

INCOME TAX

ASSESSMENT AND REASSESSMENT

Appeal from Tax Court of Canada (T.C.C.) decision dismissing appellant's appeal from redetermination of Minister of National Revenue that appellant not "eligible individual" for purposes of *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1, s. 122.6 (ITA) since appellant not meeting criteria laid out in ITA, s. 122.6, paragraph (e) of definition — Respondent cross-appealing T.C.C.'s decision — Appellant denied refugee claimant but granted permanent residence status in Canada on humanitarian and compassionate grounds — Receiving lump sum Canada Child Tax Benefit (CCTB) after submitting application — Continuing to receive CCTB for several years until advised that eligibility for CCTB would be rescinded by Canada Revenue Agency (CRA) — Minister concluding that appellant neither temporary resident of Canada, nor protected person within meaning of *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27 — Appellant objecting but redetermination confirmed — T.C.C. determining that appellant not meeting any criteria laid out in paragraph (e) of "eligible individual" definition under ITA, s. 122.6 — Since T.C.C. of view that CRA making "serious" mistake in originally granting appellant CCTB, mistake having "serious impact" on appellant, T.C.C. referring matter back to Minister so that taxpayer relief in form of waiver of any applicable interest, penalties under ITA, remission of taxes pursuant to *Financial Administration Act*, R.S.C. 1985, c. F-11 may be seriously considered — Appellant raising for first time on appeal constitutionality of ITA, s. 122.6 regarding *Canadian Charter of Rights and Freedoms*, s. 15 — Whether T.C.C. erring in concluding that appellant not "eligible individual" as defined in ITA, s. 122.6; consequently, in T.C.C. dismissing appeal; whether appellant entitled to raise challenge under Charter, s. 15(1) for first time before Court; on cross-appeal, whether T.C.C. exceeding jurisdiction in sending matter back to Minister so that taxpayer relief in form of waiver of any applicable interest, penalties, remission of taxes may be considered — T.C.C. not making any palpable, overriding error in concluding that appellant not "eligible individual" for purposes of ITA, s. 122.6, paragraph (e) — Appellant not meeting definition of "protected person" found in IRPA, s. 95(2) — No such thing as *de facto* status of protected person; refugee claimants awaiting determination of their claims do not temporarily qualify as protected persons — With respect to "temporary resident", under IRPA, s. 22, status of temporary resident granted by immigration officer upon being satisfied that all required criteria have been met — Also, no such thing as *de facto* temporary resident status — Appellant therefore could not prevail since neither protected person nor temporary resident during periods at issue — Regarding constitutional issue, respondent's submission that Crown would suffer prejudice from absence of any evidence on record in respect of alleged discriminatory purpose, policy or effect of ITA, s. 122.6 accepted — Case law cautioning against deciding constitutional questions without adequate evidentiary record — Court therefore deciding not to entertain Charter challenge; moreover, appellant's argument devoid of merit — With respect to T.C.C.'s jurisdiction, T.C.C. acting beyond scope of powers in referring matter back to Minister — Once correctness of tax assessment under appeal is confirmed, that appeal dismissed, nothing more for T.C.C. to adjudicate; only when appeal allowed that T.C.C. can refer assessment back to Minister for reconsideration, reassessment — Nor may T.C.C. interfere with Minister's discretion if only by suggesting that Minister "may" seriously consider taxpayer relief — Minister's power to waive interest, penalty under ITA, s. 220(3.1) may only be exercised on own initiative or following taxpayer's application — T.C.C. overstepping jurisdiction in referring "matter" back to Minister for sole purpose of "seriously considering" forms of relief specified — While T.C.C. entitled to express views about impact of CRA's error, fact that relief should be considered in its reasons, T.C.C. should have limited itself, in judgment, to dismissing appeal — Appeal dismissed; cross-appeal allowed .

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