

BETWEEN:

PHETH DOUANGCHANH,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on June 26 and September 30, 2013 at Toronto, Ontario

By: The Honourable Justice Judith M. Woods

Appearances:

For the Applicant: The Applicant himself
 Lane DouangChanh

Counsel for the Respondent: Rita Araujo

ORDER

The application for an order to extend the time for serving a notice of objection to a reassessment, which was made under the *Income Tax Act* for the 2007 taxation year and issued by notice dated October 18, 2011, is dismissed for the reasons attached. Each party shall bear their own costs.

Signed at Toronto, Ontario this 7th day of October 2013.

“J. M. Woods”

Woods J.

Citation: 2013 TCC 320
Date: 20131007
Docket: 2013-1145(IT)APP

BETWEEN:

PHETH DOUANGCHANH,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Woods J.

[1] The applicant, Pheth DouangChanh, seeks an extension of time to file a notice of objection with respect to a reassessment made under the *Income Tax Act* for the 2007 taxation year.

[2] The conclusion that I have reached is that, although the application should be dismissed, a previously-filed notice of objection is valid. My reasons are set out below.

[3] The applicant was represented by his daughter at the hearing and he also made submissions on his own behalf. Each of them also testified.

Positions of parties

[4] The respondent opposes the application on the ground that the applicant failed to file a similar application with the Minister of National Revenue within the deadline as required by s. 166.2(5)(a) of the *Act*.

[5] The applicant submits that the application should be allowed. First, he submits that his accountant assured him that the appropriate paperwork had been filed. Second, he submits that this decision has devastating financial consequences and that the application should be granted on grounds of fairness.

[6] During my consideration of this issue after the initial hearing was concluded, I observed that the relevant reassessment may have been issued after the normal reassessment period had expired and therefore it may be statute barred. If the reassessment is invalid on this basis, a prior reassessment would be valid and a notice of objection that was filed with respect to the prior reassessment would also be valid. Accordingly, I directed that the hearing be reopened to consider this issue.

[7] For ease of reference, I will refer to the latest reassessment as the “Latest Reassessment” and the immediately prior reassessment as the “Prior Reassessment.”

[8] At the subsequent hearing, the respondent submitted that the Latest Reassessment was issued at the applicant’s request pursuant to s. 152(4.2) of the *Act*. Accordingly, although it was issued after the normal reassessment period, it is not statute barred. The respondent further submitted that there is no right to object to the Latest Reassessment by virtue of s. 165(1.2) of the *Act*.

Applicable legislation

[9] The legislative requirements for an extension of time to serve a notice of objection are set out in subsection 166.2(5) of the *Act*. It is reproduced below together with related provisions.

166.1 (1) Extension of time by Minister - Where no notice of objection to an assessment has been served under section 165, nor any request under subsection 245(6) made, within the time limited by those provisions for doing so, the taxpayer may apply to the Minister to extend the time for serving the notice of objection or making the request.

166.2 (1) Extension of time by Tax Court - A taxpayer who has made an application under subsection 166.1 may apply to the Tax Court of Canada to have the application granted after either

(a) the Minister has refused the application, or

(b) 90 days have elapsed after service of the application under subsection 166.1(1) and the Minister has not notified the taxpayer of the Minister’s decision,

but no application under this section may be made after the expiration of 90 days after the day on which notification of the decision was mailed to the taxpayer.

[...]

(5) When application to be granted - No application shall be granted under this section unless

(a) the application was made under subsection 166.1(1) within one year after the expiration of the time otherwise limited by this Act for serving a notice of objection or making a request, as the case may be; and

(b) the taxpayer demonstrates that

(i) within the time otherwise limited by this Act for serving such a notice or making such a request, as the case may be, 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 object to the assessment or make the request,

(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, and

(iii) the application was made under subsection 166.1(1) as soon as circumstances permitted.

[10] The legislative requirements relating to reassessments made after the normal reassessment period at the request of a taxpayer are set out below.

152.(4.2) Reassessment with taxpayer's consent - Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining, at any time after the end of the normal reassessment period of a taxpayer who is an individual (other than a trust) or a testamentary trust in respect of a taxation year, the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is ten calendar years after the end of that taxation year,

(a) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; and

(b) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.

165.(1.2) Limitation on objections – Notwithstanding subsections (1) and (1.1), no

objection may be made by a taxpayer to an assessment made under subsection 118.1(11), 152(4.2), 169(3) or 220(3.1) nor, for greater certainty, in respect of an issue for which the right of objection has been waived in writing by the taxpayer.

Assessment history

[11] It is useful to set out a chronology of events relating to the initial assessment and subsequent reassessments for the 2007 taxation year.

- (a) August 25, 2008 – initial assessment issued
- (b) November 9, 2009 – reassessment issued
- (c) August 30, 2010 – Prior Reassessment issued that disallows charitable donation
- (d) February 17, 2011 – notice of objection filed with respect to charitable donation
- (e) February 17, 2011 – Minister acknowledges receipt of notice of objection and indicates that since the issue is common to several taxpayers, decisions on the file will be deferred pending resolution of related objections
- (f) March 24, 2011 – Applicant requests that Minister allow carrying charges (supporting documents submitted subsequently pursuant to request of Minister)
- (g) August 24, 2011 – end of normal reassessment period
- (h) October 18, 2011 – Latest Reassessment issued allowing carrying charges
- (i) February 19, 2013 – Minister informs applicant that the objection regarding the charitable donation is nullified by the Latest Reassessment and that it is too late to object or apply for an extension regarding the subsequent reassessment
- (j) March 15, 2013 – application to extend time filed with the Tax Court of Canada
- (k) March 27, 2013 – notice of objection and application to extend time filed

with the Minister

- (l) June 26, 2013 – further application to extend time filed orally at the hearing (This was at the request of the respondent on the ground that the earlier application was premature.)

Analysis

[12] I would first comment that the circumstances of this case are sympathetic. The applicant filed an objection relating to a charitable donation. The Minister then issued a reassessment concerning carrying charges which, according to the respondent, took away the applicant's right to object to the charitable donation.

[13] Something does not seem right about this. I do not understand why the Minister issued the Latest Reassessment dealing with the carrying charges, which if valid would have the effect of denying the applicant the right to object to the charitable donation. I would have thought that the Minister's decision on the carrying charges could have been delayed until there was a resolution regarding the charitable donation.

[14] Counsel for the respondent suggests that it does not matter what the Minister might have done. The issue is simply to consider what the Minister actually did. It is submitted that the law is clear on this point and that the application to extend time should be disallowed on the grounds that:

- (a) the applicant has failed to comply with s. 166.2(5)(a) because he had not made a prior application to the Minister within the time period allowed; and
- (b) the applicant is precluded from objecting to the Latest Reassessment because it was issued under s. 152(4.2).

[15] I agree with counsel that I need to consider the events that actually occurred. I turn now to the submissions of the Crown.

Requirement for prior application to Minister

[16] The respondent submits that an application to extend time with respect to the Latest Reassessment cannot be allowed unless the applicant has made a similar application to the Minister within the time permitted, which is one year and 90 days from when the notice of reassessment was sent. It is evident from the chronology of

events above that this deadline was not satisfied. The application to the Minister was made much later.

[17] The applicant submits that his accountant told him that all the paperwork had been submitted. However, the applicant has not been able to reach his accountant and he was not able to establish that a timely application was made to the Minister.

[18] The applicant also argued that the application should be allowed on grounds of fairness. Unfortunately for the applicant, the requirement to make a timely application to the Minister is required by the legislation and this Court cannot ignore it. It is the prerogative of Parliament to set strict timelines, which it has done in this case (*The Queen v Carlson*, 2002 FCA 145).

No objection to Latest Reassessment

[19] At the subsequent hearing, I asked the parties for submissions on whether the Latest Reassessment was statute barred. If this is the case, then the Latest Reassessment is not valid and the Prior Reassessment is valid. In addition, the notice of objection with respect to Prior Reassessment is also valid so that the applicant's appeal rights have not been extinguished.

[20] The respondent submits that the Latest Reassessment was made at the request of the applicant pursuant to s. 152(4.2) and therefore it is not statute barred. The respondent further submits that the applicant is precluded from objecting to the Latest Reassessment in these circumstances (s. 165(1.2)).

[21] The question to be determined is whether the Latest Reassessment was made pursuant to s. 152(4.2). I conclude that it was not on the basis that the applicant did not intend to make a request pursuant to s. 152(4.2).

[22] The request was made through a T1 Adjustment Request form. The form indicates that it should be used "to request an adjustment (a reassessment) to an individual income tax return."

[23] The form was sent within the normal reassessment period and not long after the objection to the charitable donation was served. Shortly before this, the Minister had informed the applicant that no action would be taken on the file pending decisions on similar charitable donations.

[24] In these circumstances, I would have thought it very unlikely that the applicant

intended to request a reassessment to be made after the normal reassessment period thereby removing his appeal rights with respect to the charitable donation.

[25] I would conclude that the applicant did not make a request for a reassessment pursuant to s. 152(4.2). In this case, the Latest Reassessment which was issued by notice dated October 18, 2011 is statute barred.

[26] The result of this conclusion is that the Prior Reassessment that was issued by notice dated August 30, 2011 is still valid as well as the notice of objection dealing with the charitable donation. In other words, the applicant's appeal rights with respect to the 2007 taxation year have not been extinguished.

[27] Finally, I would note that a similar result was reached on different facts by Justice Angers in *St Germain v The Queen*, 2009 TCC 518.

Conclusion

[28] With respect to the application for an extension of time to file a notice of objection with respect to the Latest Reassessment, the application will be dismissed. However, the applicant's appeal rights with respect to the 2007 taxation year are preserved through the notice of objection that was filed on February 17, 2011.

[29] Each party shall bear their own costs with respect to this application.

Signed at Toronto, Ontario this 7th day of October 2013.

“J. M. Woods”

Woods J.

CITATION: 2013 TCC 320

COURT FILE NO.: 2013-1145(IT)APP

STYLE OF CAUSE: PHETH DOUANGCHANH and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: June 26 and September 30, 2013

REASONS FOR ORDER BY: The Honourable Justice J.M. Woods

DATE OF ORDER: October 7, 2013

APPEARANCES:

For the Applicant: The Applicant himself
Lane DouangChanh

Counsel for the Respondent: Rita Araujo

COUNSEL OF RECORD:

For the Appellant:

Name: n/a

Firm:

For the Respondent: William F. Pentney
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