

Docket: 2008-939(EI)

BETWEEN:

KMW SERVICES INC.
o/a KMW HEALTH and CRITICAL CARE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Motion heard on common evidence with the motion in
KMW Services Inc. o/a KMW Health and Critical Care (2008-940(CPP)),
on November 24, 2008 at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant: Yehuda Levinson

Counsel for the Respondent: Brandon Siegal

JUDGMENT

UPON motion made by counsel for the Respondent for a Judgment to dismiss the appeal;

AND UPON hearing submissions of the parties;

The motion is granted and the appeal under the *Employment Insurance Act* is dismissed in accordance with the Reasons herein.

Signed at Toronto, Ontario, this 28th day of November 2008.

"Patrick Boyle"

Boyle, J.

Docket: 2008-940(CPP)

BETWEEN:

KMW SERVICES INC.
o/a KMW HEALTH and CRITICAL CARE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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Motion heard on common evidence with the motion in
KMW Services Inc. o/a KMW Health and Critical Care (2008-939(EI)), on
November 24, 2008 at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant: Yehuda Levinson

Counsel for the Respondent: Brandon Siegal

JUDGMENT

UPON motion made by counsel for the Respondent for a Judgment to
dismiss the appeal;

AND UPON hearing submissions of the parties;

The motion is granted and the appeal under the *Canada Pension Plan* is
dismissed in accordance with the Reasons herein.

Signed at Toronto, Ontario, this 28th day of November 2008.

"Patrick Boyle"

Boyle, J.

Citation: 2008 TCC 654
Date: 20081128
Dockets: 2008-939(EI),
2008-940(CPP)

BETWEEN:

KMW SERVICES INC.
o/a KMW HEALTH and CRITICAL CARE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

(Delivered orally from the Bench on November 28, 2008, in Toronto, Ontario.)

Boyle, J.

[1] The Crown has brought a motion to dismiss the Appellant's Employment Insurance and Canada Pension Plan appeals on the basis that this Court has no jurisdiction to hear these appeals because the Minister of National Revenue did not make a decision on an appeal for the reason that valid administrative appeals were not filed by the Appellant within the time period required by the legislation.

[2] The Appellant was assessed for EI and CPP in 2005. Those assessments have already been the subject of an application to this Court to late-file an appeal. The applications were turned down by Justice Bowie in 2007. Justice Bowie's reasons speak for themselves but, in essence, he concluded the Tax Court does not have jurisdiction to extend the time to appeal to this Court, or to hear an appeal, unless the Appellant has first filed an administrative appeal with the Minister.

[3] It is important to note that the EI and CPP legislation differ materially from the *Income Tax Act* as regards late filing applications. Under the *Income Tax Act*, a taxpayer has the right to request the Minister to accept a late-filed objection, and the Minister's decision can expressly be appealed to this Court. The EI and CPP legislation have no such express provision. (On the other hand, the *Income Tax Act*

and the EI and CPP legislation each provide that the Court can accept a late-filed application for an appeal to the Court. This latter application is what was before Justice Bowie.)

[4] Following Justice Bowie's decision, the Appellant wrote to the Minister implicitly requesting that the Minister exercise his discretionary power to issue EI and CPP assessments as permitted by section 94 of the *Employment Insurance Act* and section 27.3 of the *Canada Pension Plan* to allow the new administrative appeals filed notwithstanding that they were out of time. However, the Minister has not done so. The Minister replied to the Appellant's request by saying that the new appeals were also out of time and therefore could not be accepted as administrative appeals.

[5] Thus, it appears we are right back where Justice Bowie found himself with respect to the first set of appeals. However, counsel argues that the Minister's decision to not accept the new administrative appeals because they were out of time and to not exercise his discretionary power to reassess after the time period was itself a decision on an appeal that can be appealed to this Court.

[6] Subsection 103(1) of the *EI Act* only gives the Tax Court jurisdiction to hear an appeal from "a decision on an appeal to the Minister under section 91 or 92". Unfortunately for the Appellant, its right to appeal to this Court does not extend to whether or how the Minister exercises his discretionary power under section 94. Similarly subsection 28(1) of the *CPP* only gives the Tax Court jurisdiction to hear an appeal from "a decision on an appeal to the Minister under section 27 or 27.1". It does not extend to the Minister's discretionary power under section 27.3.

[7] Administrative appeals under section 92 of the *EI Act* and section 27.1 of the *CPP* are to be filed within 90 days of the assessment in question. Since that was not done, there is no decision on an appeal under those sections to bring before this Court under subsection 103(1) of the *EI Act* or subsection 28(1) of the *CPP*.

[8] The Minister's refusal to exercise his discretion under section 94 of the *EI Act* or section 27.3 of the *CPP* and reassess to give effect to an appeal notwithstanding that it was not filed within 90 days is not "a decision on an appeal under section 91 or 92" of the *EI Act* or "section 27 or 27.1" of the *CPP*. As such, they are not reviewable by this Court. This is consistent with the decision of Justice Mogan in this Court's decision in *Deerhurst Resorts Ltd. v. MNR*, 89 DTC 352, involving the former Unemployment Insurance legislation and the CPP.

[9] Notwithstanding Mr. Levinson's subtle and careful attempt in his new letter to the Minister and in this Court to try to meld a request to review the Minister's exercise or failure to exercise his discretionary power together with a substantive review of the assessments on the merits, I am allowing the Crown's motion to dismiss these appeals.

[10] I am mindful of the fact that if Mr. Levinson successfully seeks to have the Minister's decision to not exercise his discretionary power reviewed in another court, he may need to be back to this Court to have the appeal heard on its merits. While this is clearly neither efficient nor ideal, it is the legislative framework adopted by Parliament which, unless and until it is changed, has to be respected. I note that the Canadian Bar Association wrote to the Minister of Justice earlier this year recommending an extension of the Tax Court's jurisdiction to enhance such inefficiencies. That letter is posted on the CBA website. Unless and until it is acted on, it cannot help this or similarly situate Canadian taxpayers.

Signed at Toronto, Ontario, this 28th day of November 2008.

"Patrick Boyle"

Boyle, J.

CITATION: 2008 TCC 654

COURT FILE NOS.: 2008-939(EI), 2008-940(CPP)

STYLE OF CAUSE: KMW SERVICES INC. o/a KMW HEALTH
and CRITICAL CARE v. MNR

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 24, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: November 28, 2008

APPEARANCES:

 Counsel for the Appellant: Yehuda Levinson

 Counsel for the Respondent: Brandon Siegal

COUNSEL OF RECORD:

 For the Appellant:

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