

Docket: 2003-886(IT)APP

BETWEEN:

LOUISE KOLMAR,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on common evidence with the application of
1120733 Ontario Limited (2003-885(IT)APP),
on October 3, 2003, at Ottawa, Ontario.

Before: The Honourable Justice Gerald J. Rip

Appearances:

Counsel for the Applicant: Harold J. Feder

Counsel for the Respondent: Jennifer Neill

ORDER

Upon application for an Order extending the time within which appeals from the assessments made under the *Income Tax Act* for the 1997 and 1998 taxation years may be instituted;

And upon hearing what was alleged by the parties;

The application is dismissed.

Signed at Ottawa, Canada, this 7th day of November, 2003.

"Gerald J Rip"

Rip, J.

BETWEEN:

1120733 ONTARIO LIMITED,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

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ORDER

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Signed at Ottawa, Canada, this 7th day of November, 2003.

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Rip, J.

Citation: 2003TCC829
Date: 20031107
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Docket: 2003-885(IT)APP

AND BETWEEN:

1120733 ONTARIO LIMITED,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Rip. J.

[1] These are applications by Mrs. Louise Kolmar and 1120733 Ontario Limited pursuant to section 167 of the *Income Tax Act* ("Act") to extend the time to file Notices of Appeal. Mrs. Kolmar's application is with respect to 1997 and 1998 and the corporation's application concerns its 1996, 1997 and 1998 taxation years.

[2] The Minister of National Revenue reassessed Mrs. Kolmar's taxation years for 1997 and 1998 by Notices of Reassessment dated November 6, 2000. A Notice of Objection was duly filed and the Minister confirmed the reassessments and mailed the Notice of Confirmation to Mrs. Kolmar on November 30, 2001.

[3] 1120733 Ontario Limited was reassessed by the Minister for its 1996, 1997 and 1998 taxation years by Notices dated November 8, 2000. A Notice of

Objection to the reassessments was served on the Minister on December 4, 2000 and on November 30, 2001 the Minister confirmed the reassessments and mailed a Notice to the corporation.

[4] No appeal from the assessments against the corporation and Mrs. Kolmar was filed within the 90 days from the date the Notices of Confirmation were mailed to each of the applicants.

[5] The applications by the corporation and Mrs. Kolmar to file the appeals late are dated February 28, 2003, the last day an application was permitted to be filed in accordance with paragraph 167(5)(a) of the *Act*.

[6] The Minister objects to granting the applications on the basis that neither of the applicants demonstrated that its application was made as soon as circumstances permitted, as required by subparagraph 167(5)(b)(iii).

[7] The Minister does not deny that the applicants were unable to act or instruct in order to act in their respective names within the 90 days from the mailings of the Notices of Confirmation pursuant to subsection 169(1) or that the applicants had a *bona fide* intention to appeal the relevant assessments within the said period of 90 days.

[8] The issue between the applicants and the Minister is whether certain motor vehicle expenses were incurred by the corporation in its 1996 to 1998 taxation years for the purpose of producing income from a business and, if not, whether the corporation conferred a benefit on Mrs. Kolmar, a shareholder of the corporation: subsection 15(1).

[9] In her affidavit Mrs. Kolmar described the facts leading to the application:

3. In the early part of December, 2001, my late husband, Walter Kolmar, contacted our solicitor, Mr. Harold Feder, to advise that the Company and I were in a dispute with the Canada Customs and Revenue Agency ("CCRA") regarding disallowed car expenditures and that we wished to appeal.
4. My husband then began to put together the relevant tax documents for the Appeals. From the end of September to mid February is the busiest time for the business so he was unable to do much in that regard until the end of February.

5. On March 7, 2002, I requested and received from CCRA a copy of the Notice of Confirmation dated November 30, 2001 relating to my assessment.
6. Until the time of the receipt of the copy of the Notice on March 7, 2002, I did not realize that the Objection relating to my tax matter had been denied. Further, I had incorrectly understood the date of the Confirmation relating to the Company to be December 9, 2001.
7. I am advised by Mr. Feder and do verily believe that on that date, March 7, 2002, he advised my husband that the time for filing the Appeals had expired and that accordingly, we would require an extension. My husband confirmed that we were still interested in pursuing the Appeals.
8. Throughout 2002 my husband and Mr. Feder were working on gathering the necessary documentation with which to properly assess the Appeals and prepare the Appeal documents.
9. The process was difficult and time consuming due to a number of factors. The Appeals dealt with three taxation years, the earliest being over six years earlier. We did not have the documentation required by Mr. Feder. We had dealt with three different accountants over the period in question. The most involved accountant had suffered a heart attack and a stroke in the fall of 2001 and was unable to provide any assistance.
10. Throughout 2002, we were contacted periodically by CCRA and the Ontario Minister of Finance relating to the status of our tax accounts. We informed them that these matters were under appeal and directed them to Mr. Feder for further information.
11. On December 4, 2002, my husband died suddenly of a heart attack.
12. Shortly thereafter, I contacted Mr. Feder to inform him of the news and seek his advice. After some discussion, I confirmed that I wanted to proceed with the Appeals.

13. The Appeals were filed February 28, 2003 together with a Request for an Extension of Time to File the Appeals.

[10] In cross-examination on her affidavit, Mrs. Kolmar stated she misunderstood the time issue. She said she believed information in addition to that provided to the Minister during the audit and objection stages was necessary to file an appeal and her husband was "searching" for this information prior to his death.

[11] Mrs. Kolmar said she advised Mr. Feder, her counsel, to file an application for extension of time in March, 2002. She was in touch with the accountant who suffered a heart attack and stroke. This accountant was ill before the Notices of Confirmation were sent to Mrs. Kolmar. "Everything happened at the same time," Mrs. Kolmar recalled, and this was during the busiest time of year for the business. She said there was "not time to put [things] together".

[12] Mrs. Kolmar stated she does not know what happened to the original Notices of Confirmation mailed to her and the corporation on November 30, 2001.

[13] The relevant provisions of subsection 167(5) provide that:

- (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 ...
 - (iii) the application was made as soon as circumstances permitted, ...

[14] Applicant's counsel argued that one must interpret the words "application is [to be] made within one year ..." in subsection 167(5)(b)(iii) to mean that the application is to be made "as soon as circumstances permit". Time must be accorded to taxpayers, he said, to permit them to make an application not merely to stop the clock but to properly assess the taxpayer's rights. A taxpayer is given one year to file a "proper" appeal; the taxpayer need not "dump" the application.

[15] I do not agree with the applicant's counsel. Once the Minister sends a notice to the taxpayer that the assessment has been confirmed or the Minister has reassessed as a result of an objection, the taxpayer has 90 days from the mailing of the notice to appeal to the Court: subsection 169(1). [The taxpayer may also appeal an assessment if 90 days have elapsed after filing a notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessment.] Within this 90 day period the taxpayer is to gather all his or her forces, assemble documentation, obtain legal advice, etc. to prepare a notice of appeal and actually file a notice of appeal. Section 167 is an exception to section 169. All conditions in subsection 167(5) must be fulfilled before an order can be made extending the time to appeal. The taxpayer must demonstrate, among other things, that he or she was unable to act or instruct another to act in the taxpayer's name or had a *bona fide* intention to appeal within the 90 day period but because of serious illness, accident or misfortune or due to one of those inevitable mishaps that occur in life, he or she could not act or instruct another or exercise his or her intention to file an appeal on time. If a taxpayer is late in filing a notice of appeal, the taxpayer must act with diligence to apply for an extension of time to appeal and file a notice of appeal. There is no comfort of one year to get ready to make an application. In enacting section 167, Parliament did not intend to extend by a year a taxpayer's right to appeal an assessment. Such an interpretation would render the delays in section 169 absolutely meaningless.

[16] There is no doubt that because of the illness of one accountant and having to deal with two other accountants, Mr. and Mrs. Kolmar's task in retrieving documents was difficult. However, I cannot satisfy myself that Mrs. Kolmar and the corporation made their applications as soon as circumstances permitted. First of all, Mrs. Kolmar cannot recall when she or the corporation received the original notices of confirmation mailed to them on November 30, 2001. In early December, 2001 the late Mr. Kolmar had contacted their solicitor advising they had a dispute with Canada Customs and Revenue Agency ("CCRA"). It is not unreasonable to assume that his contact with the solicitor was the result of the receipts of the notices of confirmation. It was only on March 7, 2002, after the 90 days to file an appeal had expired, that Mrs. Kolmar obtained a copy of her notice of

confirmation. She had understood that the corporation's notice of confirmation was dated December 9, 2001.

[17] Secondly, the function of pleadings is to ascertain with precision the matters on which the parties in dispute differ and the points on which they agree. It is not necessary to disclose in a pleading any evidence by which a party proposes to establish his or her case at the trial. What is required is a sufficient outline of the case.¹ The applicants were scurrying around after March, 2002, it appears, not necessarily to prepare notices of appeal but looking for evidence. I infer that in the circumstances of these cases the information required to prepare a good notice of appeal was available at the time the notice of objection was filed.

[18] Thirdly, I am unaware of any material fact described in the notices of appeal filed with the applications that was unknown to Mrs. Kolmar and the corporation when Mr. Kolmar first contacted their solicitor in December, 2001.

[19] Fourthly, there appears to have been no effort to determine from CCRA what documents it had in its possession and which could be reviewed by the applicants to prepare their applications and notices of appeal on a more timely basis.

[20] In *Her Majesty the Queen v. Arthur C. Pennington*,² Thurlow, C.J. stated that it appeared to him that what the statute requires "is that the taxpayer make his application as early as, under the particular circumstances, he could reasonably be expected to get an application ready and present it". The Court of Appeal allowed the Crown's review application to set aside a decision of this Court.

¹ Carson, D.B. and Dennis, I.H., *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, 22d edition, Stevens & Sons Limited, London, 1981, p. 84

² 87 DTC 5107

[21] While, in cases of doubt, it is preferable to have a dispute between a taxpayer and the Crown decided on its merits, rather than the Crown succeeding due to a taxpayer missing a time limit, one cannot ignore the clear words of the statute. I am not convinced that circumstances were not present until early in 2003 to permit the applicants to make their applications. The applications could have been made much earlier.

[22] The applications are dismissed.

Signed at Ottawa, Canada, this 7th day of November, 2003.

"Gerald J. Rip"

Rip, J.

CITATION: 2003TCC829

COURT FILE NO.: 2003-886(IT)APP & 2003-885(IT)APP

STYLE OF CAUSE: Louise Kolmar v. The Queen and
1120733 Ontario Limited v. The Queen

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 3, 2003

REASONS FOR JUDGMENT BY: The Honourable Justice G. J. Rip

DATE OF JUDGMENT: November 7, 2003

APPEARANCES:

 Counsel for the Appellant: Harold J. Feder

 Counsel for the Respondent: Jennifer Neill

COUNSEL OF RECORD:

 For the Appellant:

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 Firm: BrazeauSeller LLP

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