Likhten
Counsel for the respondent:	Simon Vincent

COUNSEL OF RECORD:

For the appellants:

Name:	Mark Likhten
Firm:	

For the respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada