Docket: 2010-1331(IT)APP

BETWEEN:

SUGANTHI NATARAJAN,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on June 14, 2010 at Windsor, Ontario.
Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Applicant:	John Mill
Counsel for the Respondent:	Ryan Hall

ORDER

On January 27, 2010, Suganthi Natarajan, (the "Applicant") filed an application to extend the time to file notices of objection against reassessments of her 2004 to 2006 taxation years (the "2004 to 2006 reassessments").

At the hearing of the application, the Applicant's counsel agreed that the application was not properly framed. The Applicant asked this Court to vary the Consent to Judgment disposing of the Applicant's appeals of the 2004 to 2006 reassessments on the basis that it was entered into as a result of a common mistake. Counsel for the Respondent was taken by surprise by this change of direction. To avoid prejudice to both parties, I allowed the parties to file written submissions on the matter. They have done so and I am now ready to dispose of this matter.

The application is dismissed in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 9th day of November 2010.

"Robert J. Hogan"

Hogan J.

Citation: 2010 TCC 582
Date: 20101109
Docket: 2010-1331(IT)APP

BETWEEN:

SUGANTHI NATARAJAN,

Applicant,

and

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Respondent.

REASONS FOR ORDER

Hogan J.

Introduction

[1] On January 27, 2010, Suganthi Natarajan, (the "Applicant") filed an application to extend the time to file notices of objection against reassessments of her 2004 to 2006 taxation years (the "2004 to 2006 reassessments").

[2] At the hearing of the application, the Applicant's counsel agreed that the application was not properly framed. The Applicant asked this Court to vary the Consent to Judgment disposing of the Applicant's appeal of the 2004 to 2006 reassessments. Counsel for the Respondent was taken by surprise by this change of direction and to avoid prejudice to both parties, I have allowed counsel to submit their respective positions in writing to me after hearing evidence on the matter. I am now ready to dispose of this matter.

Factual Background

[3] In the relevant years, the Applicant lived in Canada in the Windsor area but was employed in Detroit as a computer programmer. She was eligible to participate in a Deferred Income Plan ("DIP") established by her US employer, where part of her wages could be deferred until the termination of her employment. She contributed amounts to the DIP in 2003, 2005 and 2006 (the "DIP contributions").

[4] As a Canadian, working in the US, she was subject to US taxation on her salary and wages. However, she was not subject to immediate US taxation on the DIP contributions because these amount were not viewed as having been received or constructively received under US tax principles. The DIP contributions would be subject to US taxation upon receipt; generally speaking, that would be the time of termination of the Applicant's employment.

[5] The Applicant did not report the funds that she had used to make the DIP contributions as income in her Canadian tax return on the basis that the funds were not received by her. If the Minister's reassessments were to stand, there would be a potential for double taxation as the Applicant would be unable to benefit from a foreign tax credit for the US tax payable upon receipt of the DIP contributions upon termination of employment. This result can occur if the taxing event does not occur at the same time in both jurisdictions.

[6] The net result of the Applicant's tax filing position in both jurisdictions is that the Applicant constitutes savings on a pre-tax basis much in the same way that a contribution to a registered retirement savings plan benefits from tax deferral.

[7] The Minister of National Revenue (the "Minister") reassessed the Applicant's 2003 DIP contributions (the "2003 reassessment") on the basis that the amount was received by the Applicant. The Applicant filed a notice of objection against the 2003 reassessment.

[8] On March 6, 2008, the reassessment for the 2003 taxation year was confirmed by way of a letter sent to the Applicant.

[9] On March 31, 2008, the Canada Revenue Agency (the "CRA") sent a letter explaining that the Applicant's 2004–2006 returns would be reassessed. The reassessments were issued on March 31, 2008 and they included the DIP contributions made to the DIP as taxable income in the years of contribution.

[10] On June 12, 2008, the Applicant filed an informal notice of appeal before the Tax Court of Canada for the years 2003 to 2006.

[11] On November 3, 2009, at the commencement of the hearing of the Applicant's 2003 to 2006 appeals, counsel for the Respondent pointed out to the Applicant's counsel that the Applicant had omitted to file notices of objection with respect to the 2004–2006 reassessments and, as a result, those appeals had not been properly initiated before the Court. As more than 1 year and ninety days had passed since the date of the 2004–2006 reassessments, the delay during which the Applicants could apply for an extension of the delay to file notices of objection against those reassessments had expired. After consulting with his client, counsel for the Applicant agreed that only the appeal for the 2003 reassessment could proceed. The 2003 appeal was heard and the Court reserved judgment at the end of the hearing.

[12] On December 4, 2009, prior to the Court rendering judgment on the 2003 appeal, the parties filed a Consent to Judgment (the "Consent"). In the Consent, the parties agreed that the 2003 appeal would be allowed and the Minister would issue a reassessment on the basis that the DIP Contributions of $83,229 made in that year were not received. The Consent also provided that the 2004–2006 appeals would be dismissed on the grounds that the Applicant had failed to file notices of objection in respect of those years. On December 19, 2009, I rendered a judgment giving effect to the Consent.

[13] On January 21, 2010, the Applicant filed an application to extend the time to file notices of appeal against the 2004 to 2006 reassessments. At the hearing of the application, the Applicant's counsel agreed that the application had not been properly framed. Indeed, the purpose of the application was to obtain a judgment from this Court varying the Consent as it pertains to the 2004 to 2006 reassessments. Counsel for the Applicant argues that the Consent was entered into by error and that I should vary it on the basis of the doctrine of common mistake.

[14] The Applicant testified as the only witness at the hearing. She claims that she gave her counsel documents on December 29, 2009 that he needed to prepare an application under the fairness program. I understand that the purpose of the fairness application was to convince the Minister to make a reassessment as to the 2004-2006 taxation years of the Applicant on the same basis as her 2003 taxation year following the Consent to Judgment.

[15] Among the documents received by counsel from his client to prepare the fairness application was a statement of account dated September 17, 2008 (the "2008 statement") received from the CRA. This statement shows the amount owed by the Applicant as of that date. There is an interesting annotation on the statement. The statement shows the amount owed by the Applicant as being nil. However, it is specified that the nil balance does not include taxes owing in respect of which the Applicant had filed objections. The exact words are as follows:

> Balance indicated does not include the unpaid amount of $84,241.80 for the taxation years which you filed notices of objection.

[16] The $84,241.80 balance of tax owing is the aggregate of two amounts. Approximately $30,037 pertains to the 2004 to 2006 reassessments. The balance pertains to the 2003 reassessment.

[17] The Applicant explained that she did communicate verbally with the CRA following receipt of the 2004-2006 reassessments to tell them that she intended to contest these reassessments in the same way that she had contested the 2003 reassessment. It appears reasonable to infer that the 2008 statement was issued as a result of that phone call.

[18] The Applicant introduced into evidence a series of email exchanged between herself and counsel. From the exchange, it appears that counsel was spending most of his energies on joining the 2004 to 2006 reassessments with the appeal he was preparing for the 2003 reassessment. He appears to have left the Applicant with the responsibility of dealing with the 2004 to 2006 reassessments at the administrative stage without reminding her of the necessity of filing formal notices of objection against the 2004 to 2006 reassessments as a precondition for filing an appeal before this Court from those reassessments. The Applicant appears to have been unaware of the fact that she was required to file notices of objection.

Position of the Parties

Applicant

[19] The Applicant submits that the judgment based on the Consent should be varied on the basis that consent was entered into in error. The common mistake

stems from the failure of both parties to appreciate that the CRA had been verbally informed by the Applicant that she intended to contest the 2004 to 2006 reassessments and that the CRA treated this communication as an objection. In support of this allegation, the Applicant alleges that the 2008 statement is evidence that the CRA intended to treat the verbal communication as a valid notice of objection.

[20] According to counsel's view, section 165 is permissive. This provision does not mandate a taxpayer to file notices of objection in writing only. Furthermore, the Minister is "served" with the notice if he is aware of the taxpayer's intention to contest a reassessment.

[21] Counsel makes it clear that he is not at all seeking to have the full Judgment or Consent for that matter set aside; rather, counsel is only asking this Court to set aside the part of the Consent which dismisses the Applicant's 2004 to 2006 appeals; the Consent and Judgment with respect to the variation of the 2003 reassessment are to be left untouched. Then, the Court would eventually have to decide on the 2004 to 2006 reassessments on the basis of the evidence heard at the initial trial unless the parties entered into a new Consent for those reassessments.

[22] The Applicant submits that the Court has the power to vary its judgment and that the doctrine of *res judicata* cited by the Minister's counsel does not bar the relief sought by the Applicant.

Respondent

[23] The Respondent submits that there was no common mistake made by the parties because there is no evidence that the Applicant filed a formal notice of objection in writing that was served on the Chief of Appeals, as required by section 165 of the *Income Tax Act* (the "*ITA*"). According to the Respondent, subsection 165(1) is permissive in the sense only that a taxpayer "may" file an objection. If the taxpayer fails to do so the taxpayer may be deprived of his right to file an appeal before this Court unless the failure is cured.

[24] The Respondent adds that consideration of this issue is also barred by *res judicata*. According to the Respondent, this doctrine bars further action on all undecided but related issues that could have been raised in the matter. In the case at hand, it is submitted that the Applicant's counsel was unaware of evidence that

might have served to argue that, somehow, a notice of objection had been filed. It was incumbent upon counsel to verify these points prior to agreeing to the Consent. Finally, the Respondent argues that the Applicant should not be granted the relief that she seeks. Were I to find that a notice of objection was indeed filed and that I have the powers to correct the Consent and the Judgment, to give effect to it, the whole judgment should be set aside. The reason for this is fairness. The Respondent may have agreed to enter into the Consent because of the dismissal of the 2004-2006 appeals. This would bring the parties back to square one, namely, they could either enter into a new Consent or ask me to render judgment on the basis of the evidence heard at the trial.

Issues

[25] In view of the above, the issues can be summarized as follows:

1. Was there a valid notice of objection filed, and, in the affirmative, did the parties enter into the Consent on the basis of a common mistake?
2. Does *res judicata* act as a bar to varying the judgment?
3. In the negative, what is the appropriate relief in this case?

Analysis

[26] In my opinion there is little support for the Applicant's contention that a notice of objection was made as required by the *ITA*. In her application for an extension of time, it is admitted that no formal objection in writing was served on the Minister. The Applicant's counsel signed a Consent to that effect on her behalf.

[27] The Applicant now asks the Court to change the Consent on the grounds that the CRA was aware of the Applicant's intention to litigate the 2004-2006 taxation years. According to the Applicant, the 2008 statement of account shows that the tax liability reassessed by the 2003-2006 taxation years, is pending because the matter is in dispute. The Applicant's argument is that an objection may be made verbally. There is no prescribed manner in which it needs to be made, or for that matter, served on the CRA. The Applicant rests her case on an interpretation of the word "may" in subsection 165(1) of the *ITA*. The provision reads as follows:

> (1) **Objection to assessment**. A taxpayer who objects to an assessment under this Part may serve on the Minister a notice of objection, in writing, setting out the reasons for the objection and all relevant facts,

[28] In my view, in spite of the word “may”, that section does require that the notice be in writing and served in the matter set out in subsection 165(2) of the *ITA*. The latter provision provides that a taxpayer must serve the notice of objection by addressing it to the Chief of Appeals in a District Office or a Taxation Center of the CRA, and delivering it by hand or mail. In my view, this confirms the requirement that the notice of objection must be made in writing. Subsection 165(6) provides that a notice of objection may be accepted by the Minister if it is served in a manner other than as prescribed in 165(2). In other words, the notice of objection is not delivered or mailed to the person identified in that provision. There is no mention that the Minister may waive the requirement that the notice of objection be in a form other than in writing. In this light, the word “may” in subsection 165(1) does not modify or otherwise make the requirements of that subsection permissive. An Applicant may choose not to file a notice of objection and try to persuade the Minister to change the reassessment.

[29] However, if the taxpayer chooses that route and fails to persuade the Minister to vary the reassessment, he or she cannot file an appeal before this Court because subsection 169(1) of the *ITA* makes it clear that the taxpayer must have served a notice of objection under section 165 in order to file an appeal before this Court.

[30] Courts have approved different ways of filing a notice of objection, but in those exceptional cases, the notice in issue was something in writing that was given to the Minister’s representative. For example, in *Schneidmiller v. The Queen*,[1] the taxpayer challenging an assessment called the CRA that sent him a ‘T1 Adjustment Request’, which he filed but was later lost by the CRA. Over a year later, he filed notices of objection, but the CRA advised the taxpayer it was too late. Beaubier J. found that, in those circumstances, the adjustment request was sufficient to be treated as a notice of objection and allowed the appeal.

[31] However, where the taxpayer has not served any written notice that can be considered an objection, there is no support in the case law for finding a valid notice of objection was given.

[32] In *870 Holdings Ltd. v. Canada*, the Applicant had sent a letter to the CRA requesting more time to provide information. The Federal Court of Appeal said that it was impossible to treat the letter as a notice of objection. To constitute such a notice, a letter must object in some way to a particular assessment, and set out some relevant

[1] 2009 TCC 354, 2009 DTC 1192.

facts in support of the taxpayer's contentions. The Court dismissed the appeal, and stated:

> The statutory requirements for the filing of a valid of Notice of Objection are minimal, but must nevertheless be complied with.[2]

[33] The Applicant has cited *Jones v. Canada (Minister of National Revenue)*.[3] In that case, the applicant claimed to have sent a notice of objection on his 1988 tax assessment to the Minister in 1990. The response was that the Minister had received no notice of objection on that taxation year until 2001. The Applicant then appealed before the Tax Court requesting that the Minister exercise his discretion under subsection 165(6) to accept a notice of objection despite the fact that it did not comply with service requirements under subsection 165(2).

[34] Snider J. took a different view: rather, the issue was whether or not the Applicant had satisfied the requirements under subsection 165(1). The Court held that those requirements were mandatory. With regards to notice, Snider J. stated:

> In my view, the party who seeks to rely on a provision and who is in a position to adduce facts in support of such reliance ought to bear the burden of proving that such reliance is warranted.[4]

[35] To summarize, a notice of objection must be in writing, it must include an actual objection to an assessment with some supporting facts, and it must be served on the Minister. The Court has been willing to accept different types of documents as notice, as long as they had been properly served on the Minister. When a taxpayer alleges that a notice has been sent to the Minister, he has the burden of proof. I have not found any case where the taxpayer was allowed to proceed to an appeal without having filed some kind of notice of objection in writing.

[36] The Applicant has failed to persuade me that she complied with the requirements of section 165 by filing a notice of objection in writing served in the manner prescribed in subsection 165(2). Therefore, I am of the view that the parties were not acting on a common mistake in arguing to the dismissal of the 2004 to 2006 appeals in the Consent. In addition, I concur with the Respondent that *res judicata* or cause of action *estoppel* would bar me from varying the Consent and my Judgment. Cause of action *estoppel* applies if, the following four conditions are met:

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[2] *870 Holdings Ltd. v. Canada*, 2003 FCA 460, at para. 2, [2004] 2 CTC 83, 2004 DTC 6001.
[3] *Jones v. Canada (Minister of National Revenue)*, 2004 FC 382, [2004] 2 CTC 339, 2004 DTC 6185.
[4] *Ibid.* at para. 20.

1. There must be a final decision of the court of competent jurisdiction in the prior action;

2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action;

3. The cause of action in the prior action must not be separate and distinct; and

4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[37] The second requirement is satisfied since the parties are identical in this matter. The third requirement is also satisfied, because the issue of an appeal on the 2004-2006 reassessments was part of the original action. As to the fourth requirement, the Applicant is now pleading that there are facts, unknown to her at the time of trial, that indicate that a notice of objection had been made. However, even assuming *arguendo* the truth of that submission, I am not persuaded that the Applicant and her counsel took reasonable steps to verify the evidence available to them so as to be able to argue that notices of objection had been filed.

[38] That being said, it appears that the Applicant has a good fairness case to present to the Minister since the 2004-2006 reassessments deal exactly with the same issue as the 2003 reassessment. There is no reason, apparent to me, why the DIP Contributions should be treated differently as to each of those years.

[39] For all of these reasons, the application is dismissed.

Signed at Ottawa, Canada, this 9th day of November 2010.

"Robert J. Hogan"

Hogan J.

CITATION:	2010 TCC 582
COURT FILE NO.:	2010-1331(IT)APP
STYLE OF CAUSE:	SUGANTHI NATARAJAN v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Windsor, Ontario
DATE OF HEARING:	June 14, 2010
REASONS FOR ORDER BY:	The Honourable Justice Robert J. Hogan
DATE OF ORDER:	November 9, 2010

APPEARANCES:

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