Docket: 2014-3370(IT)APP

BETWEEN:

UFUOMA ODEBALA-FREGENE,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on December 2, 2014, at Toronto, Ontario

Before: The Honourable Justice K. Lyons

Appearances:

For the Applicant: The Applicant herself
Counsel for the Respondent: Leonard Elias

ORDER

Upon application for an Order granting an extension of time to serve a notice of objection for the 2010 taxation year, it is ordered that the application is dismissed. The application for an extension of time to serve a notice of objection for the 2009 taxation year was previously withdrawn by the applicant.

Each party shall bear their own costs.

Signed at Vancouver, British Columbia, this 20th day of February 2015.

"K. Lyons"

Lyons J.

Citation: 2015 TCC 44
Date: 20150220
Docket: 2014-3370(IT)APP

BETWEEN:

UFUOMA ODEBALA-FREGENE,

Applicant,

and

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Respondent.

REASONS FOR ORDER

Lyons J.

[1] Ufuoma Odebala-Fregene, the applicant, brought an application for an extension of time to serve a notice of objection (the “Objection”) on the Minister of National Revenue for the 2009 and 2010 taxation years. The application was filed with the Court on September 2, 2014.

[2] On November 5, 2014, the applicant filed an amended application abandoning the application for 2009 and requesting that the application for only the 2010 taxation year (the “Application”) proceed.

[3] On November 18, 2014, the respondent filed with the Court a Reply opposing the Application because the application to the Minister requesting an extension of time to object was not made within one year after the expiration of the time otherwise limited by the *Income Tax Act* (the "*Act*") for serving a notice of objection as required by paragraph 166.1(7)(*a*).

[4] According to the Amended Affidavit, sworn by an officer of the Canada Revenue Agency ("CRA") and filed in support of the Reply, the Minister mailed a reassessment on February 24, 2012 and mailed the last reassessment on April 16, 2012 relating to the 2010 taxation year. One year after the last day (namely, the

90th day having expired on July 16, 2012) for serving a notice of objection to the April 16, 2012 reassessment was July 16, 2013.

[5] The applicant testified that it was not possible to serve a notice of objection or an application within the time limits because she was not aware that she could object until she was contacted by a CRA collections officer. Upon discovering that, she immediately served the Objection on the Minister on May 9, 2014. It was attached to the Application and states:

> I am filing this formal notice of objection outside of the window allowed because I only became aware that a formal notice of objection could be made on April 15, 2014.

[6] The Minister notified the applicant, by letter dated June 5, 2014 and filed as Exhibit A-5, that the Objection was treated as an application for an extension of time to object under section 166.1. However, the application was denied because it was outside the statutory time limit.

[7] The background as to the applicant's dispute with the Minister centres on the availability of the Canadian foreign tax credit (the "FTC"). She emigrated to Canada in 2007 to join her husband but continued to be employed with the Human Rights Commission in the United Kingdom up to July 2010 earning foreign source employment income. She received a letter from the CRA informing her that it was reviewing her 2010 Income Tax and Benefit Return and was seeking further information.[1] She claims the FTC was disallowed by the CRA despite it having been provided with Form P45 from HM Revenue & Customs. However, the evidence shows that the CRA sought and continued to seek clarification up to April 5, 2012 relating to the FTC.[2]

[8] Despite the applicant's acknowledgment that the application to the Minister was beyond the statutory time limit under the *Act*, her position is that the common law duty of "procedural fairness" – as a fundamental complement of administrative law – trumps the statutory provisions involving the time limit. As an arm of government, the CRA is subject to that duty which is imposed irrespective of the statutory provisions relating to the time limits and the CRA failed to discharge that duty.[3]

[9] I disagree with the applicant's position. The common law duty does not override the objections process under the *Act*. The objections process is governed by a mandatory statutory regime setting out strict time limits for filing objections and applications to extend time in instances where an objection is late filed.

[10] The relevant provision in this application is paragraph 166.2(5)(*a*) of the *Act* which reads:

> (5) 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;

[11] The language is clear. The requirements are strict. The time limit cannot be waived. An extension of time to file a notice of objection cannot be granted unless the application is made within one after the expiration of the time for serving an objection or making a request under the *Act*. These principles have been consistently noted at the appellate level and applied by this Court.

[12] In *Carlson v Canada,* 2002 FCA 145, 2002 DTC 6893 (FCA), the Federal Court of Appeal noted at paragraphs 12 and 13 that one year and 90 days from the date of mailing the reassessment is absolute and cannot be waived.

[13] In *Edgelow v The Queen*, 2011 TCC 255, 2011 DTC 1192, V. Miller J. had to deny the application in circumstances where the application was one day late noting that she had no discretion to extend the time.

[14] The applicant’s submission that upon discovering the objections process she immediately filed the Objection, is based on the discoverability doctrine. The doctrine was accepted in *Hickerty v Her Majesty the Queen*, 2007 TCC 482, 2007 DTC 1311, rejected in *Chu v Canada*, 2009 TCC 444, [2010] 2 CTC 2326, and disavowed by the Federal Court of Appeal in *Carlson*.

[15] In the *Hickerty* decision, it was applied in circumstances where the starting time in determining the expiry of an applicant's deadline would not commence 90 days after the date of mailing of the notice of assessment because she was under a reasonable but "mistaken apprehension" that an appeal had been validly instituted

by sending it to the CRA instead of the Court. The Court distinguished the decision in *Carlson* on the basis that the delay in *Hickerty* was only a few months, whereas the delay in *Carlson* was several years.

[16] In the *Chu* decision, Hershfield J. noted, at paragraph 26, that in his view no such distinction - a little late as opposed to very late - is warranted in adopting an approach to the subject provision. In that case, he concluded that the statutory language is clear, he has no jurisdiction and notes at paragraph 27 that:

> 27 There is a bright line, a bright timeline here that Parliament says must be observed. Acting diligently to rectify a problem upon learning of it, does not change that bright line. Being in the dark, at no fault of your own, that a clock is ticking, does not change that bright line.

[17] I agree with the approach in the *Chu* decision that the doctrine of discoverability does not apply, as found in *Carlson*.

[18] Respondent counsel submitted that the applicant's testimony that she could not recall receiving the April 16, 2012 reassessment is questionable given that all the documents up to the Objection referred to a charitable donation and it was omitted from the Objection because it had been allowed in the April reassessment.

[19] It is well established in the jurisprudence that mailing by the Minister of the reassessment, not receipt by a taxpayer, is all that is required. The Amended Affidavit indicates it was mailed on that date. The address shown on the February 24, 2012 reassessment is the same address used by the applicant on her Objection which was sent almost one month after the date of the April reassessment. I infer and find that the Minister mailed the April reassessment to the applicant at her last known address.[4] I also accept the submission by respondent counsel which is supported by the evidence.

[20] In the present case, the Minister mailed the April 16, 2012 reassessment to the applicant. She had until July 16, 2012 (90 days from mailing) to file an objection.[5] The applicant served the Minister with the Objection on May 9, 2014 (which was treated as an application to extend time under section 166.1). At that point, however, the applicant was beyond the one-year deadline of July 16, 2013. Consequently, the Court does not have the discretion or ability to grant the Application to extend time to object with respect to the 2010 taxation year.

[21] Turning to the applicant's reliance on the comments at paragraph 42 of the Supreme Court of Canada decision in *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504, she asserts that while the Court should give deference to the CRA, it should not be to the detriment of the overarching requirement of fairness.

[22] Factoring in the nature of the specialized statutory scheme of the *Act* and that this Court is a statutory Court, considerations of fairness do not apply. In his submission, respondent counsel referred to the Federal Court of Appeal in *Chaya v Canada,* 2004 FCA 327, 2004 DTC 6676 (FCA), which noted that such grounds are not within the power of this Court. In paragraph 4 of the decision, Rothstein JA, as he then was stated:

> 4 … It is not open to the Court to make exceptions to statutory provisions on the grounds of fairness or equity. If the applicant considers the law unfair, his remedy is with Parliament, not with the Court.

[23] Although her submission was not entirely clear, the applicant suggested that her combined reading of section 18.1 of the *Tax Court of Canada Rules (Informal Procedure),* subsection 152(4.2) of the *Act* and her understanding of Exhibit A-6 (April 5, 2012 letter) would enable her to ask for a reassessment which can be done anytime in the last ten years. Those provisions have no bearing on this Application and the consideration of whether statutory time limits were met and are not applicable in the applicant's situation. Exhibit A-6 is a response from the CRA to the applicant relating to a request that she had made for an adjustment for 2009 which indicates that because she did not provide all the documents requested by the CRA, her request for an adjustment relating to the FTC for 2009 was rejected. Again, this has no bearing on the Application.

[24] For all the above reasons, the Application is dismissed. Each party shall bear their own costs.

Signed at Vancouver, British Columbia, this 20th day of February 2015.

"K. Lyons"

Lyons J.

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[1] Exhibit A-1- Letter dated October 6, 2011.

[2] Exhibit A-2, Exhibit A-4 and Exhibit A-6. The February 24, 2012 reassessment states "As we have not received a reply to our letter dated October 6, 2011 your claims for foreign tax credit, amounts for children and charitable donations have been disallowed. If we receive the required information at a later date, we will review your return for a possible adjustment." Attached to the letter, dated February 29, 2012, that the applicant sent to the CRA was a receipt for the charitable donation. On September 26, 2013, she sent a letter to HM Revenue & Customs office to obtain further information and received a response in November 2013.

[3] The applicant also invites the Court to consider the adequacy of the CRA objection process. She said that the nature of the statutory regime is "huge" and while she attempted to read section 166.2, she did not have the basic knowledge of the process and could not do anything.

[4] Exhibit A-2, Exhibit A-6, Exhibit A-4 and Exhibit A-5. The applicant does not indicate in the Application that she did not receive the April reassessment.

[5] Paragraph 165(1)(*a*) of the *Act* provides:

> 165.(1) A taxpayer who objects to an assessment under this Part may serve on the Minister a notice of objection, in writing, setting out the reasons for the objection and all relevant facts,

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(*a*) if the assessment is in respect of the taxpayer for a taxation year and the taxpayer is an individual (other than a trust) or a graduated rate estate for the year, on or before the later of

(i) the day that is one year after the taxpayer's filing-due date for the year, and.

(ii) the day that is 90 days after the day of sending of the notice of assessment; …

CITATION:	2015 TCC 44
COURT FILE NO.:	2014-3370(IT)APP
STYLE OF CAUSE:	UFUOMA ODEBALA-FREGENE and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 2, 2014
REASONS FOR ORDER BY:	The Honourable Justice K. Lyons
DATE OF ORDER:	February 20, 2015

APPEARANCES:

For the Applicant:	The Applicant herself
Counsel for the Respondent:	Leonard Elias

COUNSEL OF RECORD:

For the Applicant:

Name:	N/A
Firm:	

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada