Docket: 2010-2824(IT)APP

BETWEEN:

LARRY E GAMBLE,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on April 21, 2011 at Toronto, Ontario
By: The Honourable Justice C.H. McArthur

Appearances:

Counsel for the Appellant:	Judith Sheppard
Counsel for the Respondent:	Jasmeen Mann

ORDER

Upon application, on behalf of counsel for the Applicant, for an Order extending the time within which the appeals from the reassessments made under the *Income Tax Act* for the 1993, 1994, 1995, 1996 and 1997 taxation years may be instituted;

And upon hearing the parties and reading the materials filed;

The application is allowed and the Applicant shall have until June 15, 2011 to file a Notice of Appeal. The Respondent shall file a Reply on or before August 5, 2011. Costs are awarded to the Applicant in the amount of $1,000.

Signed at Ottawa, Canada, this 4th day of May 2011.

"C.H. McArthur"

McArthur J.

Citation: 2011 TCC 244
Date: 20110504
Docket: 2010-2824(IT)APP

BETWEEN:

LARRY E GAMBLE,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

McArthur J.

[1] This application by Mr. Gamble is for an Order extending the time to file appeals for his 1993, 1994, 1995, 1996 and 1997 taxation years. The amount of tax in dispute exceeds $13,000,000.00. A dismissal of the Applicant's appeal or this application would force him to declare bankrupt. The assessment arises out of an investment in software through a Caribbean Island Corporation. The issue is whether the Appellant demonstrated that he met the conditions in clause 167(5)(*b*)(i)(A) and (B) of the *Income Tax Act* (*Act*).

[2] The Minister of National Revenue took approximately ten years after the Applicant's Notices of Objection, to issue a Notice of Confirmation. It contains amongst further detail the following:

> The purchase price and Assumed Debt are window dressing or a sham and the purchase price must be reduced by the amount of the Assumed Debt since it is not a cost that is incurred.

[3] Obviously the Appellant wonders how the Minister can be absolved from taking ten years after receipt of the Notices of Objection to file a confirmation.

[4] The Appellant was represented by counsel. In examination in chief, the Appellant offered lengthy evidence to the effect that upon receipt of the Minister's confirmation (after ten years) he was just within the 90 day period provided in subsection 169(1). This is not contested by the Minister. He immediately called Canada Revenue Agency (CRA) and or the Tax Court of Canada (TCC) and was advised he had an additional one year period to appeal to the TCC, under subsection 167(1) which includes clause 167(5)(*b*)(i)(B).

[5] Subsection 167(1) provides for an application to this Court, within one year from the 90 day period (subsection 169(1)), to extend the time limited to appeal. Mr. Gamble is just within that one year time limit. Subsection 167(5) reads:

> 167(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.

[6] The Respondent submits that the Appellant failed to meet two of these conditions: (A) and (B) but does not take issue that Mr. Gamble does not have reasonable grounds for appeal or that he is outside the time limit in section 169 of the *Act*.

[7] I have no difficulty finding that the Appellant met (B). He demonstrated a *bona fide* intention to appeal. The Respondent called no witnesses. The Appellant testified on his own behalf.

[8] Having gone through a separation from his spouse and moving out of the family, he did not receive or open the June 2, 2009 confirmation until August 20, 2009. It was far too complex for him to prepare a Notice of Appeal. Having a few days left to meet the 90 day 169(1) time limit, he called his lawyer who referred him to a tax lawyer who was out of town until mid September 2009. He then called and spoke to an officer of this Court advising him that he wanted to appeal. He was sent an email package from which he concluded he had an additional 365 days within which to appeal. I accept these actions as satisfying clause 167(5)(*b*)(i)(B).

[9] Now dealing with clause 167(5)(*b*)(i)(A), the Appellant testified that through the period from the end of August 2009 to the end of August 2010, he was preoccupied with several matters. Firstly, in September and October of 2009 his time and emotions were completely absorbed with successfully defending a criminal charge for failing an alcohol breathalyser test. During the remainder of the period he battled health set backs including heart, eye and stress problems.

[10] He stated he could scarcely walk from his kitchen to the bathroom. He did not retain a tax lawyer because he could not afford one and, he believed that he would regain sufficient health to be capable of making this application on his own with the one year following the end of August 2009 which he did, submitting this application on August 25, 2010, just days before the expiration of the statutory period.

[11] Both parties provided case law. The decision of Hershfield J. *Meer v. Canada*, [1] most closely resembles the present case. In *Meer*:

> Mr. Meer [applied] for an order extending the time within which he could bring appeals. The Crown argued that although Meer brought his application within the one-year limitation period under the Act, the application was not brought as soon as circumstances permitted. . . . The Crown also took issue with the time between when Meer hired counsel and when the application for an extension of time was brought. Meer indicated this time was used to obtain information from Revenue Canada and to accumulate evidence required by his lawyers.

[12] Hershfield J. concluded that:

> The evidence indicated that these were desperate times for Meer and his companies. He was struggling for economic survival and under those circumstances he could not reasonably have been expected to do other than what he did. . . . The reasons and

[1] 2001 D.T.C. 648

> circumstances did not give rise to any injustice and there was no evidence of dishonesty or prejudice. The reassessment was not adversely affected by granting the application, and it would have been inequitable not to allow an extension of time to file the appeal and allow the assessment to be dealt with on its merits.

[13] In paragraphs 19 and 20 he stated the following:

> [19] The phrase "as soon as circumstances permit" does not preclude prioritizing what one can reasonably do in a particular time frame. The question as set down in Pennington v. M.N.R. comes down to what can be reasonably expected in the circumstances. One does not need to rely on a flood or imprisonment or hospitalization to argue that circumstances did not permit filing the application. This is an area of broad discretion. Keeping one's life work, one's business enterprises or one's financial stake from crumbling is a circumstance that might reasonably be attended to and relieved before circumstances can fairly be said to permit the filing of an application for an extension of time to file an appeal. Accordingly, in respect of the delay during this period, I find that the application was filed as soon as circumstances permitted.
>
> [20] . . . The reasons and circumstances here do not give rise to any asserted injustice. There has been no assertion here of foul play, dishonesty or prejudice. I can find no cases, nor has the Respondent's counsel offered any cases, that would support the contention or give an illustration of a situation where all the other conditions for the granting of the application are met and it is still found not just and equitable to grant the application.
>
> The reassessment is not adversely affected by granting the application except that the reassessments can then be dealt with on its merits. In these circumstances it strikes me as inequitable not to apply the principle set down in Seater v. R., [1997] 1 C.T.C. 2204 wherein Judge McArthur concludes that it is preferable to have a taxpayer's issues decided on their merits than having them dismissed for missed time limits in the Act.

[14] For these reasons including Hershfield J.'s statements above, I allow the Appellant's application. The Appellant shall have until June 15, 2011 to file a

[15] Notice of Appeal and the Respondent shall file a Reply by August 5, 2011. Costs to the Appellant are set at $1,000.

Signed at Ottawa, Canada, this 4th day of May 2011.

"C.H. McArthur"

McArthurJ.

CITATION:	2011 TCC 244
COURT FILE NO.:	2010-2824(IT)APP
STYLE OF CAUSE:	LARRY E GAMBLE AND THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 21, 2011
REASONS FOR ORDER BY:	The Honourable Justice C.H. McArthur
DATE OF ORDER:	May 4, 2011

APPEARANCES:

Counsel for the Appellant:	Judith Sheppard
Counsel for the Respondent:	Jasmeen Mann

COUNSEL OF RECORD:

For the Appellant:

Name:	Judith Sheppard
Firm:	

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada