Docket: 2012-1956(IT)G

BETWEEN:

ROBERTO PIETROVITO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion and application heard on May 8, 2017, at Montréal, Quebec

Before: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the Appellant:	Dov Withman Anne-Sophie Villeneuve
Counsel for the Respondent:	Arnold H. Bornstein John Grant

ORDER

UPON reading the Notice of Motion and Application dated April 7, 2017, filed on behalf of the Appellant pursuant to sections 9, 21 and 54 of the *Tax Court of Canada Rules (General Procedure)* (the "GP Rules") and section 18.1 of the *Tax Court of Canada Rules (Informal Procedure)* (the "IP Rules"), and other documentary material seeking:

1) an order (the "Motion"):

   (a) dispensing with compliance with section 21 of the GP Rules, pursuant to section 9 of the GP Rules, thereby deeming the notice of appeal filed by the Appellant in this appeal to have effectively instituted an appeal in respect of the reassessment for the 2002 taxation year;

(b) granting the Appellant leave to re-amend his notice of appeal in this appeal pursuant to section 54 of the GP Rules;

(c) extending the time deemed just for the parties to file any consequential amended pleadings;

(d) maintaining this appeal in abeyance pending the outcome of the lead appellants' appeals which have been heard before this Court on March 27 and 28, 2017; and

(e) awarding the Appellant his costs on such a scale as deemed just; and

2) in the alternative, an order extending the time within which an appeal may be instituted in respect of the reassessment for the 2002 taxation year, pursuant to section 18.1 of the IP Rules (the "Application");

AND UPON hearing the submissions of the parties;

In accordance with the attached Reasons for Order, THIS COURT ORDERS AS FOLLOWS:

1) The Motion is dismissed with costs to the Respondent.

2) The Application is dismissed without costs.

Signed at Ottawa, Canada, this 21st day of June 2017.

"Dominique Lafleur"

Lafleur J.

Citation: 2017 TCC 119
Date: 20170621
Docket: 2012-1956(IT)G

BETWEEN:

ROBERTO PIETROVITO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Lafleur J.

[1] Roberto Pietrovito (the “Appellant”) filed a notice of motion (the “Motion”) and application (the “Application”) with this Court, together with a copy of the Re-amended Notice of Appeal and the affidavit of the Appellant (the “April Affidavit”) with various exhibits, seeking an order:

(a) DISPENSING with compliance with section 21 of the *Tax Court of Canada Rules (General Procedure)* (the “GP Rules”), pursuant to section 9 of the GP Rules, thereby deeming the notice of appeal filed by the Appellant in this appeal to have effectively instituted an appeal in respect of the 2002 Reassessment (as defined below);

(b) GRANTING the Appellant leave to re-amend his notice of appeal in this appeal pursuant to section 54 of the GP Rules;

(c) EXTENDING the time deemed just for the parties to file any consequential amended pleadings;

(d) MAINTAINING this appeal in abeyance pending the outcome of the lead appellants’ appeals which have been heard before this Court on March 27 and 28, 2017; and

(e) AWARDING the Appellant his costs on such a scale as deemed just.

[2] In the alternative, the Appellant applies for an order:

(a) EXTENDING the time within which an appeal may be instituted in respect of the 2002 Reassessment, pursuant to section 18.1 of the *Tax Court of Canada Rules (Informal Procedure)* (the "IP Rules").

[3] The Appellant set out the following grounds in support of the Motion:

(a) The interests of justice would be served by dispensing with compliance with section 21 of the GP Rules;

(b) The proposed amendments would not prejudice the Respondent;

(c) Any potential prejudice to the Respondent could be remedied by an award of costs; and

(d) The interests of justice would be served by allowing the proposed amendments.

[4] The Appellant set out the following grounds in support of the Application:

(a) The Application was made within one year after the expiration of the time limited by section 169 of the *Income Tax Act* (the "Act") for appealing, as that section has been interpreted by this Court in *Hickerty v. The Queen*, 2007 TCC 482, 2007 DTC 1311 ("*Hickerty*"); and

(b) All the requirements provided in clause 167(5)(*b*)(i)(A) and in subparagraphs 167(5)(*b*)(ii) to (iv) of the Act are met.

A. <u>THE HEARING</u>.

1. The relief sought by the Appellant.

[5] The Appellant is seeking to amend the previously filed Notice of Appeal so that the 2002 Reassessment will also be part of the appeal instituted by the Appellant in this Court during the month of May 2012. As it stands now, the Notice of Appeal refers only to the 2001 taxation year, i.e. an appeal from the 2001 Reassessment (as defined below). In the alternative, the Appellant is asking this Court to grant an application to extend time to file a notice of appeal in respect of the 2002 Reassessment.

2. The facts.

[6] According to the Appellant, in each of the 2001 and 2002 taxation years, the Appellant made a donation to the John McKellar Charitable Foundation (the "Foundation") and claimed the corresponding tax credits, which were disallowed by the Canada Revenue Agency (the "CRA"). Exhibits A-1 and A-2 to the April Affidavit contain copies of the notices of reassessment for the 2001 and 2002 taxation years (respectively, the "2001 Reassessment" and the "2002 Reassessment"). The amount appearing under the heading "Increase or decrease this year" is of the same amount, namely $14,500, in the 2001 Reassessment and in the 2002 Reassessment.

[7] The Appellant duly served notices of objection for both taxation years (Exhibits A-3 and A-4 to the April Affidavit). A notice of confirmation dated February 27, 2012, in respect of the 2001 taxation year (the "2001 NOC") was sent to the Appellant (Exhibit A-5 to the April Affidavit). A notice of confirmation in respect of the 2002 taxation (the "2002 NOC") was also sent to the Appellant, but the Appellant misplaced the second page of that document (Exhibit A-6 to the April Affidavit). It is, therefore, not possible to determine the exact date when the 2002 NOC was sent. However, the April Affidavit as well as the January Affidavit (as defined below) state that the Appellant recognized that the date of the 2002 NOC was also February 27, 2012 (paras. 8 and 6, respectively).

[8] On April 4, 2012, the Appellant sent to his representative (who served as a liaison between the Appellant and counsel for the Appellant) (the "Representative") an e-mail with a copy of the 2002 NOC in attachment (Exhibit A-7 to the April Affidavit) (the "1st e-mail"). Two minutes later, the Appellant sent to the Representative an e-mail with a copy of the 2001 NOC in attachment (Exhibit A-8 to the April Affidavit) (the "2nd e-mail"). A couple of minutes later that same day, the Representative answered to the 1st e-mail requesting a copy of page 2 of the 2002 NOC, and copied counsel for the Appellant (Exhibit A-9 to the Affidavit). A couple of minutes later, the Representative sent a copy of the 2nd e-mail to counsel for the Appellant with an attachment that contained a copy of the 2001 NOC, on the misunderstanding that the 2nd e-mail contained a completed version of the 2002 NOC, but, in fact, it contained the 2001 NOC (Exhibit A-10 to the April Affidavit). On that basis, counsel for the Appellant prepared a draft notice of appeal in respect of the 2001 Reassessment, not being aware that the 2002 Reassessment should also have been appealed from to this Court. That notice of appeal was filed with the Court on May 18, 2012. Exhibit A-11 to the April Affidavit contains copy of e-mail

exchanges between the Appellant and his counsel, the latter requesting a confirmation that the facts and information contained in the Notice of Appeal as drafted were correct before filing it. The Appellant confirmed to counsel to proceed with that document.

[9] According to the Appellant, the Notice of Appeal which was filed should have included an appeal in respect of the 2002 Reassessment, and not only in respect of the 2001 Reassessment.

[10] In addition, the Appellant, on the basis of the following documents, was under the impression, until the month of August 2016, that the CRA itself did act on the basis that both the 2001 Reassessment and the 2002 Reassessment had been appealed from. These documents are:

1) Exhibit A-12 to the April Affidavit: copy of a notice of assessment for the 2014 taxation year dated April 20, 2015, stating that the balance owing "of $47,897.84 does not include an unpaid amount of $73,087.86, which is the amount in dispute as a result of your [the Appellant's] notice(s) of objection".

2) Exhibit A-13 to the April Affidavit: copy of a notice of assessment for the 2015 taxation year dated April 14, 2016, stating that the balance ". . . does not include an unpaid amount of $76,779.28 that you are [the Appellant] disputing in your [his] objection".

[11] In order to reach the amount in dispute of approximately $73,087.86 or $76,779.28, both the 2001 Reassessment and the 2002 Reassessment had to be under appeal (Exhibit A-15 to the April Affidavit).

[12] Then, on May 3, 2016, the CRA sent a letter to the Appellant (Exhibit A-14 to the April Affidavit) explaining that, due to an administrative oversight, the CRA had failed to take collection action in respect of the amounts owed for the 2002 taxation year and will not be charging interest on the amounts owed. In that letter, the CRA advised the Appellant that he will receive a statement of account in the next 60 days.

[13] On August 21, 2016, the Appellant did receive a statement of account (Exhibit A-15 to the April Affidavit) showing an undisputed amount owed of $22,076.06. The Appellant's accountant then realized, after having made some phone calls to the CRA, that the 2002 Reassessment was not under appeal and

contacted counsel for the Appellant on or around September 8, 2016, to inform counsel of that fact.

[14] In September 2016, counsel for the Appellant communicated with the Respondent asking for her consent to the amendment to the Notice of Appeal which was filed with this Court in order to add a reference to the 2002 Reassessment. In December 2016, the Respondent refused to grant the consent requested. Immediately after that, counsel for the Appellant began undertaking the process to file the Motion and the Application with this Court.

[15] According to paragraph 31 of the April Affidavit, the Appellant always intended to participate in any joint legal effort undertaken on behalf of other similarly affected taxpayers in respect of claims for charitable tax credits in respect of gifts made to the Foundation.

[16] The Respondent filed an affidavit by Michelle Pearce with this Court (the "Pearce Affidavit"), together with an affidavit by the Appellant dated January 30, 2017, which was filed with this Court (the "January Affidavit").

B. <u>THE MOTION</u>.

1. The Appellant's position.

[17] The Appellant acknowledges before the Court that the inclusion of an additional taxation year in a notice of appeal is not a typical amendment but cites *Wells v. The Queen*, [2001] 4 CTC 2950, [2000] TCJ No. 409 (QL) ("*Wells*"), for an authority authorizing the remedy sought.

[18] In *Wells*, *supra*, this Court entertained a motion for leave to amend a notice of appeal to include the 1994 taxation year after the expiry of the limitation period to file a notice of appeal. The tax consequences resulted from a single transaction, which consisted in a donation of work of arts made during the 1994 taxation year. The notice of appeal which was filed by the appellant made reference to a reassessment for the 1995 taxation year only, but the amount indicated included taxes owing for both the 1994 and 1995 taxation years. This Court granted the motion for leave to amend on the ground that the purpose of the motion was not to amend the notice of appeal to add a new taxation year after the expiry of the time period prescribed by the Act to appeal but was "essentially to complete and clarify that which is implicit from the whole of the facts described in the Notice of Appeal. In other words, the purpose of the motion [was] not to gain the right to add

a fundamental element since the whole of the facts alleged implies the reality that was not expressly stated, that is, the reference to 1994. This interpretation is moreover in keeping and consistent with the progress of the case since the filing of the notice of objection dated July 28, 1997" (paras. 16 and 17). In addition to the factors which include the progress of the case and the nexus that existed between the two taxation years, this Court also invoked the general principle of fairness as well as the overarching need for appeals to be heard and decided on the merit; hence, the motion was granted.

[19] Furthermore, the Appellant cites to this Court the comments of Pigeon J. in *Bowen v. City of Montreal*, [1979] 1 SCR 511 at page 519, 1978 CanLII 14 (SCC); in that case, the plaintiff wanted to add an additional ground of relief, but the Quebec Court of Appeal had denied it:

> . . . On the other hand, this Court cannot endorse the formalistic attitude of the Court of Appeal. This would be contrary to a fundamental principle that is at the root of s. 50 of the *Supreme Court Act* and of the reform of civil procedure effected by the 1965 *Code*, and which has been sanctioned in numerous decisions, the most recent being *Cité de Pont Viau v. Gauthier Mfg. Ltd*. <u>This principle is that a party must not be deprived of his rights on account of an error of counsel where it is possible to rectify the consequences of such error without injustice to the opposing party</u>. . . .

[Emphasis added.]

[20] Finally, the Appellant cites a case decided by the Supreme Court of Canada, *Hamel v. Brunelle and Labonté*, [1977] 1 SCR 147 at page 156, where Pigeon J. allowed an amendment to increase the amount of damages claimed by the plaintiff at trial:

> In my opinion, when all the provisions of the new *Code of Civil Procedure* regarding amend-ments are read together, it becomes clear that the legislator's real intention was, as the Commissioners suggested, that in appeal as at trial, all amend-ments needed in order to rule on the dispute objectively should be allowed; <u>in other words, that procedure be the servant of justice not its mistress.</u> It is true that this is a discretionary power, but it must not be overlooked that this is a judicial discretion. Consequently, the Court is under a duty to exercise it and it is in effect to refuse to exercise it than to do so on grounds unfounded in law (*Smith & Rhuland Ltd. v. The Queen*). Moreover, even under the former *Code of Civil Procedure*, it was well established that necessary amendments were not to be denied without good reasons.

[Emphasis added.]

[21] Applying *Wells*, *supra*, the Appellant submits that amendments which are clerical in nature should be allowed by this Court. Furthermore, in view of the general principle of fairness as well as given the surrounding circumstances in this case (referring to the Appellant's intent to appeal from both the 2001 Reassessment and the 2002 Reassessment at the time the Notice of Appeal was filed and throughout the period) and the factual nexus between the two taxation years, this Court should grant the Motion on the basis of principles applicable to the amendments of pleadings.

[22] Specifically, the Appellant submits that the Appellant always intended to appeal as to both taxation years: he duly objected to both the 2001 Reassessment and the 2002 Reassessment. He had forwarded the 2001 NOC and the 2002 NOC to his Representative. Furthermore, the Appellant submits that the legal issues are identical for both taxation years and that the facts underlying the 2002 Reassessment are nearly as identical to the facts underlying the 2001 Reassessment:

(a) Both donations were made to the Foundation;

(b) Both donations were comprised partially of the Appellant's personal funds and partially of loan proceeds;

(c) The relevant terms of both loan agreements were the same;

(d) Both donations were for the same amount - $50,000 and generated the same tax credits - $14,500; and

(e) The nature and terms of both donations were identical.

[23] According to the Appellant, the principle is that amendments should be allowed *prima facie*, provided "that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice" (*Canderel Ltd. v. Canada*, [1993] 2 CTC 213, [1994] 1 FC 3 (CA) (QL)).

[24] In this case, according to the Appellant, allowing the amendments would not prejudice the Respondent since only dates and amounts are modified and the lead cases have already been heard by this Court in March 2017. Furthermore, the Appellant is of the view that the Court should keep in mind that the present appeal

is part of a large group of appeals and flexibility should be shown in allowing the amendments sought.

2. The Respondent's position.

[25] According to the Respondent, the principles outlined in *Wells, supra*, are wrong in law. That case has never been cited since 2000.

[26] Furthermore, the present case is distinguishable from *Wells*. In *Wells*, there was a single transaction but the present case pertains to 2 different purported donations made in 2 different taxation years. Accordingly, there is no nexus to a single transaction. The amendments sought could not be considered the result of a clerical error.

[27] The Respondent adds that the income tax rules applicable to the 2002 taxation years could be different than the rules applicable to the 2001 taxation year in view of the legislative changes to subsections 248(30) and following of the Act for gifts made after December 20, 2002.

[28] The Respondent submits that it is not clear in what manner the result of the lead cases would apply to the Appellant as no agreement to be bound by the outcome of those cases was signed by the Appellant.

3. Discussion.

[29] For the following reasons, the Motion is dismissed with costs to the Respondent.

[30] It is not necessary to address the soundness of the principles developed in *Wells*: it is clear that the facts of the present case are completely different from the facts in that case.

[31] In *Wells*, *supra*, the transaction that gave rise to the tax consequences in issue took place in 1994, and those tax consequences resulting from that operation applied for both 1994 and 1995. Furthermore, the notice of appeal referred to amounts the total of which was equal to the aggregate of the disputed amount of taxes for the 1994 and 1995 taxation years.

[32] In the present case, two different operations allegedly took place: the Appellant made a purported donation to the Foundation in December 2001 and

made another purported donation to the Foundation in December 2002. These two operations resulted in tax consequences to the Appellant, the donation made in 2002 resulting in the tax consequences for 2002 and not for 2001 and the donation made in 2001 resulting in tax consequences for 2001 and not for 2002. The amounts indicated in the Notice of Appeal are clearly relating to the 2001 Reassessment and not to the 2002 Reassessment.

[33] I cannot find any factual nexus between the two taxation years, as happened in *Wells*, even if I were to consider the fact that the agreements entered into by the Appellant that give effect to the operations contained similar terms and conditions. I am of the view that if the facts, the issues raised, and the relief sought may seem to be identical for both taxation years, that will have to be decided by the trial judge.

[34] I fail to understand how the amendments sought by the Appellant could essentially be considered to complete and clarify what is implicit from the whole of the facts described in the Notice of Appeal. The Notice of Appeal, a draft of which was sent to the Appellant in May 2012, does not refer to the 2002 Reassessment and does not refer to the 2002 taxation year. Furthermore, by reading the Notice of Appeal, I cannot conclude that it could be implicitly inferred from the facts described therein that the 2002 Reassessment had been appealed from. On the contrary, the Notice of Appeal is clear and makes reference solely to the 2001 Reassessment.

[35] I do not see how the amendments sought by the Appellant could be considered clerical in nature. According to the Oxford Dictionary and Thesaurus (2007):

- A "clerical error" is "[a] mistake made in copying or writing out a document";

- "Clerical" means "relating to the routine work of an office clerk";

- "Clerk" means "a person employed in an office or bank to keep records or accounts and to carry out other routine administrative duties".

[36] The thread of these definitions is the notion of routine or administrative work. The drafting of a notice of appeal cannot be considered a clerical task; in my view, taking into account the facts described above, I fail to see in the omission of the mention of the 2002 taxation year and the 2002 Reassessment in the Notice of

Appeal a mere clerical error. I am of the view that the addition of the 2002 Reassessment to the Notice of Appeal would be a fundamental measure.

[37] The Appellant submits that the whole progress of the case reveals, on the part of the Appellant, an intention to appeal from both the 2001 Reassessment and the 2002 Reassessment. That submission is not cogent as it is not uncommon for a taxpayer to appeal from a reassessment for one taxation year and decide not to appeal from a reassessment for another taxation year. However, I am aware that the underlying facts are similar and it would be improbable for the Appellant to have decided to appeal from the 2001 Reassessment without appealing from the 2002 Reassessment. However, that is of no relevance.

[38] The Appellant cited comments from Justice Pigeon in *Hamel*, *supra*, who explained that the discretion to amend pleadings is to be exercised judicially so "that procedure be the servant of justice not its mistress". The Appellant also argued that this Court should follow the general principle of fairness as well as the overarching need for appeals to be heard and decided on their merits, and hence, grant the Motion.

[39] However, I am of the view that the principles governing amendments of pleadings have no application in the present case. Divisions I and J of the Act provide for detailed mechanisms for objecting to and appealing from income tax assessments. The Appellant should abide by these mechanisms in order to appeal from the 2002 Reassessment and more particularly, with sections 169 and 167 of the Act, if such an application is necessary.

[40] The Motion is therefore dismissed, with costs to the Respondent.

C. <u>THE APPLICATION</u>.

1. The Appellant's position.

[41] In the alternative, the Appellant asks that the Application be allowed by the Court on the basis of the principles followed by this Court in *Hickerty, supra*, as all requirements set out in subsection 167(5) of the Act are met.

[42] Subsection 167(5) of the Act reads as follows:

167(5) When order to be made — No order shall be made under this section unless	**167(5) Acceptation de la demande** — Il n'est fait droit à la demande que si les

(*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.

conditions suivantes sont réunies :

a) la demande a été présentée dans l'année suivant l'expiration du délai imparti en vertu de l'article 169 pour interjeter appel;

b) le contribuable démontre ce qui suit :

(i) dans le délai par ailleurs imparti pour interjeter appel, il n'a pu ni agir ni charger quelqu'un d'agir en son nom, ou il avait véritablement l'intention d'interjeter appel,

(ii) compte tenu des raisons indiquées dans la demande et des circonstances de l'espèce, il est juste et équitable de faire droit à la demande,

(iii) la demande a été présentée dès que les circonstances le permettaient,

(iv) l'appel est raisonnablement fondé.

[43] The Appellant concedes that if the timing requirement set out in paragraph 167(5)(*a*) of the Act (the "one-year grace period") is not met, then this Court has no jurisdiction to grant the Application.

[44] However, the Appellant submits, on the basis of *Hickerty*, *supra*, a case decided by this Court, that where an appellant has taken positive actions to appeal and where that appellant reasonably believes that the appeal has been validly filed, the one-year grace period had stopped running and this Court has jurisdiction to grant an application to extend the time to appeal.

[45] On the basis of *Hickerty*, the Appellant argues that the one-year grace period will be met in the present case, if two conditions are met:

1) The Appellant must have had the belief that an appeal from the 2002 Reassessment had been validly filed;

2) This belief must have been reasonable up until the point where he was made aware that the appeal from the 2002 Reassessment had not been validly filed.

[46] In view of the facts described above, the Appellant was under the belief that an appeal with respect to the 2002 Reassessment had been validly filed between May 18, 2012, when counsel for the Appellant filed a notice of appeal with this Court and August 31, 2016, when the Appellant became aware of the fact that the CRA considered that the 2002 Reassessment had not been appealed from after receiving the statement of account dated August 21, 2016 (Exhibit A-15 to the April Affidavit).

[47] Furthermore, according to the Appellant, the Appellant's belief was reasonable during that same period of time for a number of reasons. First, the Appellant believed that the Notice of Appeal in respect of both taxation years was filed in May 2012, since he had sent to his Representative copies of the 2001 NOC and the 2002 NOC and instructed his counsel to proceed with the filing of the Notice of Appeal. Second, that belief remained reasonable until August 2016 when he received a statement of account from the CRA. Before that time, as that appeal was part of a large group of appeals, there were no actions or positive steps he was required to take to move his appeal along. Finally, the CRA did not contact the Appellant between May 2012 and May 2016 with respect to the 2002 Reassessment and did not take collection measures.

[48] Therefore, the Appellant submits that his reasonable belief that an appeal from the 2002 Reassessment had been validly filed began in May 2012, i.e., within the prescribed 90-day time to appeal from an assessment to this Court (section 167 of the Act). The one-year grace period started running on August 31, 2016, when the Appellant learned that the CRA never considered that the 2002 Reassessment was appealed from. As this Application was filed in draft form with this Court on January 30, 2017, and officially filed on April 10, 2017, the one-year grace period, was therefore, met.

[49] According to the Appellant, the approach followed in *Hickerty*, *supra*, is novel and creative, and serves objectives of fairness, by allowing deserving taxpayers to have their day in court. However, he argues that this case should not be read as endorsing the common law rule of discoverability, under which a limitation period will not start to run until a person has fully and clearly appreciated his or her legal rights. In *Hickerty*, the applicant had fully appreciated her legal rights to appeal and this was not a case where the applicant did not understand the consequences of a reassessment and simply neglected to contest it within the required time. Furthermore, the applicant took positive actions to file an appeal within the prescribed time; hence, it was reasonable for her to believe that

an appeal had been validly filed, even though the appeal was not perfected as it should have been.

[50] The Appellant cited *Breathe E-Z Homes Ltd. v. Minister of National Revenue*, 2014 TCC 122, [2014] TCJ No. 102 (QL) ("*Breathe E-Z*"), where this Court granted the application to extend time to file an appeal and referred with approval to *Hickerty*, but decided the case on another ground.

[51] At the hearing, the Appellant also argued that the other requirements found in subsection 167(5) of the Act are met in the present case. The Appellant always had a *bona fide* intention to appeal from the 2002 Reassessment since he took the necessary steps to appeal as to both taxation years and objected to the 2001 Reassessment and the 2002 Reassessment. The Application was made as soon as circumstances permitted, as shown in the timeline of events described above. There are reasonable grounds for the appeal from the 2002 Reassessment as shown by the fact that the lead cases in this large group of appeals were heard by this Court last March. Finally, according to the Appellant, it would be just and equitable to grant the Application, as all the other requirements found in subsection 167(5) of the Act are met. Furthermore, it would be deeply unjust to penalize the Appellant for being under the same misapprehension that the CRA itself was under for nearly four years (Exhibits A-12, A-13 and A-14 to the April Affidavit).

2. The Respondent's position.

2.1 Preliminary issue.

[52] The Respondent was of the view that an application to extend time to appeal has to be made using the form set out in Schedule 18.1 of the IP Rules, according to the requirement of section 18.1 of the IP Rules which reads as follows:

> **18.1(1)** An application for an order extending the time within which an appeal may be instituted may be in the form set out in Schedule 18.1.

Since the form found in the IP Rules was not used by the Appellant in filing his Application, the Respondent submits that I should not grant the Application.

2.2 Submissions.

[53] According to the Respondent, as the 2002 NOC was dated February 27, 2012 (para. 8 of the April Affidavit), the 90-day prescribed time and

the one-year grace period should be calculated as of that date. The 90-day prescribed time expired on May 28, 2012, (since it was a leap year) and the one-year grace period expired on May 28, 2013. Accordingly, as the one-year grace period is not met since the Application was filed in January 2017 (or April 2017), this Court has no jurisdiction to grant the Application.

[54] With respect to the principles developed in *Hickerty*, *supra*, the Respondent noted that that case pertained to an informal procedure and, accordingly, it has no precedential value.

[55] In addition, the Respondent submits that *Hickerty* was wrongly decided, for four main reasons:

> i) The clear and unambiguous wording of subsection 169(1) and paragraph 167(5)(*a*) of the Act.

[56] Subsection 169(1) of the Act provides that "no appeal. . . may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer under section 165. . .". Paragraph 167(5)(*a*) of the Act provides that no order shall be made unless "the application is made within one year after the expiration of the time limited by section 169 for appealing. . .".

[57] The Appellant herein recognized in the April Affidavit that the 2002 NOC was issued to him on February 27, 2012, and accordingly, that is presumed to be the date of sending (subsection 244(14) of the Act).

> ii) The doctrine of the Federal Court of Appeal.

[58] According to comments made by Justice Sharlow of the Federal Court of Appeal in *The Queen v. Shafer* (20 September 2000), Saskatoon A-414-98 (FCA) ("*Shafer*"), in respect of similar provisions found in the *Excise Tax Act*, the receipt of a notice of assessment is not relevant; the date of sending is the starting point.

> 6 The statutory provisions for assessments, objections and appeals are intended to provide clear rules for determining when the Minister's obligation to make an assessment is fulfilled, and to provide procedures by which taxpayers may challenge assessments that may be mistaken. Parliament has chosen to adopt a rule that makes no allowance for the possibility, however remote, that the taxpayer may miss the deadline for objecting or appealing because of a failure of the postal system. I do not understand why Parliament has chosen to deprive

> taxpayers of the chance to challenge an assessment of which they are unaware, but that is a choice that Parliament is entitled to make.

[59] According to the Respondent, these comments from the Federal Court of Appeal exclude the application of the discoverability rule in these circumstances.

[60] The Respondent also cited *The Queen v. Carlson*, 2002 FCA 145, 2002 DTC 6893 ("*Carlson*"); in that case, the Federal Court of Appeal granted an application for judicial review of an order rendered by this Court on an application to extend time to file a notice of objection. The Federal Court of Appeal stated that it was wrong to invoke the discoverability rule in the circumstances of this particular case and added: ". . . As to whether the rule can find application in cases arising under the Act, in regard to which question we have serious doubt, we need not answer today" (para. 17).

[61] According to the Respondent, it is also clear from *Carlson*, *supra*, that if the one-year grace period is not met, this Court has no jurisdiction to grant an application:

> 10 However, both the Minister and the TCC are precluded under paragraphs 166.1(7)(*a*) and 166.2(5)(*a*) of the Act from extending the time in which to file a notice of objection unless the application is made within one year after the expiry of the time in which a notice of objection could have been made.

iii) The Appellant was aware of the existence of the 2002 NOC in February 2012.

[62] As the Appellant knew that the 2002 NOC was issued, then the date of discovery was around the end of February 2012. Accordingly, even if this Court were to apply the discoverability rule, the one-year grace period is not met in the present circumstances.

iv) The exclusion of the discoverability rule by clear statutory language.

[63] In *Nagle v. The Queen*, 2005 TCC 462, 2005 DTC 1093, this Court had to determine whether an application to extend time to serve a notice of objection made by an applicant, which was part of a large group of appeals, should be granted. The Court followed the doctrine propounded by the Supreme Court of Canada in *Peixeiro v. Haberman*, [1997] 3 SCR 549, [1997] 3 SCJ No. 31 (QL), and dismissed the application; it stated clearly that the discoverability rule did not override the clear meaning of statutes:

> 12 I disagree with the applicant that the discoverability rule overrides legislation. The Supreme Court of Canada suggests that a literal approach is not appropriate in interpreting limitation periods, but they do not suggest that clear words of a statute can be ignored. Immediately before the above passage in *Haberman v. Peixeiro*, the Court approves the following statement from *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man C.A.) at 206:
>
>> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. <u>But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.</u> (emphasis added)

[64] The Court concluded that the language of the Act does not permit the one-year grace period to start running from when the applicant became aware that his accountant had not filed the necessary notices of objection.

[65] The same principle should be applied in this case since the wording of the different provisions of the Act is similar.

[66] The Respondent also cited *Odebala-Fregene v. The Queen*, 2015 TCC 44, 2015 DTC 1087, and *Chu v. The Queen*, 2009 TCC 444, 2009 DTC 1298.

[67] Furthermore, the Respondent pointed out to the Court that the January Affidavit and the April Affidavit are not exactly the same. In addition, the April Affidavit seems to have been drafted specifically to reflect the *Hickerty* doctrine: at paragraph 33, the Appellant stated that he "reasonably believed that the 2002 Reassessment was validly appealed". That language was improper and should not have been included in an affidavit as the purpose of an affidavit is to adduce facts relevant to the dispute, without gloss or explanation (*Canada (Attorney General) v. Quadrini*, 2010 FCA 47, [2010] FCJ No. 194 (QL) at para. 18, and referred to in *CBS Canada Holdings Co. v. The Queen*, 2017 FCA 65, 2017 DTC 5036 at para. 17).

[68] Finally, the Respondent pointed out that both affidavits do not contain any language explaining what the Appellant did with the draft notice of appeal received

from his counsel. The only information found in the affidavits is that he had instructed his counsel to file said document. According to the Respondent, the Appellant probably did not read the draft notice of appeal and did not then realize at this point that there was no reference to an appeal of the 2002 Reassessment. According to the Respondent, even a lay person reading the draft notice of appeal would have realized that the 2002 Reassessment was not being appealed from.

3. Discussion.

[69] For the following reasons, the Application is dismissed, without costs.

[70] With respect to the preliminary issue, I do not agree with the Respondent's argument that section 18.1 of the IP Rules requires an application to extend time to be filed by using the form attached to the IP Rules. Section 18.1 of the IP Rules uses the word "may". Furthermore, this Court's interpretation of the IP Rules and GP Rules should be liberal as indicated in section 4 of the GP Rules. Therefore, I am of the view that the Application is a valid application to extend time to appeal.

[71] As for the content of the April Affidavit importing improper wording, I agree with the Respondent.

[72] The Appellant asks this Court to use the novel and creative approach followed by this Court in *Hickerty*, *supra*, and thus serve the objective of fairness by allowing deserving taxpayers to have their day in court. The Appellant was clear in his submissions that the principle derived from *Hickerty* should not be read as endorsing the common law rule of discoverability according to which a limitation period will not start to run until a person has fully and clearly appreciated his or her legal rights.

[73] For the following reasons, I am of the view that the principle relied on by this Court in *Hickerty* should not be followed in the present circumstances.

[74] As *Hickerty* pertained to the informal procedure of this Court, it has no precedential value (*Castle v. The Queen*, 2008 DTC 2821, [2008] TCJ No. 66 (QL)).

[75] The Federal Court of Appeal in *Carlson*, *supra*, made it clear that the one-year grace period is strict and cannot be waived. The Appellant is of the view that the present facts are distinguishable from those in *Carlson* where the applicant

had not objected for many years and did not understand that he could have objected. I fail to see how that distinction could be relevant.

[76] The Federal Court of Appeal in *Shafer, supra*, made it clear that even the failure of the postal system will not relieve taxpayers from the strict deadlines for objecting to and appealing from an assessment as prescribed by the Act. The Federal Court of Appeal was clear that even if a taxpayer is unaware of the existence of an assessment, he will be deprived of his chance to challenge an assessment if he does not adhere to the strict deadlines prescribed by the Act for objecting to and appealing from an assessment. The Federal Court of Appeal also stated that the only requirement to be satisfied is that the notice of assessment was sent and added: ". . . [t]here is no requirement that the notice be received in order to start the limitation period running. The language of subsection 301(1.1) is clear and unambiguous and must be applied regardless of its object and purpose" (para. 12).

[77] In view of the doctrine of the Federal Court of Appeal, the fact that the Appellant did not realize before August 2016 that the 2002 Reassessment was not appealed from can have no impact whatsoever on the calculation of the one-year grace period. The Appellant admitted having received the 2002 NOC in February 2012; the 2002 NOC was sent by the CRA in February 2012. The starting date for the calculation of the 90-day prescribed time and the additional one-year grace period was February 27, 2012. The fact that the CRA was mistakenly under the impression that the 2002 Reassessment was being appealed from and did not start collection proceedings before 2016 has no bearing on that conclusion.

[78] The Appellant also cited *Breathe E-Z, supra*, in support of the application of *Hickerty, supra*. However, I note that the Court in *Breathe E-Z* had cited *Hickerty* but it did not base its decision on the ratio of *Hickerty* because the Court held that the document sent to the CRA was a request to extend time filed within the time prescribed by the applicable legislation.

[79] One of the most recent decisions of this Court dealing with the same matter is *Odebala-Fregene, supra*. In that case, this Court dismissed an application to extend time to serve a notice of objection. The applicant argued that it would not have been possible for her to serve a notice of objection within the one-year grace period applicable, since she was not aware that she could have objected until she was contacted by a CRA collection officer after the expiry of that period. The applicant argued that the application should be granted as the CRA was subject to the common law duty of "procedural fairness". At paragraph 11, this Court stated:

> 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.

[80] The Court referred also to *Hickerty* but stated that the correct approach was that the doctrine of discoverability did not apply in these circumstances as indicated by this Court in *Chu*, *supra*.

[81] In *Chu*, *supra*, the applicants, as in the instant case, took positive actions during the process and believed that a third party they had engaged to represent them had taken the necessary steps and appealed from their assessments. Once the applicants discovered the representative's failure to do so, they filed an application for an extension of time that was outside the one-year grace period. This Court rejected the principle developed in *Hickerty, supra*, and stated:

> 35 In this case, where a presumably competent practitioner failed to comply with a clear statutory requirement, it is not for [the Tax Court of Canada] to rectify the situation by ignoring the express language of the Act, even though it may well be equitable for [the judge] to do so, particularly given that the respondent should not be seeking to collect more taxes than the law requires if that is the case. But [the judge] have no equitable jurisdiction to give effect to a remedy that would allow that determination to be made.

[82] I further note that in *Nagle*, *supra*, this Court concluded on similar facts that the discoverability rule is not engaged when a person is aware of the existence of an assessment:

> 10 In my view, this is not a situation where the discoverability rule is engaged. First, the applicant admits receiving the notices of reassessment. He knew that he had a cause of action and that he had to file notices of objection. Not only was the cause of action discoverable, it was discovered. Second, the applicant in any event could have discovered that no notices of objection had been filed. He stated that he had a conversation with the accountant who told him that the notices were filed. Presumably, if Dr. Nagle had asked the accountant for copies of the notices it would have come to light that they had not been prepared.

[83] Similarly, in this Application, as pleaded by the Respondent, the Appellant knew since February 2012 that the 2002 NOC had been issued.

[84] The wording of section 167 and paragraph 167(5)(*a*) of the Act is clear and unambiguous; the language of this paragraph does not allow me to conclude that

the time stopped running because the Appellant was under the wrong impression that the 2002 Reassessment was being appealed from. It is clear that the time runs from the expiration of the 90-day period prescribed for appealing from the 2002 Reassessment (calculated from the date of the 2002 NOC), i.e., from May 28, 2012. The one-year grace period expired, accordingly, on May 28, 2013. As this Application was filed with this Court in January 2017 at the earliest, it is clear that the one-year grace period is not met and that the Application should be dismissed on that ground.

[85] Even if I were to apply the ratio of *Hickerty*, I am of the view that it is impossible for me to find that the Appellant could have been under the impression or had reasonable belief that he had appealed from the 2002 Reassessment, as the April Affidavit and the January Affidavit are silent as to the steps taken by the Appellant between the time he received the draft notice of appeal and the time he communicated with his counsel and authorized the filing of the Notice of Appeal as drafted. Did he read the draft notice of appeal? I agree with the Respondent that even a layperson would have realized from the plain reading of the document that the 2002 Reassessment and the 2002 taxation year were not mentioned in the draft notice of appeal. I cannot find that his belief was reasonable in the circumstances since both affidavits are silent in that respect.

[86] Finally, here are my last comments: no consideration of fairness or equity can be of assistance to the Appellant as this Court is a statutory court. As explained in *Odebala-Fregene, supra*:

> 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:
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>> 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.

[87] As I concluded that the one-year grace period is not met, I will not have to examine whether the other requirements provided for in subsection 167(5) of the Act are met.

[88] The Application is therefore dismissed, without costs.

Signed at Ottawa, Canada, this 21st day of June 2017.

"Dominique Lafleur"

Lafleur J.

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COURT FILE NO.:	2012-1956(IT)G
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REASONS FOR ORDER BY:	The Honourable Justice Dominique Lafleur
DATE OF ORDER:	June 21, 2017

APPEARANCES:

Counsel for the Appellant:	Dov Whitman Anne-Sophie Villeneuve
Counsel for the Respondent:	Arnold H. Bornstein John Grant

COUNSEL OF RECORD:

For the Appellant:

Name:	Dov Whitman Anne-Sophie Villeneuve Reuben Abitbol
Firm:	Davies Ward Phillips & Vineberg LLP Montréal, Quebec
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada