

BETWEEN:

LILA PARDIAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on June 3, 2011 and July 6, 2011 at Montreal, Quebec

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant:                      The Appellant herself  
Counsel for the Respondent:        Gabriel Girouard

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**ORDER**

In accordance with the attached Reasons for Order, it is hereby ordered that:

1. the Respondent's motion to dismiss the Appellant's appeal is dismissed;
2. the Appellant's application for an extension within which to file her Notice of Appeal is granted and the Notice of Appeal is deemed to have been filed as of the date of this Order;
3. the Respondent shall have 90 days from the date of this Order to file its Reply to the Notice of Appeal; and
4. the matter of costs shall be left to the trial judge.

Signed at Ottawa, Canada, this 2<sup>nd</sup> day of August 2011.

“G.A. Sheridan”

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Sheridan J.

Citation: 2011TCC375  
Date: 20110802  
Docket: 2011-715(IT)G

BETWEEN:

LILA PARDIAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR ORDER**

Sheridan J.

[1] The Respondent brought a motion for an order to dismiss the appeal of the Appellant's 2005 taxation year on the grounds that the Notice of Appeal had not been filed with the Tax Court of Canada within the time provided by subsection 169(1) of the *Income Tax Act* (the "Act") or, in the alternative, an order extending the time for the Respondent to file its Reply to the Notice of Appeal. The hearing of the motion originally set down for June 3, 2011 was adjourned to July 6, 2011 to permit the attendance of the Appellant, who not understanding that under the *Tax Court of Canada Rules (General Procedure)* her presence was required had sent her husband to represent her.

[2] In support of its motion, the Respondent filed the Affidavit of Mr. Marcel Savaria, Litigation Officer, Canada Revenue Agency. Mr. Savaria was also present at the hearing and testified on behalf of the Minister.

[3] The Appellant and her husband, Sam Saad testified on her behalf.

[4] The following facts are not in dispute: on December 7, 2009 the Minister of National Revenue issued a reassessment ("Original Reassessment") of the Appellant's 2005 taxation year. The Appellant filed a Notice of Objection to the reassessment received by the Minister on December 21, 2009. The Minister

confirmed the reassessment on July 14, 2010<sup>1</sup>. The Appellant did not file her Notice of Appeal with the Tax Court of Canada until March 11, 2011, well beyond the 90-day time to appeal under subsection 169(1) of the *Act*.

[5] However, where a taxpayer has filed a notice of objection to a reassessment but misses the deadline for filing her appeal, she may apply to the Tax Court of Canada under subsection 167(1) for an order to extend the time. In the present case, the one-year period for the Appellant to make an application under subsection 167(1) had not yet expired prior to the hearing of the Respondent's motion to dismiss; accordingly, I treated the Appellant's defence to the Respondent's motion as if it had been a formal application for an extension of time to appeal from the Notice of Confirmation dated July 14, 2010<sup>2</sup>.

[6] Having made the application within the time permitted under paragraph 167(5)(a) of the *Act*, it remained for the Appellant to satisfy the criteria for the granting of an extension of time under paragraph 167(5)(b):

167(5) No order shall be made under this section unless

(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.

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<sup>1</sup> Exhibit R-1.

<sup>2</sup> Note : There is a typographical error in paragraph 1 of the Respondent's Notice of Motion showing the date of the issuance of the of Notice of Confirmation to have been July 14, 2009 rather than 2010 as set out in the Affidavit of Mr. Savaria.

[7] As counsel for the Respondent correctly noted in his submissions, the jurisprudence is clear that for a taxpayer to succeed under paragraph 167(5)(b), all of the criteria must be met; *Dewey v. R.*, 2004 FCA 82 (F.C.A.). This I am satisfied the Appellant has done.

[8] Both the Appellant and her husband, Sam Saad, testified at the hearing. Briefly stated, their answer to the Respondent's motion to dismiss was that they simply did not receive the Notice of Confirmation dated July 14, 2010. Had they done so, they most certainly would have appealed. I say "they" because while the Appellant was involved in the matter, she had also authorized Mr. Saad to handle dealings with the Minister's officials. In support of their contention, they pointed to the fact that when they received the Original Reassessment on December 7, 2009, they promptly filed a Notice of Objection on December 21, 2009. This was confirmed by Mr. Savaria who had made a very thorough review of the Appellant's file. The reason they did not take any steps after the issuance of the Notice of Confirmation on July 14, 2010 was that not having received it, they were under the impression that their objection was still under consideration. To paraphrase Mr. Saad's submission, a taxpayer cannot be expected to appeal from a document of whose existence he is unaware.

[9] I accept the Appellant's evidence that it was not until sometime in January or February 2011 that she realized a decision had been rendered in respect of her Notice of Objection. Around that time, she received a call from her bank to inform her that the Canada Revenue Agency had garnisheed her Child Tax Benefits; this was closely followed by calls from the CRA Collections Department to say they would be proceeding with efforts to collect the amounts owing on the Original Reassessment. The Appellant remembered this date because she depended on such payments and was understandably upset at the news. After consulting with her husband, she filed her Notice of Appeal on March 8, 2011.

[10] I must say that while I found some of their evidence unpersuasive, on the question of whether the Appellant had a *bona fide* intention to appeal "within the time otherwise permitted by section 169 for appealing", both the Appellant and Mr. Saad were quite convincing. I am satisfied that during the 90-day period under subsection 169(1), they continued to believe that, having filed the Notice of Objection and not having heard back from the Minister, everything that could be done to appeal the assessment had been done. In reaching my conclusion, I do not discount the testimony of Mr. Savaria who provided the Court with a thorough review of the Appellant's files and a helpful explanation of the administrative workings of the CRA. However, no process is infallible. In an operation of its size, there is always the risk that a piece of correspondence may not reach its destination. And in any case, satisfying the criterion under sub-subparagraph 167(5)(b)(i)(B)

requires the finding of facts to support the *bona fides* of the taxpayer's intention to appeal rather than whether the Notice of Confirmation was actually sent.

[11] Turning, then, to the criteria under subparagraphs (ii), (iii) and (iv), I am satisfied firstly, that the Appellant filed her appeal as soon as circumstances permitted on March 8, 2011 after having only learned of the confirmation of the Original Reassessment sometime in February 2011. It is also clear that there are reasonable grounds for the appeal: in the second and fifth unnumbered paragraphs of the Appellant's Notice of Appeal, she puts in issue the basis of the Minister's reassessment that in 2005 she received a benefit from a corporation of which she was a director. That leaves only the criterion in subparagraph (ii), that given the reasons for the Appellant's request for an extension of time and the circumstances of the case, it would be "just and equitable" to grant the application. For the reasons set out above and on the footing that justice is better served when matters are decided on the merits rather than on procedural technicalities, I am satisfied that the Appellant has also met this final requirement.

[12] For the reasons set out above, it is hereby ordered that:

1. the Respondent's motion to dismiss the Appellant's appeal is dismissed;
2. the Appellant's application for an extension within which to file her Notice of Appeal is granted and the Notice of Appeal is deemed to have been filed as of the date of this Order;
3. the Respondent shall have 90 days from the date of this Order to file its Reply to the Notice of Appeal;
4. the matter of costs shall be left to the trial judge.

Signed at Ottawa, Canada, this 2<sup>nd</sup> day of August 2011.

"G.A. Sheridan"

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Sheridan J.

CITATION: 2011TCC375

COURT FILE NO.: 2011-715(IT)G

STYLE OF CAUSE: LILA PARDIAK AND  
THE QUEEN

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: June 3, 2011 and July 6, 2011

REASONS FOR ORDER BY: The Honourable Justice G. A. Sheridan

DATE OF ORDER: August 2, 2011

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Gabriel Girouard

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Myles J. Kirvan  
Deputy Attorney General of Canada  
Ottawa, Canada