Docket: 2007-4859(GST)APP

BETWEEN:

MARC SIMARD,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Application heard on common evidence with the application of
Transport Lanfort Inc. (2007-4861(GST)APP), on September 5, 2008,
at Québec, Quebec
Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Applicant: Stéphane Harvey

Counsel for the Respondent: Danny Galarneau

ORDER

The application for an extension of time in which to file a notice of objection to the assessment made under Part IX of the *Excise Tax Act* for the periods from August 1, 2004, to August 31, 2004, December 1, 2004, to December 31, 2004, and March 1, 2005, to March 31, 2005, notice of which is dated February 5, 2007, and bears the number PQ 2007-9556, is allowed, and the time is extended to the date of this Order, in accordance with the attached Reasons for Order.

The $100 filing fee will be reimbursed to the Applicant.

Signed at Ottawa, Canada, this 6th day of March 2009.

"Alain Tardif"

Tardif J.

Translation certified true
On this 16th day of April 2009
Monica Chamberlain, Reviser

Docket: 2007-4861(GST)APP

BETWEEN:

TRANSPORT LANFORT INC.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Application heard on common evidence with the application of
Marc Simard (2007-4859(GST)APP), on September 5, 2008,
at Québec, Quebec
Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Applicant: Stéphane Harvey

Counsel for the Respondent: Danny Galarneau

ORDER

The application for an extension of time in which to file a notice of objection to the assessment made under Part IX of the *Excise Tax Act* for the period from January 1, 2003, to March 31, 2005, notice of which is dated February 10, 2006, and bears the number 1580516, is allowed, and the time is extended to the date of this Order, in accordance with the attached Reasons for Order.

The $100 filing fee will be reimbursed to the Applicant.

Signed at Ottawa, Canada, this 6th day of March 2009.

"Alain Tardif"

Tardif J.

Translation certified true
On this 16th day of April 2009
Monica Chamberlain, Reviser

Citation: 2009 TCC 131
Date: 20090306
Dockets: 2007-4859(GST)APP
2007-4861(GST)APP

BETWEEN:

MARC SIMARD,
TRANSPORT LANFORT INC.,

Applicants,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR ORDER

Tardif J.

[1] These are two applications for an extension of the time in which to file a notice of objection. Since the matters are interrelated, the parties agreed to have them both heard on common evidence.

[2] Both matters moved through the system chaotically, to say the least. This was due to the existence of other, parallel files, to a certain amount of confusion, but, also, to the great number of actors. And it was capped by one or more instances of negligence.

[3] The contents of the pleadings, the documentary evidence and testimony suggest several theories about the cause of the failure to respect the time limits.

[4] In order to avoid unhelpful or irrelevant analyses, it is worth reproducing the relevant provisions of the Act. First of all, subsection 12(4) of the *Tax Court of Canada Act* provides as follows:

> 12(4) The Court has exclusive original jurisdiction to hear and determine applications for extensions of time under section 45 or 47 of the *Air Travellers Security Charge Act* , subsection 28(1) of the *Canada Pension Plan* , section 33.2 of the *Cultural Property Export and Import Act* , section 97.52 or 97.53 of the *Customs Act* , subsection 103(1) of the *Employment Insurance Act* , section 197 or 199 of the *Excise Act, 2001* , section 304 or 305 of the *Excise Tax Act* , section 166.2 or 167 of the *Income Tax Act* or section 56 or 58 of the *Softwood Lumber Products Export Charge Act, 2006.*

[5] The evidence refers to a multitude of dates and conversations and several players. The Applicant Marc Simard is a very active businessman who ran certain companies.

[6] At one point, he was having tax problems. Clearly clueless as to whom to turn to, he followed the advice of his accountant and retained a lawyer who was elected to the House of Commons shortly thereafter.

[7] Since the lawyer's election meant that he could no longer accept the mandate, the matter or matters were transferred to another lawyer, who eventually acknowledged that he lacked the relevant experience and knowledge.

[8] The delays that gave rise to the instant applications were characterized by the search for new lawyers, and by the new law firm's various attempts and initiatives to take the appropriate action. The situation was complicated by communication problems and by problems identifying the files. Certain evidence that is essentially intended to identify the potentially negligent person or persons has been added to the mix.

[9] Throughout this time, the Applicant persists in his intention to exhaust all possible remedies, in the firm belief that the assessments are without merit.

[10] The Minister, for his part, is convinced that the Applicant failed to send the appropriate documents – that is to say, the notices of assessment – to the person who was his lawyer at the time. He also submits that the Applicant's lack of credibility rebuts the presumption set out in subsection 335(10) of the Act.

[11] The Applicant's position is somewhat nebulous, because he says that he gave any relevant documents that he received to his lawyers, but also claims that he may not have received all the documents. In support of this theory, he refers to various mistakes, changes in his company's head office address, etc.

[12] I should state, at the outset, that the evidence disclosed nothing that would cause the Applicant's testimony to be rejected based on a lack of credibility. He might be somewhat confused, but he is certainly not the only one, as the Respondent's explanations are no model of transparency either.

Analysis

[13] The decision of the Federal Court of Appeal in *Stanfield* is highly relevant to the case at bar:

> 3 Generally, in determining whether to grant an extension of time, the four factors listed in *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (F.C.A.) should be considered. The factors are (1) whether the party seeking the extension has a continuing intention to pursue the matter, (2) whether the position taken by the party seeking the extension of time has some merit, (3) whether the other party is prejudiced by the delay, and (4) whether there is a reasonable explanation for the delay. The weight to be given to each of these factors will vary with the circumstances of each case.
>
> 4 Counsel for the appellant argues that no extension of time can be granted if the other party suffers any prejudice at all from the delay. That is not correct. The question of the existence of prejudice to the other party, and the nature and extent of the prejudice, is only one of the factors to be taken into account in deciding whether to grant an extension of time. In this case, there was evidence of some prejudice to the appellant from the delay. The Judge did not ignore that evidence. Indeed, it is clear from his reasons that he was quite aware of it, as well as the relevant jurisprudence. However, given the nature of the prejudice, the relatively short additional delay resulting from the order, and the other evidence presented to the Judge in respect of the Crown's motion, we are not persuaded that the Judge erred in giving that factor little or no weight.[1]

[14] At the trial of the matter, Bell J. had considered the prejudice to the appellant, but nonetheless decided:

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[1] *Stanfield v. The Queen*, 2005 FCA 107, 2005 CarswellNat 4222, [2005] 2 C.T.C. 104, 2005 D.T.C. 5211 (Eng.), (2005), 333 N.R. 241.

> 21 This is not a situation in which the Reply has not been filed because of inadvertence. It is not a situation where the delay is borne of any personal desire of counsel to be elsewhere. It is not an application brought after four months of delay. Failure to file a Reply by June 21, 2004 is not the result of any oversight. Whereas some of the authorities are firm in the tests to be applied to applications for extension of time, and while I have some sympathy with the submissions of Appellant's counsel, I cannot conclude that no extension of time should be given in this case. While realizing, if the motion is denied, that there would be only a presumption that the allegations of fact in the Notice of Appeal would be true and while that presumption is rebuttable, the facts surrounding the Appellant's claim are best known to him, including perhaps, those with whom he was associated in the transactions. Logically, the Court should be better informed of the circumstances if the Appellant presents his case in the normal way. This Court must be interested in fairness and in justice and it appears to me that those objectives are better served by this case proceeding in the normal fashion. While Appellant's counsel urges the Court to find that the Respondent had all facts necessary for the preparation of a Reply, counsel for the Minister have, according to Wilhelm's affidavit and submissions made at this hearing not obtained all the information apparently necessary for the preparation of a proper Reply. . . .[2]

[15] In *Massarotto*, Dussault J. dealt with an issue more similar to the one raised by the Applicant:

> 3 The applicant argued that he never received or saw the notice of assessment referred to in paragraph 1 of the Reply to the Application for an Extension of Time.
>
> . . .
>
> 6 The applicant said that it was not until June 1998 that he learned from Revenu Québec's collections unit that his dealings with Mr. Bois had been audited in 1996, that he had been assessed in August 1996 and that he owed about $35,000. The applicant stated that he never met the auditor, one Jean-Pierre Lemieux, in 1996. He also said that, at the time, no one ever contacted him about the audit and the subsequent assessment. Mr. Bois did not tell him about the audit and assessment either.
>
> . . .
>
> 16 Thus, not only is the applicant saying that he never received the notice of assessment, but it also seems that the notice was never sent to him by the Minister at his own address. Moreover, I note that, in her Reply to the

[2] *Stanfield v. The Queen*, 2004 TCC 480, 2004 CarswellNat 6830, [2004] 3 C.T.C. 2353, 2004 D.T.C. 2923 (general procedure).

Application for an Extension of Time, the respondent does not state that the notice of assessment was sent to the applicant or any other person. No evidence was adduced on this point: the respondent did not call any witnesses or file any affidavits.

17 It has been established that an assessment is not complete, and is therefore not valid, unless a notice is sent to the taxpayer concerned after the assessment is made. In this regard, reference may be made to the Exchequer Court's judgment in *Scott v. M.N.R.*, 60 DTC 1273, [1960] C.T.C 402. More recently, the Federal Court of Appeal, relying on subsection 152(2) of the *Income Tax Act*, reaffirmed this principle in *Aztec Industries Inc. v. The Queen*, 95 DTC 5235 (at page 5237), [1995] 1 C.T.C. 327 (at page 330). In that case, the taxpayer, which had made its application out of time as in the case at bar, alleged not only that it had not received the notice of assessment but also that no such notice had ever been issued. Hugessen J.A., who rendered judgment for the Federal Court of Appeal, noted that in such circumstances the burden of proving the existence of the notice of assessment and the date of its mailing falls on the Minister, since those facts are normally within his knowledge and he controls the means of proving them.

. . .

20 However, unlike in the *Income Tax Act*, the definition of the word "person" set out in subsection 123(1) of the Act includes for GST purposes a "partnership". Moreover, as is the case with income tax, the Act contains a number of presumptions about the date of an assessment and the date the notice was mailed and received. They are in subsections 335(11), 335(10) and 334(1). Subsection 335(5) deals with the affidavit evidence of an officer with respect to the nature and contents of a document. [3]

[Emphasis added.]

Case comment by David Sherman:

. . .

Indeed, as Judge Dussault pointed out, there are mechanisms in **s. 335** of the *Excise Tax Act* to simplify the burden on the tax authorities of proving that an assessment has been issued. Revenu Québec did not use those provisions to prove delivery of the Notice of Assessment.

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[3] *Massarotto v. The Queen*, 1999 CarswellNat 958, 1999 CarswellNat 2990, 99 G.T.C. 3164 (Fr.), 2000 G.T.C. 802 (Eng.), [1999] G.S.T.C. 61 (Fr.), [2000] G.S.T.C. 19 (Eng.) (with case comment by David Sherman).

> There is a curious corollary to the finding that the notice of assessment was not delivered to the appellant. Judge Bowman ruled in *Rick Pearson* that it followed that Revenue Canada could not take any collection action on the assessment. In *Massarotto*, Judge Dussault cited *Rick Pearson* as authority for making the same ruling. Technically, however, such a ruling is outside the Tax Court's jurisdiction, which is clearly limited in s. 309 to dismissing, confirming or varying an appeal, or, under s. 304, to granting or dismissing an application for extension of time. Disputes over collection matters are taken to the Federal Court -- Trial Division by way of application for injunction or similar relief. On the other hand, given the finding of fact by the Tax Court, one would expect that the Federal Court would routinely rule that no collection action could be taken on the assessment, so from a practical point of view the ruling makes sense.
>
> [Emphasis added.]

[16] In *Corsi*, Boyle J. addressed the inherent ambiguity of the postal system. The CRA had apparently sent the notice of assessment to the wrong address:

> [4] Based upon the affidavit evidence received today from both parties, the chronology of the assessment, objection and appeal can be summarized as follows. The CRA assessment is dated June 21st, 2004. The CRA mailed it by Priority Courier on that date to the taxpayer at her home address. This was not her authorized mailing address properly on file with CRA for tax purposes.
>
> [5] Canada Post returned that assessment to CRA with a stamp, indicating it was unclaimed, and a label marked, "Moved/unknown." A copy of the returned envelope was filed by CRA.
>
> [6] It is apparent from the envelope that someone, perhaps Canada Post, changed the postal code by hand to an incorrect postal code. The envelope is also stamped that a card was sent on June 24, a final notice on June 29 and that the mail itself was returned to the sender on July 15.
>
> [7] The Crown acknowledged today that, given this state of affairs, the assessment could not be considered to have been sent to the taxpayer on June 21, 2004 for purposes of subsection 152(2), nor could that be the day of mailing for purposes of beginning the 90-day period within which to file an objection under section 165.
>
> [8] However, from the record it appears that CRA had until now maintained the June 21, 2004 date was the day of mailing.

[9] Surprisingly, there is no evidence that CRA did anything with the returned assessment, except keep the envelope. One would expect at a minimum that the address of a returned package should be double-checked against the sender's own records, regardless of who the sender is. Had that been done, the CRA would have realized they had in fact sent it to the wrong address and hopefully would have sent the assessment to the correct authorized mailing address they had on file. It seems entirely unacceptable that when registered mail is returned to CRA as undeliverable they do not even check they sent it to the correct address.

[10] There was no evidence or explanation of why it was sent to the taxpayer's home address and not her authorized mailing address, nor was there an explanation of how CRA could have used the wrong address, since it is clear from the Crown's affidavit and the Exhibit "A" printout that CRA's only mailing address for her is not the address to which they mailed the assessment.

[11] The taxpayer's materials explain that her authorized mailing address is in fact that of her accountant. Ms. Corsi did not receive the assessment; she first became aware of it when CRA's collections group started to make demands for payment.

[12] A copy of the original assessment was then sent to Ms. Corsi's accountant at his request and with her authorization. This was in October 2005. More than one year and 90 days had elapsed since the date of the original mailing of the assessment.

. . .

III. Analysis

[21] The taxpayer instituted an appeal from the assessment with this Court. In order for the appeal to proceed as a properly instituted appeal, the Act requires that its objection procedures first be followed. On these facts, I am unable to conclude that the taxpayer validly filed an objection to the assessment as required. None was filed within 90 days of either June 2004 or October 2005, when the assessment was received by the accountant. One was not even filed within 90 days of when her new counsel received a copy in November of 2006.

[22] If no objection is filed this Court has no jurisdiction to hear an appeal from that assessment.

. . .

> [26] I have no choice but to grant the Crown's motion and order that the taxpayer's appeal be dismissed.
>
> [27] However, the facts of this case do raise the question of whether the CRA ever issued a valid assessment. Indeed, that is the first issue set out in the taxpayer's Notice of Appeal.
>
> [28] The further question is if a valid assessment was issued, when was it issued?
>
> [29] If the taxpayer wants to dispute an assessment in the Tax Court on the basis it is not a valid assessment, the *Income Tax Act* nonetheless requires that the impugned assessment be objected to. In this case, it was not.
>
> [30] It may be that Ms. Corsi can seek a remedy in respect of the assessment, on the basis it was never valid, in a different court. I will leave that to the taxpayer and her advisers.
>
> [31] It may also be that Ms. Corsi's remedy may be in another court, if any of her several professional advisers did not properly advise her or represent her.[4]
>
> [Emphasis added.]

[17] Dussault J. dismissed the application for an extension in *Ferrara*, because the grounds of the appeal did not satisfy subparagraph 304(5)(*b*)(iv).[5] Mr. Sherman made the following comment:

> However, Ferrara neglected to meet the condition in subpara. 305(5)(*b*)(iv), that "there are reasonable grounds for appealing from the assessment". The application for extension of time must be accompanied by a Notice of Appeal (subsec. 305(3)), which must show a clear basis on which the appeal might be allowed. If one does not make a case in the Notice of Appeal that is sufficient to overturn the assessment, the extension of time will not be granted.
>
> Since no reasonable grounds for appealing the decision had been shown, Judge Dussault dismissed the application for extension of time.
>
> This case serves as a reminder for anyone applying for an extension of time to object or appeal. Not only does evidence have to be provided of the person's intention or inability to act during the 90-day deadline, but

---

[4] *Corsi v. The Queen*, 2008 TCC 472, general procedure.
[5] *Ferrara v. The Queen*, 2002 CarswellNat 251, [2002] G.S.T.C. 18, 2002 G.T.C. 195, 2003 G.T.C. 806, [2003] G.S.T.C. 92 (T.C.C.).

> enough reasons have to be set out in the Notice of Objection, or Notice of Appeal, to show that the assessment is likely incorrect.

[18] In *Schafer*, the Federal Court of Appeal held that the ETA does not require anyone to have acknowledged receipt of the notice of assessment. Despite their unanimous position, the judges appeared to be somewhat frustrated with the rigidity of the rules governing the question. Isaac J.A. stated:

> 12 . . . Paragraph 304(5)(*a*) does not require the Minister to serve the notice of assessment on the taxpayer, personally, or even that the notice be received by the taxpayer. The paragraph merely states that the Tax Court shall not hear an application for an extension of time if it is brought more than one year beyond the expiration of time limited by subsection 301(1.1). Subsection 301(1.1) states that the limitation period begins to run ninety days after the notice is "sent." Therefore, the only requirement is that the Minister demonstrate that the notice was sent. There 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.
>
> 13 But even if, contrary to what I have concluded to be the correct interpretation of "sent" in subsection 301(1.1), and the word "sent" means that the taxpayer must have received the notice of assessment, then, in any event, subsection 334(1) of the ETA applies in this case and the respondent is deemed to have received the notice of assessment on 2 September 1993.
>
> 14 The Tax Court considers this subsection to create a rebuttable presumption as to the date that the notice was received. With respect, I do not agree.
>
> 15 In *St. Peter's Evangelical Lutheran Church (Ottawa)* v. *Ottawa (City)*, McIntyre J. stated as follows:
>
> > It is true, of course, that the words "deemed" or "deeming" do not always import a conclusive deeming into a statutory scheme. The word must be construed in the entire context of the statute concerned. . . . Any other conclusion [than a conclusive deeming provision] would frustrate and break down the whole scheme of the Act designed specifically to accomplish both the preservation of the heritage of Ontario and the protection of landowners.

> The question therefore becomes whether the conclusion that subsection 334(1) contains a rebuttable deeming provision that would frustrate the scheme of the ETA.

16 In my respectful view, subsection 334(1) does not create a rebuttable presumption. I have come to this conclusion for two reasons. The first is the conclusion of Stone J.A. in *Bowen* that:

> a requirement for the receipt of the notification would be difficult, if not totally unworkable, from an administrative standpoint.
>
> I agree that it would be extremely difficult to administer a scheme in which a notice is sent by ordinary first class mail that would require the Minister to contact every person who has been sent a notice of assessment to ensure that they have, in fact, received it.

17 The second is subsection 335(1) of the ETA. That subsection sets out the manner of proof for the Minister to demonstrate that he has indeed sent the notice of assessment to the taxpayer. It clearly establishes that the onus is on the Minister to establish that he sent the notice to the respondent. There is no corresponding subsection detailing how the Minister or the taxpayer is to establish that the taxpayer received the notice of assessment. The absence of a provision in the ETA detailing the method of proof of receipt or non-receipt of a notice of assessment is, in my respectful view, cogent evidence that the deeming provision is conclusive.[6]

[Emphasis added.]

Sharlow J.A.:

1 I have read in draft the reasons of Mr. Justice Isaac. I agree with his reasoning and conclusion. I wish only to add one comment. Ms. Schafer, representing herself in this matter, stated her argument on the main issue with admirable clarity:

> ... it is only fair and just to interpret the *Excise Tax Act* in a manner that allows a citizen of Canada an opportunity to appeal an arbitrary third party assessment when she learns of it and not allow Revenue Canada to hide behind a

[6] *Schafer v. The Queen*, 2000 CarswellNat 1948, [2000] G.S.T.C. 82, 2000 D.T.C. 6542, 2000 G.T.C. 4148, 261 N.R. 62, [2000] F.C.J. No. 1480 (FCA).

> technical interpretation of laws, that would permit Revenue Canada not to be subjected to an independent review of its assessments by the Tax Court.

2 The Tax Court Judge obviously agreed with the principle underlying Ms. Schafer's argument, as do I, although I am unable to conclude that the provisions of *Excise Tax Act* governing applications for an extension of time can reasonably bear an interpretation that achieves the result Ms. Schafer seeks. [Emphasis added.]

5 This result has much to commend it. While doing no substantial violence to the scheme of the *Excise Tax Act* relating to assessments and collection, it ensures that a taxpayer has a chance to challenge an assessment that, through no fault of her own, is not brought to her notice in time to permit the statutory deadline to be met.

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.

EDITORIAL COMMENT

This case was a follow-up to the decision of the Tax Court in *Schafer*, [1998] G.S.T.C. 7. In that case, the appellant appealed five of six assessments issued to her for having received transfers of property from her husband and a golf club corporation controlled by him. Both her husband and the corporation had GST debts to Revenue Canada.

. . .

At the Tax Court, even though the extension of time application would normally have had to be made by December 1994, Judge Bowman found a solution. He ruled that the assessment was never received by the appellant, and thus that the objection was filed on time because it was filed within 90 days of the appellant's first receiving a copy of the notice of assessment.

Although the evidence of Revenue Canada's mailing procedures suggested on the balance of probabilities that the assessment had been *mailed*, it apparently was never received. The most cogent evidence of this was the

fact that the appellant had objected to the other five assessments. There would have been no reason for her not to object to this one. [Emphasis added.]

There was a difference between this case and two earlier cases quoted in the Tax Court's judgment, *Aztec Industries* and *Rick Pearson Auto Transport*. In those cases it was ruled that the assessment had likely never been *mailed*. Here the Court concluded that it had been mailed but was never *received*. This left Judge Bowman with a problem: how to get around the rule in s. 334 that deems mail to be received on the day it is posted.

Unfortunately, as I noted in my editorial comment to the Tax Court ruling, Judge Bowman's solution was to rule that the word "deemed" in subsec. 334(1) creates only a rebuttable presumption. This runs counter to the use of the word "deemed" throughout Canadian tax legislation. The word creates a "statutory fiction" that decrees that for some particular purpose something shall be taken as being other than what it is: *R. v. Verrette*, [1978] 2 S.C.R. 838. Deemed dispositions or deemed dividends in income tax, or deemed supplies in the GST legislation, are of course not *factual* dispositions, dividends or supplies; and to even suggest that because they do not factually exist, their "deeming" can be rebutted, would be total nonsense. The *Income Tax Act* and the *Excise Tax Act* can only work properly when "deeming" cannot be refuted by the facts.

The Federal Court of Appeal has now agreed that the "deeming" in subsec. 334(1) is absolute and does not create a rebuttable presumption. The Court thus overturned Judge Bowman's ruling, and ruled that the time for objecting had expired. In doing so the Court of Appeal has also effectively overruled several income tax cases referred to in the reasons for decision, such as *Antoniou*.

While the result is decidedly unfair to the appellant, the Court of Appeal's view is that its hands are tied. As Madam Justice Sharlow noted, "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." A remedy, if any, will have to come by way of amendment to the legislation.

This puts taxpayers in an impossible situation, in cases where an assessment or reassessment is mailed but never reaches them through no fault of their own. The only saving grace is that, in most cases, the assessment or reassessment is followed by collection action on the CCRA's part, which effectively alerts the taxpayer to the fact that the assessment has been issued.

[19] However, in *Schafer*, the Federal Court of Appeal held that, even in cases where there is uncertainty regarding the receipt of the notice of assessment, receipt is not required in order for the ETA to apply and for the application for an extension to be dismissed.

> 7 In my respectful view, however, the relevant sections of the ETA clearly state that the time period for filing a notice of objection begins to run on the date that the Minister sends the notice of assessment, and that receipt of that notice is not required. . . .[7]

[20] According to the decision in *Schafer*, if the Minister is not able to prove that the notice of assessment was sent, the Appellant, if credible, is entitled to the extension.

[21] Mr. Desgagné's testimony attests that the law firm of Hickson Noonan was not in possession of the notice of assessment. As for Transport Lanfort, the meeting took place in early December (or late November) and the notice of objection was filed [TRANSLATION] "just after the holidays", but still within the one-year period contemplated in the Act.

[22] It is possible that the Applicant received the notice of assessment but did not act on it. It is also possible that the notice got lost due to the confusion regarding the address.

[23] Counsel for the Respondent therefore submits that, in the case of Transport Lanfort, the notice of assessment was received and forwarded to counsel, but the notice of objection was not sent on time.

[24] As for the matter involving the Applicant personally, he claims never to have received the notice of assessment, but merely a payment demand. When counsel asked for that second notice of assessment, the Minister only sent it after the deadline for sending a notice of objection had elapsed. The Applicants submit that they should not suffer a tax prejudice due to the problems that they had as a result of their lawyer having been elected to the House of Commons.

The relevant provisions

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[7] *Ibid.*

[25] Subsection 335(10) contains the presumption that the date indicated on the notice of assessment is the date on which it was sent:

> **335. (1)** Where, under this Part or a regulation made under this Part, provision is made for sending by mail a request for information, a notice or a demand, an affidavit of an officer of the Agency, sworn before a commissioner or other person authorized to take affidavits, setting out that the officer has knowledge of the facts in the particular case, that such a request, notice or demand was sent by registered or certified mail on a named day to the person to whom it was addressed (indicating the address), and that the officer identifies as exhibits attached to the affidavit the post office certificate of registration of the letter or a true copy of the relevant portion thereof and a true copy of the request, notice or demand, is evidence of the sending and of the request, notice or demand.
>
> **Mailing date**
>
> (10) Where any notice or demand that the Minister is required or authorized under this Part to send or mail to a person is mailed to the person, the day of mailing shall be presumed to be the date of the notice or demand.
>
> **Extension of time by Tax Court**
>
> **304. (1)** A person who has made an application under section 303 may apply to the Tax Court to have the application granted after either
>
> (a) the Minister has refused the application, or
>
> (b) ninety days have elapsed after service of the application under subsection 303(1) and the Minister has not notified the person of the Minister's decision,
>
> but no application under this section may be made after the expiration of thirty days after the day the decision has been mailed to the person under subsection 303(5).
>
> **How application made**
>
> (2) An application under subsection (1) shall be made by filing in the Registry of the Tax Court, in accordance with the provisions of the *Tax Court of Canada Act*, three copies of the documents filed under subsection 303(3).
>
> **Copy to Commissioner**

(3) After receiving an application made under this section, the Tax Court shall send a copy of the application to the office of the Commissioner.

Powers of Court

(4) The Tax Court may dispose of an application made under subsection (1) by

(a) dismissing it, or
(b) granting it,

and in granting an application, it may impose such terms as it deems just or order that the notice of objection or the request be deemed to be a valid objection or request as of the date of the order.

When application to be granted

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

(a) the application was made under subsection 303(1) within one year after the expiration of the time otherwise limited by this Part for objecting or making a request under subsection 274(6), as the case may be; and

(b) the person demonstrates that

(i) within the time otherwise limited by this Act for objecting,

(A) the person was unable to act or to give a mandate to act in the person's name, or

(B) the person had a bona fide intention to object to the assessment or make the request,

(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, and

(iii) the application was made under subsection 303(1) as soon as circumstances permitted it to be made.

(iv) there are reasonable grounds for appealing from the assessment.

[26] The conditions set out in subsection 304(5) are not very demanding.

[27] In the case at bar, it appears that the Applicant was unable to successfully give a mandate to act in his name. He relied on several lawyers, who, due to a combination of circumstances, were unable to file a notice of objection. It is clearly not this Court's role attribute possible fault or error. It is sufficient to be able to find that the Applicant was unable to act on the notice of assessment issued.

[28] The Applicant's testimony, validated by his clearly-established habit of relying on legal advice with respect to tax matters, as well as the evidence as a whole, satisfy the condition in subparagraph (i). It is certainly clear that the Applicant intended to object to the assessment.

[29] The conditions set out in subsection 304(5) are straightforward and precise:

> (i) – …the person was unable to act or to give a mandate to act in the person's name, or … had a *bona fide* intention to object to the assessment or make the request;
>
> (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 it to be made; and
>
> (iv) – there are reasonable grounds for appealing from the assessment.

[30] In his notice of objection dated July 5, 2007, the Applicant sets out the grounds of his objection to the assessment:

> [TRANSLATION]
>
> Marc Simard formally denies owing any amounts whatsoever to the Ministère du revenu du Québec for the reasons reported hereunder:
>
> > 1 – Assessments PQ-2007-9555 and PQ-2007-9556 are personal assessments regarding Marc Simard by reason of his directorship of Transport Lanfort Inc.

> 2 –Revenu Québec claims that the corporation owed it money under notices of assessment #1575061 and #1580616, which are the subject of a pending objection.
>
> 3 – Moreover, Transport Lanfort Inc. ceased operations in June 2004. Consequently, the period covered by notices of assessment PQ-2007-9555 and PQ-2007-2556 [*sic*] should be limited to the period from 2003 to June 20, 2004.
>
> 4 – In addition, Revenu Québec refused, wrongly or without basis, to recognize the validity of the ITC claims made by Transport Lanfort Inc. while it was operating. This ITC disallowance deprived the company of significant input tax credit rebates to which it was entitled.
>
> 5 – Marc Simard will show that the total input tax credits to which Transport Lanfort Inc. is entitled exceeds the total amounts claimed in notices of assessment PQ-2007-9555 and PQ-2007-2556 [*sic*] and therefore, that once the set-off is effected, Transport Lanfort Inc. has a credit balance with Revenu Québec.

[31] On a balance of probabilities, the requisite conditions have been met. The applications are accordingly allowed.

Signed at Ottawa, Canada, this 6th day of March 2009.

"Alain Tardif"

Tardif J.

Translation certified true
On this 16th day of April 2009
Monica Chamberlain, Reviser

CITATION:	2009 TCC 131
COURT FILE NOS.:	2007-4859(GST)APP, 2007-4861(GST)APP
STYLES OF CAUSE:	MARC SIMARD, TRANSPORT LANFORT INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	September 5, 2008
REASONS FOR ORDERS BY:	The Honourable Justice Alain Tardif
DATE OF ORDERS:	March 6, 2009

APPEARANCES:

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Counsel for the Respondent:	Danny Galarneau

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