

Docket: 2008-3353(IT)APP

BETWEEN:

ROBERT KESHANE,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on November 2, 2010 at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Applicant: Jaimie Lickers
Kanata Penn-Maracle (student-at-law)

Counsel for the Respondent: Brandon Siegal

ORDER

The application, for an order extending the time within which an appeal in respect of assessments made under the *Income Tax Act* for the 1999, 2000, 2001, 2002 and 2006 taxation years may be instituted, is dismissed.

Signed at Toronto, Ontario this 21st day of December 2010.

“J. M. Woods”

Woods J.

BETWEEN:

E. DIANE MARTIN,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on November 2, 2010 at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Applicant: Jaimie Lickers
Kanata Penn-Maracle (student-at-law)

Counsel for the Respondent: Brandon Siegal

ORDER

The application, for an order extending the time within which an appeal in respect of an assessment made under the *Income Tax Act* for the 2006 taxation year may be instituted, is dismissed.

Signed at Toronto, Ontario this 21st day of December 2010.

“J. M. Woods”

Woods J.

Docket: 2009-506(IT)APP

BETWEEN:

DENISE TOULOUSE,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on November 2, 2010 at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Applicant: Jaimie Lickers
Kanata Penn-Maracle (student-at-law)

Counsel for the Respondent: Brandon Siegal

ORDER

The application, for an order extending the time within which an appeal in respect of assessments made under the *Income Tax Act* for the 2000, 2001, 2002, 2003, 2004 and 2005 taxation years may be instituted, is dismissed.

Signed at Toronto, Ontario this 21st day of December 2010.

“J. M. Woods”

Woods J.

Docket: 2008-1537(IT)APP

BETWEEN:

STEFAN J. ELLIOTT,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on November 2, 2010 at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Applicant: Jaimie Lickers
Kanata Penn-Maracle (student-at-law)

Counsel for the Respondent: Brandon Siegal

ORDER

The application, for an order extending the time within which an appeal in respect of an assessment made under the *Income Tax Act* for the 2006 taxation year may be instituted, is dismissed.

Signed at Toronto, Ontario this 21st day of December 2010.

“J. M. Woods”

Woods J.

Citation: 2010 TCC 651
Date: 20101221
Dockets: 2008-3353(IT)APP
2008-3349(IT)APP
2009-506(IT)APP
2008-1537(IT)APP

BETWEEN:

ROBERT KESHANE,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent;

AND BETWEEN:

E. DIANE MARTIN,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent;

AND BETWEEN:

DENISE TOULOUSE,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent;

AND BETWEEN:

STEFAN J. ELLIOTT,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Woods J.

[1] These reasons relate to four separate applications to extend time to institute appeals to this Court from assessments under the *Income Tax Act*. The applicants were represented by the same counsel and the applications were heard at the same time.

[2] The applicants and the assessments are listed below.

- Robert Keshane – 1999, 2000, 2001, 2002 and 2006 taxation years
- E. Diane Martin – 2006 taxation year
- Denise Toulouse – 2000, 2001, 2002, 2003, 2004 and 2005 taxation years
- Stefan J. Elliott – 2006 taxation year

[3] The appeals which the applicants seek to institute all relate to the same issue. Is employment income that they received from Native Leasing Services (NLS) exempt from tax by virtue of paragraph 87(1)(b) of the *Indian Act*? The applicants submit that the income is exempt, on the basis that the income is personal property of an Indian situated on a reserve. I understand that there are over 1,000 similar appeals pending in this Court that have been instituted by employees of NLS.

[4] Subsection 87(1), as it read during most of the relevant periods, is reproduced below. An amendment effective in 2006 is not relevant.

87(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,

- (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
- (b) the personal property of an Indian or a band situated on a reserve.
(Emphasis added.)

[5] Where an appeal has not been instituted within the time provided by subsection 169(1) of the *Income Tax Act* (ITA), this Court may allow an extension of time provided that the requirements set out in subsection 167(5) have been satisfied. The subsection reads:

167(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
 - (i) within the time otherwise limited by section 169 for appealing the taxpayer
 - (A) was unable to act or to instruct another to act in the taxpayer's name, or
 - (B) had a *bona fide* intention to appeal,
 - (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, and
 - (iv) there are reasonable grounds for the appeal.

Time limit for application

[6] Paragraph 167(5)(a) provides that an extension of time cannot be granted unless the application has been made within a specified deadline. The general rule is that the application must be made within one year and 90 days from the date of the notice of confirmation.

[7] The applications before me were all filed in time except for the applications filed by Robert Keshane in reference to assessments for the 1999, 2000, 2001 and 2002 taxation years. The notices of confirmation for these assessments were all dated

April 20, 2006. The applications for extension of time were not filed until October 9, 2008, which is beyond the one year and 90 day time limit in para. 167(5)(a). These facts are not in dispute.

[8] The applications in respect of these assessments will be dismissed for this reason.

[9] Counsel for Mr. Keshane submits that this should not be a bar because there would be no prejudice to the respondent if these applications were allowed. The problem with this submission is that the legislation does not provide the Court with discretion to overlook the application deadline.

[10] The only application that remains to be decided for Robert Keshane is the application for the 2006 taxation year which was filed in time.

Reasonable grounds for the appeal

[11] The remaining applications should be allowed if the requirements set out in s. 167(5)(b) have been satisfied. A reasonably liberal interpretation of these requirements is appropriate but the requirements cannot be ignored.

[12] In all of these applications, the applicants have failed to demonstrate that there are reasonable grounds for their appeals, as required by s. 167(5)(b)(iv). The applications should be dismissed for this reason.

[13] Counsel for the applicants submits that since the tax issue is very fact specific, it is not feasible to make a determination as to whether there are reasonable grounds for the appeals without hearing all the evidence.

[14] I disagree with this submission.

[15] Although applying para. 87(1)(b) of the *Indian Act* in a particular case requires a fact specific inquiry, the approach taken in respect of NLS employees in previous judicial decisions provides considerable guidance as to whether there are reasonable grounds for appeal. Most notable are the decisions in *The Queen v. Shilling*, 2001 DTC 5420 and *Horn et. al. v. MNR*, 2008 FCA 352, 2008 DTC 6743. Leave to appeal to the Supreme Court of Canada was denied in both cases.

[16] In light of this background, I would agree with counsel for the respondent that in order to satisfy the Court that there are reasonable grounds for an appeal in these

applications, the applicant must present a reasonable argument that the conclusions in *Shilling* and *Horn* decisions are not applicable based on their particular facts. None of the applicants have attempted to do this.

[17] Counsel for the applicants also submits that some latitude should be given because counsel are handling a great many appeals by NLS employees and they have not been provided with much time to prepare.

[18] I cannot agree with this submission. The requirement to have reasonable grounds for an appeal recognizes that to grant extensions of time where there are no reasonable grounds would be a waste of scarce judicial resources. If counsel did not have time to properly prepare for these applications, other counsel could have been retained. I would also note that Webb J. had previously denied an application to extend time to an NLS employee for similar reasons: *Johnston v. The Queen*, 2009 TCC 327, 2009 DTC 1198. The position that the respondent takes in these applications is not a surprise.

[19] The applicants also submit that the *Shilling* and *Horn* decisions have misinterpreted decisions of the Supreme Court of Canada in applying the connecting factors analysis to determine the location of employment income. Counsel submits that the “location of the debtor” test set out in *Nowegijick v. The Queen*, 83 DTC 5041 (SCC) is the appropriate test to be applied.

[20] I also do not agree with this submission. Counsel did not make full arguments in respect of this issue in these applications and instead referred me to arguments that she proposed to make a few days later in appeals by Joseph Hester and Mildred Bondy. The argument was rejected in those appeals (*Hester et. al. v. The Queen*, 2010 TCC 647), and it is not necessary for me to repeat the reasons here.

[21] Although the requirement in s. 167(5)(b)(iv) should be interpreted broadly so as not to foreclose reasonable arguments, none of the applicants have demonstrated that their appeals have any reasonable prospects of success.

Stacia Loft

[22] Finally, in order to avoid confusion, I would briefly mention that an application to extend time by Stacia Loft was heard together with these applications. This application was withdrawn after the hearing and it is no longer necessary for me to deal with it.

Conclusion

[23] In the result, the applications by Robert Keshane, E. Diane Martin, Denise Toulouse and Stefan J. Elliott will be dismissed.

Signed at Toronto, Ontario this 21st day of December 2010.

“J. M. Woods”

Woods J.

CITATION: 2010 TCC 651

COURT FILE NOS.: 2008-3353(IT)APP
2008-3349(IT)APP
2009-506(IT)APP
2008-1537(IT)APP

STYLES OF CAUSE: ROBERT KESHANE v. HER MAJESTY
THE QUEEN and E. DIANE MARTIN v.
HER MAJESTY THE QUEEN and DENISE
TOULOUSE v. HER MAJESTY THE
QUEEN and STEFAN J. ELLIOTT v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 2, 2010

REASONS FOR ORDER BY: The Honourable Justice J. M. Woods

DATE OF ORDERS: December 21, 2010

APPEARANCES:

Counsel for the Applicants: Jaimie Lickers
Kanata Penn-Maracle (student-at-law)

Counsel for the Respondent: Brandon Siegal

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