

**Date: 20080220**

**Docket: T-1185-07**

**Citation: 2008 FC 218**

**Ottawa, Ontario, February 20, 2008**

**PRESENT: The Honourable Orville Frenette**

**BETWEEN:**

**M. DIANNE TELFER**

**Applicant**

**and**

**CANADA REVENUE AGENCY**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Ms Telfer filed for tax losses for the tax years 1996 and 1997, carried losses back to 1993 through 1995 and forward to 1998 and 1999. She was reassessed for the tax years 1993, 1994 and 1996 by Notice dated June 29, 2000. She filed Notices of Objection for the reassessment of those years with the Minister of National Revenue (Minister) on July 31, 2000.

[2] The applicant was also reassessed for tax years 1997, 1998 and 1999 by Notice dated March 26, 2001, and filed related Notices of Objection on May 19, 2001.

[3] At both of these instances, the respondent, Canada Revenue Agency (Agency) acknowledged receipt of the objection Notices with a letter which indicated that interest would continue to accumulate on the unpaid balance in dispute.

[4] The Agency opted to hold the applicant's Notices of Objection in abeyance, as the issue raised therein was substantially similar to that in the *Brown* case then before the Tax Court. It notified Ms Telfer of this decision by letter January 15, 2002. In that letter, the respondent again informed Ms Telfer that interest would continue to accumulate on the unpaid balance and that the Agency would pay interest on the relevant amount should her objections ultimately be successful.

[5] In 2004, following the decision of the Tax Court in the similar case, the Agency made a settlement offer in respect of the 1996 and 1997 taxation years which was accepted by Ms Telfer. The applicant was required to provide a waiver of appeal as part of the settlement, and did so on December 9, 2004. In accordance with the terms of the settlement, the Minister confirmed the reassessments of the 1993 and 1994 taxation years, and reassessed Ms Telfer for 1996, 1997, 1998 and 1999 on March 21, 2005.

[6] Ms Telfer requested interest relief (of \$10,467.00) on her tax liability on September 22, 2006 on the basis of departmental delay and financial hardship. The Agency's letter confirming receipt of this request again noted that interest would continue to accumulate on any unpaid balance and that the assignment of an Officer to assess her case might take several months. The Minister denied the request by letter dated February 19, 2007. The applicant then requested an

administrative review of the February 19<sup>th</sup> decision, which was denied by letter dated May 23, 2007. It is the refusal by the appeals officer who undertook the administrative review to grant relief which is the subject of the instant judicial review.

## I. Issues

- A. Should the delay in assessing the applicant's Notices of Objection be a basis of relief under the fairness provisions of the *Income Tax Act*, 1985, c. 1 (5th Supp.)?
- B. What is the appropriate time for the application for relief to start running?

## II. Analysis

[7] The Minister has a discretion to waive any penalty of interest pursuant to subsection 220 (3.1) of the *Income Tax Act*, which reads as follows:

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

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

into account the cancellation of the penalty or interest. et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

[8] This discretionary decision with respect to waiver of interest is subject to review on the standard of reasonableness *simpliciter*: *Dort Estate v. Canada (Minister of National Revenue - M.N.R.)*, 2005 FC 1201, [2005] F.C.J. No. 1460 [*Dort*]; *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153, [2005] F.C.J. No. 714 [*Lanno*]; *Kreklewich v. Canada Revenue Agency*, 2007 FC 892, [2007] F.C.J. No. 1153 [*Kreklewich*].

A. *Should the delay in assessing the applicant's Notices of Objection be a basis of relief under the fairness provisions of the Income Tax Act, 1985, c. 1 (5th Supp.)?*

[9] The applicant asserts that there is no reason delays in court proceedings cannot be considered as the basis of relief under the fairness provisions. She cites *Cole v. Canada (Attorney General)*, 2005 FC 1445, [2005] F.C.J. No. 1764 [*Cole*] and *Dort* in support of this proposition.

[10] The respondent counters that this case is distinguishable because Ms Telfer was not a party to the case which caused the delay and she was informed several times that interest would continue to accrue on her tax liability during the abeyance.

[11] Ministerial guidelines on the factors to be considered in the exercise of the discretion to waive penalties and interest pursuant to subsection 220 (3.1) of the *Income Tax Act* have been issued in the form of *Information Circular 07-1 – Taxpayer Relief Provisions*. Circumstances

where relief is warranted are described in paragraphs 23 through 27. Paragraph 25 provides for circumstances beyond the control of the taxpayer, such as natural disaster or serious illness. See *McLeod Estate v. Canada (Minister of National Revenue - M.N.R)*, 2007 FC 1111, [2007] F.C.J. No. 1443 [*McLeod Estate*].

[12] Paragraph 26 of the *Information Circular* illustrates circumstances where penalties and interest might be waived due to the actions of the Agency, including:

- (a) processing delays that result in the taxpayer not being informed, within a reasonable time, that an amount was owing;  
[...]
- (e) delays in providing information, such as when a taxpayer could not make the appropriate instalment or arrears payments because the necessary information was not available; or
- (f) undue delays in resolving an objection or an appeal, or in completing an audit.

[13] While guidelines such as these are not binding on the Minister or the Agency, they are useful in assessing the reasonableness of the decision: *Jim's Pizza (1980) Ltd. v. Canada (Revenue Agency)*, 2007 FC 782, [2007] F.C.J. No. 1052.

[14] In her decision, the appeals officer noted that there had been no delays by the Agency; that Ms Telfer had agreed to have her Notices of Objection held in abeyance pending the outcome of the other case at the Tax Court; and, that she had been informed on three separate occasions that interest would continue to accrue on her outstanding balance. She found, therefore, that Ms Telfer did not qualify for interest cancellation on the basis of delay. A separate request based on financial hardship was referred to the Toronto North Collections Fairness Committee.

[15] Ms Telfer does not dispute that she was informed that interest would continue to be charged on her unpaid tax bills. She simply asserts that the delay in processing her objections to her tax assessments pending the outcome of another taxpayer's case at the Tax Court of Canada should be sufficient grounds to find the decision of the appeals officer unreasonable.

[16] The standard of review of reasonableness *simpliciter* essentially questions whether the discretionary decision can be based on the evidence. Unless it is made in bad faith, contrary to law or considering irrelevant facts, it should not be disturbed.

[17] However, such a decision involving interpretation of the consequences of undue delays and accrued interest in Income Tax matters has been considered sufficient to vacate an officer's decision in *Dort* and *McLeod Estate*.

[18] In *Cole*, which involved a 10 year delay, Justice Michael L. Phelan wrote at paragraph 20:

There is no reason why delays in court proceedings, depending on the circumstances, could not be considered as a basis for relief. In addition, neither the legislation nor the Minister's policy restricts consideration only to those events within departmental or Agency control.

See also *Lanno*.

[19] I agree with the reasoning of Phelan J., but I would add that there could be a valid argument to contest the decision if the delay was due to the proceedings, and was a predicable risk on the part of the party, see *Kreklewich*.

[20] In the present case, the delay was caused by the deferral while awaiting the results in the *Brown* case which was before the Tax Court and which presented similarities to the instant case.

[21] This suspension or delay was made at the suggestion of the Minister and although the applicant agreed, is it fair that she bear all of the interest accumulated during that period? I do not think so.

[22] Justice Sean J. Harrington, in *Dort*, granted a review in the favour of the tax payer's' estate because the assessment had been appealed to the Tax Court and the Federal Court of Appeal. Justice Harrington wrote at paragraph 17 "...The principle of legitimate expectations is part of procedural fairness."

[23] In *Cole*, the lengthy delay was due to the tax payer's appeal and the judge's alleged conduct. A judicial review was granted for those reasons against a Minister's decision to refuse interest relief.

[24] It seems to me that in the present case even if the applicant was warned by the Minister of the continuance of interest during the delay caused by the court proceedings in the *Brown* case, it is unfair to impose all of the interest upon the applicant who was not before the Tax Court. Therefore,

I believe it would be only fair that the applicant should only have to pay one-half of the accrued interest during the waiting period caused by the *Brown* case.

*B. What is the appropriate time for the application for relief to start running?*

[25] The applicant also contends that her application for interest relief should be assessed based on the date the Objections were filed, so as to bring the earliest years for which she claims relief within the ten year limitation contained in subsection 220 (3.1) of the *Income Tax Act*.

[26] I would, however, agree with the argument of the respondent that the limitation in subsection 220 (3.1) is expressly laid out to restrict the Minister's discretion on the waiver or cancellation of interest and penalties to the ten calendar years after the end of the relevant taxation year. The Agency is, therefore, statutorily barred from considering waiving or cancelling interest or penalties for tax years prior to that period.

[27] I would also note that the applicant's request for direction to the respondent to make a decision regarding the tax years 1993 and 1994 is without merit, as the Objection concerning those years was resolved by a confirmation of the relevant reassessments. Notice of that confirmation was sent to the applicant on March 21, 2005, according to the respondent, although copies of that notice are not before me.

[28] Therefore, for all of these reasons, the application for judicial review should be granted.



**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** this application for judicial review is allowed and the matter is referred back to a person authorized by the Minister, other than the one who made the impugned decision, for a review limited to the issue of the delays invoked. Costs are granted in favour of the applicant.

"Orville Frenette"  
\_\_\_\_\_  
Deputy Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1185-07

**STYLE OF CAUSE:** M. Dianne Telfer  
v.  
CRA

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** January 29, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** FRENETTE D.J.

**DATED:** February 20, 2008

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