**Date: 20090826**

**Docket: T-465-09**

**Citation: 2009 FC 846**

**Toronto, Ontario, August 26, 2009**

**PRESENT: Kevin R. Aalto, Esquire, Prothonotary**

**BETWEEN:**

**MARC CARTER**

**Applicant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

## REASONS FOR ORDER AND ORDER

[1] The Respondent seeks an order striking this application essentially on the basis that as the matters in dispute deal with "assessments" those are matters that are within the sole jurisdiction of the Tax Court of Canada. Thus, there is no jurisdiction for this application to be heard in this Court and must be struck. In order to put the issue in context, a brief review of the chronology is necessary.

Background Facts

[2] On December 10, 2006, the Applicant sent a Notice of Change of Mailing Address to the Sudbury Tax Services Office. As of that date, the Applicant's address was an address in Markham, Ontario.

[3] On April 3, 2007, the Applicant sent a further Notice of Change of Mailing Address to the Sudbury Tax Services Office. Effective on that date, the Applicant's mailing address was another Markham address (the "Second Markham Address").

[4] The Minister of National Revenue (the "Minister") reassessed the Applicant for the 2003-2004 taxation years. The notices of assessment were each dated July 10, 2007 and were sent to the Applicant at an address in Markham, Ontario, which was not the Second Markham Address.

[5] Thus, the July 10, 2007 notices of assessment were sent to the original Markham address notwithstanding that the Applicant's mailing address had changed to the Second Markham Address. The Minister also reassessed the Applicant for the 2005 taxation year by notice of assessment dated December 10, 2007. That notice of assessment was also not sent to the Second Markham Address.

[6] Subsequently, the Applicant learned of the notices of assessment and on November 4, 2008 the Applicant filed notices of objection to the notices of assessment for the taxation years 2003-2005.

[7] By letter dated March 3, 2009, the Minister advised the Applicant that the notices of objection with respect to the 2003-2004 taxation years could not be accepted as they were filed more than 90 days from the mailing date on the notices of assessment. The Minister further advised the Applicant that the time to file notices of objection to the reassessments of the 2003-2004 taxation years could not be extended as the Applicant had not made an application to extend the time within one year of the expiration of the prescribed period for serving the notices of objection.

[8] It appears that the notice of objection for the 2005 taxation year was within time and accepted by the Minister.

[9] The letter dated March 3, 2009 from the Minister advising that it could not accept the 2003-2004 taxation year notices of objection and would not allow an extension of time are the subject of this judicial review. In essence, the Applicant seeks judicial review of whether or not the Minister issued valid notices of reassessment on the basis that they were not sent to the Applicant's mailing address, which the Minister had on file.

Issues

[10] As is often the case, simple facts such as these create a legal conundrum for the parties.

[11] The issues raised on the application are:

(a) is the validity of the notices of reassessment subject to judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act;*

(b) if the validity of the notices of reassessment is subject to judicial review, did the Applicant commence this application within the period prescribed by subsection 18.1(2) of the *Federal Courts Act*; and

(c) whether the decision of the Minister to refuse to accept the Applicant's notice of objection to the assessments of the 2003 to 2004 taxation years is subject to judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act.*

[12] The issue on the motion is whether the letter from the Minister deals with assessments that are within the sole jurisdiction of the Tax Court. If so, this Application must be struck. In these unique circumstances, for the reasons that follow the Application should be allowed to proceed.

Analysis

[13] There is authority for the proposition that if the Minster has not issued a valid notice of assessment, the taxpayer cannot file a notice of objection in response to it. Pursuant to subsection 152(2) of the *Income Tax Act*, the Minister issues an assessment when it sends a notice of assessment to a taxpayer. Where the notice of assessment is sent to an address other than the taxpayer's mailing address on file, the notice of assessment is not a valid assessment (*236130 British Columbia Ltd. v. R.*, 2006 D.T.C. 2053).

[14] The *236130 British Columbia* case is a decision of Justice Bell of the Tax Court. The proceeding before Justice Bell was the determination of a question of law. It resulted from a

reference under s.173 of the *Income Tax Act*. The Appellant in that case sought a determination that the Minister did not validly reassess the 1995-1996 taxation years of the Appellant. The argument of the Appellant was that the Minister sent the notices of assessment to the wrong address. There was extensive evidence before the Court from various individuals regarding what information the Minister had and whether the assessments were mailed in a timely way to the proper address. The onus is on the Minister to establish that assessments are mailed in a timely manner to the proper address of the taxpayer. The net result of the hearing was a finding by Justice Bell that the Minister had failed to meet that onus and therefore the reassessments were not valid.

[15] In this case, the Applicant argues that the reassessments for the 2003-2004 taxation years were not sent to the correct address and therefore the Minister failed to issue valid notices of assessment. Without valid notices of assessment, the Applicant cannot file notices of objection pursuant to section 165 of the *Income Tax Act* and therefore cannot file an appeal to the Tax Court pursuant to section 169 of the *Income Tax Act*.

[16] Section 165 of the *Income Tax Act* requires that a notice of objection be sent within 90 days of the receipt of the day of mailing of the notice of assessment. A taxpayer may apply to the Canada Revenue Agency to file a notice of objection late provided that the application is made within a one year period of the date of the notice of assessment (section 166.1). If the Canada Revenue Agency refuses to grant an extension, the taxpayer may apply to the Tax Court for an extension but such application must be made within 90 days of the decision of the Canada Revenue

Agency. An appeal to the Tax Court from a notice of assessment cannot be taken unless a notice of objection is first filed with the Canada Revenue Agency.

[17] Thus, the Applicant argues that he has no mechanism by which a determination of the validity of the notices of assessment can be determined in the Tax Court. More than one year and 90 days has elapsed since the mailing of the notices of assessment to the wrong address. As there is no right of appeal to the Tax Court, so the Applicant argues, the exclusive jurisdiction granted to the Tax Court concerning assessments under the *Tax Court of Canada Act*, R.S.C. 1985 c. T-2, does not apply. Therefore, this application must proceed under section 18.5 of the *Federal Courts Act.*

[18] The Applicant further argues that the Tax Court has recognized that it does not have jurisdiction in circumstances such as this in respect of whether or not a notice of assessment issued by the Minister is valid. This argument flows from the decision of the Tax Court in *Corsi v. The Queen*, 2008 TCC 472. This case involved a motion by the Minister to dismiss the appeal of the taxpayer on the ground that the appeal was frivolous because the taxpayer did not first file a timely objection or make a timely application to the Tax Court for an extension of time in which to do so.

[19] On the facts of the case, it appears that the taxpayer did not receive the notice of assessment and that it was returned to the Canada Revenue Agency. The notice of assessment was not sent to the authorized mailing address, which was the address of the taxpayer's accountant. Subsequently, it was sent to the accountant's address but more than one year and 90 days had elapsed since the

mailing of the original notice of assessment. A notice of objection was filed but was rejected by the Canada Revenue Agency as being out of time.

[20] Justice Boyle determined on the facts of the case that a valid appeal had not been instituted, neither from the assessment, because no valid notice of objection had been filed nor from the late-filed notice of objection because such an appeal had to be taken within 90 days of the decision of the Canada Revenue Agency. However, Justice Boyle went on to comment as follows:

> [30] It may be that Ms. Corsi can seek a remedy in respect of the assessment, on the basis it was never valid, **in a different Court**. I will leave that to the taxpayer and her advisers.
>
> [31] It may also be that Ms. Corsi's remedy may be **in another Court**, if any of her several professional advisors did not properly advise her or represent her. (emphasis added)

In this case, the Applicant argues the decision of Justice Boyle in *Corsi* supports the proposition that this Court is the "different" court or "another" court, which has the jurisdiction to deal with the "assessments" in issue in this case.

[21] Thus, the conundrum: if the Applicant has no appeal rights to the Tax Court does he have any right of proceeding by way of judicial review in this Court? The Applicant argues that as the Minister failed to observe procedural fairness and the principles of natural justice, the Applicant is left without any right to file a notice of objection or an appeal under the *Income Tax Act*.

[22] It would appear that the proceeding contemplated in section 173 of the *Income Tax Act*, that is, a reference to the Tax Court to determine a question of law or mixed fact and law, as used in the *236130 British Columbia* case, *supra*, has not yet been pursued. It also appears that no appeal to the Tax Court has been taken under section 169(1) nor has the extension of time to appeal under section 167(1) of the *Income Tax Act* been pursued which may give the taxpayer an avenue of appeal to the Tax Court. It is to be noted that the Applicant argues in its written submissions the following:

> 27. In the Minister's March 3, 2009 letter, the Minister did not refuse the [*sic*] grant an application for an extension of time to file the notices of objection, but rather stated that it could not grant and [*sic*] application for extension due to the fact that the objections were filed beyond the time limit in paragraph 166.1(7)(a) of the ITA. The Minister considered the July 10, 2007 reassessments to be valid, therefore, the Minister believed that it did not have jurisdiction to grant the extension. The Minister did not refuse to grant the extension; he was unable to grant the extension. The Minister did not make a decision because, in the Minister's interpretation, he did not have the jurisdiction to exercise his discretion under section 166.1 of the ITA.

[23] There is no decision for the Tax Court to review under section 166.2 of the *Income Tax Act*, thus the Tax Court does not have jurisdiction.

[24] The Minister's argument that assessments fall exclusively within the jurisdiction of the Tax Court is correct. However, if there is no "valid" assessment, which triggers the relief available to a taxpayer, then the matter falls to be determined by this Court. It is to be noted that in *Krahn v. Canada (Customs and Revenue Canada)* [2005] F.C.J. No. 582 at para. 11, Deputy Judge Strayer stated:

> If, indeed, the Applicant here is not challenging the assessment of February 9, 1999, and is only arguing that what has happened since that assessment, and its confirmation by the Tax Court of Canada, has involved some enforcement or collection decisions involving the kind of error normally reviewable under section 18.1, **it may be difficult to say that judicial review of such a decision could never be available. If it is enforcement action alone, and not the assessment, which is under attack, it is clear that the taxpayer cannot challenge that by the usual Tax Court procedure. Therefore this Court should be open to considering whether a remedy is available here in respect of official action which is not reviewable by the Tax Court.** For example this Court hears applications for judicial review in respect of the exercise of ministerial discretion under subsection 223(3.1) concerning the waiver of penalties or interest, a matter not reviewable in the Tax Court: see *Sharma v. Canada* (2001), 206 F.T.R. 40; *MacKay v. Canada*, [2002] 2 C.T.C. 130; and *Case v. Canada*, [2004] F.C.J. No. 1026. (emphasis added)

[25] In my view, Justice Strayer's observation applies in this case. This Court should be open to considering whether a remedy can be granted as it appears the notices of assessment are not reviewable by the Tax Court. It may very well be that there are other avenues that can be pursued in the Tax Court such as a reference under s. 173 of the *Income Tax Act* if the parties agree to pursue such a reference. That section provides as follows:

> 173(1) Where the Minister and the taxpayer agree in writing that a question of law, fact or mixed law and fact arising under this *Act*, in respect of any assessment, proposed assessment, determination or proposed determination, should be determined by the Tax Court of Canada, that question shall be determined by that Court.

[26] Such a proceeding would put the issues in this application squarely before the Tax Court as it did in the *236130 British Columbia* case. If such were to happen then proceedings in this Court could be stayed or otherwise disposed of pending the outcome of such proceedings. However, as the Minister and taxpayer have not pursued that option and no such proceedings are pending then

the Applicant should not be prejudiced by having this Application struck on motion by the Minister. To do so would be to leave the Applicant without a remedy.

Conclusion

[27] In the result, the motion is dismissed but given the novel issue raised there will be no costs. Further, the Respondent is granted an extension of time of 30 days within which to file its responding affidavits and documentary exhibits.

## ORDER

**THIS COURT ORDERS that**:

1. The motion to strike the application is dismissed.

2. The Respondent is granted an extension of time of 30 days from the date of this Order in which to file the Respondent's affidavits and documentary exhibits.

3. The Notice of Application is hereby amended to remove Her Majesty the Queen as a party to these proceedings and to substitute therefore the Minister of National Revenue as the Respondent.

4. The time for taking subsequent steps in the proceeding is extended to run from the date of service of the Respondent's affidavits and documentary exhibits on the Applicant.

5. There shall be no costs of this motion.

"Kevin R. Aalto"
Prothonotary

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKETS:** | T-465-09 |
| **STYLE OF CAUSE:** | MARC CARTER<br>v.<br>HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | June 8, 2009 |
| **REASONS FOR ORDER AND ORDER BY:** | AALTO P. |
| **DATED:** | August 26, 2009 |

**APPEARANCES:**

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| Laurent Bartleman | FOR THE RESPONDENT |

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