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Current Cases

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FEDERAL COURT OF APPEAL

BENDING LIMITATION PERIODS TO ACHIEVE EQUITY

Barrs v. Canada (National Revenue)
2022 FCA 147

KEYWORDS: DISCRETIONARY ■ FAIRNESS ■ RELIEF ■ INTEREST ■ TAX EQUITY ■ TAX ADMINISTRATION

Introduction

In *Barrs*,[29] the Federal Court of Appeal, reversing the decision of the Federal Court, endorsed a technique to circumvent the 10-year limitation period set out in subsection 220(3.1) of the Act, the heavily litigated provision that authorizes the minister of national revenue to cancel interest (and penalties)[30] on discretionary grounds. *Barrs* is a welcome decision that invites further reflection on whether the 10-year limitation period—which has long been criticized as arbitrary and as undermining the effectiveness of the CRA's voluntary disclosure program[31]—serves any useful purpose and whether the time has come for its repeal.

Background

The 10-year limitation period did not appear in subsection 220(3.1) when it was initially enacted in 1991,[32] but was added in 2005 to address unspecified "administrative problems" that the minister was supposedly facing with interest relief applications involving taxation years preceding the 10-year cutoff date.[33] In 2011, in *Bozzer*,[34] the

29 *Barrs v. Canada (National Revenue)*, 2022 FCA 147.

30 Issues pertaining to the cancellation of penalties fall outside the scope of this case comment.

31 See David M. Sherman, ed., *Practitioner's Income Tax Act*, 26th ed. (Toronto: Carswell, 2004), notes on subsection 220(3.1); John A. Sorensen, "A Comprehensive Review of Penalty and Interest Relief Under the Income Tax Act," in *Report of Proceedings of the Sixty-Seventh Tax Conference*, 2015 Conference Report (Toronto: Canadian Tax Foundation, 2016), 41:1-49, at 41:4; and Alistair Campbell, "Taxpayers Relief Provisions—Voluntary Disclosure and Request for Cancellation or Waiver of Penalties and Interest," in *2009 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 2009), 14:1-27, at 14:1-2 and 14:9-10.

32 As originally enacted, subsection 220(3.1) allowed the minister to waive or cancel interest in respect of any taxation year from 1985 onward: Income Tax Amendments Revision Act, SC 1994, c. 7, schedule II (1991, c. 49), section 181(1).

33 Canada, Department of Finance, 2004 Budget, Budget Plan, March 23, 2004, at 347.

34 *Bozzer v. Canada*, 2011 FCA 186.

Federal Court of Appeal expressed skepticism about the existence of these "administrative problems," and held that any ambiguity regarding the scope of the 10-year limitation period should be resolved in the taxpayer's favour.[35] Consequently, the court concluded that the 10-year limitation period does not bar the minister from granting interest relief with respect to tax debts that are more than 10 years old, but simply limits the scope of possible relief to interest that has accrued over the 10 years prior to the taxpayer's request for relief.[36]

When a taxpayer faces arrears interest on a tax debt that the minister concludes should be cancelled *in part*, the minister can potentially circumvent the 10-year limitation period by granting "extra" relief for the last 10 years of interest in lieu of relief for interest accrued over earlier periods. *Barrs* has endorsed this practice by finding that the CRA acted unreasonably in not considering the application of this approach, in light of the taxpayer's particular facts.

Barrs involved a longstanding tax dispute, dating back to the 1980s, that involved a syndicated investment scheme promoted by Overseas Credit and Guaranty Corporation ("OCGC").[37] The investment offered flowthrough losses from partnerships purporting to operate a luxury yacht-chartering business. Some 600 taxpayers participated in the scheme, including Randall Barrs in 1984.

The CRA (then known as Revenue Canada) audited and denied the losses, and in 1991, OCGC investors began to launch appeals to the Tax Court of Canada. In 1994, a settlement was reached with some of the taxpayers, but then repudiated[38] out of concern that it would prejudice the criminal prosecution of the OCGC principals (a prosecution that ultimately ended with their conviction and imprisonment).[39] After more than a decade of procedural wrangling, in 2014, the Tax Court dismissed the appeals of three lead cases in the 450-paragraph judgment in *Garber*.[40]

In 2004, while the lead cases were working their way through the Tax Court, a group of OCGC taxpayers—not including Mr. Barrs—applied for discretionary cancellation of interest on their OCGC-related tax debts. This application was made prior to (and presumably in anticipation of) the enactment of the 10-year limitation

35 Ibid., at paragraphs 41-47.

36 Ibid., at paragraphs 58-59.

37 For a history of the dispute, see *Garber v. The Queen*, 2014 TCC 1, at paragraphs 1-14.

38 *Barrs* (supra note 29, at paragraph 11), suggests that it was the "Canada Revenue Agency" that reached and then resiled from the settlement. However, it appears that the settlement was actually negotiated by the Department of National Revenue and then repudiated by the Department of Justice. Also see *Garber v. The Queen*, 2005 TCC 635, at paragraphs 11-23 and 34; aff'd 2006 FCA 177.

39 Gay Abbate, "Two Men Jailed in Record Tax Fraud," *Globe and Mail*, February 16, 2000 (www.theglobeandmail.com/news/national/two-men-jailed-in-record-tax-fraud/article25455355). See also *The Queen v. Bjellebo*, 2003 DTC 5659 (ONCA); leave to appeal to the Supreme Court of Canada dismissed, [2004] 1 SCR viii.

40 *Garber*, supra note 38 (TCC).

period. The applications were apparently held in abeyance pending the disposition of the Tax Court proceedings.

Following *Garber*, Mr. Barrs's Tax Court appeal was dismissed in an unreported decision in 2014.[41] After this decision, Mr. Barrs and another group of OCGC investors applied for discretionary cancellation of interest on *their* OCGC-related tax debts. By this point, however, the 10-year limitation period had been enacted.

The CRA considered the 2004 and 2014 interest relief applications from all the OCGC investors collectively and, after three reviews (the customary two reviews, plus a third that took place as a result of a settlement of judicial review applications filed in respect of the second review), decided that it would be appropriate to waive interest that had accrued over 180 specified months as a result of delay attributable to the Crown. About 117 of these months were prior to 2004. Consequently, in the case of Mr. Barrs and those OCGC investors who applied for interest relief in 2014, the interest relief was cut down to 63 months falling within the 10-year limitation period.

Mr. Barrs sought judicial review of this decision on the basis that he should have been granted "additional relief . . . in respect of the open years (*i.e.*, over the ten-year period during which relief is allowed under subsection 220(3.1) of the ITA) to ensure equity with the taxpayers who had made their requests in 2004."[42] It bears noting that the other OCGC taxpayers who had applied for interest relief in 2014 reached settlements, leaving Mr. Barrs as the only litigant before the Federal Court of Appeal.

Mr. Barrs's request for additional relief to "ensure equity" with the taxpayers who had applied in 2004 was perfunctorily rejected by the CRA, essentially on the ground that, because of the 10-year limitation period, "[the minister was] unable to consider the non-grandfathered taxpayers who made relief requests in 2014 in the same fashion as the grandfathered taxpayers who made relief requests in December 2004."[43] The Federal Court, on judicial review, concurred with this reasoning, holding that

> [as] to creating equality amongst the Applicants, in my view the Delegate appropriately denied interest relief beyond 10 years for the 2014 Applicants. Under subsection 220(3.1), the Minister no longer has discretion to cancel or waive interest beyond 10 years before a taxpayer's request for relief, regardless of when the underlying tax debt arose.[44]

The Federal Court of Appeal's Decision

Reversing the Federal Court's decision, the Court of Appeal found that the CRA and the Federal Court erred in their appreciation of the 10-year limitation period. The court held that

41 Tax Court of Canada docket no. 2012-39(IT)G; leave to appeal to the Tax Court of Canada dismissed August 18, 2014.

42 *Barrs*, supra note 29, at paragraph 22.

43 Ibid., at paragraph 28.

44 Ibid., at paragraph 31, citing *Brandimarte v. Canada*, 2019 FC 1034, at paragraph 58.

> the presence of the ten-year limitation period in subsection 220(3.1) of the ITA is not a complete answer to Mr. Barrs' claim for equitable treatment, and it may be open to the Minister to grant him additional relief from interest that had accrued over the period from 2004 onward, to promote equity with the group of taxpayers who had requested relief in 2004.
>
> Mr. Barrs' claim for equality of treatment is not a frivolous one. In light of the interest rates that have prevailed since the tax debt arose and the way in which interest is calculated under the ITA, Mr. Barrs finds himself faced with an interest bill that far exceeds those of the taxpayers who made their requests for relief in 2004. Yet, they all invested in the same scheme and had their claims for interest relief examined by the same review officers based on the same facts.[45]

The court found that the CRA's third-level review officer had failed to meaningfully consider the request for greater relief in the open years to ensure equitable treatment, and remitted the case to the CRA for reconsideration of the request.

Like *Bozzer* 11 years ago, *Barrs* is a welcome decision for taxpayers seeking to settle longstanding disputes with the CRA. It also underscores the arbitrariness and dubious utility of the 10-year limitation period. If the minister is permitted to cancel (and, indeed, required to consider cancelling) interest accruing over the past 10 years in lieu of cancelling interest accruing in earlier periods, why should the minister not simply be allowed to cancel the interest in the previous periods? The analogous interest relief regime in the United States functions without any limitation period, and there is no obvious reason why Canada cannot follow suit.[46]

Michael H. Lubetsky

45 Ibid., at paragraphs 36-37.

46 Michael H. Lubetsky, "Interest Relief on Income Tax Debts: Canada Versus the United States" (2020) 68:4 *Canadian Tax Journal* 931-86, at 985.