Docket: 2017-394(IT)I

BETWEEN:

MARIA W**IE**GERS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

AND

Docket: 2017-398(IT)I

BETWEEN:

NICOLA DiLENA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence on October 31, 2019,
at Toronto, Ontario
By: The Honourable Justice Ronald MacPhee

Appearances:

For the Appellant Maria W**ie**gers:	The Appellant herself
Agent for the Appellant Nicola DiLena:	Maria W**ie**gers
Counsel for the Respondent:	Matthew Turnell Sandra K.S. Tsui

AMENDED JUDGMENT

The Appeals from the reassessments made under the *Income Tax Act* for the Appellants' 2006, 2007 and 2008 taxation years are dismissed, without costs.

Signed at Ottawa, Canada, this **23rd** day of **December** 2019.

"R. MacPhee"

MacPhee J.

Citation: 2019 TCC 260
Date: 20191125
Docket: 2017-394(IT)I

BETWEEN:

MARIA W**IE**GERS,

Appellant,

and

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Docket: 2017-398(IT)I

BETWEEN:

NICOLA DiLENA,

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and

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AMENDED REASONS FOR JUDGMENT

MacPhee J.

[1] These Appeals were heard on common evidence. The Appeals in question pertain to the 2006, 2007, and 2008 taxation periods.

[2] At trial, the Appellants did not dispute the assessments in issue, nor the quantum. The Appellants instead argued at trial that they were entitled to interest relief that has accrued on their assessed liability. In the alternative they are seeking the Respondent to make the same settlement offer to them that was made by the Minister to other participants prior to the litigation of this matter.

FACTS

[3] In the 2006, 2007 and 2008 taxation years, the Appellants participated in the Global Learning Gifting Initiative ("GLGI") arrangements. As a result they claimed to have made charitable gifts within the meaning of section 118.1 of the *Income Tax Act*[1] ("*ITA*").

[4] The Minister of National Revenue ("Minister") reassessed the Appellants by disallowing the donation tax credit. The Appellants filed a Notice of Objection in time.

[5] In December 2014, the Minister sent correspondence to many participants involved in the GLGI donation program, making a settlement offer. This settlement offer in part offered to cancel interest from the date of the Notice of Reassessment to the time of the offer. The settlement offer expired 30 days after the letter was sent.

[6] The Appellants claimed that they only learned about the settlement offer on August 18, 2016. The Appellants made a request to the CRA to have the same settlement offer proposed to them, but the Minister denied to do so. In the alternative, the Appellants are seeking an order from the Court for the forgiveness of accumulated interest on their assessment.

ISSUES

[7] Does the Tax Court of Canada have the jurisdiction to grant interest relief?

[8] Does this Tax Court of Canada have the jurisdiction to order the Respondent to make a settlement offer consistent with one previously made by the Minister?

ANALYSIS

Position of the Appellants

[9] Pursuant to subsection 220(3.1) of the *ITA*, the Appellants requested that the Minister cancel past and future accrued interest on the tax arrears related to the Notices of Objection. The Appellants claim that the response from the Minister on their individual Notices of Objection was delayed as a result of the Minister

[1] *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.).

waiting for a judgement on a test case. They further take the position that the Minister did not respect its duties listed at subsection 165(3) of the *ITA* and has caused undue delays in resolving both Appellants' objections.

[10] In the alternative, the Appellants are asking for the Respondent, who now has carriage of their file, to make a settlement offer that is consistent with the offers made by the Minister to other taxpayers who participated in GLGI. The requested settlement offer would cancel interest from the date of the Notice of Reassessment to the present. In support of this position the Appellants submit that they never received the original offer that was made to other members of the GLGI group.

Position of the Minister

[11] The Respondent submits that the Tax Court of Canada can only determine whether the assessment under the appeal is correct in fact and law. This Court cannot grant relief of fairness or equity that the Appellants are requesting.

[12] Further, the Respondent submits that the Appellants did not make any gifts with respect to the Program entitling them to the donation tax credit in issue, pursuant to subsections 118.1(1) of the *ITA*.

[13] Before getting into the details of the various legislation that must be reviewed to decide the questions put before the Tax Court, the short answer to both questions is that what is being sought is not within the authority of the Tax Court. Therefore, I must deny both their appeals. Support for this position is set out below.

Authority of the Tax Court of Canada

[14] Section 12 of the *Tax Court of Canada Act*[2] ("TCCA") states that the Tax Court has jurisdiction to hear appeals made under the *ITA*.

[15] Subsection 169(1) of the *ITA* provides:

Appeal

[2] *Tax Court of Canada Act*, R.S.C., 1985, c. T-2.

> **169 (1)** Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either
>
> (a) the Minister has confirmed the assessment or reassessed, or
>
> (b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,
>
> but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.
>
> [*Emphasis added*]

[16] Subsection 171(1) of the *ITA* provides how the Court may dispose of an appeal:

> **Disposal of Appeal**
>
> **171 (1)** The Tax Court of Canada may dispose of an appeal by
>
> (a) dismissing it; or
>
> (b) allowing it and
>
> (i) vacating the assessment,
>
> (ii) varying the assessment, or
>
> (iii) referring the assessment back to the Minister for reconsideration and reassessment.
>
> [*Emphasis added*]

[17] Subsection 152(1) of the *ITA* states that the Minister uses the assessment to assess the tax for the year:

> **Assessment**
>
> **152 (1)** The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine

> (a) the amount of refund, if any, to which the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year; or
>
> (b) the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 122.8(4), 122.9(2), 122.91(1), 125.4(3), 125.5(3), 125.6(2), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.
>
> [*Emphasis added*]

Interest relief

[18] Section 161 of the *ITA* dictates that the taxpayer "shall" pay interest on any excess amount of tax owing. This provision is subject to the Minister's discretion under section 220(3.1) to waive interest or penalties.

> Subsection 220(3.1) of the ITA gives the Minister the power to waive or cancel the interest payable under the ITA. The Minister can exercise this power at her discretion.
>
> **Waiver of penalty or interest**
>
> **220 (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.
>
> [*Emphasis added*]

[19] Usually, a taxpayer needs to file Form RC4288 *Request for Taxpayer Relief - Cancel or Waive Penalties or Interest* and the Minister may grant relief of interest if the taxpayer is in one of those situations:

1) extraordinary circumstances;
2) actions of the Canada Revenue Agency;
3) inability to pay or financial hardship;
4) other circumstances.

[20] However, an appeal from the exercise of discretion must proceed by way of a judicial review in the Federal Court.[3] The Tax Court, as a statutory court, has no jurisdiction to review such discretionary relief provisions and has no jurisdiction to grant interest relief[4].

[21] In *Housser v The Queen*[5], Justice McArthur stated that the Tax Court of Canada does not have the jurisdiction to grant interest relief since the decision is at the discretion of the Minister:

> 9 This Court derives its powers from enabling statutes and is not a Court of equity.
>
> 10 The Tax Court of Canada does not have the jurisdiction to substitute its own opinion for that of the Minister in respect of the Minister's finding pursuant to subsection 220(3.1).
>
> 11 The Court was referred to the case of *Floyd Estate v. Minister of National Revenue,* [1993] 2 C.T.C. 322, 93 D.T.C. 5499. This was an application under the Federal Court Act for judicial review. The Court stated at page 324 (D.T.C. 550):
>
> > At the outset, I should point out that it is not for the Court to decide whether the interest otherwise payable by the taxpayer ought to be waived or cancelled. It is within the discretion of the Minister. The function of the Court in this judicial review, as I understand it, is to determine whether or not the Minister failed to observe procedural fairness or erred in law in making his decision, as outlined under subsection 18.1(4) of the Federal Court Act.
>
> The Court refused to analyze the substantive question of whether or not the decision was fair to the taxpayer.
>
> 12 This Court will not second guess the Minister's decision. The decision, on the merits of the appellant's application under subsection 220(3.1) is at the discretion of the Minister.
>
> [*Emphasis added*]

[22] In *Raby v. The Queen*[6], Justice Dussault also provide the following:

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[3] *R v Sifto*, 2014 FCA 140 at para 23.
[4] *Ugro v. R.*, 2011 TCC 317, paras 23-26.
[5] [1994] 2 C.T.C. 2233.

> 51 As I stated at the hearing, the cancellation of interest comes within the discretion granted to the Minister under subsection 220(3.1) of the Act. The Tax Court of Canada has no power in this regard because its jurisdiction is limited to determining whether an assessment is well founded. If a taxpayer who has asked the Minister to cancel his interest is dissatisfied with the Minister's decision, the taxpayer may file an application for judicial review in the Federal Court.

[23] In *Adamson v. The Queen*[7], Justice Mogan has analyzed the case law of the discretion granted to the Minister under subsection 220(3.1) of the *ITA*:

> 13 The second reason for striking out is based upon the discretion granted to the Minister under subsection 220(3.1). In *Floyd Estate v. Minister of National Revenue* (1993), 93 D.T.C. 5499 (Fed. T.D.), Dubé J. of the Federal Court Trial Division stated at page 5500:
>
> > The new subsection 220(3.1) is applicable with respect to penalties and interest from the 1985 taxation year but no decision has yet been released on its interpretation.
> >
> > At the outset, I should point out that it is not for the Court to decide whether the interest otherwise payable by the taxpayer ought to be waived or cancelled. It is within the discretion of the Minister. The function of the Court in this judicial review, as I understand it, is to determine whether or not the Minister failed to observe procedural fairness or erred in law in making his decision, as outlined under subsection 18.1(4) of the Federal Court Act.
>
> [*Emphasis added*]

[24] The case law is clear: if a taxpayer wants a review of the Minister's decision concerning interest relief he must file an application for judicial review at the Federal Court under section 18.1 of the *Federal Courts Act*[8]. Unfortunately, this Court cannot grant the relief that the Appellants are seeking.

Expired settlement offer

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[6] 2006 TCC 406.
[7] [2002] 2 C.T.C. 2469.
[8] *Federal Courts Act*, R.S.C., 1985, c. F-7.

[25] In *Amoroso v Canada (Attorney General)*[9], the Federal Court determined that an appellant cannot claim to be entitled to a settlement offer that was presented to them by the Minister to waive the interest if the settlement offer has expired.

[26] There appears to be very little case law on the issue of whether the Tax Court can direct the Respondent to make a particular settlement offer, under any circumstances.[10]

[27] With that being said, it remains clear and obvious, upon a review of the jurisdiction of the Tax Court as listed at section 171 of *ITA*, I cannot force either the Minister nor the Respondent to remake an expired settlement offer to an appellant.

CONCLUSION

[27] The Appeals of both Appellants are therefore dismissed.

This Amended Judgment and Reasons for Judgment is issued in substitution of the Judgment and Reasons for Judgment dated November 25, 2019 and solely corrects the spelling of the Appellant, Maria Wiegers.

Signed at Ottawa, Canada, this **23rd** day of **December** 2019.

"R. MacPhee"

MacPhee J.

[9] 2013 FC 157.
[10] See also *Moledina v R.*, 2007 TCC 354.

CITATION:	2019 TCC 260
COURT FILE NO.:	2017-394(IT)I
STYLE OF CAUSE:	MARIA W**IE**GERS AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 31, 2019
REASONS FOR JUDGMENT BY:	The Honourable Justice Ronald MacPhee
DATE OF JUDGMENT:	November 25, 2019

APPEARANCES:

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