

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20130205**

**Docket: A-343-12**

**Citation: 2013 FCA 25**

**CORAM: EVANS J.A.  
DAWSON J.A.  
STRATAS J.A.**

**BETWEEN:**

**TWENTIETH CENTURY FOX HOME  
ENTERTAINMENT CANADA LIMITED**

**Appellant**

**and**

**THE ATTORNEY GENERAL OF CANADA  
THE MINISTER OF NATIONAL REVENUE AND  
THE ASSISTANT COMMISSIONER,  
LEGISLATIVE POLICY AND REGULATORY  
AFFAIRS BRANCH OF THE CANADA REVENUE AGENCY**

**Respondents**

Heard at Vancouver, British Columbia, on February 5, 2013.

Judgment delivered from the Bench at Vancouver, British Columbia, on February 5, 2013.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**EVANS J.A.**

Federal Court of Appeal



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**CORAM:** EVANS J.A.  
DAWSON J.A.  
STRATAS J.A.

**BETWEEN:**

**TWENTIETH CENTURY FOX HOME  
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**Appellant**

**and**

**THE ATTORNEY GENERAL OF CANADA  
THE MINISTER OF NATIONAL REVENUE AND  
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LEGISLATIVE POLICY AND REGULATORY  
AFFAIRS BRANCH OF THE CANADA REVENUE AGENCY**

**Respondents**

**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Vancouver, British Columbia, on February 5, 2013)**

**EVANS J.A.**

[1] This is an appeal by Twentieth Century Fox Home Entertainment Canada Limited (Fox) from a decision of the Federal Court (2012 FC 823), in which Justice Phelan (Judge) dismissed an application for judicial review by Fox to set aside a decision by the Assistant Commissioner (A/Commissioner) of the Canada Revenue Agency (CRA).

[2] In that decision, dated July 14, 2011, the A/Commissioner advised Fox that he would not recommend that the Minister of National Revenue (MNR) accept Fox's application for the remission of approximately \$1 million of Goods and Services Tax (GST) that it had over-remitted for the period July 2000 to March 2003 as a result of an error in Fox's computer software.

[3] Fox had obtained a rebate of approximately \$11.5 million of GST that it overpaid because of the same error. However, since Fox had remitted the \$1 million in question in the present appeal more than two years before it discovered the error, it was out of time to apply for a rebate of this amount. The relevant provisions of the *Excise Tax Act*, R.S.C. 1985, c. E-15, provide as follows.

261. (1) Where a person has paid an amount

(a) as or on account of, or

(b) that was taken into account as,

tax, net tax, penalty, interest or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsections (2) and (3), pay a rebate of that amount to the person.

...

(3) A rebate in respect of an amount shall not be paid under subsection (1) to a person unless the person files an application for the rebate within two years after the day the amount was paid or remitted by the person.

261. (1) Dans le cas où une personne paie un montant au titre de la taxe, de la taxe nette, des pénalités, des intérêts ou d'une autre obligation selon la présente partie alors qu'elle n'avait pas à le payer ou à le verser, ou paie un tel montant qui est pris en compte à ce titre, le ministre lui rembourse le montant, indépendamment du fait qu'il ait été payé par erreur ou autrement.

...

(3) Le remboursement n'est versé que si la personne en fait la demande dans les deux ans suivant le paiement ou le versement du montant.

[4] Subsection 23(2) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (FAA) confers a discretion on the Governor in Council, exercisable on the recommendation of the appropriate Minister (in this case the MNR), to remit any tax when it considers that the collection of the tax would be “unreasonable or unjust” or that it is “otherwise in the public interest to remit the tax”.

23.(2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.

23.(2) Sur recommandation du ministre compétent, le gouverneur en conseil peut faire remise de toutes taxes ou pénalités, ainsi que des intérêts afférents, s’il estime que leur perception ou leur exécution forcée est déraisonnable ou injuste ou que, d’une façon générale, l’intérêt public justifie la remise.

[5] Except as specifically provided by either Part IX of the ETA (which includes section 261) or the FAA, a taxpayer has no right to recover money paid to Her Majesty as GST: ETA, section 312.

[6] In the decision under review, the A/Commissioner denied Fox’s application for remission of the \$1 million under subsection 23(2) on the basis of two provisions of the Remission Guidelines adopted by the CRA to structure the exercise of discretion under this provision.

[7] First, an over-remittance of GST as a result of an error in Fox’s computer software was not a circumstance “beyond a person’s control”. Second, in view of Fox’s large current assets (\$194.6 million) and gross revenues (\$163.8 million in the year ending June 30, 2010), Fox would not suffer financial hardship if the \$1 million that it had overpaid was not remitted: thus Fox would not suffer “a significant financial setback” that would strain its “limited resources”.

[8] The Judge stated that a review of the A/Commissioner's discretionary decision for unreasonableness must take account of the broad policy-based nature of the Governor in Council's power under subsection 23(2) of the FAA to grant the extraordinary remedy of remission, after the limitation period for a rebate had expired.

[9] The Judge stated that the A/Commissioner looked broadly at the impact of the proposed remission and held that it was reasonable to have regard to "the size of the corporation, its assets and its inter-corporate structure" (para. 41). Nor was the A/Commissioner's decision rendered unreasonable by the fact that he might have emphasized Fox's net rather than gross revenues, and might have taken the view that the computer software error was outside Fox's control. Finally (at para. 47), the Judge adopted the reasoning of Justice de Montigny in *Waycobah First Nation v. Canada (Attorney General)*, 2010 FC 1188 at para. 31, to the effect that the words "public interest" in subsection 23(2) of the FAA must be viewed in the context of the regulatory scheme governing the operation of the taxation statutes and of the principles underlying the ETA as a whole.

[10] Parliament has provided that the only right to recover an over-payment of GST is that contained in section 261. A taxpayer who has no right to a statutory rebate because it is claimed too late has no right to recover a mistaken over-payment, but may apply for a favourable exercise of discretion under subsection 23(2).

[11] Like the Judge, we are satisfied that the A/Commissioner's decision not to recommend that Fox's overpayment be remitted was reasonable, given the breadth of the Governor in Council's

statutory discretion, the extraordinary nature of the relief not otherwise available to taxpayers, and the guidelines on which he relied in exercising the discretion.

[12] In our opinion, it is not material for present purposes that Fox did not owe the \$1 million that it erroneously overpaid, but failed to apply to recover within the time prescribed by Parliament. The thrust of counsel's submission is that, in these circumstances, the A/Commissioner has virtually no discretion to refuse to recommend a remission. This argument is, in our view, inconsistent with the statutory scheme.

[13] For these reasons, and despite counsel's able submissions, the appeal will be dismissed with costs.

"John M. Evans"

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J.A.

Federal Court of Appeal



Cour d'appel fédérale

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE PHELAN.  
DATED JUNE 28, 2012, DOCKET NO. T-1374-11**

**DOCKET:** A-343-12

**STYLE OF CAUSE:** Twentieth Century Fox Home Entertainment Canada Limited v. The Attorney General of Canada, the Minister of National Revenue, and The Assistant Commissioner, Legislative Policy and Regulatory Affairs Branch of the Canada Revenue Agency

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** February 5, 2013

**REASONS FOR JUDGMENT OF THE COURT BY:** Evans, Dawson, Stratas JJ.A.

**DELIVERED FROM THE BENCH BY:** Evans J.A.

**DATED:** February 5, 2013

**APPEARANCES:**

Joel A. Nitikman and Jessica Fabbro FOR THE APPELLANT

Michael Taylor FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

Fraser Milner Casgrain LLP, Vancouver, British Columbia FOR THE APPELLANT

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

Vancouver, British Columbia