Docket: 2004-1986(GST)APP

BETWEEN:

PATRICK CHAN,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on common evidence with the applications of Patrick Chan (2004-1231(IT)APP), Ian Charles Roberts (2004-1232(IT)APP), and Ian Charles Roberts (2004-1988(GST)APP) on August 19, 2004 and decision rendered orally on August 23, 2004, at Vancouver, British Columbia

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Applicant:	Kerri D. Duncan
Agent for the Respondent:	Katey Grist, Student-at-Law

ORDER

Upon application made under section 304 of the *Excise Tax Act* for an Order extending the time within which a Notice of Objection to Assessment Number 76048, dated October 17, 2000, may be served;

And upon hearing what was alleged by the parties;

The application is dismissed for the reasons set out in the attached Reasons for Order.

Signed at Ottawa, Canada, this 10th day of September 2004.

"J.E. Hershfield"

Hershfield J.

Docket: 2004-1231(IT)APP

BETWEEN:

PATRICK CHAN,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on common evidence with the applications of Ian Charles Roberts (2004-1232(IT)APP), Patrick Chan (2004-1986(GST)APP) and Ian Charles Roberts (2004-1988(GST)APP) on August 19, 2004 and decision rendered orally on August 23, 2004, at Vancouver, British Columbia

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Applicant:	Kerri D. Duncan
Agent for the Respondent:	Katey Grist, Student-at-Law

ORDER

Upon application made under section 166.2 of the *Income Tax Act* for an Order extending the time within which a Notice of Objection to Assessment Number 17391, dated October 17, 2000, may be served;

And upon hearing what was alleged by the parties;

The application is dismissed for the reasons set out in the attached Reasons for Order.

Signed at Ottawa, Canada, this 10th day of September 2004.

"J.E. Hershfield"

Hershfield J.

Docket: 2004-1988(GST)APP

BETWEEN:

IAN CHARLES ROBERTS,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on common evidence with the applications of Patrick Chan (2004-1231(IT)APP), Patrick Chan (2004-1986(GST)APP), and Ian Charles Roberts (2004-1232(IT)APP) on August 19, 2004 and decision rendered orally on August 23, 2004, at Vancouver, British Columbia

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Applicant:	Kerri D. Duncan
Agent for the Respondent:	Katey Grist, Student-at-Law

ORDER

Upon application made under section 304 of the *Excise Tax Act* for an Order extending the time within which a Notice of Objection to Assessment Number 76057, dated October 17, 2000, may be served;

And upon hearing what was alleged by the parties;

The application is dismissed for the reasons set out in the attached Reasons for Order.

Signed at Ottawa, Canada, this 10th day of September 2004.

"J.E. Hershfield"

Hershfield J.

Docket: 2004-1232(IT)APP

BETWEEN:

IAN CHARLES ROBERTS,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on common evidence with the applications of Patrick Chan (2004-1231(IT)APP), Patrick Chan (2004-1986(GST)APP), and Ian Charles Roberts (2004-1988(GST)APP) on August 19, 2004 and decision rendered orally on August 23, 2004, at Vancouver, British Columbia

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Applicant:	Kerri D. Duncan
Agent for the Respondent:	Katey Grist, Student-at-Law

ORDER

Upon application made under section 166.2 of the *Income Tax Act* for an Order extending the time within which a Notice of Objection to Assessment Number 17392, dated October 17, 2000, may be served;

And upon hearing what was alleged by the parties;

The application is dismissed for the reasons set out in the attached Reasons for Order.

Signed at Ottawa, Canada, this 10th day of September 2004.

"J.E. Hershfield"

Hershfield J.

Citation: 2004TCC588
Date: 20040910
Dockets: 2004-1986(GST)APP, 2004-1231(IT)APP,
2004-1988(GST)APP, 2004-1232(IT)APP

BETWEEN:

PATRICK CHAN,
IAN CHARLES ROBERT,

Applicants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

(Edited from the transcript of Reasons for Order delivered orally
from the Bench on August 23, 2004 at Vancouver, British Columbia)

Hershfield J.

[1] I have had some difficulty with this case but regardless have concluded that the applications, if we can call them that, and I will remark further on that comment, must fail and the following are my reasons. The Applicants seek an extension of time to file a Notice of Objection with respect to Notices of Assessment made pursuant to subsection 323(1) of the *Excise Tax Act* for un-remitted GST, interest and penalties and subsection 227.1(1) of the *Income Tax Act* for un-remitted source deductions, interest and penalties.

[2] It is not in dispute that the Applicants were directors of 524428 B.C. Ltd., which had failed to make required remittances or pay its resulting liability and that it was such failure that gave rise to the said assessments against the applicants as directors of that company.

[3] It is not in dispute that Notices of Objection were filed in all cases on

December 15, 2003. The Respondent asserts that the Notices of Assessment were mailed on October 17, 2000 and the time limitations for filing such objections had expired, and that the time limitations to make this application for an extension of time had expired as well. The Applicants take issue with the date of mailing of the notices and deny receiving the notices until October 31, 2003 when they were sent to their lawyer under cover of a letter dated October 29, 2003. The Applicants put the Minister to the burden of proof to establish the mailing.

[4] I note at this point that if the Respondent fails to establish a mailing or a date of mailing for each assessment as a date one year and 90 days prior to December 15, 2003, the date of filing of the objections, then the objections filed are not out of time. No extensions of time to file are required in such case as the objections would have been filed within 90 days of the October 29, 2003 mailing date established by the Applicants.

[5] This Court has jurisdiction to hear applications for extension of time. This is found in section 304 of the *Excise Tax Act* and section 166.2 of the *Income Tax Act*. The question arises as to whether this Court has jurisdiction to make the determination sought which is for a determination of a mailing date which determines whether the objections were timely filed.

[6] That is, the matter before me is neither an appeal of a tax liability nor, in reality, an application for an extension of time, and as such, a question of my jurisdiction to hear the application arises.

[7] Neither party raised a question as to my jurisdiction to hear this matter. As well I note that cases sited by counsel for all parties did not deal with the question of jurisdiction including the Federal Court of Appeal's decision in *Schafer*.[1] From that one might find implied jurisdiction with this Court.

[8] Regardless, all parties have signed pleadings filed with the Court. On that basis I believe it is appropriate to proceed on the basis that section 173 of the *Income Tax Act* and section 310 of the *Excise Tax Act* apply. Such sections allow the parties to request a determination of a question relating to an assessment. In essence I have been asked in signed pleadings to make a determination of a question relating to an assessment.

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[1] 2000 DTC 6542; 2000 CarswellNat. 1948; [2000] G.S.T.C. 82; [2000] F.C.J. No. 1480 (F.C.A.)

[9] Proceeding then, I note that the only evidence in these proceedings has been by affidavits even though affiants were present in court and available for direct and cross-examination. The Respondent relied on the Affidavit of two CCRA officers, and the Applicants relied on the Affidavits of each of the Applicants and a legal assistant from their counsel's office.

[10] The affidavit evidence of the Respondent is as follows: Ms. Light swore that on October 17, 2000, she produced the assessments and in respect of Roberts' assessments that she personally took the assessments to the mailroom on that same day October 17, 2000 and sent them by registered mail, to 1606 - 3071 Glen Drive in Coquitlam, an address taken from CCRA records dated September 2000 and August 1999. And in respect of Chan's assessments that she personally took the assessments to the mailroom on the same day, October 17, 2000, and sent them by register mail to 2307 Lorraine Avenue in Coquitlam, in the case of the GST assessments but sent them to 2037 Lorraine Avenue, Coquitlam in the case of the income tax assessments.

[11] Since this is an oral judgment I will repeat that. The address under the GST assessment was "2307" but it was "2037" in respect of the income tax assessment.

[12] Ms. Light also swore that she maintained a diary which on January 26, 2001 noted that all mail had been returned.

[13] The second affiant of the Respondent, Mr. Desai, swore that Ms. Light's diary confirmed entries as to the mailing date and the return of the registered mail. As well he swore in respect of Roberts' assessments: that he sent the assessments by regular mail on March 20, 2001, to a Princess Crescent address in Coquitlam, which was not returned; and, that on March 29, 2001, he spoke to Roberts who confirmed he had received the assessments; and, that on August 22, 2001, he issued a requirement to pay to Roberts' employer for the garnishment of wages. In respect to Chan's assessment he swore: that he sent the assessments by regular mail on March 20, 2001 to 2037 Lorraine Avenue in Coquitlam, which was not returned; and, that on August 22, 2001 he issued a requirement to pay to Chan's employer for the garnishment of wages.

[14] The affidavit evidence of the Applicants is as follows: Roberts swore that he never received the assessments which is to implicitly deny Mr. Desai's sworn statement that he, Roberts, acknowledged receipt in a telephone conversation on

March 29, 2001. He confirmed that his address from March 1999 to May 2002 was the Princess Street address referred to in Mr. Desai's affidavit, but swore that he first knew of an issue when garnishment was effected in September 2001, when he retained counsel.

[15] Mr. Chan swore that he never received the assessments and that his address was 2037 Lorraine Avenue (as opposed to 2307 Lorraine Avenue in Coquitlam); and, that he first became aware of an issue when garnishment was effected in September 2001, when he retained counsel.

[16] A legal assistant for counsel for the Applicants, Ms. Armstrong, swore as to correspondence evidencing that the Applicants' counsel sent the CCRA a letter on September 10, 2003 requesting copies of the assessment and demanding an accounting. Following a further letter and a request by the CCRA for a corporate authorization in addition to the personal authorizations provided, the CCRA finally supplied three of the four assessments on October 29, 2003. It appears that the fourth assessment was made available or found prior to the filing of the four objections on December 15, 2003.

[17] I note that the request by the CCRA for corporate authorization is anomalous in respect of an assessment against directors who had retired as such years earlier. I note as well that Mr. Desai's Affidavit acknowledges that he received authorizations from the office of Applicants' counsel on October 22, 2001, some two months after the garnishments were issued and effected; (i.e. some two years before the 2003 correspondence referred to in Ms. Armstrong's Affidavit). Such authorizations were not referred to by the Applicants in any of the three affidavits tendered at the hearing. However, counsel for the Applicants filed, at the hearing, further correspondence from the law firm dated as early as September 6, 2001. The correspondence enclosed personal authorizations of the Applicants but referred to the account number of 524428 B.C. Ltd. On receiving no reply, a second letter was sent September 20, 2001, and a third on October 16, 2001, and a fourth of December 18, 2001.

[18] The latter letter acknowledges the CCRA's request for a corporate authorization and that the account number referred to in their correspondence to the CCRA may be the corporate account number but – appropriately in my view – confirms that they were responding to personal garnishments which presumably arise from personal assessments which in turn suggests that the personal authorizations were sufficient. No reply to this last letter from Applicants' counsel to the CCRA was forthcoming and no explanation was

provided as to why further authorizations were required. There was no further communication on either side until September 2003 when a similar series of correspondence commenced again as attested to in Ms. Armstrong's Affidavit.

[19] Had the request for copies of the assessments been complied with by the CCRA in the period September through December 2001, as they were in the 2003 series of correspondence referred to in Ms. Armstrong's affidavit, there seems to be no reason why the objections would not have been filed in December 2001, as they were in December 2003. Had they been filed in December 2001 they would have been within the one year and 90 days from even the first asserted mailing of the assessments which was October 17, 2000. That is, a proper CCRA response, following the garnishment, to letters of counsel, timely sent at that time, would have permitted a timely application for an extension of time to late file the Notices of Objection filed two years later.

[20] Such failure by the CCRA cannot be condoned. Mr. Desai's affidavit confirms receipt of this correspondence from Applicants' counsel yet no particulars were provided. No explanation as to the need for extra authorizations was provided.

[21] It is a stain on the administration and on natural justice and on the Courts that I am handcuffed by Draconian legislation that relies on sending dates regardless of actual notice where the CCRA has failed to respond to pleas for particulars of assessments. Such failure by the CCRA brings disrepute to the entire system. On the other hand, somewhat offsetting this inexcusable performance by the CCRA, it is relevant that it took two years for counsel for the Applicants to resume their efforts. No attempts were made to enforce the Applicants' legal rights to have the information requested. It should have been clear that time would be of the essence in respect of any proceedings arising in respect of garnishments under either the *Income Tax Ac*t or the *Excise Tax Act*.

[22] In this regard I note, as I will again towards the end of these reasons, that Justice Sharlow in the Federal Court of Appeal decision in *Schafer* acknowledged the unfairness of the legislation regarding time limitations running from sent dates without regard to receipt, but noted that regardless of such unfairness and regardless of her expressing agreement in principle with the Tax Court decision in *Schafer*, Parliament had chosen, for reasons unexplained, to subject taxpayers to time limitations even where they had no notice of the assessments that were running out of time.

[23] Turning then to the question of the mailing date of the assessments, I note that while the receipt of the assessments or knowledge of their existence are not relevant under the terms of either Act, the Crown must establish on the evidence that on a balance of probability the assessments were sent. If not sent, no time limitation will have started to run as time limitations run from the date of mailing the assessments in the case of the *Income Tax Act* or sending the assessments in the case of the *Excise Tax Act*. In the case of the *Income Tax Act* such starting time is provided for in subsection 165(1) and in the case of the *Excise Tax Act* such starting time for the limitation period is provided in subsection 301(1.1). Again this presumes that assessments are mailed or sent.

[24] At this point it is helpful to ask if the subject Acts prescribe a required method of sending assessments. Under the *Income Tax Act*, section 227.1 assessments, and under the *Excise Tax Act*, subsection 323(1) assessments, are governed by subsection 227(10) and subsection 323(4) respectively which provide that Divisions I and J of Part I of the *Income Tax Act* and sections 296 to 311 in respect of the *Excise Tax Act* apply with such modification as circumstances require. Subsection 152(2) in Division I of Part I of the *Income Tax Act* and section 300, Part IX of the *Excise Tax Act* provide that assessments are to be sent. No manner of sending is set out.

[25] As it happens, in this case it is asserted by the Respondent that they were mailed, first by registered mail and then by regular mail. Counsel for both parties cited sections 244 of the *Income Tax Act* and 335 of the *Excise Tax Act* as assisting in terms of evidentiary rules regarding such manner of sending assessments. Such rules contained in subsections (5), (14) and (15) of section 244 of the *Income Tax Act* and subsections (1), (10) and (11) of section 335 of the *Excise Tax Act* apply for the purposes of the *Income Tax Act*, or Part IX of the *Excise Tax Act* as the case maybe and accordingly apply to director's liability assessments.

[26] I note that in the case of the *Excise Tax Act* I have been referred to an additional provision which does not appear to be in the *Income Tax Act*. That additional provision is subsection 334(1) of the *Excise Tax Act* which deems a receipt in the case of mailing by first class mail. I note that none of the Respondent's affiants make reference to mailing by first class mail. As such, technically speaking at least, that provision does not apply. I also note that the Respondent, ultimately, does not rely on receipt and maintains its position that the limitation periods run from date of mailing or date sent.

[27] With respect to subsection (5) of section 244 of the *Income Tax Act* and subsection (1) of section 335 of the *Excise Tax Act*, I note that these subsections only apply where the respective Acts provide for sending by mail. In such case where a CCRA affidavit sets out that a notice was sent by registered mail and attaches a post office certificate of registration, in the absence to the evidence to the contrary, the affidavit shall be received as evidence of the sending of the notice.

[28] Ignoring the question as to whether or not the subject Acts actually provide for sending by mail, which is only implied in the case of the *Income Tax Act* from the time limitation provision which says that the time limit runs from the mailing date, I note that post office certificates were not attached to the affidavit of Ms. Light.

[29] Section 244 then does not assist the Crown and raises doubt in my mind as to whether the attempts of Ms. Light to send by registered mail were completed. Respondent counsel argues that if they were returned then they must have been sent. Ms. Light's affidavit is insufficient on this point. If she had said or testified that she had knowledge of their arrival at a post office to be registered and that they were registered then sent back, then I would say such statements, unchallenged, would suffice in lieu of a certificate, but as it is, I know nothing of where they were returned from, or whether or not they were actually registered at a post office. Further, her affidavit re Chan's assessments has different addresses. On balance then I am not satisfied that the assessments were sent on October 17, 2000.

[30] I also note that subsections 244(14), (15) of the *Income Tax Act* which apply for the purposes of that Act and subsections (10), (11) of section 335 of the *Excise Tax Act* which apply for the purposes of Part IX of that *Act, require* a finding that an assessment *has been mailed*. I make no such finding in respect of the registered mail so that these subsections, in fact, do not apply at all to the mailings referred to in Ms. Light's affidavit.

[31] That takes me to the mailing dates sworn in Mr. Desai's affidavit. I see no reason not to accept his sworn statements as to these mailing dates. That both Applicants did not receive them does not seem, on balance of probability, likely. Mr. Roberts never expressly challenged in his affidavit Mr. Desai's statement in his affidavit that he, Roberts, had acknowledged receipt of the assessments. Roberts never took the stand at the hearing; Mr. Desai was not cross-examined on the statement. None of the assessments sent by Desai were returned. They

were sent to correct addresses.

[32] While I have talked more about Mr. Roberts than Mr. Chan I would note that if Roberts knew of the assessments, it is unlikely Chan was ignorant of them. Fellow former directors of a financially fallen company might share such information. On receiving the garnishments, both retained the same counsel again indicating the probability that information might have been shared.

[33] Still the Applicants rely on Associate Chief Justice Bowman's Tax Court decision in *Schafer*[2] to support the view that, for the purposes of time limits, the date notices are sent should not be determinative if the assertedly sent material was not received. In *Schafer* it seems Associate Chief Justice Bowman believed the applicant, through no fault of her own, such as not informing the Minister of changing of addresses, did not receive the assessments and was not notified of them. He was satisfied that she had not been notified of the assessments until an Examination for Discovery on another matter. Mrs. Schafer was subjected to vigorous cross-examination and testified as to problems in receiving mail. It was on this basis that Associate Chief Justice Bowman found that he could, on balance of probability, conclude the assessments *were not sent*.[3]

[34] In the case at bar I have no oral testimony to come to the credibility conclusions that Associate Chief Justice Bowman came to. I have no cross-examination at all, let alone vigorous cross-examination of the affiants. I have no challenge of Mr. Desai's sworn statement that he sent the assessments and that he had a telephone conversation with Roberts confirming their receipt. Beyond mailing procedures I have Mr. Desai's statement in his affidavit, unchallenged except by the notion of not being received, that they were sent.

[35] In short, even applying Associate Chief Justice Bowman's reasoning in *Schafer*, I am not faced with the same fact situation and would not come to the

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[2] *Schafer v. Canada*, [1998] T.C.J. No. 459.

[3] The Federal Court of Appeal did not adhere to this finding of fact. Clearly if the Respondent did not send the assessments, time limits do not run. The Federal Court of Appeal in *Schafer* and the Tax Court, in cases like *Nasha Properties*, 98 DTC 1493, have accepted that the Respondent's burden of proof for having sent assessments is generally met if mailing procedures are adhered to as attested to by affidavit. It cannot be said, however, that such affidavits are absolutely determinative, so it remains open to a trial judge to make a factual finding that an assessment has not been sent or mailed. This seems to be a trite statement of law and I have relied on it in my finding that the assessments were not sent or mailed on October 17, 2000 by Ms. Light as attested to by her.

same conclusion on the facts as he came to in regard to Mrs. Schafer.

[36] Further, Mrs. Schafer did act when informed. Here, lawyers were retained and inquiries were made upon their being informed for the first time. But still in spite of the clear and reprehensible default of the CCRA there is a two-year gap in pursuing inquiries.

[37] I also note that the Applicants' counsel referred to Judge Hamlyn's decision in *Adler*[4]. In *Adler* Judge Hamlyn found the sworn affidavit testimony of the applicant to be uncontroversial; that is not the case here. Mr. Desai's sworn statement controverts the statements of Mr. Roberts.

[38] Of course the main reason why I might not follow decisions like *Adler* and the Tax Court decision in *Schafer* is the Federal Court of Appeal decision in *Schafer*[5] where Justice Sharlow commended the approach taken by the Tax Court in *Schafer* and *Adler* and suggested it did not do violence to the scheme of the Act but went on to concur with the majority judgment (which overturned the Tax Court decision) and to say that:

> "Parliament has chosen to adopt a rule that makes no allowance for the possibility, however remote, that the taxpayer may miss the deadline for objecting or appealing because of a failure of the postal system. I do not understand why Parliament has chosen to deprive taxpayers of the chance to challenge an assessment of which they are unaware, but that is a choice that Parliament is entitled to make."

[39] Given my remarks as to the conduct of the CCRA, it is with considerable regret that I have to ultimately concur with Justice Sharlow. This is what Parliament has done, notwithstanding how unfair it may seem to the Applicants.

[40] It is for those reasons then, having found that the notices sent by Mr. Desai were sent by mail, that I find that the Applicants are out of time. The applications are therefore denied for those reasons.

[41] Subject to the lawyers for the Applicants explaining the two-year lag in their responses and questions as to the merits of the appeal, I might have suggested redress possibly under the *Financial Administration Act*. Counsel for

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[4] [1998] T.C.J. No. 66.

[5] *Schafer v. Canada*, [2000] F.C.J. No. 1480

the Applicants might consider that or other possible courses of action. As I said, it is inexcusable that the CCRA did not respond to correspondence at a time that would have permitted these Applicants to make timely applications for extensions of time.

Signed at Ottawa, Canada, this 10th day of September 2004.

"J.E. Hershfield"

Hershfield J.

CITATION:	2004TCC588
COURT FILE NOS.:	2004-1986(GST)APP, 2004-1231(IT)APP, 2004-1988(GST)APP, 2004-1232(IT)APP
STYLE OF CAUSE:	Patrick Chan and Ian Charles Robert v. Her Majesty the Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	August 19, 2004
REASONS FOR ORDER BY:	The Honourable Justice J.E. Hershfield
DATE OF ORDER:	September 10, 2004

APPEARANCES:

Counsel for the Applicants:	Kerri D. Duncan
Agent for the Respondent:	Katey Grist, Student-at-Law

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