Docket: 2016-2305(IT)APP

BETWEEN:

JAN CARPENTER,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on September 9, 2016
at Toronto, Ontario.

Before: The Honourable Justice Guy R. Smith

Appearances:

For the Applicant:	The Applicant herself
Counsel for the Respondent:	Ildilco Erdei

ORDER

UPON application by the applicant for an Order extending the time within which to appeal the assessments made under the *Income Tax Act* for the 1999 to 2012 taxation years;

AND UPON hearing from the parties;

IT IS ORDERED THAT the application be dismissed in accordance with the attached Reasons for Order. There will be no order as to costs.

Signed at Ottawa, Canada, this 16th day of September 2016.

"Guy Smith"

Smith J.

Citation: 2016 TCC 201
Date: 20160916
Docket: 2016-2305(IT)APP

BETWEEN:

JAN CARPENTER,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Smith J.

[1] This is an application for an Order extending the time within which a Notice of Appeal may be filed in respect of the 1999 to 2012 taxations years.

[2] The Minister of National Revenue (the "Minister") initially assessed the applicant for the 1999, 2000, 2001 and 2002 taxation years pursuant to subsection 152(7) of the *Income Tax Act*, L.R.C. 1985, 5th Supp., (the "Act") by Notices of Assessment dated March 8, 2004.

[3] The applicant took no steps to deal with this matter until March 26, 2013 when she filed her income tax returns for the 1999 to 2012 taxation years.

[4] The Minister assessed the applicant for the 2003 to 2012 taxation years as filed (including interest and late filing penalties) by Notice of Assessment dated June 20, 2013 and on July 9, 2013 informed the applicant that her request for an assessment of the 1999 to 2002 taxation years could not be considered as more than ten years had elapsed. These returns were sent back to her.

[5] On September 10, 2013, the applicant served a Notice of Objection on the respondent with respect to the 1999 to 2012 taxation years.

[6] By letter dated March 3, 2015, the Minister confirmed its position, maintaining that a Notice of Objection with respect to the 1999-2002 taxation

years had not been filed on a timely basis and that a request for an extension of time had also not been filed on a timely basis. The Minister then confirmed the assessments with respect to the 2003-2012 taxation years, indicating in particular that the Notices of Assessment for the 2004, 2005 and 2010 taxation years could not be appealed as they resulted in nil assessments.

[7] On May 9, 2016, the applicant filed an application for an extension of time to file a Notice of Appeal of the confirmation of March 3, 2015.

[8] The applicant claims that she had attempted to retain the services of Tax Audit Solutions on a *pro bono* basis as neither she nor her husband were working. According to her testimony, a banker's box of documents was returned to her a short time prior to the expiry of the 90 day period to file a Notice of Appeal. For reason not explained, Tax Audit Solutions had decided not to accept the retainer.

[9] A copy of a letter dated May 27, 2015, addressed to the Court and setting out the applicant's efforts to retain an agent or legal counsel to assist in the filing of a Notice of Appeal, was filed as corroborating evidence of her intention to file an appeal.

[10] The applicant explained that during the twelve months that followed, she (and her husband) made several attempts to retain qualified legal counsel (and conducted personal research on the matter), but that they were unable to do so. She also related personal mitigating circumstances.

[11] The applicant explained that she was not so much concerned about the assessments made in relation to the taxation years 2003 to 2012 since they involved penalties and interest and that she now understood that this Court had no jurisdiction to address those issues. She explained that her primary motivation was to get the Minister to correct and review the Notices of Assessment issued on March 8, 2004.

[12] The applicant explained that she had worked in the banking industry for about 27 years and that she had filed income tax returns every year until 1998. She maintained that she did not receive any assessment for 1999, 2000 and 2001 and that the Notice of Assessment for 2002 (dated March 8, 2004) indicated a balance forward of approximately $69,000 which she could not explain and which she wanted to correct.

[13] During cross-examination, it became apparent that the applicant's employment had been terminated in 1999 and that she had received a lump sum severance payment from her former employer, such that her annual income increased to about $151,000. It is not clear in which year this was received.

[14] The applicant otherwise confirmed that she had received the Notice of Assessment of March 8, 2004 with respect to the 2002 taxation year but that she had simply not dealt with it. She referred to personal circumstances including a death in the family and other extenuating circumstances to explain her failure to act.

[15] Turning to the provisions of the Act, from a plain and ordinary reading of subsections 165(1), 166.1(1) and 166.2(1) as well as subparagraphs 166.1(7)(a) and 166.2(5)(a), it is clear that the applicant is precluded from objecting to the Notices of Assessment issued on March 8, 2004 with respect to the 1999, 2000, 2001 and 2002 taxation years. Those provisions read as follows:

> 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; and
>
> (b) in any other case, on or before the day that is 90 days after the day of sending of the notice of assessment.
>
> …

166.1 (1) 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.

...

(7) No application shall be granted under this section unless

(a) the application is made 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

…

166.2 (1) 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.

…

166.2 (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; and

…

[16] As indicated above, the applicant has admitted that she did not file a Notice of Objection to the Notices of Assessment of March 8, 2004 but she argues that it was only a "notional assessment" and that the Minister had never truly assessed her for those years. Subsection 152(7) of the Act provides as follows:

> 152(7) **Assessment not dependent on return or information** - The Minister is not bound by a return or information supplied by or on behalf of a taxpayer and, in making an assessment, may, notwithstanding a return or information so supplied or if no return has been filed, assess the tax payable under this Part.

[My emphasis.]

[17] According to that provision, if no tax return has been filed, the Minister may assess a taxpayer and such an assessment is in law "an assessment" that is subject to the provisions outlined above dealing with the filing of a Notice of Objection. As noted by counsel for the respondent, the filing of a Notice of Objection is a condition precedent to an appeal: *Bormann v. Canada*, 2006 FCA 83.

[18] The applicant argues in the alternative, that the Minister had an obligation to assess her income tax returns for 1999, 2000, 2001 and 2002 taxation years, relying on subsection 152(4.2) of the Act. That provision was referred to in the case of *Vidanovic v. R.*, 2012 TCC 265, where the appellant had filed a request asking the Minister to reassess the years 1970 to 1999, Lamarre J. (as she then was) made the following observations:

> 5. On August 18, 2010, the applicant requested a reassessment for the 1970 to 1999 taxation years, asking for a revision of his tax returns with respect to his pension contributions, the retroactive payment of pension benefits, and what he called on overcharge of government taxes (Exhibit R-2).
>
> 6. By letter dated December 15, 2010, the CRA replied to the applicant, telling him that the Minister of National Revenue (Minister) no longer had the discretion to reassess his income tax returns in order to give a refund, or to apply a refund against amounts owing, beyond the normal three-year period, since an application by the taxpayer for such relief had to be made not more than ten years after the end of the taxation year for which the request was made (Exhibit R-3). This answer was based on subsection 152(4.2) of the ITA, which read as follows, effective January 1, 2005:
>
>> 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), 122.7(2) or (3), 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.
>
> 7. Here, the request dated August 18, 2010 for the years 1970 to 1999 was made out of time.
>
> …
>
> 13. None of the documentation provided by the applicant evidences any notice of objection or request for an extension of time to file a notice of objection to the most recent assessment issued for each year.
>
> 14. The CRA was right in declining to reopen all the years at issue as it did no longer had jurisdiction to do so in light of subsection 152(4.2) of the ITA, and it is now too late to file a notice of objection for any of those years.
>
> [My emphasis.]

[19] Although it is not necessary for me to do so in the context of this application, I find that the applicant had until December 31, 2012 (ten years calculated from December 31, 2002) to make a request pursuant to subsection 152(4.2). She did not do so. As such, the Minister's conclusion that the income tax returns for the 1999, 2000, 2001 and 2002 taxation years could not be accepted, appears to be correct.

[20] I should also add that the Appellant referred to the decision of *Leola Purdy, Sons Ltd. v. Canada*, 2009 TCC 21, as authority for the proposition that the Minister can assess beyond the ten year limitation period. That case involved a loss carry-forward of a non-capital loss (incurred during a statute-barred year) to a subsequent year when the loss could be applied. I would distinguish that case on the basis that there is no obligation to claim non-capital losses until such time as

they can be applied against income earned in a subsequent year. I am of the view that this case does not apply to the appellant's situation.

[21] I will also add that the applicant referred to subsection 222(3) of the Act and the 10 year limitation period for the collection of a tax debt. That argument was not fully fleshed out and few details were provided. In any event, this Court does not have any jurisdiction over the collection of crown debts: *O'Byrne v. R.*, 2015 FCA 239. The applicant would thus have to raise this issue in the Federal Court.

[22] I now turn to the merits of the application itself. The statutory framework is as follows:

> 167 (1) Where an appeal to the Tax Court of Canada has not been instituted by a taxpayer under section 169 within the time limited by that section for doing so, the taxpayer may make an application to the Court for an order extending the time within which the appeal may be instituted and the Court may make an order extending the time for appealing and may impose such terms as it deems just.
>
> (2) An application made under subsection 167(1) shall set out the reasons why the appeal was not instituted within the time limited by section 169 for doing so.
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> (3) An application made under subsection (1) shall be made by filing in the Registry of the Tax Court of Canada, in accordance with the provisions of the *Tax Court of Canada Act*, three copies of the application accompanied by three copies of the notice of appeal.
>
> (4) The Tax Court of Canada shall send a copy of each application made under this section to the office of the Deputy Attorney General of Canada.
>
> (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.

[23] Even if I accept the applicant's testimony, as corroborated by her letter of May 9, 2016, that she "was unable to act or to instruct another to act" in her name and that she has always had "a *bone fide* intention to appeal" within the 90 day period set out in subsection 169(1), I find that her application is problematic for several reasons.

[24] My first observation is that the application is technically deficient in that the Notice of Appeal is dated June 7, 2016, that is "more than one year after the expiration of the time limited by section 169 for appealing". Subsection 167(3) requires that the Notice of Appeal be filed with the application. Although, the application itself, being the letter of May 9, 2016, was filed within the twelve month period, it was not actually perfected until June 7, 2016. As such, the applicant has not met the requirement set out in paragraph 167(5)(a) of the Act.

[25] Moreover, the application must be considered in light of the context that the applicant failed to file a tax return for the 1999 to 2002 taxation years, despite the fact that she had received a lump sum severance payment. She also ignored the Notice(s) of Assessment of March 8, 2004 and waited until March 26, 2013 before filing her income tax returns for the 1999 to 2012 taxation years. Counsel for the respondent has argued that this type of conduct should not be condoned. I would agree.

[26] I have already addressed the fact that the applicant failed to file a Notice of Objection on a timely basis and I have addressed her argument with respect to the Minister's purported obligation to reconsider her tax returns for the 1999 to 2002 taxation years on the basis of subsection 152(4.2) of the Act.

[27] When I consider all the evidence, I am unable to conclude that the applicant has satisfied the four-prong test set out in subsection 167(5)(b) of the Act. In

particular, I am not satisfied that “it would be just and equitable to grant the application” nor that “there are reasonable grounds for the appeal”.

[28] For these reasons, I am unable to extend the time for instituting an appeal against the assessments for the 1999 to 2012 taxation years.

[29] The application is therefore dismissed.

Signed at Ottawa, Canada, this 16th day of September 2016.

“Guy Smith”

Smith J.

CITATION:	2016 TCC 201
COURT FILE NO.:	2016-2305(IT)APP
STYLE OF CAUSE:	JAN CARPENTER v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 9, 2016
REASONS FOR ORDER BY:	The Honourable Justice Guy R. Smith
DATE OF ORDER:	September 16, 2016

APPEARANCES:

For the Applicant:	The Applicant herself
Counsel for the Respondent:	Ildilco Erdei

COUNSEL OF RECORD:

For the Applicant:

Name:

Firm:

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