

Docket: 2024-510(IT)G

BETWEEN:

BIN ZHANG,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion of the Respondent, in writing, filed on August 15, 2024

Before: The Honourable Justice John C. Yuan

Participants:

Counsel for the Appellant: Sergio Pustogorodsky

Counsel for the Respondent: Allanah Smith

ORDER

BACKGROUND

The Respondent brought a motion to quash the Appellant's appeal by Notice of Motion filed on August 15, 2024.

The Appellant requested with the Respondent's consent that the motion be disposed of on the basis of the parties' written submissions and without the need for appearance by the parties.

The Court initially scheduled the Respondent's motion to be heard in person in Winnipeg, Manitoba on January 25, 2025 but later determined that it could decide the motion without the need for further submissions from the parties and so advised the parties.

ORDER

Upon reviewing the materials that the parties filed in connection with the Respondent's motion, this Court orders that:

1. The Respondent's motion is dismissed.
2. Costs will be awarded to the Appellant and fixed at \$1,000, payable forthwith.

Signed at Ottawa, Canada, this 5th day of February 2025.

“John C. Yuan”

Yuan J.

Citation: 2025 TCC 21
Date: 20250305
Docket: 2024-510(IT)G

BETWEEN:

BIN ZHANG,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

AMENDED REASONS FOR ORDER

Yuan J.

[1] This is a motion made by the Respondent for an order quashing the Appellant's appeal of the Minister's reassessments on the basis that the Appellant previously filed a notice of discontinuance for a proceeding in this Court involving the same reassessments.

[2] The Respondent filed its notice of motion on August 15, 2024. The Court initially scheduled the motion to be heard in person but subsequently decided to consider the motion based on the written representations submitted by the parties, as initially requested by the Appellant with the consent of the Respondent.

BACKGROUND

The Current Appeal

[3] At issue in this appeal ("**Current Appeal**") are the Minister's reassessments of the Appellant's 2015, 2016, and 2017 taxation years dated May 13, 2021 ("**Subject Reassessments**"). The Current Appeal was instituted on June 4, 2024 by order of this Court extending the Appellant's deadline for filing its notice of appeal to that date.

[4] The Minister issued the Subject Reassessments mostly as a result of the Minister's analysis of the increases to the Appellant's net worth during the 2015,

2016, and 2017 taxation years and the Minister's belief with respect to the source of funds for those increases.

The Previous Appeal

[5] Before the Current Appeal was instituted, the Subject Reassessments had also been the subject of a notice of appeal filed on March 27, 2023, filed under the Court's informal procedure as Court file number 2023-719(IT)I ("**Previous Appeal**").

[6] The notice of confirmation for the Subject Reassessments was issued on August 4, 2022 and, by virtue of subsection 169(1) of the *Income Tax Act*, the Appellant could not institute an appeal of the Subject Reassessments to this Court after November 4, 2022 without obtaining an extension for doing so pursuant to section 167 of the *Income Tax Act*.

[7] Before filing the Previous Appeal, the Appellant did not obtain a Court order to late-file pursuant to section 167. Nonetheless, the Registry allowed the Appellant to file its notice of appeal for the Previous Appeal.

[8] On July 18, 2023, the Respondent filed its reply for the Previous Appeal. In its reply, the Respondent advised both the Appellant and the Court that the Respondent would be bringing a motion at the commencement of hearing to quash the Previous Appeal on the basis that it was late-filed and, therefore, invalid.

[9] However, before the Previous Appeal was heard, the Appellant filed a notice of discontinuance with the Court for the Previous Appeal on August 23, 2023, which discontinuance was accepted and acknowledged by the Court the same day.

RESPONDENT'S MOTION TO QUASH

[10] In support of the motion to quash the Current Appeal, the substance of the Respondent's position appears to be, as follows:

- As a consequence of filing the notice of discontinuance to the Previous Appeal, subsection 16.2(2) of the *Tax Court of Canada Act* applies to deem the Previous Appeal to have been dismissed; and

- Allowing the Current Appeal to proceed would be tantamount to allowing the Appellant to withdraw its notice of discontinuance for the Previous Appeal, which is not permitted.

[11] For the reasons discussed below, the Respondent's motion will be dismissed.

Previous Appeal Was Not Properly Instituted

[12] While the Court never had the opportunity to hear the Respondent's motion to quash at a hearing of the Previous Appeal, there is no dispute between the parties concerning either (i) the August 4, 2022 date of the Minister's confirmation of the Subject Reassessments, or (ii) the March 23, 2023 filing date of the Previous Appeal. Consequently, it is clear that more than 90 days had lapsed between the confirmation date and the filing of the Previous Appeal and, therefore, the Appellant had not complied with the timing requirements in section 169 of the *Income Tax Act* for instituting the Previous Appeal.

[13] As noted by this Court in *MacDonell*, 84 DTC 1258, at paragraph 6 [underlining added]:

...Regardless of the propinquity of the steps taken to appeal to the expiration of the 90 day period, this Court is without jurisdiction to hear an appeal that is not instituted before that period has elapsed. The right of appeal granted by paragraph 169(1)(a) is purely statutory and, if it is to be invoked, the conditions pertaining thereto must be strictly complied with. If that is not done, this Court is without jurisdiction. For this Court to even add one day to the 90 day period would be tantamount to rewriting paragraph 169(a) which, of course, it cannot do. There is ample authority for my conclusion: *Horowitz v. Minister of National Revenue*, [1962] CTC 17, 62 DTC 1038, *MNR v. Simard*, [1962] CTC 310, 62 DTC 1192, and *MacIsaac v. The Queen*, [1983] CTC 213, 83 DTC 5258.

The point that this Court is without jurisdiction if the statutory conditions for filing an appeal have been not met was also discussed in *Hughes*, [1987] 2 CTC 2360, in a passage from that case that the Respondent cited in its written submissions and highlighted in its book of authorities. Accordingly, since the Previous Appeal was not instituted in accordance with the requirements of section 169 of the *Income Tax Act*, this Court was without jurisdiction at the outset to make any binding determinations with respect to the Subject Reassessments in the context of the Previous Appeal.

[14] If one finds that a dispute involving the Subject Reassessments was not properly before this Court in the Previous Appeals for lack of jurisdiction, it seems obvious that any filing or other step taken in this Court by the Appellant in the context of the Previous Appeals could not possibly be dispositive of any substantive right that the Appellant may have had for disputing the Subject Reassessments under the *Income Tax Act*.

What Is the Impact of Section 16.2 of the Tax Court of Canada Act?

[15] In this motion, the Respondent argues that the Appellant's rights of appeal concerning the Subject Reassessments were extinguished by operation of section 16.2 of the *Tax Court of Canada Act*, which provides:

16.2 (1) Discontinuance – A party who instituted a proceeding in the Court may, at any time, discontinue that proceeding by written notice.

(2) Effect of discontinuance – Where a proceeding is discontinued under subsection (1), it is deemed to be dismissed as of the day on which the Court receives the written notice.

[16] The Respondent submits that, once the Appellant filed its Notice of Discontinuance for the Previous Appeal with the Court, subsection 16.2(2) applies to extinguish the Appellant's rights to dispute the Subject Reassessments for all purposes.

[17] I do not agree that subsection 16.2(2) of the *Tax Court of Canada Act* applies in this way.

[18] While subsection 16.2(2) does effect a dismissal of the proceeding that the Appellant initiated through the filing of the Previous Appeal, the Respondent's position requires the subject matter of that proceeding to be the Subject Reassessments. However, as previously noted, this Court was without jurisdiction to consider an appeal of the Subject Reassessments in the context of Previous Appeal and, therefore, the Subject Reassessments could not have been the subject matter of the proceeding that was the Previous Appeal. In other words, whatever rights of the Appellant may have been extinguished by discontinuing the Previous Appeal, such extinguished rights could not have included the Appellant's right to dispute the correctness of the Subject Reassessments.

[19] Also, the nature of the discontinuance of a proceeding was described by the Federal Court of Appeal in *Philipos*, 2016 FCA 76 — another case that the Respondent brought to the Court’s attention in its written submissions — at paragraph 13 [underlining added]:

[13] Five things can happen to proceedings once they are started:

* * * *

- ***Discontinuance.*** This is more than suspension. Discontinuance terminates the proceeding and closes the Court file. After the unilateral filing of a notice of discontinuance under rule 165, parties need not take any further steps. Discontinuance is not a determination on its merits, so it does not trigger the bar against a determination on the merits expressed by the doctrine of *res judicata*. Theoretically, a party may start a new proceeding concerning the same subject matter: *Audet v. Canada*, 2002 FCA 130, 289 NR 382; *The “Kronprinz”* (1887), 12 AC 256 (H.L.). And theoretically a party can resurrect a discontinued proceeding, as the appellant seeks to do here. But unlike a stay, the unilateral filing of a notice of discontinuance tells everyone that they can regard the proceeding as over.

[20] Accordingly, the discontinuance of a proceeding does not necessarily extinguish the discontinuing litigant’s rights with respect to the subject matter of the discontinued proceedings.

[21] In its written submissions, the Respondent sought to rely on a case that invoked the doctrine of *functus officio* and cases in which the taxpayer was seeking to set aside a discontinuance. But none of those cases are applicable to the present situation: First, the present motion is not one in which Appellant is seeking to reinstate the proceeding that was the Previous Appeal or rescind a previously filed discontinuance. Second, none of those cases involved a situation where the Court lacked jurisdiction to deal with the subject matter of the original proceeding, as was the case for this Court with the Previous Appeal.

[22] I am satisfied that the words of subsection 16.2(2) and the statutory framework for appeals to this Court under the *Income Tax Act* require me to reject the Respondent’s position. However, I have difficulty understanding why the Minister would even pursue an interpretation of section 16.2 of the *Tax Court of Canada Act* that would deny a taxpayer’s right to dispute the Minister’s reassessments in these and other similar circumstances.

[23] Here, it appears that the Appellant was not aware that the Previous Appeal was late-filed until the Respondent indicated in its reply that (i) the Previous Appeal was not instituted within 90 days of the date of confirmation, (ii) the Appellant had not obtained an extension pursuant to section 167 of the *Income Tax Act* to late-file its appeal, and (iii) the Respondent would be making a motion to quash the appeal at the commencement of the hearing. Rather than wait for the Court to quash the Previous Appeal at the hearing of the appeal, the Appellant chose to discontinue the Previous Appeal.

[24] The Appellant subsequently filed an application with this Court pursuant to section 167 of the *Income Tax Act* for permission to late-file an appeal of the Subject Reassessments, which relief the Court granted with the Respondent advising that it was not opposed. This opened the door for the Appellant institute the Current Appeal.

[25] If subsection 16.2(2) of the *Tax Court of Canada Act* applied according to the Respondent's interpretation, the Appellant's rights to appeal the Subject Reassessment would have been extinguished before they arose simply because the Appellant mistakenly filed an appeal before a statutory condition for instituting it had been met.

[26] In the case of the Appellant, the relevant statutory condition was obtaining permission from the Court under section 167 of the *Income Tax Act* to late-file the appeal. However, an analogous situation arises if a taxpayer (i) files an appeal with the Court before having served a notice of objection to the subject reassessment to the Minister (as required by the preamble to subsection 169(1) of the *Income Tax Act*), or (ii) filed an appeal with the Court before 90 days have lapsed after serving the notice of objection on the Minister (as required by paragraph 169(1)(b)). In each of those three situations, the Respondent's interpretation of subsection 16.2(2) of the *Tax Court of Canada Act* would result in the taxpayer losing its right to appeal the subject reassessment if the taxpayer discontinued its appeal upon learning that it had filed its appeal prematurely.

[27] In my view, these are all circumstances in which it would be inappropriate for a taxpayer to lose its right to appeal a reassessment.

[28] However, even though I believe that the Respondent's interpretation of subsection 16.2(2) of the *Tax Court of Canada Act* would yield inappropriate results

and I am surprised that the Minister would seek to apply an interpretation that would extinguish a taxpayer's otherwise valid rights of appeal, I reiterate that I find that a proper interpretation of the applicable statutory provisions in their context dictates that the Respondent's motion be dismissed.

DISPOSITION

[29] For the reasons outlined above, the Respondent's motion is dismissed. Costs will be awarded to the Appellant and fixed at \$1,000, payable forthwith.

The amended Reasons for Order are issued in substitution for the Reasons for Order dated February 5, 2025. The correction is on the backpage only; this motion was disposed of on the basis of the parties' written submissions and without the need for appearance by the parties.

Signed at Ottawa, Canada, this **5th** day of **March** 2025.

“John C. Yuan”

Yuan J.

CITATION: 2025 TCC 21
COURT FILE NO.: 2024-510(IT)G
STYLE OF CAUSE: BIN ZHANG AND HIS MAJESTY THE KING

DATE OF HEARING: **Motion Determined by Written Submissions**

AMENDED REASONS FOR ORDER BY: The Honourable Justice John C. Yuan

DATE OF **AMENDED REASONS FOR ORDER**: **March 5, 2025**

PARTICIPANTS:

Counsel for the Appellant: Sergio Pustogorodsky

Counsel for the Respondent: Allanah Smith

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