

Federal Court



Cour fédérale

Date: 20170630

**Dockets: T-1478-16
T-1801-16**

Citation: 2017 FC 642

Ottawa, Ontario, June 30, 2017

PRESENT: The Honourable Mr. Justice Campbell

Docket: T-1478-16

BETWEEN:

BINDER CAPITAL CORP

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

Docket: T-1801-16

AND BETWEEN:

**BONNYBROOK PARK INDUSTRIAL
DEVELOPMENT CO LTD**

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

[1] The present Applications concern the correct interpretation of s. 129 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), (*ITA*). The essential features of the provision under consideration are as follows:

129 (1) Where a return of a corporation's income under this Part for a taxation year is made within 3 years after the end of the year, the Minister

(a) may, on sending the notice of assessment for the year, refund without application an amount (in this Act referred to as its "dividend refund" for the year) equal to the lesser of

(i) 38 1/3% of all taxable dividends paid by the corporation on shares of its capital stock in the year and at a time when it was a private corporation, and

(ii) its refundable dividend tax on hand at the end of the year; and

(b) shall, with all due dispatch, make the dividend refund after sending the notice of assessment if an application for it has been made in writing by the

129 (1) Lorsque la déclaration de revenu d'une société en vertu de la présente partie pour une année d'imposition est faite dans les trois ans suivant la fin de l'année, le ministre :

a) peut, lors de l'envoi de l'avis de cotisation pour l'année, rembourser, sans que demande en soit faite, une somme (appelée « remboursement au titre de dividendes » dans la présente loi) égale à la moins élevée des sommes suivantes :

(i) 38 1/3 % de l'ensemble des dividendes imposables que la société a versés sur des actions de son capital-actions au cours de l'année et à un moment où elle était une société privée,

(ii) son impôt en main remboursable au titre de dividendes, à la fin de l'année;

b) doit effectuer le remboursement au titre de dividendes avec diligence après avoir envoyé l'avis de cotisation, si la société en fait la demande par écrit au cours de la période

corporation within the period within which the Minister would be allowed under subsection 152(4) to assess tax payable under this Part by the corporation for the year if that subsection were read without reference to paragraph 152(4)(a).

[Emphasis Added]

pendant laquelle le ministre pourrait établir, aux termes du paragraphe 152(4), une cotisation concernant l'impôt payable en vertu de la présente partie par la société pour l'année si ce paragraphe s'appliquait compte non tenu de son alinéa a).

[Non souligné dans l'original.]

[2] With respect to each Application under consideration, the Respondent Minister applied s. 129 to decide that no refund can be provided because, in each case, the required return was not filed within the relevant three-year period.

[3] It is common ground that the Tax Court has jurisdiction over questions of law arising from the *ITA*, while the Federal Court has jurisdiction over the Minister's conduct in applying the provisions of the *ITA*.

[4] The Applicants argue that the failure of the Minister to grant relief from the filing date requirement in s. 129 is a matter of the Minister's conduct which is unreasonable, and, accordingly, the Minister's decisions must be set aside. The Minister argues that as a matter of law, s. 129 does not allow such relief to be granted by the present Applications because this Court has no jurisdiction to address the correct interpretation of s. 129. For the reasons that follow, I find in favour of the Minister's argument.

[5] While the factual circumstances of each Applicant are different, the legal issues with respect to each Applicant are the same. This latter fact allows a decision on both Applications under consideration to be delivered in this single set of reasons.

I. Binder Capital Corp

[6] John Binder is a shareholder of High Noon Holdings Inc. (HNH), which is a shareholder of the Applicant, Binder Capital Corporation (BCC). BCC is a shareholder of Avmax Group Inc. (AGI), which is a shareholder of Avmax Aircraft Leasing Inc (AAL). John Binder is CEO and President of AGI (Notice of Objection, Binder Application Record (NOO, BAR), p. 110-112).

[7] On April 16, 2015, both BCC and HNH filed income tax returns for the 2010 taxation year. The Minister assessed HNH's return on June 15, 2015 and the BCC return two days later. On the application of s. 129, BCC was assessed to owe \$944,771.88 due to denied dividend refunds, late-filing penalties and interest (NOO, BAR p. 87). BCC served a Notice of Objection (NOO) on September 20, 2015. In the NOO, BCC, *inter alia*, requested that the Minister exercise discretion to grant a dividend refund pursuant to ss. 220(2.1) and 220(3) of the *ITA* notwithstanding the three-year limit in s. 129. BCC relied on the following extenuating circumstances:

In the course of a year, Mr. Binder tragically loses his spouse; deals with a major corporate reorganization of the AGI group, with the assistance of a temporary CFO, that affects his personal companies; finds a permanent CFO after the reorganization has taken place, who is not familiar with the changes to his personal companies; gets engaged in a reorganization that is expected to be tax neutral to his personal companies, unless a return is not made within a three year period; loses his personal bookkeeper, who normally does the financial statements and returns for his personal companies; and gets pulled into a lawsuit with his spouse's family.

The series of events create a perfect storm for BCC's failure to make its return of the Taxation Year within the time limit in subsection 129(1) of the Act. But for the extenuating circumstances, BCC's return would have been made within the time limit.

(NOO, BAR, p. 114)

[8] The Canada Revenue Agency (CRA) proposed to confirm the Assessment and deny administrative relief on July 13, 2016. The Applicant replied to this proposal on August 5, 2016. On August 9, 2016, the CRA, on behalf of the Minister, confirmed the Assessment and denied administrative relief. That decision is the subject of the present judicial Applications.

II. Bonnybrook Park Industrial Development Co Ltd

[9] Bonnybrook applied to late file its T2 corporate tax returns for the 2003 to 2012 taxation years as part of an Application for Taxpayer Relief under the Voluntary Disclosure Program (VDP). The Minister accepted Bonnybrook's late-filed returns on February 20, 2015.

[10] On May 13, 2015, the Minister assessed Bonnybrook's 2003-2012 tax returns and disallowed \$220,729 in dividend refunds for the 2003-2011 taxation years. The Minister allowed a dividend refund of \$22,785 for the 2012 taxation year, but assessed penalties pursuant to s. 162(1) of the *ITA* for failure to file the 2003 and 2004 returns only, as they were outside the 10-year limitation period for the VDP.

[11] By letter dated May 6, 2016, Bonnybrook requested that the Minister exercise discretion pursuant to *ITA* ss. 220(2.1) and 220(3) to waive and extend the filing requirements for its 2003-2011 tax returns, respectively. In the alternative, Bonnybrook requested that the Minister cancel and waive any existing or future late-filing penalties and interest, respectively, pursuant to *ITA* s. 220(3.1). Bonnybrook submitted that the returns had been filed late for the following reasons:

The applicant's delay in making its returns was due to extenuating circumstances surrounding its principal, Beverly Armbrust, who faced severe and debilitating health issues during 2004 to 2012, which impacted her ability to manage her personal financial affairs, and that of the applicant.

(Bonnybrook Application Record (BBAR), p. 369, para. 4)

[12] It is undisputed that Ms Ambrust's health issues were very serious, and resulted in extensive treatment, medication, and hospitalization.

III. The Requests for Relief

[13] Both Applicants did not file their returns within the three-year period set out in s. 129(1). They therefore requested that the Minister exercise discretion pursuant to *ITA* ss. 220(2), 220(3) and 220(3.1) to waive the requirement to file returns, extend the time limit in s. 129(1), and waive penalties and interest, respectively:

(2.1) Where any provision of this Act or a regulation requires a person to file a prescribed form, receipt or other document, or to provide prescribed information, the Minister may waive the requirement, but the person shall provide the document or information at the Minister's request.

(3) The Minister may at any time extend the time for making a return under this Act.

(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

(2.1) Le ministre peut renoncer à exiger qu'une personne produise un formulaire prescrit, un reçu ou autre document ou fournisse des renseignements prescrits, aux termes d'une disposition de la présente loi ou de son règlement d'application. La personne est néanmoins tenue de fournir le document ou les renseignements à la demande du ministre.

(3) Le ministre peut en tout temps proroger le délai fixé pour faire une déclaration en vertu de la présente loi.

(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

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.

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.

IV. The Decisions Under Review

[14] The Minister denied both Applicants' requests.

[15] In both Decisions the Minister took the position that no authority exists pursuant to s. 220(3) of the *ITA* to extend the three-year period under s. 129(1). Both Decisions also declined to waive penalties and interest as requested; for BCC, the Minister simply stated that the penalties and interest had been correctly assessed, while for Bonnybrook, the Minister noted that the Applicant had not requested relief within ten years as required (see below). The following are the critical details with respect to each Decision.

A. *Binder Capital Corp*

[16] By letter dated August 9, 2016, the Minister noted that BCC's 2010 return was not filed within the three-year time period required by s. 129(1) in order to issue a dividend refund. The letter quoted Income Tax Ruling 2011-0426331E5(E):

With respect to the issue of administrative relief, Income Tax Ruling 2011-0426331E5(E) states: "Although subsection 220(3) of the Act provides the Minister with the discretion to extend the time for making a return of income, this discretion does not extend to the filing deadline in subsection 129(1) of the Act" It further states "Subsection 220(3) does not alter or affect whether a corporation has factually filed its return of income within the period required under the Act. In addition, there is no provision within section 129 to permit the Minister to extend the time period. As a result, the

granting of an extension of time to make a return pursuant to 220(3) of the Act does not have the effect of extending the three-year period in subsection 129(1).”

(Notice of Confirmation, Binder Application Record (NOC, BAR), p. 120-121)

[17] The letter concluded as follows:

As the return for the 2010 taxation year was filed beyond the three-year time period, you are not eligible to receive a dividend refund pursuant to subsection 129(1) of the *Act*. Furthermore, subsection 220(3) of the Act does not permit an extension with respect to the filing deadline provided under subsection 129(1) of the *Act*. The failure to file penalty was correctly assessed pursuant to subsection 162(1) of the *Act*; the return was not filed within six months from the end of its taxation year as required by subsection 150(1) of the *Act*.

(NOC, BAR), p.121)

B. *Bonnybrook Park Industrial Development Co Ltd*

[18] By letter dated October 12, 2016, the Minister noted:

We have carefully considered your submission in relation to the guidelines set out in *Information Circular 07-1* and the applicable legislation. We have determined that this is not a case that would allow for any relief from penalties and interest that have already been waived by the voluntary disclosure program (VDP). We are also unable to waive the filing requirement for the purposes of the dividend refund.

[...]

Corporation’s tax returns for 2003 to 2012 taxation years were filed under the Voluntary disclosure Program (VDP). VDP accepted the T2 returns for the taxation years 2005 to 2012, therefore no penalties were applied with respect to those returns. Corporation’s tax returns for 2003 and 2004 taxation years were outside of the 10 year limitation period and were not accepted under the VDP program; therefore late filing penalties were applied for those returns.

[...]

Taxpayer relief provisions have a Limitation Period on Exercising Ministerial Discretion to waive penalties and interest. A taxpayer has 10 years from the end of the calendar year in which the tax year or fiscal period at issue ended to make a request to the CRA for relief. A taxpayer can ask for relief in accordance with the provisions of the *subsection 220(3.1)*: *Subsection 220(3.1)* gives the Minister the discretionary authority to waive or cancel all or part of any penalty and interest otherwise payable by a taxpayer under the Act. The request must be made within the 10-year time limit.

[...]

You have requested under subsection 220(3) that the Minister exercise discretionary powers to waive or extend the requirement to file the corporation's tax returns within three years for the purposes of dividend refund. *Subsection 220(3)* states, "*The Minister may at any time extend the time for making a return under this Act*". Filing requirements and refund of overpayment of tax are governed by two different sections of the Act. *Subsection 150(1)* of the Act sets out the tax return requirements and filing deadlines for taxpayers, and *Subsection 164(1)* of the Act provides rules governing the refunds of overpayments of tax. It is our position that *Subsection 220(3)* is only applicable to the provisions of *Subsection 150(1)* and has no application to *Subsection 164(1)*. (BBAR, pp. 365-366)

V. Positions of the Parties

[19] The Applicants argue that the Minister's decision is unreasonable because there is no limit placed on the Minister's discretion to provide relief with respect to the three-year limit in s. 129(1):

29. The Minister has the statutory authority under subsection 220(2.1) to waive the filing requirement under subsection 129(1), so that she can make the dividend refund.

30. Subsection 220(2.1) broadly states that "[w]here any provision of this Act or a regulation requires a person to file a prescribed form ... the Minister may waive the requirement" [Emphasis added].

31. The applicant's position is that subsection 129(1) [a provision of the Act] requires a corporation [a person (see Act,

s. 248(1)] to file an income tax return [a prescribed form (see: Act, s.150(1)(a)]. This means that the provision falls squarely within the scope of subsection 220(2.1).

32. Once the Minister waives the requirement to file the return under subsection 129(1), the applicant is relieved from having to meet the three year time period and the Minister is no longer barred from making the dividend refund.

33. The Minister also has the statutory authority under subsection 220(3) to extend the time to file a return, so that she can make the dividend refund.

34. Subsection 220(3) states without qualification that "[t]he Minister may at any time extend the time for making a return under this Act" [Emphasis added].

35. The applicant's position is that subsection 129(1) contains a requirement to file an income tax return within a three year time period, which may be extended by subsection 220(3). Once the discretion is exercised, the preamble of subsection 129(1) can accordingly be re-read as:

129 (1) Where a return of a corporation's income under this Part for a taxation year is made within [x] years after the end of the year, [...]

36. If the [x] is 5, representing an extension of 2 years from the original 3, then the applicant's return will satisfy the filing requirement and there will be no impediment for granting it the dividend refund.

(BAR, p. 160-161; repeated almost *verbatim* in BBAR, p. 377-378)

[20] The Minister disputes the Applicants' position that ss. 220(2.1) and (3) apply to s. 129(1).

As to this Court's authority to decide the dispute, the Minister's primary argument is that:

The issues raised [by the Applicants] are within the jurisdiction of the Tax Court of Canada and not within the jurisdiction of this Court as the [Applicants seek] to challenge the correctness of an assessment and the Minister's interpretation of a section of the *Income Tax Act*.

(Binder Respondent's Record, p. 277-278, para. 27; Bonnybrook Respondent's Record, p. 311, para 33)

[21] Caution is required in addressing the Minister's argument. As noted by the Supreme Court in *Canada v Addison & Leyen Ltd.*, 2007 SCC 33 at paragraph 11:

Reviewing courts should be very cautious in authorizing judicial review in such circumstances. The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.

[22] In my opinion, to address the application of the Minister's discretion with respect to s. 129, it is first necessary to establish that the Minister's discretion applies to s. 129. I find that establishing whether the Minister's discretion applies to s. 129 is a jurisdictional question with respect to an interpretation of the *ITA* which is not within this Court's authority to decide. I also find that, as advanced by the Minister, the Federal Court of Appeal's decision in *1057513 Ontario Inc. v. Canada*, 2015 FCA 207 (105) supports this conclusion.

[23] In *105*, Justice Boccock in the Tax Court made the following statutory interpretation finding:

[...] the failure to file a tax return within 3 years from the end of the taxation year during which the dividend was paid precluded the Appellant from receiving the dividend refund for that year.

(*105*, para. 1)

[24] Justice Webb, speaking for the FCA, concurred with Justice Boccock:

However, it is a condition for either paragraph 129(a) or (b) that the corporation's return for the particular year for which it will be claiming the refund must be filed within 3 years after the end of this year. If the return is not filed within this three year period, neither paragraph (a) nor paragraph (b) is applicable. Since the

Appellant did not file its tax returns for any of its 1997 to 2004 taxation years within three years from the end of any of these taxation years, the provisions of paragraphs (a) and (b) of subsection 129(1) are not applicable and the Minister is neither obligated nor empowered, under subsection 129(1) of the Act, to pay the dividend refund amount to the Appellant for any of these years.

In this appeal the Appellant essentially repeated the arguments that it made before the Tax Court Judge. We are not persuaded that, under the applicable statutory interpretation principles, the Tax Court Judge committed any error in concluding that the requirement to file tax returns within three years from the end of the taxation year in which the dividend is paid as set out in subsection 129(1) of the Act is a condition that must be satisfied in order for the Appellant to receive the dividend refund under this subsection.

(105, paras 4-5)

[25] In my opinion, the FCA's decision in *105* is a binding precedent. The interpretation of s. 129 is for the Tax Court to decide.

JUDGMENT IN T-1478-16 AND T-1801-16

THIS COURT'S JUDGMENT is that:

1. The Applications under review are dismissed; and
2. Pursuant to Rule 302 of the *Federal Courts Rules* the following orders are made:

For Binder Capital Corp:

The Application, as it relates to the cancellation of penalties and interest otherwise payable under the *Income Tax Act* for the taxation year ended September 30, 2010 is granted, on consent, and the matter is referred back to the Minister for a fresh consideration by another delegate.

For Bonnybrook Park Industrial Development Co Ltd:

The Application, as it relates to the cancellation of interest otherwise payable under the *Income Tax Act* for the taxation year ended December 31, 2005 to December 31, 2012 is granted, on consent, and the matter is referred back to the Minister for a fresh consideration by another delegate. In so reconsidering, the respondent and applicant agree that the review will include interest as it has accrued from the year ended

December 31, 2005, although related to assessments of tax arising from years ended December 31, 2003 and December 31, 2004.

The issue of costs to be awarded will be determined on further argument from Counsel.

"Douglas R. Campbell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS: T-1478-16 AND T-1801-16

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STYLE OF CAUSE: BINDER CAPITAL CORP v MINISTER OF NATIONAL REVENUE

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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 4, 2017

JUDGMENT AND REASONS: CAMPBELL J.

DATED: JUNE 30, 2017

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