

Docket: 2003-1854(IT)APP

BETWEEN:

FERNANDO MARTINCIC JR.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on December 15, 2003 at Windsor, Ontario

Before: The Honourable Justice Georgette Sheridan

Appearances:

For the Applicant: The Applicant himself

Counsel for the Respondent: Ifeanyi Nwachukwu

ORDER

Upon reading the application for an Order extending the time within which an appeal from the assessment made under the *Income Tax Act* for the 1995 taxation year may be instituted;

And upon hearing what was alleged by the parties;

This Court orders that the application be dismissed.

Signed at Ottawa, Canada, this 30th day of December 2003.

"G. Sheridan"

Sheridan, J.

Citation: 2003TCC933
Date: 20031230
Docket: 2003-1854(IT)APP

BETWEEN:

FERNANDO MARTINCIC JR.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Sheridan, J.

ISSUE TO BE DECIDED

[1] Whether to grant an extension of time to the Appellant, Mr. Martincic to file a Notice of Appeal for the 1995 taxation year.

FACTS

[2] Mr. Martincic is self-employed in the construction business. He is seeking an extension of time within which to file a Notice of Appeal for the 1995 taxation year. At the hearing, the Minister and Mr. Martincic presented an agreed-upon list of dates for the documents and events relevant to this application:

| | |
|------------------------------|---------------|
| Notice of Assessment | June 14, 1999 |
| Notice of Objection | July 13, 1999 |
| Settlement and Waiver signed | July 17, 2001 |
| Notice of Reassessment #1 | July 17, 2001 |

| | |
|----------------------------------------|-------------------|
| Notice of Reassessment #2 | September 4, 2001 |
| Notice of Reassessment #3 | November 13, 2001 |
| 90-day deadline for Notice of Appeal | February 11, 2002 |
| Final deadline for extension to appeal | February 11, 2003 |
| Notice of Appeal filed | May 16, 2003 |

ANALYSIS

[3] The Minister takes the position that Mr. Martincic's application cannot be granted because he failed to make his application for an extension of time within the time permitted by the *Income Tax Act* (the "Act"). Mr. Martincic argues that he would have done so had he known about time limitation rules. He argues further that his appeal depends on new information which he did not have in his possession until after the time for appealing had expired. He feels that justice can only be done if the application is granted and his appeal heard in light of the new information.

[4] The relevant provisions of the *Act* are subsections 169¹ and s. 167². Under section 169, the taxpayer has 90 days from the date of a reassessment to appeal the

¹ 169(1) **Appeal.** Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either (a) the Minister has confirmed the assessment or reassessed, or (b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed, but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been mailed to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.

² 167(1) **Extension of time to appeal.** Where an appeal to the Tax Court of Canada has not been instituted by a taxpayer under section 169 within the time limited by that section for doing so, the taxpayer may make an application to the Court for an order extending the time within which the appeal may be instituted and the Court may make an order extending the time for appealing and may impose such terms as it deems just.

167(5) **When order to be made.** 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.

Minister's decision to the Tax Court of Canada. In this case, Mr. Martincic had until February 11, 2002 to file his appeal. No appeal was filed. In such cases, the taxpayer still has another door open to him. Under subsection 167(1), Mr. Martincic had a further period of one year after the missed deadline to apply to the Court for an extension of time to file his appeal. Mr. Martincic did not apply until May 16, 2003, long after the final deadline of February 11, 2003.

[6] Mr. Martincic argues that he could not have appealed within the time limit because the new information upon which his appeal is based did not come into his hands until the end of October 2002. After certain exchanges with Canada Customs and Revenue Agency (CCRA) officials, he was reminded by letter dated December 5, 2002 that in reaching a settlement with CCRA in July 2001, he had waived future objection and appeal rights. The letter further advised that accordingly, "... no further review could be undertaken". This evidence does not help Mr. Martincic as it shows he obtained the new information within the time for seeking an extension to appeal. What stopped him from doing so was not the CCRA letter; it was that he was unaware of the time limits set out in the *Act*. It was not until March 2003 that he learned he would have to apply for an extension of time to appeal before he could proceed. By then, it was too late.

[7] The Court accepts Mr. Martincic's testimony that he did not realize the clock was running out on his ability to apply for an extension of time. The difficulty is that this, in itself, does not permit him to avoid the consequences of having missed the statutory deadline. The Court is equally bound by the provisions of the *Act* and can only make an order to extend the time for the filing of an appeal when the applicant can satisfy the conditions set out in subsection 167(5). The first of these is *when* the order for extension Mr. Martincic is seeking can be granted: "No order *shall* be made ... unless the application is made within one year after the expiration of the time limited by section 169 for appealing; ...". The use of the word "shall" in subsection 167(5) means the Court has no power to grant the application unless this condition has been satisfied.

[8] The parties agree that the final deadline under subsection 167(5) was February 11, 2003. Mr. Martincic did not make his application for an extension of time until May 16, 2003. Mr. Martincic has not satisfied the first condition set out in paragraph 167(5)(a) and accordingly, the Court has no discretion to extend the time for him to file his appeal. Mr. Martincic argues that even if he missed the deadline, an extension ought to be granted to see justice done. A similar argument

was considered by the Federal Court of Appeal in the *Minuteman Press*³ case. The Federal Court of Appeal, whose decisions are binding on this Court, held that "...Once it has been determined that no application was made for an extension of time to appeal within the one-year limit, the question of whether or not it would be just and equitable to grant an extension of time does not arise." In view of the above, the application must be dismissed.

Signed at Ottawa, Canada, this 30th day of December 2003.

"G. Sheridan"

Sheridan, J.

³ *Minuteman Press of Canada Company Limited v. MNR*, 88 D.T.C. 6278; *Lamothe v. Canada* [2002] T.C.J. No.95

CITATION: 2003TCC933

COURT FILE NO.: 2003-1854(IT)APP

STYLE OF CAUSE: Fernando Martincic Jr. and Her Majesty
the Queen

PLACE OF HEARING: Windsor, Ontario

DATE OF HEARING: December 15, 2003

REASONS FOR JUDGMENT BY: the Honourable Justice G. Sheridan

DATE OF JUDGMENT: December 30, 2003

APPEARANCES:

For the Applicant: The Applicant himself

Counsel for the Respondent: Ifeanyi Nwachukwu

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Morris Rosenberg
Deputy Attorney General of Canada
Ottawa, Canada