

Docket: 2022-388(IT)APP

BETWEEN:

FOOi Inc.,

Applicant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on October 11, 2023 at Toronto, Ontario

Before: The Honourable Justice Ronald MacPhee

Appearances:

Counsel for the Applicant: John Sorensen

Counsel for the Respondent: Eric Myles

JUDGMENT

UPON hearing from the parties;

AND in accordance with the attached Reasons for Judgment, the application for an extension of time to file a Notice of Objection with respect to the Applicant's 2018 taxation year is dismissed without costs.

Signed at Ottawa, Ontario, this 22nd day of December 2023.

“R. MacPhee”

MacPhee J.

Citation: 2023 TCC 176
Date: 20231222
Docket: 2022-388(IT)APP

BETWEEN:

FOOi Inc.,

Applicant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

MacPhee J.

I. FACTS

[1] The facts in this unusual case were described aptly by the Applicant’s counsel in this manner: “What we are doing here is wrangling about what kind of bad outcome befalls a taxpayer when the CRA loses their material”.

[2] The Applicant is a Canadian-controlled private corporation with a June 30 year-end. The Applicant was successful in claiming its scientific research and experimental development (“**SR&ED**”) tax credits in the 2017 and 2019 taxation years. It is the claim made by the Applicant for the SR&ED credits for the 2018 taxation year that leads to this litigation. These credits amount to just under \$200,000.

[3] On December 5, 2019, the Applicant’s 2018 T2 income tax return (“**2018 return**”) was late-filed electronically. At the time it was filed, the Applicant had not yet provided the relevant information necessary for their accountants to make a SR&ED claim. The accounting firm assisting the Applicant was Goodman and Associates LLP (“**Goodman**”).

[4] On December 11, 2019, the Minister of National Revenue (“**Minister**”) issued a Notice of Assessment to the Applicant for its 2018 taxation year pursuant to the *Income Tax Act* (“**Act**”).¹

[5] On December 20, 2019, upon receiving the necessary information from their client, Goodman filed with the CRA the SR&ED claim for the 2018 taxation year.² By April 2020, no response had been received from the CRA regarding the SR&ED filing. During 2020, Ms. Sarah Lo, an accountant with Goodman attempted to gather information on the status of the filing with the Canada Revenue Agency (“**CRA**”). Ms. Lo testified she had great difficulty in reaching anyone at the CRA. As this was during the early days of the COVID 19 epidemic, starting in mid March 2020, CRA offices were understaffed, or not staffed at all. I accept the Applicant’s evidence that, after March 2020, it was very difficult to follow up with the CRA on the additional filings they made for the 2018 taxation year.

[6] Approximately a year after the initial Notice of Assessment was issued, in December 2020, the Applicant learned that the CRA could not locate the Applicant’s 2018 SR&ED claim filings.

[7] In response to this revelation, on January 21, 2021, Mr. Alan Goodman (the managing partner of Goodman) sent a letter to the CRA Scientific Research and Experimental Development Division, located on 1 Front Street West, Suite 100 in Toronto, on behalf of the Applicant. This letter explained that the Applicant had filed their SR&ED claim in December 2019, and had received no response. The letter also contained a duplicate copy of the 2018 return which contained the SR&ED claim. There was no mention of “Chief of Appeals” or “objection” in this correspondence.

[8] On March 8, 2021, the Minister informed the Applicant that the SR&ED expenditures claim was denied as the claim was filed more than 12 months after the return was due.

[9] On April 9, 2021, the Applicant’s accountants sent a formal Notice of Objection. The Minister notified the Applicant on June 2, 2021 that the Notice of Objection could not be accepted as it was filed past the prescribed deadlines.

¹ *Income Tax Act*, RSC 1985, c 1 (5th Supp) [Act]. All statutory references herein are to the Act unless otherwise stated.

² As will be set out later, after hearing the testimony from Mr. Goodman and Ms. Lo, I accept that the 2018 SR&ED claim was filed on December 20, 2019, as the Applicant claims.

[10] Three witnesses testified at the hearing. Mr. Goodman and Ms. Lo provided convincing evidence with corroborating documentation that the initial SR&ED claim was made on December 20, 2019. Furthermore, that Goodman made efforts, which were mostly unsuccessful, to follow up on the status of the claim through 2020.

[11] Also testifying was David Michael Morrison, owner of the Applicant. He gave background on FOOi Inc., and testified that it was always the Applicant's intention to pursue the SR&ED claim.

[12] I have concluded that the CRA misplaced the Applicant's original December 20, 2019 filing concerning the SR&ED claim for the 2018 taxation year. The Applicant is not asking for an order that the CRA process this misplaced claim, as this is outside the jurisdiction of the Tax Court.

[13] Unfortunately, even when an error has been committed by the CRA, the requirements of the Act must be met in order to object to the Notice of Assessment. In this case, because an assessment was issued by the Minister in December 2018, a timely notice of objection, pursuant to s.165 of the Act, was required to be filed by the Applicant³.

II. ISSUES

[14] In order for this Court to decide whether to grant the application for an extension of time for serving a Notice of Objection, the parties have raised the following issues:

1. Whether the Applicant filed a Notice Of Objection in their correspondence dated December 20, 2019;
2. If a Notice of Objection is found not to have been filed on December 20, 2019, whether the Applicant filed an application for an extension of time with the Minister by way of their correspondence on January 21, 2021;
3. If I find in the positive to the question above, whether the correspondence dated January 21, 2021 is also a Notice of Objection.

III. ANALYSIS

³ Unfortunately the extensions granted under the *Time Limits and Other Periods Under the Income Tax Act (COVID-19)* offers no relief.

[15] As was recently set out by this Court in *Adams v The King*:⁴

[1] In general terms, the *Income Tax Act* (the “Act”) allows a taxpayer to object to an assessment of tax, interest, or penalty within 90 days of the Minister of National Revenue (the “Minister”) sending the notice of assessment. The Canada Revenue Agency (“CRA”) will then consider the objection. If the CRA agrees with it, they will issue a reassessment. If they do not agree with it, they will not reassess and will confirm the assessment.

[2] If a taxpayer does not serve a notice of objection on the Minister within the normal 90-day deadline, they may apply to the Minister for an extension of time to serve their notice of objection if they apply for the extension within one year from the end of that 90-day period and if they meet certain other conditions.

[3] If the Minister decides not to grant the application for an extension of time, the taxpayer may apply to this Court to grant an order extending time to serve their notice of objection. The same timing condition applies, namely, that the taxpayer must have made their application for an extension of time to the Minister within one year from the expiration of the 90-day period to object. That timing condition is at the heart of these applications.

A. Whether the Applicant filed a Notice of Objection on December 20, 2019

(1) Position of the Parties

(a) Position of the Applicant

[16] With the above general principles in mind, the Applicant submits that their filing with the CRA on December 20, 2019, which was a T2 with the appended SR&ED claim, constituted a Notice of Objection. As part of this argument, they state that this filing challenged the assessing position of the Minister by filing additional information. In effect, they claim their SR&ED claim filed in December 2019 should satisfy the requirement that a Notice of Objection must be filed.

[17] The Applicant submits that the bar for establishing an objection is low. A simple letter can be considered to be a Notice of Objection as there are no strict requirements to use the prescribed form.⁵ Furthermore, the Applicant argues that the taxpayer does not need to be as precise in his Notice of Objection as he would be in his Notice of Appeal.

⁴ *Adams v. The King*, 2023 TCC 86 at paras 1-3.

⁵ *Randall v. The Queen*, 2008 TCC 621 at paras 4 and 7.

[18] In support of this position, the Applicant submits that neither an “Objection” nor a “Notice of Objection” is defined in the Act. In *Schneidmiller v. The Queen*,⁶ this Court held that an objection is a matter of substance, not form. It is a step in opposition to something. The letter sent on December 20, 2019 was not detailed, but its enclosures contained details inconsistent with the December 11, 2019 Notice of Assessment. Therefore, this Court should consider the filing to be a Notice of Objection.

(b) Position of the Respondent

[19] The Respondent argues that the SR&ED claim submitted by the Applicant on December 20, 2019 does not constitute a Notice of Objection. Even if the bar for establishing an objection is not high, the Respondent submits that a SR&ED claim is conceptually and legally different from a Notice of Objection.⁷

[20] The Respondent further submits that since the Applicant had nothing payable in its taxation year ending on June 30, 2018, the Minister’s assessment dated December 11, 2019 represented a nil assessment. The case law is clear that “a taxpayer can neither object to nor appeal from a nil assessment.”⁸ The Respondent submits that this is an additional reason that the application for an extension of time should be dismissed.

(2) Analysis

[21] When a taxpayer receives a Notice of Assessment under the Act, to object to it one must send a written Notice of Objection to the Chief of Appeals, setting out the reasons for the objection and all relevant facts. These brief requirements were clearly established by the Federal Court of Appeal in *870 Holdings Ltd v The Queen*:

The statutory requirements for the filing of a valid Notice of Objection are minimal but must nevertheless be complied with. It must be addressed to the Chief of Appeal [sic] of the relevant district (subsection 165(2)) and

⁶ *Schneidmiller v. The Queen*, 2009 TCC 354 at para 9.

⁷ The Respondent submits that SR&ED claims are founded upon s.37 of the Act whereas objections are found in s.165, 166.1 and 166.2 of the Act.

⁸ *Bormann v. The Queen*, 2006 FCA 83 at para 8.

subsection 165(1) merely requires that the objection, in addition to being in writing, set out the reasons for the objection and the relevant facts.⁹

[22] In contrast, Mr. Goodman, in correspondence with the CRA, described the Applicant's filings dated December 20, 2019 as follows:¹⁰

On December 20, 2019 we updated related SRED schedules, including T661, S60, S566 and S508 in the corporate tax returns for the fiscal year June 30, 2018. On the same date, the corporate tax returns for June 30, 2018 was reviewed by our partner and printed to submit to CRA by paper. In another word, we filed the corporate tax returns with SRED expenditure claims for fiscal year of June 30, 2018 on December 20, 2019 which was before the filing deadline on December 31, 2019.

[23] In this instance, the filing by the Applicant for a SR&ED claim does not challenge an assessment; it presents new information to the Minister who then has the obligation to consider. In fact, “[a]ny adjustments resulting from a review of the SR&ED claim will result in a reassessment of the tax return.”¹¹ Therefore, when sending its SR&ED claim for the 2018 taxation year, there was no requirement for the Applicant to file a Notice of Objection in order for the Minister to consider it.¹² Filing the required form to apply for a tax credit does not constitute a Notice of Objection.

[24] The Minister has discretion to accept a document that does not meet the formal requirements of a Notice of Objection. Ss.165(6) of the Act provides that the Minister may accept a Notice of Objection that was served under s.165 but that was not served in the manner required by ss.165(2). Unfortunately, the Minister has not exercised this discretion in the Applicant's favour. I have no authority to direct the Minister to apply this discretion.

[25] Concerning the Respondent's position that the Applicant could not object to the nil assessment which existed in December 2019, I am in agreement. The right to object, or to bring an appeal before this Court only applies to assessed amounts,

⁹ *870 Holdings Ltd v The Queen*, 2003 FCA 460 at para 2; see also *McClelland v The Queen*, 2004 FCA 315 at para 5.

¹⁰ As part of the formal Notice of Objection that was filed on April 6, 2021

¹¹ Phil Feely and Elizabeth Pringle, “The CRA's SR&ED Claim Processing Procedures” (2007), *7 Tax for the Owner-Manager* 7 at 7.

¹² *870 Holdings*, *supra* note 9 at para 5.

which arises from assessments that determine or confirm the taxpayer's liability to pay a specified amount.¹³ In this matter, no taxes were owing.

[26] The denial of a SR&ED claim can be objected to after the Minister has assessed a taxpayer's income tax return for a taxation year. However, such appeals address whether a claim was properly denied because it did not meet the requirements for a valid SR&ED claim.

[27] In this case, the Applicant's SR&ED claim for its 2018 taxation year has not been assessed on its merits nor evaluated by the Minister when the December 20, 2019 filing was sent by the Applicant's accountants.

[28] For both the reasons put forth by the Respondent, I am in agreement that the Applicant's correspondence dated December 20, 2019 was not a Notice of Objection.

B. Whether the Applicant filed an application for an extension of time and if it constitutes a Notice of Objection

(1) Position of the parties

(a) Position of the Applicant

[29] As noted above, after the Applicant was made aware that the Minister did not have in their records the SR&ED claim forwarded on December 20, 2019, the claim was resubmitted on January 21, 2021. On March 8, 2021 the Minister informed the Applicant that it did not accept the amended Form T661 as it was filed more than 12 months after the return was due.

[30] The Applicant argues that the letter dated January 21, 2021 sent by Mr. Goodman to the Scientific Research and Experimental Development Division of CRA should be regarded as both an application for an extension of time with the Minister (as the 90-day period to file a notice of objection had elapsed) and a Notice of Objection.

[31] The Applicant argues that Goodman, in resubmitting the Company's 2018 SR&ED claim, with a copy of the T2 for greater certainty, fulfilled the requirement of requesting consent from the Minister as a late filed Notice of Objection, as well

¹³ See *Interior Savings Credit Union v. R.* 2007 FCA 151 in which the denied appeal was not about losses but refundable credits.

as an actual Notice of Objection filed prior to the year and 90 days deadline. The Applicant submits that Mr. Goodman's letter dated January 20, 2021 is the application for an extension of time made to the Minister under s.166.1. Pursuant to ss.166.1(2), the letter includes the reason why the objection was not served within the time contemplated by the Act, i.e. that the CRA lost the paper-filed SR&ED claim.

(b) Position of the Respondent

[32] The Respondent argues that the Applicant must be unsuccessful on this argument because the Applicant did not satisfy the legislative requirement set out in s.166.2(5)(a) of the Act. This provision requires that, as a condition for this Court to grant an extension of time, the taxpayer must have previously applied to the Minister of National Revenue for an extension within the time prescribed. The Respondent argues that the January 21, 2020 filing does not do this.

(2) Analysis

[33] Given the passage of time since the December 11, 2019 assessment, the Applicant was well past the 90 day period to file an Objection. According to the provisions of the Act, the Applicant's required next step in order to object was to make an application for an extension of time to the Minister pursuant to s.166.1 of the Act.

[34] The January 20, 2021 letter, in setting out its reasons stated the following:

In the last week of December 2019, we have mailed corporate tax returns with SRED by paper for the fiscal year ended of June 30, 2018. However, we were recently notified by CRA that no copy has been received.

We are now sending a duplicate copy of corporate tax returns for the fiscal year ended of June 30, 2018. Please see attachment.¹⁴

[35] While I do think it is appropriate in these circumstances to consider this issue generously in favour of the taxpayer, the January 21, 2021 correspondence simply cannot reasonably be considered as an application to the Minister for an extension of time for purposes of s.166.1 of the Act.

[36] This because, first, an application to extend time has to be sent to the Chief of Appeals, who is in the Appeals Division. The January 21 letter was sent to the

¹⁴ Exhibit A-6.

Scientific Research and Experimental Development Division, which is a different division of the Canada Revenue Agency. Further, the January 21 letter does not clearly indicate that it is intended as an application to extend time, or even as a notice of objection. In such circumstances, the January letter cannot reasonably be interpreted as complying with s.166.1 of the Act.

[37] Given that the Applicant had not met their duty under s.166.1 of the Act, they therefore had not met the requirements as set out in ss.166(5), which states that no application for an extension to object shall be granted unless an application was first made to the Minister pursuant to s.166.1 of the Act.¹⁵

IV. CONCLUSION

[38] Unfortunately, despite the very frustrating facts of this case, I agree with the Respondent that the Application for an extension of time under s.166.2 must be dismissed. The Applicant never sent a Notice of Objection for the 2018 taxation year in a timely fashion. Furthermore, after the expiration of 90 days from the date of the assessment, an application for an extension of time with the Minister was not filed.

[39] There will be no costs payable in this matter.

Signed at Ottawa, Canada this 21st day of December 2023.

“R.MacPhee”

MacPhee J.

¹⁵ *Topping v. The Queen*, 2013 TCC 346.

CITATION: 2023 TCC 176
COURT FILE NO.: 2022-388(IT)APP
STYLE OF CAUSE: FOOi Inc. v. His Majesty The King
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: October 11, 2023
REASONS FOR JUDGMENT BY: The Honourable Justice Ronald MacPhee
DATE OF JUDGMENT: December 22, 2023
APPEARANCES:

Counsel for the Applicant: John Sorensen

Counsel for the Respondent: Eric Myles

COUNSEL OF RECORD:

For the Applicant:

Name: John Sorensen

Firm: Gowling WLG (Canada) LLP
Toronto, Canada

For the Respondent:

Shalene Curtis-Micallef
Deputy Attorney General of Canada
Ottawa, Canada