Federal Court Cour fédérale

Date: 20130214

Dockets: T-402-11
T-403-11

Citation: 2013 FC 157

Ottawa, Ontario, February 14, 2013

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

GIUSEPPE AMOROSO
ANGELINA PERROTTI-AMOROSO

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision of the Canada Revenue Agency (the CRA) dated February 3, 2011, in which the CRA partially denied relief to cancel interests under the taxpayer relief provisions of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [the Act]. The applicants sought cancellation of all interests accumulated for taxes owed for years 1989, 1990 and 1992. The CRA cancelled interests

for the period between January 1, 2009 and January 5, 2011, but refused to cancel interests for the years prior to 2009.

[2] The proceedings in file T-402-11 (Mr. Giuseppe Amoroso) and file T-403-11 (Mrs. Angelina Perrotti-Amoroso) have been consolidated by Order of this Court on July 28, 2011.

Factual Background

[3] Mr. Giuseppe Amoroso and Mrs. Angelina Perrotti-Amoroso (the applicants) invested in a Research and Development project in 1992, called Biosystems 2. Before investing in Biosystems 2, the applicants allegedly visited the premises and called the CRA to obtain information on the project. As a result of this investment, the applicants were reassessed on March 15, 1996, for the 1989, 1990 and 1992 tax years. This reassessment was the result of an audit carried out by the CRA of several tax shelters that operated under a Research and Development scheme. The applicants, along with thousands of taxpayers, were affected by this audit (Respondent's Record, Affidavit of Jean Laporte, pp 2 and 250).

[4] The scheme operated by having taxpayers invest an amount of money in a Research and Development project, following which they would receive half of their investment back in money or see their "loan" erased. This resulted in the actual investment in the project being only 50% of the declared investment. The taxpayers would then claim a business loss or an investment tax credit which were substantially higher than the amount actually invested in the project (Respondent's Record, Affidavit of Jean Laporte, pp 2 and 250). The taxpayers would receive a substantial tax refund, varying from 135% to 140% of the invested amount (Application Record, p 41).

[5] The CRA's audit proceeded in different stages, the second stage concerning a group known as the "Groupe principal". This audit was conducted from 1991 until 1995, covered tax years from 1989 until 1993 and affected over 12,000 individuals and 176 corporations. The applicants were part of this "Groupe principal" (Respondent's Record, Affidavit of Jean Laporte, pp 3 and 251).

[6] Given the high number of taxpayers involved in the scheme, the CRA chose to offer a global solution to the taxpayers. A document entitled "Projet de Règlement", dated June 30, 1995, was sent to all the taxpayers from the "Groupe principal" who were affected by the audit on Research and Development tax shelters (Respondent's Record, Affidavit of Jean Laporte, pp 3 and 251; Exhibit R-3, pp 29-52 and 276-99). The settlement offer was meant as a global solution which applied only to taxation years from 1989 to 1993. The initial settlement proposed on June 30, 1995, cancelled interests until October 31, 1995 and had to be accepted before September 30, 1995. The offer's deadline was extended until February 28, 1997, and offered to cancel interests from May 1st of the year when the taxes were owed until the reassessments, or until December 29, 1995, for the taxpayers who signed the offer after December 30, 1995. In exchange, the taxpayers would see their investment tax credit and business loss disallowed, and would waive their right to objection and appeal in this respect.

[7] In response to the settlement offer, a defence fund was set up in August 1995 and recommended that investors refuse the settlement offer and oppose their notices of reassessment before the Tax Court of Canada. The investors who joined would be represented by Me Jean-Maurice Gagné (Respondent's Record, Exhibit R-4, pp 53-61 and 300-08). The CRA never

received a signed copy of the settlement offer from the applicants (Respondent's Record, Affidavit of Jean Laporte, pp 3 and 251).

[8] Since the CRA did not receive the signed settlement offer from the applicants, their files remained pending until they were reassessed on March 15, 1996. Mr. Amoroso was reassessed as follows: i) for the tax year 1989, $5,918.78 in income tax and $1,561.83 in interest charges; ii) for the tax year 1990, $2,090.83 in income tax and $551.72 in interest charges; and iii) for the tax year 1992, $6,380.46 in income tax and $1,762.95 in interest charges (Respondent's Record, Affidavit of Jean Laporte, pp 3-4). Ms. Amoroso was also reassessed as follows: i) for the tax year 1989, $2,234.14 in income tax and $471.31 in interest charges; ii) for the tax year 1990, $6,506.49 in income tax and $1,372.62 in interest charges; and iii) for the tax year 1992, $15,687.10 in income tax and $4,609.56 in interest charges (Respondent's Record, Affidavit of Jean Laporte, p 251).

[9] When the applicants filed notices of objection to the 1996 reassessments in June 1996, the CRA informed them that even if the amounts were not immediately due, interests would continue to accrue.

[10] On September 10, 1996 (for Mr. Amoroso) and on February 28, 1997 (for Ms Amoroso), the applicants' representative and counsel for the investors' defence fund, Me Gagné, appealed directly to the Tax Court of Canada on behalf of the applicants for the 1992 taxation year only (Respondent's Record, Affidavit of Jean Laporte, p 4).

[11] On February 28, 1997, the CRA's settlement offer expired (Respondent's Record, Affidavit of Jean Laporte, pp 4 and 252).

[12] On March 21, 1997, the CRA and the taxpayers' lawyers, including Me Gagné, chose the case of Richard McKeown (the *McKeown* case) as the test case for the Research and Development scheme before the Tax Court of Canada (Respondent's Record, Affidavit of Jean Laporte, pp 4 and 252). The applicants' notices of objection for the reassessments of tax years 1989 and 1990 were suspended until the resolution of the *McKeown* test case.

[13] After thirty-three (33) days of hearings in 1998 and 1999, the Tax Court of Canada rendered its judgment in the *McKeown* case on March 12, 2001. The Court's judgment was not favourable to the involved taxpayers (*McKeown v Canada*, [2001] 4 CTC 2197, [2001] ACI no 236 (QL) [*McKeown*]).

[14] On February 7, 2003, the applicants were sent a letter informing them that they could ask for a taxpayer relief if they were unable to pay, and that interests could only be cancelled if the amount payable was definitive. Following the outcome of the *McKeown* judgment, the CRA confirmed the male applicant's reassessments for the years 1989 and 1990 on November 7, 2003, and the female applicant's were confirmed on May 10, 2004. The male applicant filed a notice of appeal to the Tax Court of Canada for the 1989 and 1990 reassessments on August 13, 2004, and the female applicant on June 23, 2004 (Respondent's Record, Affidavit of Jean Laporte, pp 5 and 252).

[15] On December 23, 2004, the applicants submitted a first request for relief which they themselves indicated was incomplete (Respondents' Record, Affidavit of Jean Laporte, Exhibit R-7, pp 140-42 and 393-95). The applicants requested that CRA waive the interest charges owed, but also that it wait for their request to be complete before making a decision. The CRA responded by letter dated June 22, 2005, indicating that they would gather the necessary information to examine the file, but needed the taxation years for which relief was being requested before they could proceed (Respondents' Record, Affidavit of Jean Laporte, Exhibit R-8, pp 143-45 and 396-98). The response letter also reminded the applicants that interests would continue to accrue even though a request for relief had been made. According to the respondent, the CRA never received an answer from the applicants to the June 22, 2005 letter. According to the applicants, they never received the June 22, 2005 letter.

[16] On October 1, 2007, Me Daniel Bourgeois wrote to the CRA about several taxpayers, including the applicants, asking for relief in the form of cancellation of interests, invoking information circular IC07-1, dated May 31, 2007, and its paragraphs 35 and 36 regarding third party actions. According to the letter, the taxpayers received unsound advice not to accept the 1995 settlement offer from their representative at the time, Me Gagné. The taxpayers now wished to avail themselves of the terms and conditions of the 1995 settlement offer (Respondents' Record, Vol 1, p 148 and Vol 2, p 401). On October 29, 2007, Mr. Jean Laporte, Litigation Manager at the Montréal Tax Services Office, responded to Me Daniel Bourgeois and indicated that the settlement offer was only valid from June 30, 1995 until February 28, 1997, and that the CRA did not intend to reintroduce the said offer. Mr. Laporte also indicated that the taxpayer relief is a last resort to which

taxpayers cannot turn as long as other judicial recourses are being exercised (Respondents' Record, Affidavit of Jean Laporte, Vol 1, pp 150-52; Vol 2, p 403-05).

[17] On January 17, 2008, the applicants abandoned their appeals at the Tax Court of Canada for the taxation years 1989, 1990 and 1992.

[18] In a letter dated January 18, 2008, the CRA followed up on a meeting which took place on November 6, 2007 with the applicants. The letter confirmed that the applicants' appeals at the Tax Court of Canada had been withdrawn, and indicated that they could communicate with Mrs. Francine Perreault of the CRA if they still wished to request a review of their file under taxpayer relief provisions of the ITA (Material from Tribunal filed in T-402-11, Tab 4).

[19] The male applicant's file for the relevant taxation years is summarized as follows (Respondents' Record, Vol 1, p 198):

Year	**Initial Assessment**	**Reassessment**	**Objection**	**Confirmation**	**Notice of Appeal**	**Discontinued**	**Interests on 13-10-2010**
1989	07-10-1991	15-03-1996	YES	07-11-2003	13-08-2004	17-01-2008	$15,546.31
1990	28-08-1992	15-03-1996	YES	07-11-2003	13-08-2004	17-01-2008	$6,728.09
1992	16-06-1993	15-03-1996	YES	N/A	10-09-1996	17-01-2008	$18,923.55

[20] The female applicant's file for the relevant taxation years is summarized in the following table (Respondents' Record, Vol 2, p 452):

Year	**Initial Assessment**	**Reassessment**	**Objection**	**Confirmation**	**Notice of Appeal**	**Discontinued**	**Interests on 13-10-2010**
1989	03-06-1991	15-03-1996	YES	10-05-2004	23-06-2004	17-01-2008	$5,554.72
1990	25-09-1992	15-03-1996	YES	10-05-2004	23-06-2004	17-01-2008	$17,649.94
1992	07-06-1993	15-03-1996	YES	N/A	28-02-1997	17-01-2008	$52,825.89

[21] On March 22, 2008, the applicants submitted a request for taxpayer relief for the years 1989, 1990 and 1992. They requested cancellation of interests, and indicated the reasons as being CRA error, CRA delay, financial hardship and inability to pay, as well as other circumstances set out in their documentation (Respondent's Record, Affidavit of Jean Laporte, Exhibit R-11, pp 155 and 408). In the Taxpayer Relief Provisions Reports signed May 12, 2008 (for the male applicant) and June 5, 2008 (for the female applicant), the CRA reported the total amount owed by the male applicant, including interests, to be over $48,000, whereas he offered to pay an amount equivalent to what was required by the settlement offer in 1995, namely, over $10,000. The total amount owed by the female applicant was, at that time, over $84,000, and she proposed a final amount of over $16,000 in settlement, as was offered in the 1995 settlement (Respondent's Record, pp 158-61 and 411-14). An examination of the applicants' files revealed a monthly deficit, but higher assets than liabilities resulting in a surplus of almost $250,000. The CRA concluded in these reports that the applicants were not in a situation of financial hardship.

[22] The applicants' first-level taxpayer relief request was prepared by Mrs. Francine Perreault and was denied by letter sent on June 20, 2008 (Respondent's Record, Affidavit of Jean Laporte, Exhibits R-13 and R-14, pp 162-79 and 415-33). The CRA analysed the delays in the applicants' case and concluded that the reassessments were done within the prescribed delay. Given the amount of taxpayers involved in audits for Research and Development programs (over 10,000), audits were ongoing from 1992 until 1995, resulting in a settlement offer to taxpayers in June 1995. The CRA concluded that it could not be responsible for the applicants' decision, informed by their legal representative at the time, to reject the settlement offer, and that CRA officials did not act without diligence when reassessing the applicants.

[23] When analyzing the delays with the notices of objection and at the Tax Court of Canada, the CRA noted that the applicants' representative, along with the Minister of Justice, agreed to wait for the resolution of the *McKeown* case, which occurred in March 2001. The CRA noted that despite the *McKeown* case being decided in a manner which did not favour the applicants, they persisted with judicial procedures and delayed paying their debt. The reassessments for the years 1989 and 1990 were confirmed in November 2003 for the male applicant, and May 2004 for the female applicant. The CRA, in its analysis of the delay between the *McKeown* judgment and the confirmation of the applicants' reassessments, noted that there was a 30-day period for an appeal of the judgment, as well as a moratorium required from the Department of Justice from May 1, 2001, until November 30, 2001, because of the large number of appeals already before the Tax Court of Canada. While the CRA concedes in its analysis that there is no specific reason for the delay as of December 2001, given the sheer number of files involved in the Research and Development projects, confirmation of reassessments could not be achieved without a certain processing delay.

[24] The CRA further noted that once the applicants appealed their reassessments to the Tax Court of Canada, the CRA had no control over delays. The CRA cited Madam Justice Lamarre-Proulx's words in *Lassonde v Her Majesty the Queen*, 2003 TCC 715 at paras 141 and 158, 2003 DTC 1289 [*Lassonde*]:

> [141] … Une fois les procédures devant cette Cour entamées, il appartient à l'appelant de promouvoir l'audience de sa cause.
>
> [141] … Once proceedings have begun before this Court, it is the responsibility of the Appellant to request that the case be heard.
>
> [158] Il est possible pour un contribuable de demander à notre Cour d'inscrire son appel pour audition une fois que la Réponse a été produite. En fait, dans une procédure judiciaire qui est un appel, c'est à l'appelant de la promouvoir.
>
> [158] It is possible for a taxpayer to ask this Court to enter an appeal for hearing once the Response is filed. In fact, in an appeal litigation, it is the responsibility of the appellant to request the hearing.

The CRA also noted that at paragraph 142 of the *Lassonde* judgment, which also dealt with Research and Development investments, the Tax Court concluded that there was no lack in diligence on the part of the Minister of National Revenue's agents with regards to processing assessments. According to the CRA, the applicants chose to wait for the outcome of the *Lassonde* case at the Federal Court of Appeal, which was issued in 2005 and was not in their favour (*Lassonde v Canada*, 2005 FCA 323, [2005] FCJ No 1682 (QL)).

[25] The CRA agreed that the delays were lengthy in this case, but held that it acted with due diligence. With regards to the applicants' argument that the delays diminished their chances of success, the CRA noted that no taxpayers involved in the Research and Development scheme were successful in their legal proceedings, an outcome known since the 2001 *McKeown* case. The CRA

also remarked that the applicants in this case benefited from important income tax refunds when they invested in the Biosystems 2 project, and that they have had the exclusive enjoyment of these amounts of money. The CRA also noted that while it is true that the government encouraged investing in Research and Development, it did not encourage participation in the scheme in which the applicants invested. According to the CRA, the applicants should have known that the investment scheme was "too good to be true". The CRA noted that the fact that they issued a tax shelter number is only an administrative formality, and not a guarantee of the legitimacy of the tax shelter.

[26] The CRA recognized that the applicants' good faith and integrity were not challenged and that they had produced their income tax returns and paid their taxes in the past.

[27] With regards to the 1995 settlement offer, the CRA held that it was meant to be a global and final solution, which required that taxpayers waive their rights to appeal. The CRA noted that by appealing to the Tax Court of Canada, the applicants clearly refused the settlement offer which cannot now be applied in the context of a taxpayer relief.

[28] The CRA held that the applicants did not act with diligence because they did not undertake the necessary steps to minimize the interests that were accumulating and they invested in a dubious scheme. The CRA examined the applicants' assets and concluded that although they were faced with an important monthly deficit, the value of their assets was sufficient to show that they were not in financial hardship and that their inability to pay was due to factors on which they had control.

The CRA also noted that the applicants were in the process of building a medical clinic, the cost of which was approximately six (6) million dollars.

[29] The CRA also referred to the case of *Moledina v Canada*, 2007 TCC 354 at para 31, [2008] TCJ No 286 [*Moledina*], where the Tax Court of Canada stated the following when discussing the same 1995 settlement offer:

> [31] … Nonetheless, I do not think I can grant the appellant the relief he seeks. Quite apart from the question of jurisdiction, I have to ask who is responsible for the delay. Certainly no fault can be attributed to the Department of National Revenue. Its response to the problem was swift, decisive and responsible. It made a fair and generous offer to settle and even extended the time for acceptance. I can find no basis for criticizing the government's behaviour and even if delay were a legal basis for granting the relief sought by the appellant, I can see no grounds for laying that delay at the feet of the government. The Minister delayed confirmation of the assessments in an attempt to resolve the thousands of objections filed in connection with the SRED tax shelters. It was open to any taxpayer to institute an appeal in this court 90 days after filing a notice of objection. Once a case is in this court the practice of the Registry is to accommodate any appellant who wishes to move a case at flank speed. If the parties want a trial date they can have one within a month. …

[30] The first level recommendation was that interests should not be cancelled because they did not result from extraordinary circumstances outside of the applicants' control, or from actions attributable to the CRA. This recommendation was confirmed by letter sent to the applicants on June 20, 2008 (Respondent's Record, Affidavit of Jean Laporte, Exhibits R-13 and R-14, pp 162-78 and 415-33).

[31] The applicants requested a re-examination of their files on August 8, 2008 (Respondent's Record, Affidavit of Jean Laporte, Exhibit R-15, pp 180-84 and 434-37). In their request, the

applicants stated that they could not have paid the amounts owed in 1996 because their financial situation would not have allowed them to do so. According to the applicants, they were told by their legal advisor, Me Gagné, that the individuals who settled with the 1995 offer had other issues to hide, and that their situation was different. They further stated that they signed the settlement offer with instructions to their legal representative to verify its legitimacy, and to forward the signed offer to the CRA if it was found to be legitimate. According to the applicants, their legal representative may have sent the signed offer, which may have been lost by CRA. The applicants also claimed to have contacted the CRA several times between 1995 and 1996, but were told to pay and appeal, or sign the settlement.

[32] The applicants stated that when they met with CRA officials, they were convinced to take two (2) actions: 1) to withdraw their appeal at the Tax Court of Canada and 2) to pursue relief for the interests which, they were allegedly told, would be likely because of the extraordinary circumstances of this case. The applicants expressed disagreement with the CRA's conclusions on their financial situation at the first level review, and indicated that the six (6) million dollar medical centre is not their property, is funded by many investors, and should therefore not be factored in an evaluation of their financial situation. The applicants expressed their desire to benefit from the 1995 settlement. According to the applicants' letter, they have exhausted all their financial resources to pay the capital of the taxes owed for 1989, 1990 and 1992, and the only remaining issue is the compounded interest on the said taxes.

[33] The applicants also argued in their letter to the CRA that they were misled when the government did not warn them of the instability of the program. The applicants referred to a

publication entitled the “Taxpayer Bill of Rights”, which stipulates at item 14 that “You have the right to expect us to warn you about questionable tax schemes in a timely manner”, and argue that they were not warned when they inquired in 1992 for the validity of the Biosystems 2 project. The applicants claim that the government questioned itself about the Research and Development program in 1987, but did not warn them when they called in 1992 prior to investing.

[34] Following the applicants’ request, the CRA engaged in a second level review and rendered a final decision by letter dated February 3, 2011. This decision is the one under review in the present application.

Decision under Review

[35] A Taxpayer Relief Provisions Report, dated September 24, 2008, was prepared to analyze the financial hardship component and was signed on October 28, 2008 (Respondent’s Record, Affidavit of Jean Laporte, Exhibit R-16, pp 185-88 and 438-42). The report concluded that the applicants were not unable to pay all amounts owing in interests, nor were they in a situation of financial hardship. The report examined the applicants’ assets and stated that using the applicants’ RRSPs to reimburse the interests owed would only create a new debt. However, the equity the applicants have on their home was evaluated at approximately $532,000. The report indicated that it was difficult to understand how the applicants could sustain their current lifestyle with a deficit of nearly $4,000 every month and the applicants’ reported incomes, and suggested that selling their house for a more modest one would be a way to remedy the situation. The report also indicated that the CRA received post-dated cheques on behalf of both the applicants for the capital of taxes owed (Respondent’s Record, Affidavit of Jean Laporte, Exhibit R-16, pp 186 and 439). The CRA’s

Appeals Branch received the report on November 7, 2008 (Respondent's Record, Affidavit of Jean Laporte, Exhibit R-17, pp 190 and 444).

[36] The second review was prepared by Mrs. Françoise Bienvenue and signed on February 3, 2011 (Respondent's Record, Affidavit of Jean Laporte, Exhibit R-18, pp 191-213 and 445-68). It summarized the history of the Research and Development project, and explained that audits were carried out in three (3) different groups, the applicants belonging to the "Groupe Principal", audited between November 1991 and March 1996. It explained that a study group was created in October 1994, following which the Appeals Branch asked that the processing of Research and Development files that were being audited, and those where taxpayers objected to a reassessment be suspended. Following the results of the study group, a settlement offer was sent to investors, both those being audited and those who had objected to a reassessment, in June 1995. The offer was reiterated in November 1995. In March 1996, CRA reassessed all taxpayers who had not accepted the offer and whose reassessments had been pending.

[37] After presenting a lengthy history of the Research and Development project in general, as well as a general explanation of the delays stemming from notices of objection and procedures at the Tax Court of Canada, the CRA examined the applicants' particular circumstances. It identified the motives raised by the applicants in their August, 2008 request as the following:

a. they have always paid their taxes without delay;

b. they received information from their legal representative, Me Gagné, and a report from the "Protecteur du citoyen", according to which they were correct and the reassessments were unfounded;

c. they signed the 1995 offer, gave it to their legal representative, with instructions to verify its legitimacy and then forward it to the CRA;

d. the excessive delays in this case have resulted in loss of evidence and diminished chances of success;

e. they received tax shelter numbers from both provincial and federal governments;

f. the Biosystems 2 project was serious, had economic potential, and had been operational for several years;

g. the 1995 settlement offer should be applicable today because it is wrong for the CRA to decline a settlement previously offered because the applicants exercised their rights.

[38] The CRA began by explaining that relief provisions allow the Minister of National Revenue to make use of a discretionary power when interests accrued because of an unjustified delay in processing, for instance. The CRA had to determine whether the processing time was reasonable and justified in the circumstances. Referring to the *Lassonde* case, above at para 132, the CRA noted that:

> [132] In proceedings related to complaints made under administrative law, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the case and its complexity, the purpose and nature of the proceedings, and whether the respondent contributed to the delay or waived the delay.

[39] According to the CRA, given the complexity and amount of files involved, the auditing process had to be undertaken over the span of several years. The research corporations had to be audited before investors' tax benefits could be denied, and general anti-avoidance rules had to be examined in order to determine whether they applied. The CRA also explained that scientific advisors who were involved thought that the projects were interrelated and had to be examined globally. The CRA also indicated that certain promoters caused delays themselves. The CRA recognized that some of these delays were not directly linked to the applicants, but were nonetheless

relevant since they chose to invest in a dubious tax shelter. The CRA concluded that it could not be held responsible for these delays, and it reassessed the taxpayers in a reasonable delay, justified in the circumstances. The CRA also said that even if it suspected that some of the corporations were inadmissible, it could not simply and automatically disallow all tax benefits for the involved taxpayers without an in-depth analysis. The CRA emphasized that part of the delay for the 1992 taxation year was due to the CRA's study, which allowed it to better position itself and offer a settlement to the taxpayers in 1995.

[40] The CRA then analyzed the delays caused by the objections of the taxpayers and at the Tax Court of Canada. It noted that an assessment is deemed valid pursuant to paragraph 152(8) of the Act, and therefore due immediately. An objection merely allows the taxpayer to defer the payment of the amount owed until the outcome of the case, plus accrued interests should the outcome not be in the taxpayer's favour. The CRA recalled that the taxpayers were informed in October 1994 and in March 1995 that their objections would be pending while it examined the situation to position itself – an internal procedure which is, according to the CRA, frequent when litigation involves several taxpayers faced with a similar question. The taxpayers who disagreed with this administrative decision could appeal to the Tax Court of Canada within 90 days pursuant to paragraph 169(1)(*b*) of the Act, which the applicants did. The CRA recalled that in March 1997, the parties, including the applicants' representative, agreed to choose the *McKeown* case as the test case and to stay the hearings of the other cases until the *McKeown* case would be decided. All objections were also deemed to be pending until the outcome of the *McKeown* case was known. The CRA noted that the applicants were warned in February 1999 that the *McKeown* case might not be decided until autumn 1999, and yet chose not to act.

[41] The second level review also explained the delay between the *McKeown* judgment (March 2001) and the confirmation of the taxpayers' reassessments (November 2003 and May 2004) in the same manner as the first level review, and similarly referred to the taxpayers' obligation to further their own case at the Tax Court of Canada. On the question of delay, the CRA concluded to a normal evolution given all the circumstances, and that the taxpayers knowingly let interests accrue on their owed taxes for this period.

[42] The CRA indicated that most investors accepted the settlement offer following recommendations from almost all taxation specialists. The CRA held that the applicants chose to pursue their case, following their legal representatives' advice, and that it cannot be held responsible for recommendations made by a third party.

[43] As in the first level review, the CRA in its second level review noted that while the government encouraged investing in Research and Development, it did not encourage the specific tax shelter in which the applicants invested, which was dubious and appeared too good to be true. The CRA also noted that the applicants' good faith was not an issue, nor was their taxation history, which was otherwise without problems. The CRA also repeated its comments regarding the 1995 settlement offer, to which the applicants renounced by appealing to the Tax Court of Canada on September 10, 1996 and February 28, 1997, and which was a global and final solution that cannot be applied under relief provisions.

[44] The CRA held that it is unreasonable for the applicants to further delay the payment of their debt by requesting relief since they know the exact amount of the debt owed, they are aware that

interests continue to accrue, and the litigation opposing CRA to the taxpayers in this case is over. According to the CRA, there are no circumstances outside the applicants' control that would justify granting relief, nor has financial hardship been demonstrated in their case.

[45] In this second level review, the CRA summarized a meeting that took place between the applicants, Mr. Jean Laporte, Manager for the Committee of Taxpayer Relief, and Mrs. Françoise Bienvenue, Litigation Officer, on December 9, 2010. The CRA recognized that some delays warrant caution and allowed the cancellation of twenty-four (24) months of interests for the time elapsed between the receipt of the Taxpayer Relief Provisions Report, which was received on November 7, 2008 by the Appeals Branch, and the time when the file was reviewed, in early January 2011. A normal processing time, according to the CRA, would have been two (2) months, and thus should have been completed by the end of December 2008. Accordingly, interests were cancelled from January 1, 2009, until January 5, 2011.

Relevant Provisions

[46] Subsection 220 (3.1) of the *Income Tax Act* provides for the discretion of the Minister of Revenue to waive or cancel penalties and interests:

PART XV ADMINISTRATION AND ENFORCEMENT	PARTIE XV APPLICATION ET EXÉCUTION
ADMINISTRATION	APPLICATION
…	[…]
Waiver of penalty or interest	Renonciation aux pénalités et aux intérêts
220. (3.1) The Minister may, on	**220.** (3.1) Le ministre peut, au

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.	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.

[47] Other relevant dispositions are presented in Annex to this judgement.

[48] The Minister of National Revenue has also created Guidelines to facilitate this discretionary decision (*Taxpayer Relief Guidelines (Part II)*: Information Circular IC07-1 (Guidelines)). These Guidelines are not binding and cannot exclude relevant reasons (*Sutherland v Canada (Customs and Revenue Agency)*, 2006 FC 154 at para 17, [2006] FCJ No 242 (QL)), but generally state the following:

Part II	***Partie II***
Guidelines for the Cancellation or Waiver of Penalties and Interest	**Lignes directrices concernant l'annulation ou la renunciation aux pénalités et aux intérêts**

…	[…]
Circumstances Where Relief From Penalty and Interest May Be Warranted	***Situations dans lesquelles un allègement des pénalités et des intérêts peut être justifié***
23. The Minister may grant relief from the application of penalty and interest where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation or requirement at issue: (a) extraordinary circumstances (b) actions of the CRA (c) inability to pay or financial hardship	23. Le ministre peut accorder un allègement de l'application des pénalités et des intérêts lorsque les situations suivantes sont présentes et qu'elles justifient l'incapacité du contribuable à s'acquitter de l'obligation ou de l'exigence fiscale en cause : a) circonstances exceptionnelles; b) actions de l'ARC; c) incapacité de payer ou difficultés financières.
24. The Minister may also grant relief if a taxpayer's circumstances do not fall within the situations stated in 23.	24. Le ministre peut également accorder un allègement même si la situation du contribuable ne se trouve pas parmi les situations mentionnées au paragraphe 23.

Issue

[49] The sole issue raised by this application for judicial review is whether the CRA's decision to cancel only a portion of the applicants' interests was reasonable.

Standard of Review

[50] The standard of review to apply to a Minister's discretionary decision to cancel interests owed is that of reasonableness (*Lalonde v Canada (Revenue Agency)*, 2010 FC 531 at paras 27-30, [2010] FCJ No 638 (QL); *Telfer v Canada (Revenue Agency)*, 2009 FCA 23 at para 24, [2009] FCJ

No 71)QL); *Jim's Pizza (1980) Ltd v Canada (Revenue Agency)*, 2007 FC 782 at para 3, [2007] FCJ No 1052 (QL) [*Jim's Pizza*]). The Minister's decision to waive or cancel interests is a discretionary one, and as such this Court must show deference and be "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]). As pointed out by the respondent, the Minister's discretionary power to cancel interests is an exceptional relief (*Jim's Pizza*, above, at para 13).

Arguments

Applicants' Arguments

[51] The applicants submit that the CRA did not divulge important information about questionable elements of the Research and Development program, and that they became aware of this in 2010 during a meeting with CRA officials. The applicants also submit that the CRA was aware of certain non-eligible Research and Development projects, but neglected to inform them and simply provided a tax shelter number when they called to inquire about Biosystems 2.

[52] According to the applicants, the CRA withheld information which would have influenced their decision with regards to the 1995 settlement offer: namely, an expert report on Biosystems 2 submitted to the CRA in January 1995 (Application Record, pp 64-98). The applicants claim to have become aware of this report in 2007 during proceedings at the Tax Court of Canada.

[53] The applicants submit that the only delays for which they are responsible concern the rescheduling of court dates in 2007 pending decisions in other similar files. The applicants also contend that they were incited by the legal representatives of the CRA to withdraw their appeal at the Tax Court of Canada as a sign of good faith and that a favourable decision on tax relief was probable in their case.

[54] The applicants also claim that the CRA did not act in an objective manner because Mr. Jean Laporte was allegedly part of the first level review in their case as well as the second level review which is the object of this application for judicial review.

[55] The applicants seek cancellation of all interests charged prior to January 1, 2009, and after January 5, 2011, and seek to avail themselves of the 1995 agreement**.**

Respondent's Arguments

[56] The respondent argues that the CRA's decision was not unreasonable because the accrual of interest charges is imputable to the applicants and not to the Minister of National Revenue or his representatives, except for the period during which relief has already been granted. According to the respondent, no undue delay is imputable to the CRA, the applicants are not in a situation of financial hardship, the allegations of mistakes and misinformation against the CRA are ill-founded, and the allegations of other exceptional circumstances do not justify the taxpayer's relief – therefore, the decision is reasonable.

[57] On the issue of delay, the respondent maintains that no undue delay is imputable to CRA, except for the period of January 1, 2009 to January 5, 2011, where relief has already been granted. The respondent notes that the applicants appear to acknowledge that the delays were due to the important volume of files in the Research and Development scheme (Application Record, pp 3 and 7). The respondent recalls that the audit for the Research and Development scheme had to be carried out in three (3) stages, the one (1) concerning the applicants from 1991 to 1995. According to the respondent, this delay is not inordinate and culminated with a settlement offer cancelling interest charges for the taxpayers who accepted it. The respondent further submits that the CRA reassessed the tax years 1989, 1990 and 1992 within the reassessment period, as is required by subsection 152(4) of the Act. According to the respondent, the large scale and complexity of the audit explain why the reassessment occurred just before the end of the normal reassessment period (citing *Adm c L'Agence du revenu du Canada* (17 November 2010), Montreal, T-352-10 (FC) at p 3).

[58] The respondent maintains that the applicants could not benefit from the terms and conditions of the 1995 settlement offer today, since the CRA never received a signed copy of the settlement offer from the applicants and its February 28, 1997 deadline for acc/eptance is long past (citing Article 1392 CCQ).

[59] The respondent notes that the applicants chose to oppose the reassessments of the tax years 1989, 1990 and 1992, without paying the balance owing, knowing that the interest charges would accrue until a final decision was made on the oppositions. The respondent also argues that the applicants knew as early as July 1996 that the resolution of their oppositions might take time, since the CRA informed them that processing was suspended until the judgment in the *McKeown* case.

The respondent notes that after the *McKeown* judgment was issued in 2001, in favour of the Minister of National Revenue, the applicants continued with their objection without paying the owing balance.

[60] The respondent argues that the CRA had no control over any delays that may have occurred at the Tax Court of Canada. The respondent notes that the applicants chose to wait for the resolution of their file instead of paying the balance owing, until they abandoned their appeals in January 2008.

[61] Lastly, on the issue of delay, the respondent argues that the only delay imputable to the CRA in the applicants' requests for taxpayer relief was the delay of twenty-four (24) months before a decision was rendered in their second level review – a delay for which interests were indeed cancelled. According to the respondent, the applicants knew or ought to have known, when they submitted their first request for relief in December 2004, that they had to wait for the resolution of their appeal and oppositions before the CRA could review their files, that the *McKeown* judgment was favourable to the CRA, and that the CRA would not review their files as long as the request for relief was incomplete, as the applicants themselves requested.

[62] With regards to the issue of financial hardship, the respondent recalls that the applicants have not established that they were in a situation of financial hardship since their assets exceed their liabilities, resulting in a surplus that could cover their debt. The respondent also argues that the applicants failed to mitigate the amount they owe to the CRA by not paying the owing balance since their March 15, 1996 reassessment. The respondent does note that between September 15, 2008 and

April 15, 2009, the applicants have made monthly payments for a total of over $12,000 for the male applicant and over $25,000 for the female applicant.

[63] The respondent argues that the allegations of mistake and misinformation from the CRA are ill-founded. The respondent recalls that the audit of most of the Research and Development projects, including Biosystems 2, was completed in 1995. It would therefore be unreasonable to expect the CRA to confirm the validity of the Biosystems 2 project in 1992, when the applicants allegedly inquired about the project. The respondent also recalls that the fact that tax shelter identification numbers are issued does not certify that a given project is safe, but is merely an administrative formality. The respondent also notes that the settlement offer sent to the applicants in 1995 contained a detailed document outlining the problems arising out of the Research and Development scheme.

[64] The respondent claims that the other exceptional circumstances do not justify relief, such as: i) the delays making it impossible for the applicants to submit the best evidence to support their claim; ii) the CRA lawyers swaying them to withdraw their appeals at the Tax Court of Canada; and iii) the CRA lawyers convincing them that a positive outcome of a request for relief would be likely. The respondent states that the CRA has acknowledged the delay in this case, but that it acted with due diligence given the large scale of the case. It also adds that none of the taxpayers involved in the Research and Development scheme have successfully appealed their reassessments in Court since the *McKeown* case. The respondent also filed the affidavit of M[e] Simon Petit who affirms that at no time did any person present at the November 6, 2007 meeting suggest or acknowledge that the

applicants could expect a more favourable outcome with a fairness request if the appeals were discontinued (Respondent's Record, Affidavit of Simon Petit, Vol 1, pp 215-17).

[65] The respondent also takes issue with the applicants raising matters in their application for judicial review which were not previously raised in the request for relief. Specifically, the applicants claim in their affidavits that the CRA misled them by not including with the 1995 settlement offer an expert report about Biosystems 2, issued on January 27, 1995. They claim that this omission precluded them from making an intelligent decision in respect of the said offer, and that this report was made known to them only during proceedings before the Tax Court of Canada. The respondent claims that this issue was never raised, neither in the first nor second requests for relief, and as such, the CRA cannot be expected to consider facts that are not brought to its attention. In any event, the respondent submits that this report is irrelevant to the fact that the applicants chose to let the interest charges accrue and wait for a resolution to their appeals.

[66] The respondent rejects the applicants' claims that the CRA did not act objectively because Mr. Jean Laporte would have been part of both the first and second review of their requests. The respondent claims that Mr. Laporte never took part in the first review, but merely replied to Me Bourgeois in October 2007 after the latter had inquired about reopening the terms and conditions of the 1995 offer for the applicants, and was solely acting in his capacity of Litigation Manager for the CRA. According to the respondent, the first review did not start until March 2008; therefore, it would be unreasonable to conclude that Mr. Laporte took part in the first review by writing a letter in October 2007.

Analysis

[67] The Court finds that the CRA's decision was reasonable. The Court recalls that the Minister of National Revenue's decision to cancel interests is a discretionary one, warranting much deference. The Court's review is limited to the manner in which the Minister's discretion was exercised (*Sutherland*, above at para 20,). To this effect, the Court also recalls the following excerpt from *Jenkins v Canada (Revenue Agency)*, 2007 FC 295 at para 13, [2007] FCJ No 415 (QL):

> [13] In reviewing the decision in this case, it is important to keep in mind that the power of the Minister, as set out in subsection 220(3.1) of the Act, is a discretionary power and as such, there is no obligation on the part of the Minister to reach any given conclusion. Furthermore, the liability of a taxpayer to pay penalties and interests for the late filing of income tax returns results from the application of the Act itself, not from any discretionary decision of the Minister to impose such penalties and interests. Therefore, the discretionary power of the Minister is limited to providing exceptional relief from the operation of the Act, where the Minister believes such relief to be warranted.

[68] Although the delays in this case were lengthy, the applicants failed to convinced the Court that such delays are imputable to the CRA (other than the twenty-four (24) month period for which relief was granted), nor that exceptional circumstances arose which the CRA would have neglected to address in its first and second level reviews of the applicants' requests. The Court also notes that the applicants were at all times aware that interests continued to accrue on their debt, and knowingly chose to defer payment of the owed amounts. According to paragraph 33 of the Guidelines, such is a factor which can be considered when arriving at a decision:

Factors Used in Arriving at the Decision	***Facteurs utilisés pour arriver à la décision***
33.Where circumstances beyond a taxpayer's control, actions of the CRA, or inability to pay or financial hardship has	33. Lorsque des circonstances indépendantes de la volonté du contribuable, des actions de l'ARC, ou l'incapacité de

> prevented the taxpayer from complying with the Act, the following factors will be considered when determining whether or not the CRA will cancel or waive penalties and interest:
>
> (a) whether or not the taxpayer has a history of compliance with tax obligations;
> (b) whether or not the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued;
>
> (c) whether or not the taxpayer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system; and
> (d) whether or not the taxpayer has acted quickly to remedy any delay or omission.
>
> [Emphasis added]

> payer ou les difficultés financières ont empêché le contribuable de respecter la Loi, les facteurs suivants seront considérés pour déterminer si l'ARC annulera ou renoncera aux pénalités et aux intérêts, ou non :
> a) le contribuable a respecté, par le passé, ses obligations fiscales;
> b) le contribuable a, en connaissance de cause, laissé subsister un solde en souffrance qui a engendré des intérêts sur arriérés;
> c) le contribuable a fait des efforts raisonnables et n'a pas été négligent dans la conduite de ses affaires en vertu du régime d'autocotisation;
>
> d) le contribuable a agi avec diligence pour remédier à tout retard ou à toute omission.
>
> [Je souligne]

[69] It was open to the CRA to conclude that the delays of this case did not warrant cancellation of the interests. The Court finds that the issue of delay was properly and adequately addressed in the CRA's decision. Furthermore, the Court notes, as the respondent submitted, that delays were examined in *Moledina*, above, which concerned the same Research and Development scheme audit as the one which affected the applicants. The Tax Court of Canada held that the CRA acted quickly, thoroughly and fairly when it presented the settlement offer to the taxpayers and that no fault could be attributed to the CRA in its response to the problem. While these comments referred to a different case and were made in the context of an appeal from reassessments, they are, nonetheless,

relevant in establishing that the CRA acted with due diligence in its general approach to the Research and Development "unfortunate saga" (*Moledina*, above at para 8).

[70] The Court is also not convinced that the CRA misled the applicants. The delivery of a tax shelter number does not amount to an acceptance by the CRA of the legitimacy of an investment, giving investors a right to a deduction of losses claimed and investment tax credits for that investment. Instead, a tax shelter number is an administrative requirement to the deduction of certain losses and expenses associated with a tax shelter (*Moledina*, above at para 9). Thus, when the applicants called the CRA in 1992 and obtained tax shelter numbers, the CRA was not in any way guaranteeing the legitimacy of the investment. The Court finds that this was adequately explained in both first and second level reviews of the applicants' relief requests.

[71] The Court also finds that the CRA's decision on the issue of the 1995 settlement offer is reasonable. The applicants were aware of the existence of the settlement offer and its conditions. The evidence before this Court shows that the applicants either chose not to accept it following the advice of their legal representative, or signed the settlement offer and instructed their legal representative to verify its legitimacy before sending it to CRA. In any event, the applicants clearly refused the settlement offer when they chose to appeal their reassessments at the Tax Court of Canada. The applicants cannot now claim to be entitled to an offer that expired in 1997, and which they clearly declined by not respecting one of the conditions – namely, waiving their rights of appeal. While the Court sympathizes with the applicants, the fact remains that the applicants continued to defer the payment of the taxes owed for several years, knowing that interests would continue to accrue.

[72] The Court finds that the CRA's findings on financial hardship were also reasonable. While it may have been erroneous to rely on the fact that the applicants were involved in the building of a six million dollar medical clinic in the first level review, this factor was not part of the financial hardship assessment carried out for the second level review (Respondent's Record, Affidavit of Jean Laporte, Exhibit R-16, pp 185-89 and 438-42). Based on the record, it was reasonable for the CRA to conclude that since the applicants' assets exceed their liabilities in an amount sufficient to cover the remaining debt, the applicants had failed to show financial hardship.

[73] Contrary to the applicants' submissions, the Court finds no issue with the involvement of Mr. Laporte in the present case. Mr. Laporte indicated in his sworn affidavit that he was in no way involved in the first revision the applicants' taxpayer relief request (Respondent's Record, Affidavit of Jean Laporte, paragraph 5, pp 2 and 250). Mr. Jean Laporte rendered the final decision in the applicants' second level review, which had been prepared by CRA Officer, Mrs. Françoise Bienvenue (Respondent's Record, Affidavit of Jean Laporte, Exhibit R-1, pp 12 and 259; Exhibit R-18, pp 212 and 466). On the other hand, the first level review was signed by Mr. James Thompson (Exhibit R-14, pp 179 and 432) and prepared by CRA Officer, Mrs. Francine Perreault (Exhibit R-13, pp 176 and 429). The Court finds the applicants' argument that the CRA did not act objectively because Mr. Laporte was involved in both the first and second level reviews to be without merit.

[74] The Court agrees with the respondent's submissions according to which the applicants cannot, at the judicial review stage, raise the matter of the Biosystems 2 expert report not being included with the settlement offer: this concern was not raised with the CRA when requesting the

taxpayer relief. As a general principle, the CRA cannot be expected to comment on elements of the case which were not brought to its attention (*Rosenberg Estate v Canada (Minister of National Revenue)*, 2011 FC 445 at para 42, [2011] FCJ No 564 (QL)). Additionally, the Court observes that the 1995 settlement offer was accompanied by a detailed document outlining the problems with Research and Development projects which would have been sufficient to allow the applicants to evaluate the legitimacy of their tax shelter investment.

[75] The applicants have not convinced the Court that the CRA's decision was unreasonable. The exceptional circumstances of this file (its size, complexity and ensuing delays) were considered and thoroughly explained in the second level review of the applicants' request for relief. It was certainly open to the CRA to decide not to cancel all interests, but to cancel only the interests accrued during the twenty-four (24) month period during which the delay was imputable to the CRA. The CRA adequately considered the arguments put forth by the applicants in their requests for relief, and the Court is satisfied that its decision was adequately justified, transparent and intelligible (*Dunsmuir*, above; *Nurses' Union v Newfoundland and Labrador*, 2011 SCC 62, [2011] 3 SCR 708).

[76] Based on the foregoing analysis, the application for judicial review will be dismissed. Notwithstanding the request on behalf of the respondent for costs against the applicants, the Court exercises its discretion in that regard to decline to provide any order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

Without costs.

"Richard Boivin"

Judge

Annex

The following provisions from the *Income Tax Act* are relevant to the present application for judicial review:

PART I
INCOME TAX

…

DIVISION I
RETURNS, ASSESSMENTS, PAYMENT AND APPEALS

…

Assessment

…

Assessment and reassessment

152. (4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(*a*) the taxpayer or person filing the return

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any

PARTIE I
IMPÔT SUR LE REVENU

[…]

SECTION I
DECLARATIONS, COTISATIONS, PAIEMENT ET APPELS

[…]

Cotisation

[…]

Cotisation et nouvelle cotisation

152. (4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :

a) le contribuable ou la personne produisant la déclaration :

(i) soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la

information under this Act, or

(ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;

(*b*) the assessment, reassessment or additional assessment is made before the day that is 3 years after the end of the normal reassessment period for the taxpayer in respect of the year and

(i) is required pursuant to subsection 152(6) or would be so required if the taxpayer had claimed an amount by filing the prescribed form referred to in that subsection on or before the day referred to therein,

(ii) is made as a consequence of the assessment or reassessment pursuant to this paragraph or subsection 152(6) of tax payable by another taxpayer,

(iii) is made as a consequence of a transaction involving the taxpayer and a non-resident person with whom the taxpayer was not dealing at arm's length,

(iii.1) is made, if the taxpayer is non-resident and carries on a business in Canada, as a consequence of

(A) an allocation by the taxpayer of revenues or expenses as amounts in respect of the Canadian business (other than revenues and expenses that relate solely to the Canadian business, that are recorded in the books of account of the Canadian business, and the

déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,

(ii) soit a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période normale de nouvelle cotisation applicable au contribuable pour l'année;

b) la cotisation est établie avant le jour qui suit de trois ans la fin de la période normale de nouvelle cotisation applicable au contribuable pour l'année et, selon le cas :

(i) est à établir en conformité au paragraphe (6) ou le serait si le contribuable avait déduit un montant en présentant le formulaire prescrit visé à ce paragraphe au plus tard le jour qui y est mentionné,

(ii) est établie par suite de l'établissement, en application du présent paragraphe ou du paragraphe (6), d'une cotisation ou d'une nouvelle cotisation concernant l'impôt payable par un autre contribuable,

(iii) est établie par suite de la conclusion d'une opération entre le contribuable e une personne non résidente avec laquelle il avait un lien de dépendance,

(iii.1) si le contribuable est un non-résident exploitant une entreprise au Canada, est établie par suite :

(A) soit d'une attribution, par le contribuable, de recettes ou de dépenses au titre de montants relatifs à l'entreprise canadienne (sauf des recettes et des dépenses se rapportant uniquement à l'entreprise canadienne qui sont inscrits dans les documents

documentation in support of which is kept in Canada), or

(B) a notional transaction between the taxpayer and its Canadian business, where the transaction is recognized for the purposes of the computation of an amount under this Act or an applicable tax treaty.

(iv) is made as a consequence of a payment or reimbursement of any income or profits tax to or by the government of a country other than Canada or a government of a state, province or other political subdivision of any such country,

(v) is made as a consequence of a reduction under subsection 66(12.73) of an amount purported to be renounced under section 66, or

(vi) is made in order to give effect to the application of subsection 118.1(15) or 118.1(16);

(*c*) the taxpayer or person filing the return has filed with the Minister a waiver in prescribed form within the additional 3-year period referred to in paragraph (*b*); or

(*d*) as a consequence of a change in the allocation of the taxpayer's taxable income earned in a province as determined under the law of a province that provides rules similar to those prescribed for the purposes of section 124, an assessment, reassessment or additional assessment of tax for a taxation year payable by a corporation under a law of a province that imposes on the corporation a tax similar to the tax imposed under this Part (in this paragraph referred to as a "provincial reassessment") is made, and as a consequence of the provincial reassessment,

comptables de celle-ci et étayés de documents conservés au Canada),

(B) soit d'une opération théorique entre le contribuable et son entreprise canadienne,
qui est reconnue aux fins du calcul d'un montant en vertu de la présente loi ou d'un traité fiscal applicable,

(iv) est établie par suite d'un paiement supplémentaire ou d'un remboursement d'impôt sur le revenu ou sur les bénéfices effectué au gouvernement d'un pays étranger, ou d'un état, d'une province ou autre subdivision politique d'un tel pays, ou par ce gouvernement,

(v) est établie par suite d'une réduction, opérée en application du paragraphe 66(12.73), d'un montant auquel il a été censément renoncé en vertu de l'article 66,

(vi) est établie en vue de l'application des paragraphes 118.1(15) ou (16);

c) le contribuable ou la personne produisant la déclaration a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période additionnelle de trois ans mentionnée à l'alinéa *b*);

d) par suite d'un changement intervenu dans l'attribution du revenu imposable du contribuable gagné dans une province, déterminé selon la législation d'une province qui prévoit des règles semblables à celles établies par règlement pour l'application de l'article 124, une cotisation, une nouvelle cotisation ou une cotisation supplémentaire (appelée « nouvelle cotisation provinciale » au présent alinéa) est établie à l'égard de l'impôt à payer par une société pour une année d'imposition en vertu d'une loi provinciale

an assessment, reassessment or additional assessment is made on or before the day that is one year after the later of

(i) the day on which the Minister is advised of the provincial reassessment, and

(ii) the day that is 90 days after the day of sending of a notice of the provincial reassessment.

…

aux termes de laquelle la société est assujettie à un impôt semblable à celui prévu par la présente partie et, par suite de la nouvelle cotisation provinciale, une cotisation, une nouvelle cotisation ou une cotisation supplémentaire est établie au plus tard le jour qui suit d'une année le dernier en date des jours suivants :

(i) le jour où le ministre est avisé de la nouvelle cotisation provinciale,

(ii) le quatre-vingt-dixième jour suivant la date d'envoi de l'avis de la nouvelle cotisation provinciale.

[…]

Assessment deemed valid and binding

(8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.

…

Présomption de validité de la cotisation

(8) Sous réserve des modifications qui peuvent y être apportées ou de son annulation lors d'une opposition ou d'un appel fait en vertu de la présente partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée être valide et exécutoire malgré toute erreur, tout vice de forme ou toute omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.

[…]

DIVISION J
APPEALS TO THE TAX COURT OF CANADA AND THE FEDERAL COURT OF APPEAL

Appeal

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

SECTION J
APPELS AUPRES DE LA COUR CANADIENNE DE L'IMPOT ET DE LA COUR D'APPEL FEDERALE

Appel

169. (1) Lorsqu'un contribuable a signifié un avis d'opposition à une cotisation, prévu à l'article 165, il peut interjeter appel auprès de la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation:

(*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.

…

a) après que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation;

b) après l'expiration des 90 jours qui suivent la signification de l'avis d'opposition sans que le ministre ait notifié au contribuable le fait qu'il a annulé ou ratifié la cotisation ou procédé à une nouvelle cotisation; toutefois, nul appel prévu au présent article ne peut être interjeté après l'expiration des 90 jours qui suivent la date où avis a été envoyé au contribuable, en vertu de l'article 165, portant que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation.

[…]

PART XV ADMINISTRATION AND ENFORCEMENT

ADMINISTRATION

…

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.

PARTIE XV APPLICATION ET EXÉCUTION

APPLICATION

[…]

Renonciation aux pénalités et aux intérêts

220. (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.

The following provisions from the *Federal Courts Act*, set out the grounds upon which the decision can be reviewed:

JURISDICTION OF THE FEDERAL COURT	COMPÉTENCE DE LA COUR FÉDÉRALE
…	[…]
Application for judicial review	Demande de contrôle judiciaire
18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	**18.1** (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
Time limitation	Délai de présentation
(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.
Powers of Federal Court	Pouvoirs de la Cour fédérale
(3) On an application for judicial review, the Federal Court may	(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(*a*) order a federal board, commission or other tribunal to do any act or thing it has	*a*) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement

unlawfully failed or refused to do or has unreasonably delayed in doing; or	omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	*b*) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.
Grounds of review	Motifs
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	*a*) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	*b*) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	*c*) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	*d*) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or	*e*) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(*f*) acted in any other way that was contrary to law.	*f*) a agi de toute autre façon contraire à la loi.
Defect in form or technical irregularity	Vice de forme
(5) If the sole ground for relief established	(5) La Cour fédérale peut rejeter toute

on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(*a*) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(*b*) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-402-11 T-403-11
STYLE OF CAUSE:	Giuseppe Amoroso Angelina Perrotti-Amoroso v Attorney General of Canada
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 10, 2013
REASONS FOR JUDGMENT: AND JUDGMENT	BOIVIN J.
DATED:	February 14, 2013

APPEARANCES:

Giuseppe Amoroso Angelina Perrotti-Amoroso	FOR THE APPLICANTS (ON THEIR OWN BEHALF)
Mathieu Tanguay	FOR THE RESPONDENT

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William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT