

Docket: 2015-2361(IT)APP

BETWEEN:

FARAMARZ SHABITAI,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[ENGLISH TRANSLATION]

Application for extension of time to institute an appeal heard on
August 19, 2015 at Montréal, Ontario [*sic*]

Before: The Honourable Justice Réal Favreau

Appearances:

For the applicant: The applicant himself

Counsel for the respondent: Stéphanie Côté

JUDGMENT

The application for an Order to extend the time to file a notice of appeal from reassessments made under the *Income Tax Act* for the 2000 to 2007 taxation years is dismissed, in accordance with the attached reasons for judgment.

Signed at Montréal, Canada, this 29th day of January 2016.

“Réal Favreau”

Favreau J.

Citation: 2016 TCC 20
Date: 20160129
Docket: 2015-2361(IT)APP

BETWEEN:

FARAMARZ SHABITAI,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Favreau J.

[1] Mr. Shabitai seeks an extension of time to institute an appeal from reassessments made for the 2000 to 2007 taxation years inclusively.

[2] In order for an extension of time to be granted, the applicant must satisfy the conditions set out in subsection 167(5) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) in its applicable version (the “Act”). This provision reads:

When order to be made

(5) No order shall be made under this section unless

(a) the application is made within one year after the expiration of the time limited by section 169 for appealing; and

(b) the taxpayer demonstrates that

(i) within the time otherwise limited by section 169 for appealing the taxpayer

(A) was unable to act or to instruct another to act in the taxpayer’s name, or

(B) had a *bona fide* intention to appeal,

(ii) given the reasons set out in the application and the circumstances of the case, it would be just and equitable to grant the application,

- (iii) the application was made as soon as circumstances permitted, and
- (iv) there are reasonable grounds for the appeal.

[3] Farah De Vito, an objections officer at the Canada Revenue Agency (the “CRA”), testified at the hearing and summarized the applicant’s case history as follows:

- On August 3, 2012, the applicant was issued notices of reassessment for the 2000 to 2007 taxation years inclusively;
- The applicant did not dispute the notices of reassessment on time. On or around May 15, 2013, he asked the Minister of National Revenue (the “Minister”) for a time extension to file an objection;
- On May 30, 2013, the Minister accepted the application for an extension to file an objection;
- On March 7, 2014, the Minister resolved the objection by issuing notices of reassessment for the 2000 to 2007 taxation years inclusively (hereinafter “new notices of reassessment”);
- The applicant did not file notices of objection to dispute these new notices of reassessment within the required time limit;
- On July 17, 2014, the applicant applied for another time extension to file an objection;
- The Minister accepted the application for extension on August 20, 2014 (hereinafter “2nd objection process”);
- For the 2nd objection process, the applicant cited no grounds to support his objections and provided no documentation despite the time he had had to do so;
- On December 17, 2014, the Minister confirmed all the new notices of reassessment;
- On December 18, 2014, the respondent gave the agent for the applicant a copy of the December 17, 2014 notice of confirmation at a hearing in the Superior Court, District of Montréal, in connection with case 500-17-076180-135, entitled *Procureur général du Canada v. Shabitai*;

- On December 19, 2014, a copy of the December 17, 2014 notice of confirmation was also sent by registered mail to the applicant's personal address at 6-2605 Ekers Street in Montréal;
- The applicant had until March 17, 2015 to institute an appeal from the new notices of reassessment. He failed to do so within the required time limit;
- On May 21, 2015, the applicant filed an application for an extension of time to institute an appeal from the new notices of reassessment with the Tax Court of Canada, arguing that he had not received the December 17, 2014 notice of confirmation until April 8, 2015;
- What the applicant received on April 8, 2015 is a copy of the December 17, 2014 notice of confirmation, which he had requested the day before during a telephone conversation with the objections officer.

[4] Patrick Dragan, collections officer at the CRA, also testified at the hearing and said that he personally knew that Stéphanie Côté had given counsel for the applicant a copy of the December 17, 2014 notice of confirmation at the hearing for *Procureur général du Canada v. Shabitai*, to have a property owned by the applicant sold in a judicial sale because of delinquent taxes. The case was heard by the Superior Court of Québec on December 18, 2014 at the Montréal courthouse. A copy of the judgment in that case, rendered on January 30, 2015, was admitted as evidence. According to the witness, counsel in the case referred to the December 17, 2014 notice of confirmation in argument. Lastly, the witness confirmed that the applicant had not attended the hearing on December 18, 2014.

[5] Mr. Shabitai testified at the hearing as well. He said that he had never received the December 17, 2014 notice of confirmation and that his counsel had not given him a copy. According to him, as soon as he learned of the notice's existence, he called Ms. De Vito to ask for a copy. He indeed received a copy of said notice of confirmation on April 8, 2015, the day after his conversation with Ms. De Vito. During said telephone conversation, he had told her that the notice of confirmation had been lost by Canada Post.

[6] Mr. Shabitai included with his application for an extension of time the letter from Canada Post, dated May 15, 2015, confirming that the mail he had picked up and signed for on December 23, 2014 had not been intended for him. The following excerpt from the letter from Canada Post explains the situation well:

[TRANSLATION]

After looking into this incident, and based on the statement obtained from the clerk on duty that day, we can confirm that registered mail item no. RW967424111CA addressed to you was not delivered to you, despite the information displayed, which can be checked with Canada Post.

Our investigation confirmed what you said, that is, that at 10:59 a.m. on December 23, 2014, you picked up mail by presenting the delivery notice at the Wilderton postal outlet, located at 2535 Van Horne, that you showed photo identification, and that you signed for the mail before looking at it; you left the postal outlet without immediately realizing what had happened and returned a few moments later to tell the clerk that the mail did not belong to you, since the name on it was not yours. The clerk on duty confirmed this, took the mail back, and tried to find yours in order to give it to you. Despite her efforts, she could not locate the item you had come to pick up. We must assume that it was mistakenly given to the wrong person.

[7] The content of the letter from Canada Post was the subject of an admission by the respondent at the opening of the hearing. The applicant cited no other facts to support his application for an extension of time.

[8] In the notice of appeal included with his application, the applicant cited as grounds for the appeal only the fact that his tax documents had been lost in a fire.

Analysis and conclusion

[9] The condition set out in paragraph 167(5)(a) of the Act is satisfied because the application was made within one year after the expiration of the time limited by section 169 for appealing. The applicant made his application on May 21, 2015, that is, within one year after the expiration of the time limit for appealing.

[10] The conditions set out in subparagraph 167(5)(b)(i) of the Act are not satisfied, because the applicant failed to demonstrate that, within the time limit for appealing, he was unable to act or to instruct another to act in his name, or that he had a *bona fide* intention to appeal.

[11] In *Canada v. Schafer*, [2000] F.C.J. No. 1480, the Federal Court of Appeal clearly pointed out that there is no requirement that the notice of confirmation be received in order to start the limitation period specified in subsection 169(1) of the Act running. The Minister need only demonstrate that the notice of confirmation was mailed to the applicant. Justice Little from our Court quoted heavily from the decision rendered in *Schafer* in *Haggart v. The Queen*, 2003 TCC 925.

[12] In this case, a copy of the notice of confirmation was hand-delivered to counsel for the applicant at the hearing of a case involving the applicant before the Superior Court of Québec, held on December 18, 2014. The applicant did not attend the hearing and it cannot be assumed that counsel for the applicant personally gave him a copy of the notice of confirmation. However, it is more than likely that his counsel at least informed him of the existence of said notice of confirmation. In any case, the applicant failed to provide the Court with the exact date on which he learned that the notice of confirmation had been mailed by the CRA.

[13] During the hearing, the applicant provided no credible explanations as to the reasons for which or the circumstances under which he was unable to act or to have someone else act in his name within the time limit for appealing. He cited the fact that he was sick, without specifying the illness, and that he was unable to take care of his tax files. According to him, he was living with his father and travelled to Cuba every month. All his bank accounts had been seized by the CRA. The applicant was represented by counsel in the judicial sale of real property and by an accountant during the 2nd objection process, during which the applicant had ample time to submit his documents and representations. Specifically, the CRA notified the applicant in a letter dated October 27, 2014 that he had until November 27, 2014 to submit his representations. After a call from an agent for the applicant, the period was extended to December 16, 2014. Since the CRA subsequently received nothing, the applicant's file was closed, and the notice of confirmation was sent by registered mail. The applicant did not dispute the fact that the notice of confirmation had been sent to his personal address by registered mail. His argument was that he had not received it because of an error by Canada Post.

[14] There is nothing in the record to indicate that the applicant had an intention to appeal the reassessments. At first glance, one could conclude that the applicant surely had an intention to appeal, given that he had objected to the reassessments twice. However, in the absence of any evidence of the steps he took or attempted to take to institute an appeal, he has not fulfilled this requirement. His failure to submit representations for the 2nd objection process raises serious doubt as to his intention to appeal.

[15] Therefore, the conditions set out in subparagraph 167(5)(b)(ii) are not satisfied. Given the reasons set out in the application and the circumstances of the case, I do not believe that it would be just and equitable to grant the application. The applicant had several opportunities to exercise his rights and did nothing, at

least with regard to the 2nd objection process. The reassessments issued on March 7, 2014 were established based solely on estimates of expenses, such as mortgage interest expenses, expenses incurred for the purpose of earning rental income, and commissions paid during the sale of property. On the whole, the applicant seems to have been treated fairly with regard to the disputed assessments.

[16] The condition set out in subparagraph 167(5)(b)(iii) is not satisfied, since the application was not made as soon as circumstances permitted. Between December 16, 2014, the date of the latest extension granted to the applicant to submit representations, and April 7, 2015, the date on which the applicant called Ms. De Vito, a period of approximately 105 days elapsed. The applicant knew or ought to have known that, after expiration of the latest extension granted, the CRA would act quickly in his case if he did not submit his representations. He was very slow to call Ms. De Vito to ask about the status of his case. Even after calling Ms. De Vito on April 7, 2015, he did not apply for an extension of time until May 21, 2015, that is, more than 30 days later.

[17] The condition set out in subparagraph 167(5)(b)(iv) is not satisfied, since there are no reasonable grounds for the appeal. The only grounds cited are the fact that the documents pertaining to the dispute were lost in a fire. In such circumstances, the applicant seems unable to meet his burden of proof to attack the validity of the reassessments. He had many opportunities to do so, and did not.

[18] For all these reasons, the application for an extension of time to institute an appeal is dismissed.

Signed at Montréal, Canada, this 29th day of January 2016.

“Réal Favreau”

Favreau J.

CITATION: 2016 TCC 20

COURT FILE NO.: 2015-2361(IT)APP

STYLE OF CAUSE: Faramarz Shabitai and Her Majesty the Queen

PLACE OF HEARING: Montréal, Ontario [*sic*]

DATE OF HEARING: August 19, 2015

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: January 29, 2016

APPEARANCES:

For the applicant: The applicant himself
Counsel for the respondent: Stéphanie Côté

COUNSEL OF RECORD:

For the applicant:

Name:

Firm:

For the respondent:

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