

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170612

Docket: A-389-16

Citation: 2017 FCA 124

**CORAM: PELLETIER J.A.
WEBB J.A.
NEAR J.A.**

BETWEEN:

STEPHEN BYGRAVE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on May 10, 2017.

Judgment delivered at Ottawa, Ontario, on June 12, 2017.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

**WEBB J.A.
NEAR J.A.**

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Mr. Bygrave appeals from an unreported decision of the Tax Court of Canada (the Tax Court) dismissing his application for an extension of time pursuant to section 167 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) to file his notice of appeal of the Minister of National Revenue's (the Minister) reassessment of his tax liability for the 2010 taxation year. In that year, Mr. Bygrave sold a condominium property that he had acquired 3 years previously. He declared the gain from the sale in his 2010 income tax return as a capital gain. In 2014, the

Minister reassessed Mr. Bygrave's return, treated the gain from the sale of the condominium property as income and assessed a penalty.

[2] Mr. Bygrave filed a notice of objection. On January 12, 2016, the Minister confirmed the reassessment and sent her notice of confirmation to Mr. Bygrave. This started the clock on the 90 day period for the filing of a notice of appeal to the Tax Court provided at subsection 169(1) of the Act.

[3] At this point the bookkeeper who had been assisting Mr. Bygrave referred him to a chartered accountant who apparently told him that he had the skills to assist him in dealing with his income tax problem. Subsequent events show that this was not the case.

[4] The accountant communicated with Canada Revenue Agency (CRA) officials in the hope of persuading them that the confirmation of the reassessment was a mistake. Within a short time, the CRA advised the accountant that the file had been closed and that Mr. Bygrave would have to file a notice of appeal to the Tax Court if he wished to challenge the Minister's reassessment. The accountant was of the view that it would be unprofessional to file a notice of appeal unless he had in hand all the documentary evidence that he intended to put before the Court on the appeal. To that end, he asked Mr. Bygrave to obtain that documentation, a process which took Mr. Bygrave beyond the 90 day limitation period for filing his notice of appeal.

[5] Some 52 days after the expiry of that limitation period, the accountant filed Mr. Bygrave's application for an extension of time to file his notice of appeal pursuant to section 167(1) of the Act.

[6] At the hearing of the application, the accountant pursued his foray into unfamiliar territory and acted as Mr. Bygrave's counsel.

[7] Subsection 167(5) sets out the conditions for the granting of an extension of time:

(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

(5) Il n'est fait droit à la demande que si les conditions suivantes sont réunies :

a) la demande a été présentée dans l'année suivant l'expiration du délai imparti en vertu de l'article 169 pour interjeter appel;

b) le contribuable démontre ce qui suit :

(i) dans le délai par ailleurs imparti pour interjeter appel, il n'a pu ni agir ni charger quelqu'un d'agir en son nom, ou il avait véritablement l'intention d'interjeter appel,

(ii) compte tenu des raisons indiquées dans la demande et des circonstances de l'espèce, il est juste et équitable de faire droit à

grant the application,

la demande,

(iii) the application was made as soon as circumstances permitted, and

(iii) la demande a été présentée dès que les circonstances le permettaient,

(iv) there are reasonable grounds for the appeal.

(iv) l'appel est raisonnablement fondé.

[8] The Tax Court gave its decision at the conclusion of the hearing. The Tax Court found that the application for an extension of time had been made within one year, that within the relevant period Mr. Bygrave had a continuing intention to appeal the Minister's reassessment and that there were reasonable grounds for the appeal. The latter point was conceded by counsel for the Minister so that the basis for that conclusion is not apparent from the record. However, the Tax Court was not satisfied that subparagraphs 167(5)(b)(ii) and (iii) had been satisfied. In other words, the Tax Court was not persuaded that the application was made as soon as circumstances permitted and that it would be just and equitable to grant the application. As a result, the Tax Court dismissed Mr. Bygrave's appeal.

[9] The issues on the appeal are the Tax Court's conclusions with respect to subparagraphs 167(5)(b)(ii) and (iii) of the Act, specifically whether the application for an extension of time was made as soon as circumstances permitted and whether it would be just and equitable to allow the application.

[10] Given that this is an appeal from a decision of the Tax Court after trial, the standard of review is that set out in *Housen v. Nikolaisen*, 2002 SCC 31, [2002] 2 S.C.R. 235, namely correctness for questions of law and palpable and overriding error for questions of fact and

mixed questions of fact and law unless there is an extricable question of law. The fact that the Tax Court's decision can be considered to be a discretionary decision ("just and equitable") does not affect the standard of review since the *Housen* standard applies to discretionary decisions: *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 79, 402 D.L.R. (4th) 497.

[11] In addressing the question of whether Mr. Bygrave made his application as soon as circumstances permitted, the Tax Court noted that both Mr. Bygrave and his accountant were aware of the 90 day limit for filing a notice of appeal. It also noted that the reason for the delay was the perceived need to obtain all the relevant documentation prior to filing a notice of appeal, a process which took some time.

[12] In coming to its decision on this aspect of the case, the Tax Court referred to two cases in which reliance upon professional advisers was not found to be a sufficient explanation for the delay in filing the application for an extension of time: *Carrier v. The Queen*, 2005 TCC 182, [2007] 2 C.T.C. 2121, and *Kolmer v. The Queen*, 2003 TCC 829, [2004] 1 C.T.C. 3047. While reliance on professional advisers may be a relevant consideration, this is not a case of taxpayer inactivity in reliance on the mistaken belief that their professional advisers are dealing with the appeal. This is a case in which the taxpayer embarked on a course of action in support of his appeal which he was unable to complete within the 90 day limitation for filing his notice of appeal.

[13] In considering an application for an extension of time to file an appeal pursuant to subsection 167(5), there are two relevant time periods. The first is the 90 day period following the sending of the Minister's confirmation of the assessment during which a taxpayer can appeal the Minister's assessment to the Tax Court pursuant to section 169. For the purposes of an extension of time, the taxpayer must demonstrate that during this period they were "unable to act or instruct another to act" or had "a bona fide intention to appeal", being the alternative requirements of subparagraph 165(5)(b)(i).

[14] The second period begins at the end of the first period and runs to the date of application for an extension of time, which must be made within one year from the expiration of the first period. This second period is the relevant period for assessing whether the application for an extension of time was brought as soon as circumstances permitted under subparagraph 165(5)(b)(iii).

[15] In conducting this inquiry, the issue is the applicant's use of the time between the expiry of the 90 day appeal period and the filing date of the application for an extension of time. This is not simply a question of asking why the application was not made in the shortest number of days after the 90 day period has expired. It requires an examination of the applicant's particular circumstances to determine if the applicant acted with diligence appropriate to the circumstances.

[16] In my view, the Tax Court did not direct its mind to the appropriate period when it considered whether Mr. Bygrave's appeal had been brought as soon as circumstances permitted. In setting out the law, the Tax Court correctly noted that if "a taxpayer is late in filing a Notice of

Appeal, the taxpayer must act with diligence to apply for an extension of time to appeal and file a Notice of Appeal”: *Bygrave v. The Queen* (12 Sept. 2016), Toronto 2016-2201 (IT) APP at 9 [Reasons]. The Tax Court, however, concluded that Mr. Bygrave knew of the 90 day time limit and could have filed his notice of appeal within it. This conclusion shows that the Tax Court asked whether the circumstances permitted Mr. Bygrave to file a notice of appeal during the 90 day period, rather than asking whether, once that period had expired, he brought his application for an extension of time as soon as circumstances permitted. This is an error of law that warrants our intervention.

[17] I am supported in my reading of the Tax Court’s reasons by its earlier consideration of subparagraph 167(5)(b)(i). While that inquiry is limited to the 90 day period, the Tax Court found that Mr. Bygrave had an “ongoing intention to appeal this reassessment throughout the 90-day time period, and until this application was filed and he has therefore met the requirement at subparagraph 167(5)(b)(i)”: Reasons at 10. As this passage makes clear, the Tax Court considered both periods on this issue when it should have only considered the first. Evidently, the Tax Court was mistaken as to the relevant time periods for both subparagraphs 167(5)(b)(i) and (iii).

[18] Paragraph 52(c) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 provides that in an appeal, other than an appeal from the Federal Court, this Court may give the decision that should have been given, or send the matter back for determination in accordance with any directions it considers appropriate. In my view, this is a case in which this Court should render the decision which the Tax Court ought to have given. Having incurred the expense of a hearing in the Tax

Court and now an appeal, Mr. Bygrave ought to be spared the necessity of a further hearing on this question if I am able to decide it on the basis of the record developed before the Tax Court. While the record is fairly sparse, I believe I can.

[19] It would appear that once the CRA confirmed that Mr. Bygrave's file had been closed, he began gathering the documentary evidence that his accountant told him that he needed to bring his appeal. The evidence is that Mr. Bygrave spent the period between the expiry of the 90 day period and the filing of his application for an extension of time gathering this documentary evidence.

[20] We have no information as to the basis for the Minister's reassessment but given that it arises from a single transaction with respect to a condominium property that Mr. Bygrave owned for a period of three years and that the characterization of the gain as a capital gain was rejected, one may safely assume that the Minister concluded that the purchase and sale of the property was an adventure in the nature of trade. In those circumstances, Mr. Bygrave's intention, both primary and secondary, at the material time will be relevant. To the extent that evidence of that intention may require proof of surrounding circumstances, some of which may require documents that Mr. Bygrave had to obtain from Jamaica, the time to secure those documents would be a circumstance explaining the delay in the bringing of the request for an extension of time. While those who have some knowledge of tax matters know that it was not necessary to have that evidence in hand prior to filing the notice of appeal, Mr. Bygrave did not know that.

[21] The evidence suggests that the application for an extension of time was brought as soon as the necessary documents were in hand. As a result, I am satisfied that the application for an extension of time was made as soon as circumstances permitted.

[22] As to whether it is just and equitable to grant the application, I am of the view that it is. There is no conduct on Mr. Bygrave's part that would make it unjust or inequitable to award him the extension of time which he seeks. In addition, this is a case in which the Minister has imposed a penalty pursuant to subsection 163(2) of the Act which deals with false statements made knowingly or in circumstances amounting to gross negligence. A taxpayer should be given every reasonable opportunity to defend himself against the imposition of such a penalty.

[23] I would therefore allow Mr. Bygrave's appeal with costs in this Court and in the Tax Court of Canada.

"J.D. Denis Pelletier"

J.A.

"I agree
Wyman W. Webb J.A."

"I agree
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-389-16
STYLE OF CAUSE: STEPHEN BYGRAVE v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

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REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

DATED: JUNE 12, 2017

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