Citation: 2007TCC482
Date: **20070905**
Docket: 2005-1588(IT)APP

BETWEEN:

BETTY HICKERTY,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR ORDER

Boyle J.

[1] The taxpayer has made an application to late file a notice of appeal in an informal appeal of her income tax reassessments for 1998 and 1999. The application arises because Mrs. Hickerty mailed her **appeal** addressed to the Tax Court and to the Canada Revenue Agency in a timely fashion but used a street address in Ottawa that was not the Court Registry's address. It was in fact an address for the CRA that she was given by a CRA information officer on its telephone helpline as the address for filing her Tax Court appeal. Her appeal was prepared and mailed by her after hearing her objection was not going to be successful but before receiving the information package from CRA Appeals on appealing its decision on the objections to the Tax Court. This was her uncontradicted testimony and is corroborated by the dates of the relevant written correspondence. I accept her version of the events entirely as the Crown neither put forward any alternative version nor questioned the correctness of her testimony.

[2] The Crown has objected to this application primarily on the basis that it was brought more than one year and 90 days after the date of the reassessments. Neither the Crown nor the Applicant put in evidence copies of the reassessments. The only evidence is that on July 8, 2003, CRA Appeals wrote a letter explaining the objection would be only partly allowed, together with a schedule T7WC setting out the numbers and indicating that the reassessments would be issued separately. The

Applicant confirmed that she did receive reassessments separately. The Applicant's wrongly addressed appeal to the Court was dated four days later – July 12, 2003.

[3] The appeal Mrs. Hickerty mailed was never received by the Registry of the Tax Court. The Court received a copy of it from Mrs. Hickerty in December 2004 after she became aware of the problem. This copy accompanied her late filing application.

[4] It is the Crown's position that the Applicant's initial appeal cannot constitute appealing for purposes of section 169 of the *Income Tax Act* within 90 days of the date of the reassessments. It appears that subsection 18.15(3.2) of the *Tax Court of Canada Act* precludes a notice of appeal that is never received by the Registry from being a properly instituted appeal under section 175 for purposes of section 169.

[5] It is the Crown's further position that when a copy of that initial appeal was received by the Court in December 2004, it was received more than 90 days after the reassessments and could not be considered to validate the institution of the appeal. CRA's letter advising that reassessments would issue was dated July 8, 2003. Unless CRA took more than a year to issue the reassessments, December 2004 was not within the 90 day period. I, like other tax professionals, know that the reassessments would be issued by a separate group within CRA than the Appeals group that authored the July 8, 2003 letter and the attached T7WC and that such reassessments are often dated and received sometime later than the letter and T7WC from CRA Appeals. However, Mrs. Hickerty's testimony was consistent with the reassessments having been received in the ordinary course, not more than one year later.

[6] Since I have concluded Mrs. Hickerty has not properly instituted an appeal, I turn to her application to file an appeal outside the ordinary timeframe of 90 days. In order for this application under subsection 167(5) to be granted, I must be satisfied of five things.

[7] Firstly, the Applicant must have had a *bone fide* intention to appeal within the normal 90 day period. In this case, I am entirely satisfied she did. Indeed, her resolve to appeal the decision of her objections to the Tax Court had her filing her initial ill-addressed appeal within days of being aware of the outcome of her objections, and before receiving Appeals' letter of July 8, 2003. This diligence, resolve and haste are why she needs to bring this application. This is very different than the many applications that result from delay.

[8] Secondly, the application to late file must be brought as soon as circumstances permit. I am again satisfied on the facts before me that this requirement is met. The Applicant became aware of the fact her initial appeal was wrongly addressed sometime in October 2004. This was relayed to her in a telephone conversation with CRA and CRA's letter to her confirming this was dated November 16, 2004. Her application to the Court **(**which is what CRA suggested in its November letter that she do**)** was made on December 10, 2004.

[9] Thirdly, I must conclude that there are reasonable grounds for the appeal. The Crown did not contest that there were reasonable grounds for the appeal. The notice of appeal goes through the issues of business use and business expenses in some detail. I am satisfied on this point.

[10] Fourthly, I must conclude that granting the order would be just and equitable in the circumstances. In this case, I am satisfied that it is just and equitable for the Order to be granted and I am prepared to grant the application provided the fifth requirement is met. To my mind, the facts of this case speak for themselves:

1) The taxpayer sought to appeal to this Court virtually immediately upon hearing of CRA Appeals' decision on her objections;

2) She prepared and mailed her notice of appeal to the Court;

3) Her mistake was to wrongly address it. She called CRA's information line for the Court's address and mailed it to the address she was given. Unfortunately, that was an incorrect address. But for that, this application would not be necessary and this Court would be proceeding to hear the merits of her appeal;

4) After mailing her initial appeal document in July 2003, the first reference in her written and oral evidence to her being contacted by CRA Collections was in October and November 2004. Not hearing from Collections following the filing of a notice of appeal is consistent with having instituted a valid appeal and the collection restrictions in section 225.1 applying as a result;

5) After filing her initial July 12, 2003 appeal, the Applicant heard a Canadian radio program on income tax disputes from which she understood that the hearing of an appeal with the Canadian Tax Court could be a slow and lengthy process; and

6) The Applicant is far from the only taxpayer to not fully understand the Tax Court's separate existence from CRA generally or from CRA's Appeals Directorate specifically. Indeed, during the week this application was heard, I heard four other appeals and one intervention addressed to the Tax Court at a CRA address. The difference seems to be that in those cases CRA did forward the appeals to the Registry of the Court. Each of those parties had also been provided with the CRA information sheet on how to appeal to the Tax Court.

[11] This leaves only the fifth requirement to be satisfied. That requires that this application have been brought within one year of the normal 90 day period for filing the appeal following receipt of the reassessments. If the reassessments were dated July 8, 2003, this application would have to have been brought within one year of October 6, 2003. Since the application was dated December 10, 2004 this condition could not be met unless the period during which the Applicant was under the reasonable but mistaken misapprehension that she had validly instituted her appeal does not count in the calculation of the further one year period. If not, this application could not succeed unless the reassessments were not issued by CRA until early September 2003, some two months after its July 8, 2003 letter. Unfortunately, that evidence is not before the Court and, while that period may be within the bounds of CRA's ordinary course, the Applicant has not met her onus to show that that was the case.

[12] Thus I return to the question whether the time the Applicant was under the mistaken misapprehension that she had validly instituted her appeal is included in the one year grace period. In the circumstances, I am of the view that the period during which the taxpayer is under a reasonable but mistaken belief that she has validly instituted an appeal is not included in the further one year grace period provided for in paragraph 167(5)(*a*). This issue does not appear to have been previously considered by the Court with respect to either late filed objections or appeals. An interpretation favourable to the taxpayer is consistent with this Court's expressed preference to have taxpayers' tax disputes heard and resolved on their merits, especially in the absence of any prejudice to the Crown. To interpret and apply this differently would deprive a taxpayer of the right to have an appeal that she reasonably believed for a period of just less than five months to have properly instituted, heard on its merits, where there was nothing else she could reasonably have been expected to do during that period. In most cases, the one year period will be a calendar year plain and simple. However, if a taxpayer mistakenly but reasonably believes that she has validly instituted an appeal and the other requirements of subsection 167(5) are met, the one year grace period stops running until the taxpayer becomes aware, or should have become aware if she is acting and

thinking reasonably, that the intended appeal was invalid. That is, there will come a point when a taxpayer's mistaken belief may cease to be reasonable but, on the facts of this case, it was reasonable for her to continue to so believe until at least December 10, 2003, even if it may have ceased to be reasonable by December 10, 2004.

[13] This case and this last issue are significantly different than the issues of awareness and understanding of an assessment, and of discoverability, considered by the Federal Court of Appeal in the case of *H. M.Q. v. Carlson*, 2002 **DTC** 6893. In that case, the taxpayer had not even objected to his tax assessments issued in 1993 until he sought to late file his objection in 1999, some five years later. The Court of Appeal concluded he could not be helped because he was "neither diligent nor reasonable in the way he conducted himself following service of the Notice of Assessment."

[14] **Another** case referred to by the Crown, *Schiavone v. H.M.Q.*, 2002 **DTC** 2023 (TCC)**,** also involved a delay of some five years in seeking to late file an appeal to the Court which delay was not explained in the Reasons.

[15] I note that in the third case referred to by the Crown, *Meer v. H.M.Q.*, 2001 **DTC** 648, this Court concluded in paragraph 16 that it was reasonable for a taxpayer to be under a continuing mistaken belief that his appeal had been instituted for a period of five months.

[16] For these reasons I am granting Mrs. Hickerty's application. For the same reasons, I will also be granting Mr. Hickerty's identical application made on identical facts and heard on common evidence.

These Amended Reasons for Order are issued in substitution for the Reasons for Order dated August 22, 2007.

Signed at Ottawa, Canada, this **5th** day of **September** 2007.

"Patrick Boyle"

Boyle J.

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COURT FILE **NO**.:	2005-1588(IT)APP
STYLE OF CAUSE:	BETTY HICKERTY AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Grande Prairie, Alberta
DATE OF HEARING:	August 7, 2007
REASONS FOR ORDER BY:	The Honourable Justice Patrick Boyle
DATE OF **AMENDED** ORDER:	**September 5, 2007**

APPEARANCES:

For the Applicant:	The Applicant herself
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