Citation: 2008 TCC 410
Date: 20080714
Docket: 2007-1633(EI)APP
2007-1634(CPP)APP

BETWEEN:

KMW SERVICES INC.,
o/a KMW HEALTH AND CRITICAL CARE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR ORDER

**(Delivered orally from the bench
on December 6, 2007, in Toronto, Ontario.)**

Bowie J.

[1] I have before me two applications for extensions of time, one of them under the E*mployment Insurance Act* and the other one under the *Canada Pension Plan*. The schemes of both those *Acts* are, from an administrative point of view, identical, at least insofar as they deal with the remedies available to somebody who has been assessed for premiums or contributions, penalties, or interest. The facts of the cases are quite straight forward.

[2] I heard evidence from Mr. Webbe, who was a director of the Appellant and was the person who dealt with the assessor, and is familiar with the facts of the case. He told me that in May of 2005 the company was assessed, it was audited, and that audit, no doubt, took some period of time, but on September 1st and September 2nd, he received two assessments, one under the *Employment Insurance Act*, the other under the *Canada Pension Plan*.

[3] The assessments were for premiums under the *Employment Insurance Act*, and interest and penalties, and under the *Canada Pension Plan* for contributions, interest and penalties. And he said that, having received these in early September, he decided to apply to the Fairness Committee of the Canada Revenue Agency with respect to the interest component of the assessments. He did this, he said, by letter. And in early October, he received a response from the Fairness Committee, the gist of which was that they would grant him no relief from the interest. He said he then decided, in mid-October 2005, that he would appeal these two assessments. His evidence was that he appealed them in writing, and he mailed those Notices of Appeal to the London branch of Revenue Canada, or Canada Revenue Agency as it is now called, by regular post.

[4] He kept no copy of the letter, or more accurately, I think his evidence was that he suffered a crash of his computer system at some point after that, and the electronic copy of the letter was lost in that crash, and he had no hard copy of it. However, he said that the letter indicated that he disagreed with the results of the audit and he wanted to appeal from it. At this point he was invoking section 92 of the *Act*, which says that an employer who has been assessed under section 85 may appeal to the Minister for a reconsideration of the assessment, either as to whether any amount should be assessed payable, or as to the amount assessed, within 90 days after having been notified of the assessment. He was also invoking section 27.1 of the *Canada Pension Plan*, which is in virtually identical terms.

[5] The next thing that happened according to Mr. Webbe's evidence, was that in November 2005, the assessor came back, apparently for a routine follow-up visit, and in conversation indicated to Mr. Webbe that he was wasting his time appealing the assessment. He went on to say that Mr. Nivaro had the authority to go back and to issue a further assessment for earlier years, and while Mr. Webbe did not quote Mr. Nivaro's exact language, I am invited to reach the conclusion that it was out of concern for what Mr. Nivaro might do that Mr. Webbe made his next decision, and that was to withdraw the appeals that he had filed the previous month.

[6] In his direct evidence, Mr. Webbe said that he telephoned Mr. Randolph of the London office of the Canada Revenue Agency. His telephone call was answered by an automatic answering system, and that he left a message on that system saying that he wished to withdraw his appeals. He went on to say that he got no acknowledgment of that message, and after that, received no communication whatsoever from the Canada Revenue Agency with respect to his appeals.

[7] In his cross-examination, he made reference at one point to the letter that he sent to Revenue Canada to withdraw his appeals. This inconsistency, although, not huge, has to be considered in light of the fact that I have before me no piece of paper whatsoever evidencing that an appeal was ever filed. However, I will assume for the sake of today's proceeding, that an appeal was, in fact, filed by Mr. Webbe from each of the two assessments in question. There is no doubt whatsoever that the appeals, if they were filed, were withdrawn.

[8] The next thing that happened, according to Mr. Webbe's evidence, was that in mid-February 2007 he had a conversation with a supervisor at the Toronto office of the Canada Revenue Agency, because he had telephoned there looking for some information relating to the manner in which he should fill out T4 summary forms. During the course of that conversation, the same supervisor told him that in his opinion, the persons in respect of whom he had been assessed in September 2005 were not employees, or to put it another way that he had an appeal under each of the statutes that was likely to succeed. He also, according to Mr. Webbe, went on to say that he still had time to appeal.

[9] It is difficult to resist the conclusion that Mr. Webbe's recollection of this conversation is faulty or alternatively that the supervisor who gave him this opinion was unaware of the timelines involved, because the timelines under both the *Act* and the *Plan* governing relief from assessments are very clear and very limited.

[10] Section 92 of the *Act*, and 27.1 of the *Plan*, provide that the appeal to the Minister has to be taken within 90 days after being notified of the assessment, and that was done according to Mr. Webbe. However, the applications before me are to appeal to this Court, and the appeal to this Court is governed by section 103 of the *Act* and section 28 of the *Plan*. Those both provide that the Commission or a person affected by a decision on an appeal to the Minister under section 91 or 92 of the *Act* (the equivalent being section 27 or 27.1 of the *Plan*) may appeal from the decision to the Tax Court of Canada in accordance with the *Tax Court of Canada Act*, and the applicable Rules of court made thereunder, within 90 days after the decision is communicated to the Commission or the person, or within such longer time as the Court allows on application made to it within 90 days after the expiration of those 90 days.

[11] The scheme, in brief, is that the assessment is appealed within 90 days to the Minister and if the Minister's decision on that appeal is adverse, then it may be

appealed to this Court within 90 days, or failing that, within a further 90 days one may apply to this Court for an extension of time within which to bring that appeal.

[12] There is, however, no appeal to this Court directly from the assessment. In the present case, putting the appellant's case at its highest, the assessments were appealed to the Minister within the time limited by statute. They were then withdrawn, and the Minister issued no decision. The Minister having issued no decision, there is nothing from which an appeal lies to this Court. And if there is nothing from which an appeal lies to this Court, then obviously an extension of time for doing so cannot be granted.

[13] I am not particularly happy with the result in this case because there is no question in my mind that there is before me a factual situation as to which there would be an arguable appeal, if an appeal were to lie at all. In other words, the appeal is not one that is clearly without any merit. Indeed, considering recent decisions under these statutes dealing with the question of who is employed and who is engaged under contracts for services, or as independent contractors as its sometimes put, it might well be suggested that any appeal on that issue would have some merit, as the Chief Justice has recently pointed out. Nevertheless, the facts, even put at their highest for the Appellant, leave absolutely no doubt that no appeal lies simply because there is nothing to appeal from.

[14] If there were an application before the Minister by way of appeal, and the Minister failed to deal with it, this court still could not offer a remedy. The remedy for that would lie elsewhere. It was not suggested in argument that Mr. Webbe was a victim of intimidation, but even if he were, the remedy for that also would not lie here. Regrettably, I must dismiss both applications.

Signed at Ottawa, Canada, this 14th day of July, 2008.

"E.A. Bowie"

Bowie J.

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