

BETWEEN:

CHRISTOPHER D. PALIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on March 15, 2007, at Toronto, Ontario

Before: The Honourable Justice E. P. Rossiter

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Nimanthika Kaneira

ORDER

Upon hearing a motion by the Respondent for:

1. an Order dismissing the Appellant's Notice of Appeal in respect of his 1990, 1991, 1992 and 1993 taxation years;
2. in the alternative, an Order extending the time within which the Respondent must file and serve its Reply to 60 days from the date of communication of the Court's Order.

And having heard the submissions of the parties and reading the materials filed by the parties;

1. The Motion is granted and the appeal is dismissed.
2. There will be no Order as to costs.

Signed at Ottawa, Canada, this 1st day of November, 2007.

"E. P. Rossiter"

Rossiter, J.

Citation: 2007TCC255
Date: 20071101
Docket: 2006-1074(IT)I

BETWEEN:

CHRISTOPHER D. PALIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Rossiter, J.

[1] The Respondent brought a Notice of Motion for:

1. an Order dismissing the Appellant's Notice of Appeal in respect of his 1990, 1991, 1992 and 1993 taxation years;
2. in the alternative, an Order extending the time within which the Respondent must file and serve its Reply to 60 days from the date of communication of the Court's Order.

Issue

[2] The issue is whether this Court has the jurisdiction to entertain an appeal from a matter being subject to the Fairness Provisions in subsection 220(3.1) of the *Income Tax Act* ("Act") or if it is a matter which is within the jurisdiction of the Federal Court of Canada.

Facts

[3] The facts in this matter are straightforward.

1. On December 22, 1994, the Appellant was arbitrarily assessed in respect of his 1990, 1991, 1992 and 1993 taxation years. The

Canada Revenue Agency (“CRA”) found the Appellant had overpaid his tax liability and was owed a refund.

2. On March 9, 1995, the Appellant filed Notices of Objection with respect to all assessments. The Objections were, in part, that CRA had miscalculated the Appellant's taxable income too low resulting in a refund.
3. On February 15, 1995 and June 21, 1996, CRA reassessed the Appellant for the 1990, 1991, 1992 and 1993 taxation years upholding the refund and issuing a refund cheque to the Appellant.
4. On October 7, 2004 the Appellant filed amended returns for the 1990, 1991, 1992 and 1993 taxation years after the Appellant discovered that CRA had under-assessed the Appellant for the taxation years in question and explained the excess refund. The Appellant had received a refund and deposited it in a non-interest bearing account some four and one-half years after the refund was issued. These amended returns were treated by CRA as requests to adjust the Appellant's income tax returns for the 1990, 1991, 1992 and 1993 taxation years.
5. On June 16, 2005, CRA in response to the amended returns, issued Notices of Reassessment with respect to the Appellant's 1990, 1991, 1992 and 1993 taxation years seeking a substantial amount by way of interest on the excess refund.
6. On September 7, 2005, after complying with this new reassessment of June 16, 2005, the Appellant requested that CRA reduce the interest assessed to zero.
7. On January 17, 2006, the Appellant's request was refused pursuant to the Fairness Provisions of the *Act* because the request was outside the relevant time period; the Respondent's position was that the Fairness Provisions only relate to the 10 years ending in the previous calendar years; therefore a request in 2005 would only be accepted for 1995 and subsequent tax years.

Respondent's Position

[4] The position of the Respondent is that:

- (1) the Minister considered the Appellant's request for interest relief under subsection 220(3.1) of the *Act*;
- (2) under subsection 165(1.2) of the *Act* no objection may be made by a taxpayer to an assessment made under subsection 220(3.1). This subsection reads:

165.(1.2) Limitation on objections -- Notwithstanding subsections (1) and (1.1), no objection may be made by a taxpayer to an assessment made under subsection 118.1(11), 152(4.2), 169(3) or 220(3.1) nor, for greater certainty, in respect of an issue for which the right of objection has been waived in writing by the taxpayer.
- (3) in order to appeal the taxpayer must file a valid Notice of Objection under subsection 169(1) of the *Act*. The Respondent reasons that although the Appellant did send a letter on September 7, 2005 in response to the June 2005 reassessment, this letter is not a valid Notice of Objection, pursuant to subsection 165(1.2);
- (4) given that the Appellant is barred from making an objection, this Court has no jurisdiction to proceed with the appeal. The Respondent takes the position that the only way that a review could be conducted with respect to the Fairness Provisions under subsection 220(3.1) is by way of judicial review to the Federal Court of Canada and not by way of appeal to the Tax Court of Canada.

Appellant' Position

[5] The Appellant took the position that this is not an appeal from a Fairness decision, but rather is an appeal from the Appellant's request for a reduction of the interest payable to zero. The Appellant's view is that the Minister did not honour his September 2005 request at all and simply said the Appellant was outside of the limitation period - end of the matter. The Appellant subsequently argued that the Minister did not interpret subsection 220(3.1) correctly.

[6] Further, the Appellant also states that the Minister treated the Appellant's amendments as an adjustment of the 1990 to 1993 returns and that he did not give the Minister permission to do this reassessment.

Analysis

[7] This was not an appeal of an interest assessment but rather an appeal from a review or failure of a review under subsection 220(3.1) of the *Act*. The record

reveals that the Appellant's request for relief was reviewed under subsection 220(3.1) of the *Act* and as a result subsection 165(1.2) of the *Act* applies. Subsection 165(1.2) of the *Act* precludes a taxpayer from objecting to an assessment which was made under subsection 220(3.1) of the *Act*. Given the foregoing, the Appellant may not appeal to the Tax Court of Canada because he is barred from filing a valid Notice of Objection pursuant to subsection 169(1) of the *Act*.

[8] Reference should be made to a Federal Court of Appeal decision in *Armstrong v. Canada*; *Armstrong v. Canada (M.N.R.)*, [2006] F.C.J. No. 463 wherein Justice Sharlow stated in paragraph 8:

An amended return for a taxation year that has already been the subject of a notice of assessment does not trigger the Minister's obligation to assess with all due dispatch (subsection 152(1) of the *Income Tax Act*), nor does it start anew any of the statutory limitation periods that commence when an income tax return for a particular year is filed and then assessed. An amended income tax return is simply a request that the Minister reassess for that year.

This passage from the Federal Court of Appeal certainly supports the proposition that when the Appellant filed the amended returns in 2004, it was implicit the Appellant was also authorizing the Minister to reassess his taxation years in question. Reference may also be made to a decision by Justice Mogan of the Tax Court of Canada in *Yaremy v. Canada*, [1999] T.C.J. No. 713 where subsection 165(1.2) of the *Act*, was also considered. Justice Mogan stated in paragraph 10 as follows:

Having found that the reassessment under appeal was made under subsection 152(4.2), I conclude that subsection 165(1.2) applies and no valid objection could be made by the Appellant to that reassessment. If no valid objection can be made, then no valid appeal can be commenced under subsection 169(1). I uphold the Respondent's preliminary objection and will quash the appeal.

[9] Similarly, in this case, I conclude that given the request for relief was reviewed under subsection 220(3.1) of the *Act*, subsection 165(1.2) of the *Act* applies and no valid objection or appeal lies therefrom to this Court. A challenge to a decision under the Fairness Provisions of subsection 220(3.1) of the *Act* is by way of judicial review to the Federal Court of Canada. A challenge to a failure of the Minister to consider a request under the Fairness Provisions is by way of seeking mandamus to the Federal Court of Canada. There will be no Order as to costs.

Signed at Ottawa, Canada, this 1st day of November, 2007.

"E. P. Rossiter"

Rossiter, J.

CITATION: 2007TCC255

COURT FILE NO.: 2006-1074(IT)I

STYLE OF CAUSE: CHRISTOPHER D. PALIN AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 15, 2007

REASONS FOR ORDER BY: The Honourable Justice E.P. Rossiter

DATE OF ORDER: November 1, 2007

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Nimanthika Kaneira

COUNSEL OF RECORD:

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Name:

Firm:

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