

Docket: 2009-3473(GST)APP

BETWEEN:

DANIEL BOUGANIM,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Application for an order extending the time to appeal
heard on common evidence with the file of
Nathalie Bouganim (2009-3474(GST)APP)
on April 8, 2010, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the applicant:

Éric De Louya

Counsel for the respondent:

Marie-Josée Brunelle

ORDER

Upon application for an order extending the time within which an appeal may be instituted from the assessment made under the *Excise Tax Act*, notice of which bears the number PM-12934-1 and is dated October 2, 2008;

The application is dismissed in accordance with the attached Reasons for Order.

Signed at Toronto, Ontario, this 3rd day of November 2010.

"Réal Favreau"

Favreau J.

Translation certified true
on this 14th day of December 2010
Tu-Quynh Trinh, Translator

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Appearances:

Counsel for the applicant:

Éric De Louya

Counsel for the respondent:

Marie-Josée Brunelle

ORDER

Upon application for an order extending the time within which an appeal may be instituted from the assessment made under the *Excise Tax Act*, notice of which bears the number PM-12935-1 and is dated October 2, 2008;

The application is dismissed in accordance with the attached Reasons for Order.

Signed at Toronto, Ontario, this 3rd day of November 2010.

"Réal Favreau"

Favreau J.

Translation certified true
on this 14th day of December 2010
Tu-Quynh Trinh, Translator

Citation: 2010 TCC 560
Date: 20101103
Dockets: 2009-3473(GST)APP
2009-3474(GST)APP

BETWEEN:

DANIEL BOUGANIM,
NATHALIE BOUGANIM,

Applicants,

and

HER MAJESTY THE QUEEN,

Respondent.

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REASONS FOR ORDER

Favreau J.

[1] These are two applications for an order extending the time within which an appeal may be instituted from reassessments made under the *Excise Tax Act* (the ETA) on October 2, 2008, against the applicants for the reporting periods of August 2003; February, May, August and November 2004; and February and November 2005 of Goldiamor Jewellery Inc. (the Corporation). The two matters were heard on common evidence.

[2] The issue is whether the negligence of the lawyer, Victor A. Carbonneau, may be a just and equitable ground for granting the applications under subsection 305(5) of the ETA. The lawyer's mistake was admitted at the hearing.

[3] The following facts were admitted:

- a) The Corporation was incorporated on May 30, 2000, under the *Canada Business Corporations Act* and specialized in the sale of jewellery.
- b) On May 24, 2002, at the age of 18, Nathalie Bouganim, Daniel Bouganim's daughter, became a shareholder of the Corporation holding more than 50% of the issued and outstanding shares, the sole director,

president and secretary of the Corporation, as well as the sole person authorized to sign the Corporation's bank documents.

- c) Daniel Bouganim was never a *de jure* director of the Corporation but was at all times a *de facto* director of the Corporation.
- d) Daniel Bouganim made an assignment in bankruptcy on May 22, 2002, two days before Nathalie became director and shareholder of the Corporation.
- e) The Corporation was audited in 2005 by the Ministère du Revenu du Québec and was assessed on March 17, 2006, by the Quebec Minister of Revenue, as agent for the Minister of National Revenue (collectively, the Minister) for the period from March 1, 2002, to February 28, 2005, under the ETA. The amount claimed totalled \$509,604.57: \$280,993.54 in duties, \$16,805.66 in interest and \$131,109.83 in penalties. According to the auditor's report, the Corporation took part in a scheme for issuing false invoices to improperly claim tax credits, and it was assumed that the Corporation's suppliers were unable to provide the auditor with the jewellery sold by the Corporation.
- f) On May 3, 2006, Mr. Carbonneau, who represented the Corporation during the audit, presented, within the prescribed time, a notice of objection to the Notice of Assessment dated March 17, 2006.
- g) On September 15, 2006, the Corporation made an assignment in bankruptcy, even though it had ceased operations in the fall of 2005.
- h) On November 3, 2006, the Minister issued notices of assessment under subsection 323(1) of the ETA against each of Daniel Bouganim and Nathalie Bouganim, as directors, for a total of \$463,554.14: \$288,464.22 in duties, \$148,254.79 in penalties and \$26,835.13 in interest.
- i) On April 23, 2008, the Minister confirmed the assessment dated March 17, 2006, subject to objection, despite the many written and oral representations by the Corporation and its lawyer over a period of over one year.
- j) On October 2, 2008, the Minister issued notices of reassessment under subsection 301(5) of the ETA against each of Daniel Bouganim and Nathalie Bouganim, as directors, for a total of \$229,701.80: \$162,211 in duties, \$27,195.53 in penalties and \$40,295.27 in interest. These reassessments resulted from the notices of objection filed by the applicants within the prescribed time.
- k) The applicants failed to appeal these reassessments within the prescribed time of 90 days after the date on which these reassessments were issued, as set out in section 306 of the ETA, the 90 days having expired on December 31, 2008.

- l) The applications for an extension of time to appeal are dated November 9, 2009, and were filed with the Court that same day, more than 10 months after the expiration of the 90-day period set out in the ETA and more than 9 months after the applicant Daniel Bouganim had learned that the appeals had not been filed within the time prescribed the ETA. The applicant Daniel Bouganim stated that it was not until February 4, 2009, that he was told that the appeals had not been filed.
- m) The applicant Daniel Bouganim consulted a new lawyer five months after having learned of the inaction of his lawyer, who, moreover, did not file the applications for an extension of time to appeal until four months after having been given the mandate to do so.

Applicants' explanations

[4] The applicants Daniel and Nathalie Bouganim testified at the hearing. Nathalie Bouganim, a student in Medicine at the Université de Sherbrooke, acknowledged that she had been appointed as director of the Corporation at the age of 18 and had signed numerous documents on behalf of the Corporation. She claimed that she has always had complete trust in her father and his lawyer. She also stated that she did not understand why the Corporation had been assessed. The assessment made against her was extremely prejudicial to her, and she wanted to restore her good name and reputation. Lastly, she asserted that she was not told of the problem until several months after the expiration of the time limit to appeal.

[5] The applicant Daniel Bouganim stated that he has always intended to appeal the assessments issued against the Corporation and against him personally and that he had retained Mr. Carbonneau to prepare the notices of appeal. In an email to Mr. Carbonneau dated October 30, 2008, the applicant Daniel Bouganim asked him the following question:

I need to know that we are not missing a deadline to appeal to the tax courts.

He also referred to the fact that Mr. Carbonneau had been instructed to obtain from the Quebec tax authorities the Memorandum on Objection regarding the assessments made against him and against the applicant Nathalie Bouganim. Mr. Carbonneau received that Memorandum on Objection on October 15, 2008, and sent it to the applicants on November 12, 2008, as shown by an email from Mr. Carbonneau filed in evidence.

[6] The applicant Daniel Bouganim also testified that, on December 12, 2008, during a 15-minute telephone conversation, he had asked Mr. Carbonneau the date on which the notices of appeal would be filed. The list of calls made by the applicant Daniel Bouganim to Mr. Carbonneau between October 1, 2008, and April 29, 2009, and the list of calls made by Mr. Carbonneau to the applicant Daniel Bouganim for the same period were filed in evidence.

[7] The applicant Daniel Bouganim confirmed that Mr. Carbonneau had told him for the first time on February 4, 2009, that the deadline to appeal had been missed because of family problems. In spite of this, he continued to trust Mr. Carbonneau and maintained regular contact with him for personal assessment files and other files. Such files included that of his spouse, Rachel, from whom the Minister had claimed \$72,644.65 in duties, interest and penalties, under section 316 of the ETA, after a certificate dated February 2, 2009, had been obtained from the Federal Court. There was also the file regarding the claim of \$40,000 in fees from TD Bank against the applicant Nathalie Bouganim and Dr. Moghrabi's unpaid invoices.

[8] The applicant Daniel Bouganim also explained that Mr. Carbonneau had asked him, on March 27, 2009, for a \$7,000 retainer to finalize and file the applications for an extension of time to appeal and the notices of appeal. A cheque for \$7,000 was made out to Mr. Carbonneau by the Corporation 4392175 Canada Inc., doing business as Goldiamor. The cheque is dated March 31, 2009, and the witness confirmed that Mr. Carbonneau had written the date on the cheque himself when he cashed it.

[9] According to the applicant Daniel Bouganim, Mr. Carbonneau had been unwilling to admit to his mistake or remedy it. Given this situation, the witness retained the services of Eric De Louya and Valérie Rebecca Molina on July 27, 2009, to file the applications for an extension of time to appeal and the notices of appeal, which was eventually done on November 9, 2009.

Mr. Carbonneau's version

[10] Mr. Carbonneau also testified at the hearing. He explained that, in late 2008, he spent most of his time in Florida and on business trips. His spouse was being treated for cancer, and his daughter was undergoing tests for brain cancer. He raised three points that he had allegedly discussed with the applicant Daniel Bouganim: that he would be absent from Montréal for an extended period of time, that he had not received a retainer to institute the appeals and that it was not possible to meet with

the Corporation's suppliers to obtain their affidavits to confirm the jewellery sales to the Corporation. Mr. Carbonneau contended that he had explained the issue of the fees and affidavits in a letter to his client. In his opinion, the notices of appeal could not be filed without the suppliers' affidavits. He referred to the fact that two of the Corporation's suppliers had been found guilty of having participated in a scheme for issuing false invoices. To his knowledge, the applicant Daniel Bouganim had thought that meeting with the suppliers was not essential and that the affidavits could be obtained from the suppliers without necessarily meeting with them.

[11] Mr. Carbonneau also explained that he had entrusted his associate, Dominique Talarico, with preparing the documents for extending the time to appeal and the notices of appeal, which was never done, even though Mr. Carbonneau had paid him a \$4,000 retainer.

[12] Mr. Carbonneau submitted a first draft of the notices of appeal to his clients on July 12, 2009, explaining that Part F of that document, entitled "The Reasons the Appellant intends to rely on", would be completed by Mr. Talarico in the second draft.

Parties' positions

[13] Counsel for the applicants claimed that the applicant Daniel Bouganim and Mr. Carbonneau maintained regular contact and were both aware of the 90-day period to appeal the assessments. He also sought to show the inconsistency of Mr. Carbonneau's testimony by stating that Mr. Carbonneau's letter discussing, among other points, the fees and affidavits had not been filed in evidence and had probably never been received by his client. He also claimed that the requirement of the affidavits was an excuse by Mr. Carbonneau, not an actual condition for filing the notices of appeal. In fact, the first draft of the notice of appeal made no mention of it.

[14] Counsel for the applicants also submitted that Mr. Carbonneau had erred in failing to preserve his clients' rights as a matter of priority and failing to inform them in writing of the conditions for filing notices of appeal. He also referred to the fact that, in an email dated August 20, 2009, Mr. Carbonneau had offered to reimburse most of the fees that he had received in the file and to ask Mr. Talarico to do the same for the fees that he had been paid.

[15] Counsel for the respondent argued that there was a conflict between the applicant Daniel Bouganim and Mr. Carbonneau regarding payment of the legal fees and the need to file affidavits. In her opinion, if a mistake had been made, the blame

did not lie entirely with Mr. Carbonneau, as the applicant Daniel Bouganim had been aware of his lawyer's position. Under the circumstances, the applicant Daniel Bouganim should have consulted another lawyer and was therefore negligent in failing to do so.

[16] Counsel for the respondent submitted that, unlike her father, the applicant Nathalie Bouganim did not show her intention to appeal the assessment made against her and did nothing herself to appeal it. No evidence was presented in her file.

[17] Counsel for the respondent contended that all of the lawyers involved in the file and the applicant Daniel Bouganim were careless. The applications for an extension of time to appeal were filed nine months after the applicants learned that those applications had not been filed within the time prescribed by the Act. Mr. Carbonneau failed to act with due diligence. It took the applicant Daniel Bouganim nearly five months to retain the services of another lawyer, whereas it took this other lawyer more than three months to file the required documents.

Analysis

[18] Section 305 of the ETA deals with applications for an order extending the time for appealing. Subsection 305(5) sets out the conditions to be met as follows:

When order to be made - 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.

[19] The applicants met the condition set out in paragraph (a), as the applications were made within one year after the expiration of the time otherwise limited by that Part for appealing.

[20] Both applicants also met the condition stipulated in subparagraph (b)(i), in that they had a bona fide intention to appeal. In Nathalie Bouganim's case, her intention to appeal is less obvious, but, as both files were dealt with together and in the same manner, it is reasonable to consider that she, like her father, intended to appeal.

[21] The respondent challenged the conditions stated in subparagraphs (b)(ii) and (iii) but not the one at subparagraph (b)(iv).

[22] To determine whether it would be just and equitable to grant the applications so as to fulfill the condition set out in subparagraph (b)(ii), the reasons given in the applications and the circumstances of the case should be considered. Clearly, Mr. Carbonneau had a mandate to represent the Corporation in the audit and to challenge the assessments made against the Corporation and, later, against the applicants. He filed the notices of objection within the time allowed and obtained a copy of the Memorandum on Objection. In response to the notices of objection, reassessments were made against the applicants. The applicant Daniel Bouganim was right to entrust Mr. Carbonneau with the mandate of preparing and filing the notices of appeal, since Mr. Carbonneau was quite familiar with the files and had adequately represented the Corporation and the applicants up until then.

[23] Under the circumstances, it is appropriate to ask why Mr. Carbonneau failed to file the notices of appeal by the deadline, of which he had been aware. In the beginning, family problems, his prolonged absences on business trips and trips to Florida were invoked. Later, there was a matter of conflicts between Mr. Carbonneau and the applicant Daniel Bouganim, over fees and what approach to take in the files. Mr. Carbonneau seems to have been right to be careful in the circumstances, given that the auditor's report found that some of the Corporation's suppliers were part of a scheme for issuing false invoices to claim tax credits. That Mr. Carbonneau had wanted to meet with the Corporation's suppliers to make sure that they actually existed and to obtain their affidavits to confirm the sales to the Corporation seems plausible and appropriate under the circumstances.

[24] However, Mr. Carbonneau made several mistakes, including not filing the notices of appeal within the time allotted and not carrying out his mandate, not promptly informing his clients of that failure, not swiftly remedying the failure, and having asked Mr. Talarico to prepare the applications for an extension of time to

appeal and the notices of appeal. Mr. Talarico did nothing, and Mr. Carbonneau was the one who prepared the first draft of the notice of appeal. All of these mistakes clearly amounted to negligence or carelessness on the part of Mr. Carbonneau and his associate.

[25] In *Di Monica v. The Queen*, 2001 CanLII 548, Justice Lamarre Proulx dismissed an application to extend the time for serving a notice of objection because the lawyers concerned had been negligent or careless. At paragraph 16 of her decision, she concluded as follows:

It is my view that an error by counsel can be a just and equitable reason for granting an extension of time if counsel otherwise exercised the reasonable diligence required of a lawyer. I do not think that the state of the law is such that counsel's negligence or carelessness can constitute a just and equitable reason for granting the requested extension within the meaning of subparagraph 166.2(5)(b)(ii) of the *Act*.

[26] Given that Mr. Carbonneau was negligent or careless, the condition set out in subparagraph 305(5)(b)(ii) has not been met, as it does not seem that it would be just and equitable to grant the applications.

[27] The condition in subparagraph 305(5)(b)(iii) that the applications be made as soon as circumstances permitted them to be made has also not been met in the present cases. The applications for an extension of time to appeal were filed more than ten months after the expiration of the time to appeal, more than nine months after the applicant Daniel Bouganim had been told of the missed deadline and more than three months after the applicant Daniel Bouganim had retained a new lawyer to file them. Under the circumstances, the applicants' and their lawyers' inaction amounts to recklessness and negligence, which precludes finding that the applications were made as soon as circumstances permitted.

[28] For these reasons, the applications are dismissed.

Signed at Toronto, Ontario, this 3rd day of November 2010.

"Réal Favreau"

Favreau J.

Translation certified true
on this 14th day of December 2010
Tu-Quynh Trinh, Translator

CITATION: 2010 TCC 560

COURT FILE NOS.: 2009-3473(GST)APP
2009-3474(GST)APP

STYLES OF CAUSE: Daniel Bouganim v. The Queen
Nathalie Bouganim v. The Queen

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: April 8, 2010

REASONS FOR ORDER BY: The Honourable Justice Réal Favreau

DATE OF ORDER: November 3, 2010

APPEARANCES:

Counsel for the applicants: Éric De Louya

Counsel for the respondent: Marie-Josée Brunelle

COUNSEL OF RECORD:

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