Federal Court  Cour fédérale

Date: 20170427

Docket: T-802-16

Citation: 2017 FC 411

Ottawa, Ontario, April 27, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

GLENN WALSH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act] for judicial review of a decision of the Minister of National Revenue [Minister], communicated October 9, 2015 [Decision], which denied the Applicant's request for interest relief relating to his 1998 taxation year.

II. BACKGROUND

A. *Departure Trade Transaction*

[2] In 1998, the Applicant entered into a departure trade transaction with the Canadian Imperial Bank of Commerce [CIBC]. In a departure trade, an interest deduction is created to reduce the tax of an individual who is planning to emigrate from Canada. The departing taxpayer borrows money from a financial institution and incurs interest, which is deductible in part for the period prior to the departure. The borrowed money is simultaneously reinvested with the lender and the taxpayer earns interest that is not taxable because it is received after the taxpayer has terminated Canadian residence.

[3] In February 1998, the Applicant obtained a residency permit from Malta. The following June, the Applicant and CIBC each created corporations resident in the Cayman Islands, named Falcon Enterprises Inc [Falcon] and Phoenix Corporation [Phoenix**]**, respectively. The Applicant then borrowed $694,852,318 USD from CIBC New York Agency [CIBC NY] at an interest rate of 8.74%, with the first interest payment due on December 31, 1998 and maturation of the loan occurring on January 15, 1999. The Applicant used the loan to purchase preferred shares in Falcon; Falcon then used the funds to purchase preferred shares in Phoenix. A subsequent series of transfers resulted in a return of the funds to CIBC NY.

[4] On December 29, 1998, the Applicant was to depart Canada for Malta. Then, on December 31, 1998, following the Applicant's intended emigration, CIBC NY loaned the Applicant $47,499,148 to make the first interest payment on the original loan. In 1999, the

liabilities between the parties were resolved, the Applicant's shares in Falcon were redeemed, and Falcon and Phoenix were dissolved.

[5] In his 1998 tax return, the Applicant claimed a deduction of $47,499,149 as interest and carrying charges, offsetting income that he realized in that year through an employee profit sharing plan [EPSP] created by three corporations under his control. He reported a taxable capital gain of $7,493,510 for the deemed disposition of his shares in Falcon as a result of ceasing to be a Canadian resident, which was based on an amount of $10,000,000 as the proceeds of disposition.

B. *First Personal Reassessments*

[6] On October 10, 2002, the Minister reassessed the Applicant's 1998 income tax return [1998 Reassessment]. The 1998 Reassessment denied the entire amount of Interest Debenture and increased the amount of capital gain from the Falcon disposition to $48,119,646. On the same day, the Minister also reassessed the Applicant's 1999 income tax return [1999 Reassessment], which denied the use of a loss carry-forward arising out of a loss that the Applicant had claimed in his 1998 income.

[7] In response, the Applicant filed Notices of Objection for both reassessments. Following the confirmation of both reassessments by the Minister on June 4, 2004, the Applicant filed a Notice of Appeal to the Tax Court of Canada [TCC] on June 24, 2004.

C. *Corporate Reassessments*

[8] In the same year as the first personal reassessments, the Minister also issued reassessments to the corporations under the Applicant's control, dated May 7, 2002; August 9, 2002; and April 15, 2002. The corporate reassessments denied the deductibility of payments made to the corporations by the EPSPs in the 1998 and 1999 taxation years, despite the inclusion of the transfers in the Applicant's income in the first personal reassessments.

[9] The corporations filed objections to the corporate reassessments, which were confirmed by the Minister on March 29, 2004. Subsequently, the corporations filed Notices of Appeal to the TCC on June 24, 2004.

D. *Second Personal Reassessments*

[10] In a Notice of Reassessment dated May 11, 2006 of the 1999 tax return [Second 1999 Reassessment], the Minister included $54,859,700 in income due to amounts received by the Applicant from non-resident corporations after 1998. This inclusion was based on the view that the Applicant had not ceased to be a resident of Canada in 1998, which was not the view in the prior reassessments.

[11] In response, the Applicant submitted a new Notice of Objection on August 7, 2006.

E. *Litigation*

[12] On February 13, 2006, the TCC issued a Notice of Status Hearing and the Applicant's appeal became subject to case management. An Order was issued requiring discoveries to be completed by the end of 2006. However, in December 2006, following the second Notice of Objection, the Crown advised that they did not wish to proceed with discovery until issues with the Applicant's pleadings were resolved. As a result of the second objection, the Applicant had placed the 1999 Reassessment with the Canadian Revenue Agency [CRA] appeals branch, despite it also being before the TCC.

[13] At the same time, the TCC was considering a similar case containing a departure trade transaction and the Applicant's personal Notice of Appeal was held in abeyance pending the outcome of the case. In June 2006, the TCC upheld the denial of the interest deduction on the basis that the taxpayer did not pay the interest he sought to deduct before ceasing to be a Canadian resident: *Grant v the Queen*, 2006 TCC 373 [*Grant*]. *Grant* was upheld by the Federal Court of Appeal in April 2007 and leave to appeal was dismissed by the Supreme Court of Canada in November 2007.

[14] On May 29, 2007, the Applicant amended his Notice of Appeal before the TCC to exclude the 1999 taxation year. The parties then agreed to complete litigation steps by October 31, 2007; however, the timeline was revised multiple times with the consent of both parties. Finally, a week-long hearing was set for April or May 2010.

F. *Settlement*

[15] A settlement agreement between the two parties was reached on April 19, 2010. The terms of the settlement were as follows: the Applicant agreed that he would not be entitled to the interest and carrying charge deduction of $47,499,148; the CRA agreed that there would be no deemed dividend on the disposition of the Falcon shares in 1999; and the CRA agreed to reduce the 1998 income by $1,542,104. Concurrently, the Minister allowed the deductions of the EPSP payments for the corporations under the Applicant's control.

[16] On July 7, 2010, the Minister reassessed the Applicant's 1998 and 1999 income tax returns in accordance with the settlement agreement. The tax liabilities were reduced to $16,212,110 and nil for 1998 and 1999, respectively. The Applicant then paid the total balance owing of $38,067,818.

G. *Request for Relief*

[17] On December 17, 2012, the Applicant submitted a request for the cancellation of interest in respect of his 1998 income tax return, with further submissions made on April 29, 2013.

[18] In response, the Minister agreed to grant interest relief in part on July 26, 2013. The Applicant requested a review of the decision on August 16, 2013, which was upheld on December 6, 2013.

[19] The Applicant then filed an application for judicial review of the December 6 decision. On November 25, 2014, the Federal Court issued an Order setting aside the decision and referred the Applicant's request for cancellation of interest in relation to the 1998 taxation year for redetermination by individuals not previously involved in the matter.

[20] Accordingly, the Applicant submitted a new request for the cancellation of interest, which forms the subject of this judicial review.

III. DECISION UNDER REVIEW

[21] In a Decision dated October 9, 2015, the Minister refused the Applicant's request for interest relief in relation to his 1998 taxation year.

A. *Legislation*

[22] In consideration of the request, the Minister referred to s 220(3.1) of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [*ITA*], which provided situations under which relief could be granted. However, the Minister also acknowledged that relief could be granted for circumstances outside the situations in the *ITA*. Based on the legislation and the Applicant's submissions, the Minister's review of the request considered whether the Applicant: had a history of voluntary compliance with tax obligations; knowingly allowed a balance to exist; took reasonable care in conducting his affairs; and acted quickly to deal with any delay or omission.

B. *Basis for Request and Examination of Reassessments*

[23] The Minister then considered the basis for the request, which was the disallowance of claimed interest in 1998. The Minister then examined the reassessments that were made, including the reasons, time frames, and amounts.

(1) Disallowance of Expensed Interest in 1998

[24] The Minister summarized the reasons for the adjustment to the Applicant's 1998 income tax return, which was reassessed to disallow the interest claimed of $47,499,142.21. The reasons were: the transactions were a sham in that they were undertaken to create a tax deduction, had no *bona fide* business purpose, and were not profitable from the beginning; the interest expense was not allowed under ss 18(1)(a) and 18(1)(h) of the *ITA* because it was for the Applicant's personal benefit and not incurred to earn business income; the Applicant was not entitled to claim the interest per s 20(1)(c) of the *ITA* because he was a resident at the time and the interest expense was not incurred to earn income; and the general anti-avoidance rule was applicable because the transactions were conducted with a primary purpose of generating an interest expense that would offset future income.

(2) Residency and Inconsistency of Reassessments

[25] The Minister then reviewed the reasons for the inconsistent reassessments based on the Applicant's residency status, which was non-resident in 1998 but resident in 1999. The 1999 Audit Report found that the Applicant had been resident of Canada from 1999 to 2002 because

he did not sever all ties with Canada in that period. Accordingly, the Applicant's 1999 tax return was reassessed and resulted in a balance owing of $45,798,555.

[26] Though inconsistent, the jurisprudence provided that when facts were in dispute, the Minister was permitted to issue inconsistent assessments pending the resolution of the dispute. As a result, the 1999 Audit Report provided two possible conclusions: if the Applicant was resident in 1998 and 1999, then the capital gain in the 1998 tax return would be reversed; however, if he was non-resident in 1998 and 1999, the adjustments would be removed from his 1999 income. Due to the inconsistency, the 1999 Audit Report also stated that the 1999 Reassessment would be amended once further information was available. The Applicant was therefore notified of the Minister's intention to reassess the 1999 tax return, which was done on July 1, 2010.

(3) Inconsistent and Contradictory Positions in Reassessment of the Corporations

[27] The Minister then reviewed the deductions claimed through the EPSP and the related reasons for reassessment. The Minister found that: no trust relationship had been established; the proposed EPSP did not qualify as it was set up for only one employee; the contributions were not reasonable expenses; the contributions were not expenses incurred for the purpose of earning income; and the contributions remained unpaid. Accordingly, reassessment was required since deductions were not allowed but income was still reported. However, this was not done at the time because it is CRA's policy to not make downward reassessments to a related taxpayer until the issue of the upward reassessments is resolved.

[28] Next, the Minister addressed the capital gain reported on the Falcon shares. The Audit Division of the CRA had opined that the fair market value of the Falcon shares ($48,128,299) was more than the reported proceeds of disposition ($9,383,596). The 1999 Audit Report also commented that the adjustment in regards to the proceeds of disposition would be reversed if the CRA was successful in the disallowance of the carrying charges, which occurred when the 1999 tax return was reassessed on July 1, 2010.

[29] The Minister then discussed the amounts owing after subsequent reassessments and payments. In 2006, the total tax owing was determined to be $119,905,525, with $96,052,070 owing in personal tax and $23,858,454.55 owing in corporate tax. However, the settlement in April 2010 reduced the total tax owing for 1998 to $38,067,818. The Applicant's payments on account totaled $38,568,251.

(4) Collection Action Taken

[30] The Minister then reviewed the details concerning the CRA's attempts to collect amounts owing on the Applicant's T1 account, which included various seizures of the Applicant's property, incoming payments, deposits, shares, and investments as well as numerous requests to various parties.

(5) Evidence of Money Transfers

[31] Next, the Minister reviewed the deposits paid by the Applicant to various individuals, which included members of his family.

(6) Residency Status and Assets

[32] The Minister then examined the Applicant's residency status and assets, which included various real estate properties.

(7) Proposals to Reduce Tax Owing

[33] The Minister also reviewed the correspondence and negotiations that occurred between the Applicant's representatives and the CRA on the resolution of the accounts. This included statements that the Applicant had missed deadlines, failed to make payments as indicated, and failed to provide requested information.

(8) Reassessment and Interest Issues in the June 17, 2015 Submission

[34] The Minister noted that CRA charged interest on the amounts owed from the due date of the return on April 30, 1999 to the date of the reassessment on July 1, 2010, with additional interest charged after July 7, 2010 up until the account was fully paid. However, interest relief was provided for the period in which the CRA and Applicant awaited the outcome of *Grant*, above, which was between April 6, 2003 and June 3, 2004. The Minister referred to correspondence from Samantha Eksal, dated November 10, 2003, that stated: "After reviewing the issues in these files, it has been determined that all of the above Notices of Objection must be held in abeyance pending the outcome of a similar issue that is currently before the Courts…."

(9) Delay Issues in the June 17, 2015 Submission

[35] In response to the issue of delay due to the TCC appeals, the Minister noted that the CRA was not awaiting the resolution of the *Grant* decision to resolve the Applicant's file, as the T401 Appeals Report for the 1998 T1 had been signed June 3, 2004, two years prior to the *Grant* decision of June 29, 2006. Additionally, *Grant* was resolved two and a half years prior to the April 2010 settlement. Furthermore, the term "abeyance" had not been used in any correspondence save for a letter dated April 19, 2010, which indicated that due to the settlement of April 2010, the tax returns would be held in abeyance for 60 days to enable reassessment.

(10) Reasonable Care Issues

[36] The Minister noted that the Applicant was not personally liable to pay any tax, interest, or penalty that was assessed to the corporations. Additionally, the Minister acknowledged that the CRA obtained a cheque for $22 million from the Applicant's lawyer on October 25, 2013.

C. *Considerations for Requested Relief*

(1) History of Compliance

[37] The Minister acknowledged the Applicant's compliance with return filing deadlines, which were on time from 1992 to 1997 and mostly on time after 1998.

[38] With regards to the remittance of payments, the Minister noted that the Collections Division of the CRA was involved with the Applicant's account from December 2, 1993 to

October 22, 1997. Collection activity resumed on July 27, 1999 and reached a balance of $4.98 million by April 9, 2002. Although the Applicant's representatives had proposed to settle the account, the proposals were insufficient to pay the entire balance. Additionally, despite the 2010 settlement, the Applicant continued to make similar insufficient proposals and never submitted a repayment plan.

[39] The Minister then noted that the Applicant did not make voluntary payments to his account until April 15, 2014, which was 12 years after the 2002 reassessment and 4 years after the 2010 settlement. Accordingly, extensive collections activity was required to ensure compliance.

[40] The Minister pointed out that had the payments been remitted in amounts larger than the amounts due, the funds would have been returned to the Applicant with interest.

(2) Knowledge

[41] Next, the Minister considered whether the Applicant knowingly allowed a balance to exist upon which interest accrued amounts owing. The Minister found that the Applicant's representative, in a memorandum dated February 6, 2008, had acknowledged awareness that the reassessments contained protective positions and that further reassessments would be made to reduce the amounts once additional information was made available. The Minister also found that the Applicant's representatives could have considered a best or worst case scenario to determine the amounts owing, which was in fact done on July 14, 2003 and February 6, 2008. Furthermore, the February 6 memorandum demonstrated that the Applicant's representatives

were aware of the strength of CRA's position and could have estimated taxes owing on the 1998 return due to the high probability that the interest expense claimed would be disallowed.

(3) Reasonable Care

[42] The Minister then evaluated the Applicant's claim that reasonable care was taken in conducting his affairs under the self-assessment system, including the Applicant's consultation with tax accountants and lawyers during the trade departure transaction and reassessments. In particular, the Minister noted that the Applicant had failed to heed his former representative's concerns regarding the departure trade transaction and, instead, switched to a different representative.

(4) Delay or Omission

[43] Upon review of the file, the Minister concluded that the duration of the audit was due to the Applicant's failure to be forthcoming with relevant information, including information related to his residency and assets owned. Additionally, the Minister found that the Applicant could have signed a waiver and thereby avoided the second reassessment for the 1999 tax return, but did not do so.

(5) Extraordinary Circumstances

[44] After reviewing the examples from the Information Circular IC07-1 where extraordinary circumstances would prevent compliance, the Minister concluded there were no extraordinary circumstances in the Applicant's situation.

(6) Summary of Decision

[45] The Minister determined that interest relief was not warranted. First, there was no undue delay caused by the CRA or the Crown; rather, the delays were the fault of the Applicant's failure to be forthcoming in a timely manner or were caused by the Applicant's counsel. Second, the Applicant's failure to comply with payments allowed the balance to exist and accrue interest for a period of 12 years. Third, the Applicant had not acted quickly to deal with the reassessments and had ignored advice concerning the validity of the departure trade transaction. Fourth, no extraordinary circumstances existed. And finally, there were no other reasons to conclude that relief should be granted.

IV. ISSUES

[46] The Applicant submits that the following is at issue in this application:

A. Whether the Minister erred in the exercise of his discretion under s 220(3.1) of the *ITA*, resulting in a Decision that is contrary to law and/or unreasonable?

[47] The Respondent submits that the following is at issue in this application:

A. Whether the Minister's Decision is reasonable and, if it is not, whether the Applicant's request for taxpayer relief must be returned to the Minister for redetermination?

V. STANDARD OF REVIEW

[48] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a

satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[49] Both the Applicant and Respondent agree that the standard of review should be reasonableness. The exercise of the Minister's discretion to grant interest relief under s 220(3.1) of the *ITA* has been held to be reviewable under reasonableness: *Canada Revenue Agency v Telfer*, 2009 FCA 23 at para 2 [*Telfer*].

[50] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[51] The following provisions from the *ITA* are relevant in this proceeding:

Waiver of penalty or interest	**Renonciation aux pénalités et aux intérêts**
(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 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.	(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 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.

VII. ARGUMENT

A. *Applicant*

(1) Extraordinary Circumstances

[52] The Applicant submits that the Decision is incorrect or unreasonable. The issuance of inconsistent and contradictory tax reassessments constitutes either extraordinary circumstances that prevented compliance, or circumstances beyond the Applicant's control.

[53] While the Minister has the authority to issue inconsistent or contradictory assessments, this authority is limited to exceptional cases and should not be exercised as a general rule: *Duthie Estate v Canada*, [1995] FCJ No 770 at para 43; *Hawks v the Queen*, [1996] FCJ No 1694 at para 7. If exercised in the context of a taxpayer relief application, the central consideration is the impact of the assessments on the Applicant.

[54] The Applicant cites three inconsistent and contradictory positions taken by the Minister: the adjustment to the proceeds of disposition of the Falcon shares in the 1998 Reassessment; the determination that the Applicant was a resident of Canada in the 1999 Reassessment; and the inclusion of the Applicant's 1998 income of EPSP amounts received while concurrently denying the deductibility of the payment of such amounts by the corporation reassessments. These inconsistent and contradictory reassessments exceeded $110 million in liabilities and left the Applicant with no choice but to wait for the Minister to take a conclusive and consistent position. The Applicant submits that the Minister failed to consider the impact of the inconsistent and contradictory assessments in the appropriate context and that it was unreasonable not to consider them to be extraordinary circumstances.

[55] In the Decision, the Minister states that the Applicant knew that only one of the positions would ultimately stand and therefore should have known that "double tax" would not result; however, this was never communicated to the Applicant by the CRA. In fact, by the time the Applicant was made aware of the CRA's position in this regard, settlement negotiations had commenced and the information became less relevant.

[56] The Applicant argues that the Minister could have provided assurance or comfort to the Applicant around the time when the assessments were proposed or made. The absence of this assurance left the Applicant with no way of knowing how matters would ultimately be resolved.

[57] In the Decision, the Minister failed to consider the facts in the proper context; instead, the Minister took the position that the authority to issue alternative reassessments precludes the availability of relief. In other words, the Minister focused on the authority to issue the assessments, not the impact of the assessments. The refusal of interest relief is inconsistent with the spirit of taxpayer relief provisions and undermines the fairness process.

[58] The Applicant also argues that the Minister's consideration of extraordinary circumstances was limited to the examples in the Guidelines. However, circumstances warranting relief need not be both beyond a taxpayer's control and extraordinary: *3500772 Canada Inc v Canada (National Revenue)*, 2008 FC 554; *Nixon v Canada (National Revenue)*, 2016 FC 906. The Applicant submits that the Minister erred by requiring the application to meet both branches. The existence of inconsistent and contradictory circumstances should constitute the type of circumstances beyond a taxpayer's control, particularly given the amounts involved in the present case.

[59] The Applicant submits that the present case is distinguishable from *Telfer*, above, which found that taxpayers who fail to pay a tax debt pending a decision in a related case normally cannot complain that they should have to pay interest. The present case is not a normal situation due to the quantum owed.

[60] The Applicant contends that the CRA aggressively and knowingly assessed contradictory and inconsistent positions which placed the Applicant in a position where there was no realistic alternative but to wait for the outcome of the litigation, given that the liabilities exceeding $110 million.

[61] Accordingly, the Applicant submits that his request for the cancellation of interest should be reconsidered.

(2) Undue Delay

[62] Alternatively, the Applicant submits that he was subject to undue delay in this matter as a result of the CRA's actions, thereby rendering the Minister's refusal to grant relief unreasonable.

[63] The CRA linked all of the appeals together; consequently, they could not be dealt with separately. Since the CRA does not make downward reassessments to related taxpayers until upward reassessments are resolved, in this case, the corporate reassessments could not be dealt with until after the personal reassessments, which the CRA also chose not to deal with until the *Grant* litigation was resolved. As a result, there was no realistic alternative but to wait for the outcome of *Grant*. Although the term "abeyance" was not specifically used, the appeals were effectively held in abeyance at the will of the CRA and the Applicant was prejudiced by these delays. While the delay in resolving the appeals is understandable, it should not be attributed to the Applicant so as to preclude interest relief.

[64] In the Decision, the Minister states that the Applicant was not waiting for the outcome of the *Grant* case because the TCC rendered the decision on June 29, 2006. The Applicant submits that this is a misunderstanding of the relevant facts and process. In 2006, the 1998 Reassessment and Corporate Reassessments were not before the Appeals Division; they were before the TCC. Additionally, the TCC decision was appealed to the Federal Court of Appeal, with leave sought to the Supreme Court of Canada. Thus, *Grant* was not fully resolved until November 2008. Accordingly, the Applicant could not pursue a resolution based on *Grant* until November 2008.

[65] Moreover, the Applicant submits that the Minister ought to have vacated the 1999 Reassessment once the *Grant* decision had been determined to be definitive of the 1998 and 1999 Reassessments. However, the Minister did not do so until July 2010, after the settlement was reached. The Applicant submits this delay was because the positions of the parties were not certain until the settlement agreement was reached. Consequently, the Applicant submits that the Applicant's position was not clear and obvious in 2006.

(3) Non-Compliance

[66] The Decision refers to the Applicant's failure to comply with payments on the account and various collections activity. However, the Minister admitted in cross-examination that, while the reassessments were under objection and appeal, the Applicant had no obligation to pay the amounts. The Minister also stated that the non-payment of disputed amounts is not the same as non-compliance. The Applicant submits that the Decision does not take the aforementioned into account. Furthermore, the Applicant also notes that the Minister clarified that collection action

could take place in certain circumstances, such as when a jeopardy order has been issued; however, the Applicant has never been under such an order.

[67] The Decision also clearly demonstrates that the Minister considered the timing of payments for the outstanding amount arising from the reassessments under the settlement agreement. The Applicant notes that three significant payments were made to retire the balance owing, including two that were in excess of $37 million and made shortly after the settlement agreement. The Minister appears to have failed to consider these payments.

[68] The Applicant therefore submits that his request for the cancellation of interest should be reconsidered in light of the delays which allowed the interest in question to accrue.

B. *Respondent*

(1) Considerations of the Minister

[69] The Respondent submits that the Decision is reasonable in light of the information before the Minister.

[70] Section 220(3.1) of the *ITA* allows the Minister a broad discretion to waive or cancel penalties and interest, which is guided by CRA guidelines. Cancellation of interest may be justified in certain circumstances, which is assessed under the following considerations: history of compliance with tax obligations; knowingly allowing interest to accrue; exercise of a

reasonable amount of care in conducting affairs under the self-assessment system; and acting quickly to remedy delays or omissions.

(2) Undue Delay

[71] Upon review, the Minister considered that the Crown did not cause undue delay in the litigation concerning the Applicant's debt for the 1998 taxation year. The record does not reflect any request to the TCC for abeyance of the Applicant's appeal prior to settlement in April 2010; if there was such an abeyance, the Applicant admits that it was on the consent of both parties.

[72] Despite the Federal Court of Appeal's ruling against the departure trade scheme on April 30, 2007, the Applicant repeatedly requested and consented to timeline extensions before finally setting down a hearing date and offering to concede the departure trade deduction in April 2010. Throughout this process, the extensions were agreed to on the consent of both parties, and on some occasions, were required as a result of to the Applicant's own conduct.

[73] The Respondent contends that the Crown cannot be held responsible for the Applicant's failure to vigorously prosecute his own appeal in the face of knowledge that interest was accruing. The Applicant chose not to take steps in his appeal because he was awaiting rulings on other departure trade scheme appeals; however, this is not a delay imposed by the Crown.

[74] Moreover, the present case is not distinguishable from *Telfer*, above. The Applicant is not entitled to relief because of his gamble on the outcome of *Grant*. The existence of contradictory assessments did not prevent the Applicant from consulting with counsel, determining the

likelihood that his position would succeed, and making efforts to address the situation by paying his debt, advancing litigation, or cooperating with the CRA audit to resolve confusion about his residency. Additionally, the Applicant has not submitted evidence to suggest that the quantum of reassessments prevented him from addressing his tax debts promptly at the time of reassessment, as contemplated by *Telfer*.

[75] Consequently, the Respondent submits that it was reasonable for the Minister to deny that no additional relief was merited due to Crown delay.

(3) Extraordinary Circumstances

[76] The Respondent also submits that it was reasonable for the Minister to conclude that contradictory reassessments did not constitute an extraordinary circumstance. Extraordinary circumstances are situations beyond a taxpayer's control that prevent them from fulfilling an obligation, such as natural disasters and civil disturbances. The contradictory reassessments were not issued until May 11, 2006; accordingly, they cannot justify failure to address the 1998 tax liabilities prior to that date. While the Applicant may have been concerned about the significance of the reassessments against the corporations he was involved with, he was not liable for the amounts and has not provided evidence that the corporate reassessments imposed financial hardship that would have impeded him from addressing his personal debt.

[77] Moreover, even after the contradictory reassessments had been issued, the Applicant could have voluntarily addressed his 1998 tax liabilities prior to the implementation of the settlement agreement on July 7, 2010. The 2006 reassessment was only raised because the

Applicant declined to provide information that would have allowed the CRA to take a consistent position as to his residency, which was within his control.

[78] The uncertainties regarding the 1998 and 1999 tax liabilities could have been clarified by the Applicant's diligent efforts to provide information to the CRA, pursuit of appeal before the TCC, or settlement. He was not prevented from doing any of those things; instead, he wagered upon the possibility that waiting to resolve the issues would be beneficial. Accordingly, the Applicant cannot now claim that the appeals process put him at a disadvantage.

[79] Finally, the existence of contradictory assessments is unconnected to the Applicant's failure to address the obligations after the July 7, 2010 reassessment. The Applicant's liability was certain at this point.

(4) Additional Basis for Relief

[80] The Minister reviewed the Applicant's representations and reasonably concluded the circumstances did not warrant interest relief. The Applicant's conduct did not merit it: he failed to make payments; he knowingly allowed interest to accrue despite warnings from counsel; he engaged in a pattern of behaviour designed to frustrate the CRA by threatening bankruptcy and transferring assets to foreign jurisdictions; he failed to make voluntary payments for 12 years; and he avoided addressing his 1998 tax liabilities even after settlement.

[81] The Respondent submits that the Minister considered an exhaustive amount of material and issued a reasonable Decision that should be upheld.

VIII. ANALYSIS

A. *Introduction*

[82] This application deals with the Minister's refusal of interest relief that the Applicant requested under s 220(3.1) of the *ITA* for the 1998 taxation year.

[83] The history of dealings that led to the refusal is long and convoluted and grows out of an aggressive tax planning strategy that the Minister found to be contrary to the *ITA*. The Applicant feels that the Minister's refusal to deny him the requested relief is based upon the Minister's disapproval of this strategy rather than the principles and jurisprudence that govern interest relief.

[84] In particular, the Applicant says that the Minister:

a) Failed to consider the extraordinary impact that the issuance of inconsistent and contradictory assessments had upon the Applicant in the particular circumstances of this dispute; and

b) Failed to properly consider the administrative delay in moving the matter forward, and ignored or misapprehended important underlying facts that affected the delay.

[85] There is no dispute between the parties that the standard of review applicable to the issues raised in this application is reasonableness, and the Court agrees. See, for example, *Telfer*, above, at para 2.

B. *Inconsistent and Contradictory Reassessments*

[86] The Applicant says that the Minister's issuance of inconsistent and contradictory reassessments constituted extraordinary circumstances, or circumstances beyond the Applicant's control, for which he is entitled to interest relief.

[87] The inconsistent/contradictory assessments at issue are:

a) The adjustments to the proceeds of disposition of the Falcon shares in the 1998 Reassessment;

b) The determination that the Applicant was a resident of Canada in the second 1999 Reassessment; and

c) The inclusion of the Applicant's 1998 income of EPSP amounts received while concurrently denying the deductibility of the payments of such amounts by the corporate taxpayers involved.

[88] The Applicant's position is that these inconsistent/contradictory assessments (which resulted in liabilities in excess of $110 million) left the Applicant with no realistic alternative but to wait for the outcome of relevant cases that the Minister had brought before the Courts so that the Minister could take a conclusive position on the basis of which the Applicant could respond.

[89] The Applicant points out that the additional amounts assessed by the Minister were "egregiously" in excess of what was ultimately owing upon eventual settlement and should have been accepted as an "extraordinary circumstances" that entitled the Applicant to interest relief.

[90] The Applicant feels the egregious assessments should have been regarded as an extraordinary circumstance because:

a) It is simply unreasonable to not consider the inconsistent reassessments to constitute extraordinary circumstances; and

b) The Minister's position presupposes that the Applicant knew that only one of the assessing positions would ultimately stand, with the result that any double taxation issues would be resolved.

[91] The Applicant's principal point here is that the Minister, in denying the interest relief requested, has focussed "on the authority to issue inconsistent or contradictory reassessments" and has failed to consider the impact of doing so upon the Applicant:

> [T]he Minister has failed to consider the facts in the proper context and has effectively taken the position that authority to issue alternative reassessments precludes the availability of relief. The Minister's refusal to grant interest relief in these circumstances, where the CRA has taken an aggressive and even punitive approach in assessing the Applicant, is not consistent with the spirit of the taxpayer relief provisions and undermines the fairness process.

[92] The Applicant concedes that "extraordinary circumstances" means "circumstances beyond a taxpayer's control." While acknowledging the Federal Court of Appeal decision in *Tefler*, above, he says that his was a different situation because "the quantum makes this distinguishable from a 'normal' situation."

[93] The Applicant's full argument on this issue was set out in his June 17, 2015 request for relief:

> 84. In dealing with the Taxpayer and the Corporate Taxpayers the CRA, albeit in response to what CRA perceived to be an aggressive 'departure trade' on the part of the Taxpayer, took an overly aggressive assessing position with the Taxpayer and the Corporate Taxpayers beginning with its re-assessment of October 10, 2002 of the Taxpayer which both denied the interest deduction and assessed tax on a capital· gain resulting in an

excessive tax assessment. This was compounded unfairly with concurrent contradictory assessments of the Corporate Taxpayers denying the deduction of the expense of payments to the Taxpayer under the EPSPs. This was followed by the Second 1999 Reassessment founded on the position (in contradiction of the 1998 Reassessment) that the Taxpayer remained a resident of Canada following his departure which had been acknowledged. Overall, the response of the CRA, to what was perceived as an abuse of the provisions of the Income Tax Act (the 'departure trade') was itself abusive. It most unfairly and inequitably mis-used powers of Assessments and Reassessments against the Taxpayer and the Corporate Taxpayers (and even a non-resident corporation).

85. In reference to the latter point, the CRA took the position the Taxpayer remained a resident of Canada in the Second 1999 Reassessment, even though the Taxpayer had severed all ties to Canada. This position was contrary to its own position in the 1998 Reassessment and in the First 1999 Reassessment. The result for. the taxpayer was an additional liability in excess of $45,000,000. This position was eventually abandoned and it was acknowledged by CRA that the Taxpayer had ceased to be a non-resident of Canada on December 29, 1998.

86. The CRA also took inconsistent and contradictory positions in its Corporate Reassessments. The CRA raised the Corporate Reassessments, creating in excess of $18,000,000 of Corporate liabilities based upon a position that the EPSP payments which the corporate Taxpayers made were not expenses deductible to the corporations even though the Taxpayer had included them in his income and·CRA assessed him on this basis.

87. The CRA even increased the Falcon Shares Capital Gain reported in the Taxpayer's 1998 tax return from $9,991,347 to $48,119,646, enormously increasing the Taxpayer's tax liability for which CRA could not have reasonably expected payment by the Taxpayer additional to the Reassessment denying the interest expense. CRA eventually abandoned its position.

88. The inconsistent and contradictory reassessing positions of the CRA were aggressive and questionable over-reactions to a perceived abusive 'departure trade'. The CRA's strategy effectively prevented the Taxpayer from making an informed decision to pay taxes assessed until when, ultimately, a rational settlement was concluded and payments made by the Taxpayer· and by the Corporate Taxpayers. The Taxpayer was in a position which, in practical terms, meant it was impossible to pay all assessed liabilities to stop accumulation of interest. When the

Second 1999 Reassessment was raised, the aggregate liability of the Taxpayer was in excess of $90,000,000, of which $62,119,030 was on account of tax. The egregiousness of the CRA's position is borne out by the terms of the Settlement Agreement, pursuant to which the lability was reduced to approximately $21,000,000 of which $16,214,247 was tax. This was a reduction in the tax liability of over $46,000,000. These amounts were further reduced under the January 13, 2013 settlement agreement.

89. When the Second 1999 Reassessment was issued, the Corporate Taxpayers were liable for in excess of $30,000,000 of which $13,201,809 was on account of tax. The Corporate Reassessments were vacated in their entirety under the Settlement Agreement.

90. In summary, the Taxpayer and Corporate Taxpayers were facing, at the time of the Second 1999 Reassessment, aggregate liabilities in excess of $110,000,000, of which approximately $75,000,000 was on account of tax. This aggregate liability was reduced by approximately $90,000,000 under the Settlement Agreement. The aggregate tax liability was reduced by almost $60,000,000. These adjustments highlight how overly aggressive the Minister's reassessing positions were. In these circumstances, the Taxpayer is entitled to relief from payment of interest. The usual rationale that a taxpayer pays what is assessed to avoid interest has no justification here and cannot prevail in these circumstances. Here, the CRA issued conflicting and contradictory assessments knowing both could not be valid; yet, if interest relief is denied, the CRA will have insisted *both* had to be paid in order for the Taxpayer and the Corporate Taxpayers to avoid interest. Such a position by the CRA would be egregious. A denial of interest relief would be an extraordinary and unfair result which would sanction egregious conduct by CRA.

91. It is well-established, as a general rule, the Minister should not issue inconsistent or contradictory assessments. The courts have recognized that in "exceptional cases" it may be necessary for the Minister to issue inconsistent or contradictory assessment. (See, for example: *Hawkes v. The Queen*, 97 D.T.C. 5060 (FCA), at para. 7; *Fink v. The Queen*, [1999] 2 C.T.C. 2088 (TCC), at para. 14; and *Duthie Estate v. Canada*, [1995] 2 C.T.C. 157 (FCTD), at para. 42). However, in this case it would be unreasonable and punitive to require the Taxpayer to pay interest on such assessments. Certainly, the 'exceptionally' available use .of inconsistent or contradictory assessments to protect the Minister's position does not justify the Minister refusing to grant relief in the present case under the taxpayer relief provisions.

> 92. The Taxpayer acknowledges the comments of the Federal Court of Appeal in *Telfer v. Canada*, 2009 FCA 23, that "those who ... knowingly fail to pay a tax debt pending a decision in a related case normally cannot complain that they should have to pay interest" (at para. 35). Note the term 'normally'. This is not a normal situation. A taxpayer who receives inconsistent and contradictory assessments such as in the present case is in a fundamentally different position compared to the taxpayer in *Telfer*. There, the taxpayer knowingly allowed a balance to exist rather than paying it outright and subsequently obtaining a refund.
>
> 93. Here, the CRA aggressively and knowingly assessed contradictory and inconsistent positions which put the Taxpayer (and the Corporate Taxpayers) in a position where there was no realistic alternative available other than to wait for the outcomes of the cases before the Courts selected by the Minister. Aggregate liabilities were in excess of $110,000,000. The Taxpayer was without any options.
>
> 94. The Taxpayer should be granted relief on the basis of the Minister's issuance of inconsistent and contradictory assessments and the timing of them in the context of the actual process which was followed and taking into account the administrative process and delays which naturally and without fault of the Taxpayer (or the Corporate Taxpayers) which inevitably occurred.
>
> [emphasis in original]

[94] The problem for the Court is that the Applicant has presented no evidence that he "was without any realistic options." He simply leaves the Court, as he left the Minister, to assume that the aggregate liabilities involved meant that, for him, there were no realistic options. The sums involved are indeed significant, but they do not in themselves establish that, in the Applicant's particular circumstances, he could not have paid the assessed tax debt.

[95] No information was provided to the Minster and no information has been brought before the Court to establish that the Applicant could not have addressed his tax debts at the time of the reassessment.

[96] The Applicant's case for no "realistic options" is answered in the Decision itself:

> **Knowingly Allowed a Balance to Exist Upon Which Interest Accrued Amounts Owing**
>
> It is agreed that the reassessments resulted in large amounts owing. However, your representatives were well aware that they contained protective positions and that further reassessments would be made to reduce the amounts owing once additional information was made available. In his 15-page Memorandum dated February 6, 2008 Curtis Stewart acknowledged this when he wrote "The CRA has indicated that any offer which they were prepared to make would ensure there was only "one layer of tax."
>
> To determine the amounts owing, your representatives could have considered a best case / worst case scenario. On July 14, 2003 Joel A. Nitikman prepared such a document; he created two potential outcomes for 1998 and then estimated tax payable for each scenario. He also advised which scenario was the more realistic of the two. On February 6, 2008 Curtis Stewart prepared a Memorandum, wherein he analysed the Agency's various positions and reasoned out possible outcomes. An estimate of potential taxes owing was not made at this time.
>
> In his Memorandum of February 6, 2008 Curtis Stewart wrote "With the recent success the CRA achieved in the *Grant* case their position on the assessment on the "Departure Strategy" is extremely strong." As a result, he could have estimated taxes owing on the1998 income tax return as there was a high probability the interest expense claimed would be disallowed.

[97] The Applicant's emphasis is upon the quantum of the reassessments. However, it would appear that CRA's aggressive reassessments were a response to the lack of information from the Applicant. The Applicant: could have provided the information required to make a realistic assessment; could have provided a waiver so that CRA did not need to take a defensive position and use inconsistent assessments; could have sat down with his advisors and produced a settlement offer.

[98] Instead, the Applicant chose to wait in the hope that the "departure trade" would survive scrutiny and/or that his tax debt would be significantly less than the assessment figure. He now argues that it was the "quantum" of the reassessment that meant "there was no realistic alternative available other than to wait for the outcomes of the cases before the Court selected by the Minister." But he has not demonstrated how "quantum" prevented him from dealing with his tax debt in the ways suggested. He appears to be saying that the only alternative available to him was to pay the "aggregate liabilities" of $110,000.000 and it would be totally unreasonable to expect him to do so in a situation where he wanted to see what would happen in other cases before the Courts. But this was not his only alternative. He had created a complex and aggressive "departure trade" scheme and he chose to stay with it until the Courts made it clear that this was not possible. This was not something beyond his control; it was simply the tactic he chose in the circumstances. In choosing this approach, he was fully aware of all quantum issues. But he chose, no doubt with the advice of capable counsel, to deal with quantum by waiting for the Courts to pronounce upon the validity of departure trade.

[99] In my view, the Minister did not ignore impact. Impact was within the knowledge and control of the Applicant.

[100] If the Applicant was concerned about interest running then he could have taken action. He controlled the information and he had the ability to assess the situation and to make a reasonable settlement offer. He also knew whether the 1999 defensive reassessment was ultimately sustainable. There was no evidence before the Minister that the Applicant could not have estimated taxes owing in 1998 and met his obligations. He simply chose not to do this. This

was not a quantum issue because, as Mr. Mienneau points out in his decision, the Applicant and his representatives "were well aware that [the reassessments] contained protective positions and that further reassessments would be made to reduce the amounts owing once additional information was made available."

[101] The Applicant points to the settlement figure and the reduction of some $46,000,000 in tax liability as evidence of CRA's "egregious" reassessment but, with the knowledge at his disposal, he would have known how "egregious" it was when the reassessment was made in 2002 and that it was purely defensive. The only plausible reason for not acting earlier to retire his tax debt and reduce interest is that he wanted to see if the Courts would endorse the departure trade. This was not an extraordinary circumstance and it brings the Applicant with the warning contained in *Telfer* that "Those who […] knowingly fail to pay a tax debt pending a decision in a related case normally cannot complain that they should not have to pay interest." I don't see that the quantum issue relied upon by the Applicant in this application establishes something abnormal that the Applicant could not have dealt with.

C. *Undue Delay*

[102] The Applicant also says that there were lengthy delays in dealing with his appeals and those of the linked Corporate Taxpayers. He says the appeals could not be dealt with separately so that there was no realistic alternative but for the Applicant to wait out the test case chosen by CRA, which was *Grant*.

[103] The Applicant argues that, in effect, the appeals of the Applicant and the linked corporate taxpayers were "held in abeyance at the will of the CRA."

[104] The Applicant says that, in the present application, the Minister's Decision assumes that the Applicant's position was clear and obvious after the TCC decision in *Grant* in 2006, but this was not the case. He says it was not until November 2008 that the *Grant* decision was such that a resolution of the Applicant's 1998 and 1999 years could be pursued based upon *Grant*.

[105] Relying upon *Telfer*, the Minister says that the Crown cannot be held responsible for the Applicant's failure to vigorously prosecute his own appeal in full knowledge that interest was accruing on the assessed liability.

[106] It is difficult to see, on the present facts, how the Applicant does not fall into the category of someone who knowingly failed to pay a tax debt pending a decision in a related case, as described in *Telfer*. When he says that there was no realistic alternative but to await a decision in *Grant*, he had to have known that interest would continue to accrue on all balances owing. The complexity of the situation and the linkages between the Applicant and the corporate taxpayers were a function of the departure trade arrangements that the Applicant had chosen to enter into. The resolution to these complexities, which were of the Applicant's own making, cannot be used to absolve him from having to pay interest. While the legalities of the departure trade scheme were being debated and litigated, this does not mean, of course, that the Applicant should have to pay interest for any undue delay on the part of the Crown, but there is no evidence before me to suggest that any "abeyance" was not consented to by both sides. The Applicant himself

requested timeline extensions in 2007, 2008 and 2009, and he took over eight months to amend his pleadings following the May 11, 2006 reassessment of the 2009 taxation year.

[107] It is noteworthy that CRA did provide some interest relief granted for delay for the 1998 income tax return. The Appeals Division of CRA cancelled interest for the period of April 6, 2003 to June 3, 2004 "due to CRA delay." This meant that "interest was cancelled for the maximum possible period that it could have been – the entire time the file was in process by the Appeals Division."

[108] The Applicant's detailed submissions on delay were as follows:

> 95. There were lengthy delays in dealing with the appeals of the Corporate Taxpayers and of the Taxpayer for a number of reasons. The appeals of the Taxpayer were, and were treated by the Crown, as linked. None of the appeals could be dealt with or settled separately; all had to be handled together. The Corporate Reassessments had to be dealt with *after* the personal assessments of the Taxpayer. More importantly, The CRA intended to first deal with a different 'departure trade' case [which ultimately was *Grant*] as a 'test case' before dealing with the appeal of the Taxpayer.
>
> 96. The Notices of Objection respect of both the Taxpayer and the Corporate Taxpayers were effectively held in abeyance at the decision of the CRA for which no attribution of fault of the Taxpayer or prejudice to his Submission fairly can be made. The Taxpayer initiated contact with the CRA prior to the matter moving to the Tax Court, in good faith, including numerous attempts to meet with CRA Appeals to resolve the matter during this interval. However, the CRA determined it was not prepared to attempt to resolve the objections then, instead determining to hold the matters in abeyance pending the outcome of other Departure Trade appeals.
>
> 97. Upon CRA Appeals advising it was going to await a Tax Court decision on a similar departure trade case put the Taxpayer in the position where he was, through the actions of the CRA, inevitably to be delayed as that case was heard and worked its way

> through the various levels of Court. This is what happened. The Settlement Agreement was concluded in Aril 2010 only after the *Grant* case ran its course. Resulting reassessments were issued July 7, 2010.
>
> 98. Thus, the resolution of the Taxpayer's appeals was delayed. This was for understandable reasons which should, however, be accounted for by interest relief.
>
> 99. As was entirely predictable, this delay continued when the matters moved to the Tax Court of Canada. The Taxpayer's and Corporate Taxpayers' Appeals were, by implicit agreement, held in abeyance pending resolution of similar issues before the court. The Crown proceeded with the cases it chose to advance first.
>
> 100. Given the Tax Appeals of the Taxpayer and the Corporate Taxpayers were held in abeyance for these strategic reasons, the Taxpayer is entitled to interest relief on the same rationale that interest relief already has been given for the period April 6, 2003 to June 4, 2004 (the date the reassessment of the Taxpayer was confirmed). The interest relief should continue after June 4, 2004. All that date signifies is that CRA had made a decision such that the matter would have to be determined by the Tax Court of Canada: The inconsistent and contradictory assessments continued. The holding in abeyance of the Personal Tax Appeal pending the disposition of other appeals justifies interest relief being granted to the Taxpayer.
>
> [emphasis in original]

[109] The Decision under review deals with the delay issue in full:

> Delay Issues Raised in the June 17, 2015 Submissions
>
> In the submission of June 17, 2015, you cite delays in dealing with the tax court appeals. The following summarizes our understanding of the facts in dealing with these delays.
>
> Catherine and David Grant were involved in a trade departure plan; they, too, were clients of Jas Butalia. The TCC rendered its decision on the case (2006 TCC 373) on June 29, 2006. The Federal Court of Appeal heard the case (2007 FCA 174) on April 3, 2007; on April 30, 2007 that court upheld the lower court's decision. Leave to appeal to the SCC was denied in November of 2007 (SCC 2007/11/15).

The T401 Appeals Report for the 1998 Tl was signed off on June 3, 2004. The TCC rendered its decision in the Grant case on June 29, 2006. Consequently, the Appeals Division was not waiting for the *Grant* case to be resolved before it completed the file.

With respect to paragraph 97 of the June 17, 2015 submission, I note that the Notice of Appeal to the TCC for your 1998 income tax return was received by the Department of Justice on September 15, 2004. The Settlement Agreement was reached in April 2010. The final appeal in the Grant case ended in November, 2007 -this was approximately 2 1/2 years before the final settlement of April 2010.

On page 92 of the your [*sic*] affidavit, (in an e-mail dated May 17, 2006 from Curtis Stewart to Jas Butalia and Dave Horne at Tercon) Curtis Stewart wrote:

> "Glen Walsh Tax Court matters . . . have Glenn's matters progress but not conduct Examinations for discovery until after the Kitsch/Tower trial. The Crown is of the view they may win Kitsch/Tower on the issue of residency. We will want to determine the Court's views on both residency and the Departure Trade itself in order to best chart our strategy on Glenn's matter."

In a letter dated February 29, 2008 to the Tax Court of Canada, Curtis Stewart wrote:

> "As previously indicated to the Court, Glenn Walsh. the Appellant, resides outside Canada and the parties are currently seeking to arrive at mutually agreeable dates to recommence the examination. . . In addition, the parties continue to examine whether this matter may settle or the issues may be narrowed. We wish to advise the Court that discussions in such regard encompass more than this single appeal. There are three other Tax Court matters: Tercon Contractors Ltd. v. Her majesty the Queen, Court No. 2004-2891(IT)G; Conex Services Inc. v. Her majesty the Queen, Court No. 2004-2874(IT)G; and Elbee Development Corp. v. Her Majesty the Queen, Court No. 2004-2890(IT)G which it is anticipated will be part of such discussions."

> The letter was co-signed by Robert Carvalho of the Department of Justice.
>
> Justice Judith Woods of the Tax Court of Canada became involved in managing the case as it was not proceeding in a timely manner.
>
> It is our understanding that the only time the term "abeyance"; arose was in a letter dated April 19, 2010. The letter was addressed to the Registrar of the Tax Court of Canada in Ottawa. It indicated that a settlement had been reached in the cases of Glenn Walsh, Conex, Tercon, and Elbee and it requested that the file be held in abeyance for 60 days to enable the Minister to reassess the returns. The letter had both Robert Carvalho and Curtis Stewart as signatories.

[110] Mr. Vienneau then concludes as follows:

> There were no undue delays caused by CRA or the Crown. Delays were caused because you were not forthcoming with information/documentation in a timely manner; your file was not held in abeyance by CRA waiting for the results of court cases; in many cases, the delays were on the part of you or your counsel.

[111] The Applicant says that CRA looks beyond the period for which he is seeking interest relief. The period ends when the Supreme Court of Ccanada refused leave on the *Grant* case. He says he is only seeking interest relief for the period of time during which the *Grant* case ran its course, and his position is that, during that period, CRA made the decision "to hold the matters in abeyance pending the outcome of other Departure Trade appeals." This meant, says the Applicant, that he was "inevitably delayed" by the actions of CRA.

[112] It is true that the Settlement Agreement was concluded in April 2010 only after the *Grant* case ran its course, but this does not, in itself, mean that CRA held matters in abeyance. It is clear that the Applicant himself did not wish to negotiate a settlement until he was sure that the

departure trade could not be sustained. But, once again, that was his choice. He says that it was "not until November 2008 that the *Grant* decision was such that a resolution of the Applicant's 1998 and 1999 years could be pursued based on that Decision."

[113] The Applicant's position is that CRA was not prepared to resolve its dispute with the Applicant until after the *Grant* case had fully proceeded through the Courts:

> 75. Given the CRA's policy not to make downward reassessments to a related taxpayer until the issue of the upward reassessment is resolved, the assessments of the Corporate Taxpayers had to be dealt with after the assessments of the Applicant, and the CRA intended to deal with both only after a different "departure trade" test case - one of the CRA's choosing (which ultimately was *Grant*).
>
> 76. In these circumstances, it is submitted there was no realistic alternative but for the Applicant to wait as the CRA's chosen test case, *Grant*, proceeded through the Courts. The Applicant's and Corporate Taxpayers' appeals were therefore effectively held in abeyance at the will of the CRA. That the term "abeyance" may not have been used in the materials is irrelevant; factually there can be no dispute that this is what occurred. The Applicant was prejudiced by these delays.
>
> 77. The Applicant acknowledges that the delay in resolving the appeals was for understandable reasons. The delay should not, however, be attributed to the Applicant so as to preclude interest relief. In the Decision the Minister states the position that the Tax Court rendered its decision in the *Grant* case on June 29, 2006 and "consequently, the Appeals Division was not waiting for the *Grant* case to be resolved before it completed its file".
>
> 78. It is submitted that this exhibits a complete misunderstanding and or misapprehension as to the relevant facts and process. Firstly, in 2006 the 1998 Reassessment and Corporate Taxpayer Reassessment were not before the Appeals Division of the CRA, rather they were before the Tax Court of Canada. Secondly, the Tax Court decision was appealed to the Federal Court of Appeal and subsequently leave was sought to the Supreme Court of Canada. It was not until November 2008 that the *Grant* decision was such that a resolution of the Applicant's 1998 and 1999 years could be pursued based on that decision.

[footnotes omitted]

[114] The assertions by the Applicant that "CRA intended to deal with both only after a different 'departure trade' test case – one of the CRA's choosing…" and that "CRA determined it was not prepared to resolve the objections then, instead determining to hold the matter in abeyance pending the outcome of other Departure Trade appeals" are not supported by any evidence. It seems clear that the Applicant wanted to wait until *Grant* had finally run its full course, but there is no evidence that CRA required this to happen before it would proceed with appeals or settle the dispute, or that there was even an implicit understanding that matters would be held in abeyance.

[115] Once again, this issue seems to come back to *Telfer* and the Applicant's choice not to take steps in his appeal until he had Court rulings in other departure trade cases.

D. *Conclusions*

[116] In my view, the issues of inconsistent assessments and quantum, and undue delay were the decisive issues in the appeal on interest relief. I can see nothing material in the other factors considered that render the Decision unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed with costs to the Respondent.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-802-16
STYLE OF CAUSE:	GLENN WALSH v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	MARCH 15, 2017
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	APRIL 27, 2017

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