

BETWEEN:

ALDON JOHNSON,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on September 23, 2009 at Halifax, Nova Scotia

By: The Honourable Justice Judith Woods

Appearances:

For the Applicant: The Applicant himself

Counsel for the Respondent: Jan Jensen

ORDER

Upon application for an Order granting an extension of time to serve a notice of objection, it is ordered that the application is dismissed.

Each party shall bear their own costs.

The Registry is directed to send a copy of this Order to the applicant and to the counsel of record at the time of the hearing.

Signed at Ottawa, Canada this 1st day of October 2009.

“J. M. Woods”

Woods J.

Citation: 2009 TCC 496
Date: 20091001
Docket: 2009-979(IT)APP

BETWEEN:

ALDON JOHNSON,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Woods J.

[1] This is an application brought by Aldon Johnson for an extension of time. The matter relates to assessments issued under the *Income Tax Act* for the 1999, 2000, 2001 and 2002 taxation years, for which the total amount owing is over \$50,000.

[2] The application was filed by Mr. Johnson's solicitor. The solicitor, who did not attend the hearing, subsequently filed with the Registry a notice of intention to cease to act.

[3] Mr. Johnson was informed by his former solicitor that he should attend the hearing and he did so. It appeared that he had very little understanding of what the application was all about.

[4] It is useful to begin by setting out the procedural history.

[5] On March 17, 2009, the solicitor filed with the Court a letter applying to extend the time to file a notice of appeal. A notice of appeal in Form 21(1)(a) was appended to the application.

[6] A second letter, dated April 7, 2009, was filed by the solicitor, which modified the original application. It stated that, pursuant to a telephone conference with an

officer of the Court's Registry, both letters should be considered to constitute an application to extend time to file a notice of objection.

[7] On July 2, 2009, the respondent filed with the Court a reply to the application to extend time to serve a notice of objection. Appended to that reply was a supporting affidavit of an officer of the Canada Revenue Agency.

[8] According to the reply, the application is opposed. The reason appears to be that Mr. Johnson did not make a request for an extension of time under section 166.1 of the *Act* within the time period stipulated in subsection 166.1(7).

[9] The background to this matter is set out in some detail in the original application. The relevant parts of the letter are set out below:

Enclosed for filing please find a Notice of Appeal on behalf of the above noted taxpayer.

Please accept this letter as our client's formal application for an extension of time to appeal the assessment of his personal income tax for the taxation years 1999, 2000, 2001 and 2002.

The taxpayer is one of three individuals that the undersigned has represented in proceedings before the Ontario Court of Justice pursuant to s.490 of the Criminal Code of Canada. In those proceedings the Crown sought an application for the forfeiture of approximately \$60,000 which had been seized from the three individuals on November 5, 2001 at the Lester B. Pearson International Airport in Toronto. Each individual was in possession of approximately \$20,000. The Crown alleged that the funds seized were the proceeds of crime. In early October 2002, the Crown decided not to lay charges against the three individuals which meant the funds were not needed as evidence and were subject to being returned to the individuals. At that time the Minister of National Revenue reassessed all three individuals for the tax years 1999, 2000 and 2001 for an amount exceeding the funds seized from them. The Minister of National Revenue then issued a Requirement to Pay in respect of each taxpayer to the RCMP who were holding the seized funds.

None of the three individuals was ever charged with a criminal offence in respect of the funds. However, the Crown did make an application under s.490 of the Criminal Code seeking forfeiture of the funds. The application was dismissed on July 31, 2003 after the Crown's evidence was struck for failing to comply with the laws of evidence. However, in July 2004 the matter was sent back for a rehearing on appeal to the Ontario Superior Court. The individuals appealed to the Ontario Court of Appeal which upheld the original decision on the exclusion of evidence but nonetheless remitted to the matter to the Ontario Court of Justice for re-hearing. When the matter came on for hearing again in December 2006, the Crown was ordered to fully disclose information to the individuals pursuant to the *Charter*. This

information we believed would reveal the level of cooperation between the RCMP and the Minister of National Revenue. The information was to have been disclosed by February 15, 2007. When the Crown failed to disclose the information by that date, the Crown prosecutor handling the matter advised the undersigned that the Crown did not intend to proceed with the s.490 application. However, the matter has not been concluded and the RCMP still hold the funds and take the position that the taxpayer's portion of the funds must be turned over to the Minister of National Revenue pursuant to the Requirement to Pay issued to the RCMP.

The other two individuals successfully appealed their assessments for 1999, 2000, 2001 and 2002. The decisions of this Court in those cases are enclosed: *R. v. Beavis*, 2008 CarswellNat 456; *R. v. West*, 2006 CarswellNat 3456. The latest case was heard in January 2008. It is obvious from these decisions that in assessing income the Minister of National Revenue used the net worth approach based on generalized statistics from Statistics Canada. Neither of the individuals had substantial assets.

It appears that the Minister National Revenue was advised by the RCMP of the funds that were seized and took steps to assess income with very little factual basis so as to be able to issue a Requirement to Pay to the RCMP. This provided a backstop to the Crown in the event the funds were ordered to be returned to the individuals under section 490.

Our client will testify that he had no income for the tax years in question. He has limited education having dropped out of school at an early age. When he realized the notices of assessment affected him and not his father (who is also Aldon Johnson) he contacted a representative of Canada Revenue Agency and explained that he had not earned income in the tax years in question. He was provided with no assistance at all. He didn't realize that he could still appeal these assessments until our office advised him of his rights recently. We became involved after learning from the RCMP that they had received a Requirement to Pay in respect of the seized funds.

The taxpayer has incurred significant unpaid legal fees in respect of the seized funds and must now incur further legal fees in respect of this appeal. The judgement is for in excess of \$54,000. If the judgement remains, the taxpayer will have no choice but to declare bankruptcy.

Discussion

[10] Neither party made reference to the applicable provision in dealing with an application of this nature. It is subsection 166.2(5) of the *Act*, which provides:

166.2(5). No application shall be granted under this section unless

- (a) the application was made under subsection 166.1(1) within one year after the expiration of the time otherwise limited by this Act for

serving a notice of objection or making a request, as the case may be;
and

(b) the taxpayer demonstrates that

(i) within the time otherwise limited by this Act for serving such a notice or making such a request, as the case may be, 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 object to the assessment or make the request,

(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, and

(iii) the application was made under subsection 166.1(1) as soon as circumstances permitted.

[11] The relevant time requirement is set out in s. 166.1(5)(a). In essence, it provides that an extension of time cannot be granted by the Court unless the taxpayer had previously applied to the Minister for an extension within one year after the normal time for making an objection. This requirement is strict. No exceptions are provided, even in cases of hardship.

[12] The question, then, is whether such an application to the Minister was made in a timely manner.

[13] Mr. Johnson's solicitor sent a letter to the Chief of Appeals dated January 21, 2009 which sought an extension of time to serve a notice of objection. Based on the facts set out in the affidavit filed by the respondent, the extension request was clearly out of time.

[14] The Court cannot ignore the requirement in s. 166.1(5)(a). Since the applicant has not demonstrated compliance with this provision, the application must be dismissed.

[15] It is always unfortunate if an appeal must be dismissed for a procedural misstep such as a failure to object or appeal on a timely basis. It is not possible to ignore the requirement, however: *Bormann v. The Queen*, 2006 FCA 83, 2006 DTC 6147.

[16] The consequences to Mr. Johnson of this conclusion could be quite severe. The amount at issue is substantial, and it appears that two other taxpayers in similar circumstances were successful in large measure in their appeals to this Court.

[17] In all the circumstances of this case, it is my hope that the Minister would review the assessments notwithstanding that Mr. Johnson does not have an appeal to this Court. The review would take into account the decisions of this Court in the two other appeals that were mentioned in the application.

[18] Finally, I will include in the order a direction to the Registry that a copy of this decision be provided to Mr. Johnson's former solicitor as well as to Mr. Johnson. Although the solicitor did not appear at the hearing, he was the counsel of record at the time of the hearing.

Signed at Ottawa, Canada this 1st day of October 2009.

“J. M. Woods”

Woods J.

CITATION: 2009 TCC 496

COURT FILE NO.: 2009-979(IT)APP

STYLE OF CAUSE: ALDON JOHNSON and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: September 23, 2009

REASONS FOR ORDER BY: The Honourable Justice J. M. Woods

DATE OF ORDER: October 1, 2009

APPEARANCES:

For the Applicant: The Applicant himself

Counsel for the Respondent: Jan Jensen

COUNSEL OF RECORD:

For the Applicant: N/A

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada