

Docket: 2010-3250(GST)APP

BETWEEN:

BRENT DAVIS,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Application heard on December 8, 2010,  
at Halifax, Nova Scotia

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Applicant:

The Applicant himself

Counsel for the Respondent:

Jan Jensen

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ORDER

The application made by Brent Davis to extend the time within which the appeal of the reassessment of his liability under the *Excise Tax Act* for the reporting periods from January 1, 2002 to December 31, 2004 may be instituted, is dismissed, without costs, for the reasons as attached.

Signed at Halifax, Nova Scotia, this 22<sup>nd</sup> day of December, 2010.

“Wyman W. Webb”

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Webb, J.

Citation: 2010TCC653  
Date: 20101222  
Docket: 2010-3250(GST)APP

BETWEEN:

BRENT DAVIS,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR ORDER**

Webb J.

[1] Although it is not entirely clear, it appears that the Applicant on October 15, 2010 filed an application to extend the time within which he could institute an appeal in relation to the reassessment of his liability under the *Excise Tax Act*.

[2] The Applicant had objected to assessments that had been issued under the *Income Tax Act* in relation to his liability under that *Act* for 2002, 2003 and 2004. The inventory control number that had been assigned to the Applicant's objection in relation to these assessments was "GB07185110367". Following the filing of his notice of objection, the Applicant was reassessed for each of these three years on October 9, 2007.

[3] The Applicant was also reassessed under the *Excise Tax Act* for the reporting periods from January 1, 2002 to December 31, 2004. The Applicant also objected to this reassessment and the decision and Notices of Reassessment for these reporting periods were sent to the Applicant on February 21, 2008.

[4] The Applicant then wrote to this Court on April 7, 2008. This letter stated as follows:

To Whom It May Concern: (Reference GB#071851150367)

We are appealing our income tax rulings, but realize it will be determined by the results of Brent's business tax audit.

We wish to appeal the following items: (1) motor vehicle expenses with reference to the car for the years 2002, 2003 and 2004. (2) telephone and utilities for 2004 (3) interest expenses for 2002-2004.

We are appealing the Tax Court decision reference #2003-4189 (GST) I, regarding HST paid for out of country warranty work. Reference Section 13 of Part V of Schedule VI of the Canada Excise Tax Act.

[5] The reference number (GB07185110367) is the number assigned by the Canada Revenue Agency in relation to his objection filed under the *Income Tax Act*. The letter specifically indicates that the Applicant was appealing the income tax rulings. The items identified also confirm that he was appealing the income tax ruling (and not the HST reassessment) as one of the specific items identified was "interest expenses" which would be relevant in an income tax appeal but not in an HST appeal as no HST would be paid in relation to any amount paid as interest. The payment of interest is a financial service and therefore is an exempt supply under section 1 of Part VII of Schedule V to the *Excise Tax Act*.

[6] The only reference to HST is in the last paragraph where the Applicant indicates that he is appealing a previous decision of this Court. Appeals from any decision of this Court are to be made to the Federal Court of Appeal, not to this Court. Therefore this letter is not a valid Notice of Appeal in relation to the reassessment of his net tax liability under the *Excise Tax Act* for the reporting periods from January 1, 2002 to December 31, 2004.

[7] Since the Applicant filed this letter on or after April 7, 2008, it was filed after the time period permitted to file an appeal under the *Income Tax Act*. Subsection 169(1) of the *Income Tax Act* provides that:

169. (1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

(a) the Minister has confirmed the assessment or reassessed, or

(b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been mailed to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.

[8] Since more than 90 days had elapsed from the date that the Applicant was reassessed under the *Income Tax Act* (following the filing of his notice of objection under that *Act*) on October 9, 2007, the Applicant would have had to make an application for an extension of time to file an appeal under the *Income Tax Act*.

[9] Subsections 167(1), (2), (3) and (5) of the *Income Tax Act* provide as follows:

167 (1) Where an appeal to the Tax Court of Canada has not been instituted by a taxpayer under section 169 within the time limited by that section for doing so, the taxpayer may make an application to the Court for an order extending the time within which the appeal may be instituted and the Court may make an order extending the time for appealing and may impose such terms as it deems just.

(2) An application made under subsection (1) shall set out the reasons why the appeal was not instituted within the time limited by section 169 for doing so.

(3) An application made under subsection (1) shall be made by filing in the Registry of the Tax Court of Canada, in accordance with the provisions of the *Tax Court of Canada Act*, three copies of the application accompanied by three copies of the notice of appeal.

...

(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.

[10] Justice Sharlow of the Federal Court of Appeal in *Dewey v. The Queen*, 2004 FCA 82, 2004 DTC 6159, [2004] 2 C.T.C. 311 stated that:

3 Section 167 of the *Income Tax Act* permits the Tax Court to extend the time for commencing an appeal to the Tax Court, if a number of the conditions are met. A failure to meet any one of the conditions is fatal to the application.

[11] The letter does not address the reasons why the appeal under the *Income Tax Act* was not instituted within 90 days of October 9, 2007 and therefore does not satisfy the requirements of subsection 167(2) of the *Income Tax Act*.

[12] The Applicant did not take any further action or file any further documents until October 15, 2010 when he filed a covering letter and the same letter that he had filed in 2008. The only reference to HST is the reference to the Applicant appealing a previous decision of this Court. As noted above, appeals from decisions of this Court are not made to this Court but to the Federal Court of Appeal. This is not a valid appeal to this Court under the *Excise Tax Act*.

[13] As well even if this were to be treated as an application to extend the time to institute an appeal under the *Income Tax Act*, this letter filed on October 15, 2010 not only suffers from the same deficiency noted above but also was filed after the expiration of the time period within which an application to extend the time to institute an appeal can be made. The time period to make an application to extend the time for instituting an appeal under the *Income Tax Act* would have expired in January 2009 (which would have been one year after the expiration of the 90 day period from the date of the reassessment (October 9, 2007)).

[14] The *Excise Tax Act* also includes a similar provision that limits the time within which an application to extend the time for instituting an appeal under that *Act* can be made. Section 305 of the *Excise Tax Act* provides as follows:

305. (1) Where no appeal to the Tax Court under section 306 has been instituted within the time limited by that provision for doing so, a person may make an application to the

Tax Court for an order extending the time within which an appeal may be instituted, and the Court may make an order extending the time for appealing and may impose such terms as it deems just.

(2) An application made under subsection (1) shall set out the reasons why the appeal to the Tax Court was not instituted within the time otherwise limited by this Part for doing so.

(3) An application made under subsection (1) shall be made by filing in the Registry of the Tax Court, in accordance with the provisions of the Tax Court of Canada Act, three copies of the application accompanied by three copies of the notice of appeal.

(4) After receiving an application made under this section, the Tax Court shall send a copy of the application to the office of the Deputy Attorney General of Canada.

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

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

(b) the person demonstrates that

(i) within the time otherwise limited by this Part for appealing,

(A) the person was unable to act or to give a mandate to act in the person's name, or

(B) the person 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 it to be made, and

(iv) there are reasonable grounds for appealing from the assessment.

[15] Section 306 of the *Excise Tax Act* provides that:

306. A person who has filed a notice of objection to an assessment under this Subdivision may appeal to the Tax Court to have the assessment vacated or a reassessment made after either

(a) the Minister has confirmed the assessment or has reassessed, or

(b) one hundred and eighty days have elapsed after the filing of the notice of objection and the Minister has not notified the person that the Minister has vacated or confirmed the assessment or has reassessed,

but no appeal under this section may be instituted after the expiration of ninety days after the day notice is sent to the person under section 301 that the Minister has confirmed the assessment or has reassessed.

[16] While the date of the Notice of Reassessment under the *Excise Tax Act* (February 21, 2008) was later than the date of the notice of reassessment under the *Income Tax Act*, the time limit for making an application for an extension of time within which an appeal may be instituted under the *Excise Tax Act* in relation to this reassessment would also have expired long before October 15, 2010.

[17] For the above reasons the Applicant's application to extend the time within which an appeal may be instituted under the *Excise Tax Act* is dismissed.

Signed at Halifax, Nova Scotia, this 22<sup>nd</sup> day of December, 2010.

“Wyman W. Webb”

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Webb, J.

CITATION: 2010TCC653

COURT FILE NO.: 2010-3250(GST)APP

STYLE OF CAUSE: BRENT DAVIS AND  
HER MAJESTY THE QUEEN

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: December 8, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Wyman W. Webb

DATE OF JUDGMENT: December 22, 2010

APPEARANCES:

For the Applicant:	The Applicant himself
Counsel for the Respondent:	Jan Jensen

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Myles J. Kirvan  
Deputy Attorney General of Canada  
Nanaimo, British Columbia