

BETWEEN:

ROBERT JOHN WARD,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion heard on common evidence with the motion of
Robert John Ward (2007-631(GST)APP)
on May 15, 2008, at Miramichi, New Brunswick

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Applicant: Marc Cormier
Counsel for the Respondent: Catherine McIntyre

JUDGMENT

The motion for an order extending the time for appealing the notices of reassessment dated April 20, 2004, issued under the *Income Tax Act* for the 2000 and 2001 taxation years, and the notice of reassessment dated June 23, 2005, issued under the *Income Tax Act* for the 2002 taxation year, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 17th day of September 2008.

"François Angers"

Angers J.

Translation certified true
on this 14th day of November 2008.

Brian McCordick, Translator

Docket: 2007-631(GST)APP

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Motion heard on common evidence with the motion of
Robert John Ward (2007-652(IT)APP) on May 15, 2008,
at Miramichi, New Brunswick

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Applicant: Marc Cormier
Counsel for the Respondent: Catherine McIntyre

JUDGMENT

The motion for an order extending the time for appealing the notice of assessment dated May 5, 2004, issued under the *Excise Tax Act* for the period of January 1, 2000 to December 31, 2001, is dismissed in accordance with the attached Reasons for Judgment.

Signed at Edmundston, New Brunswick, this 17th day of September 2008.

"François Angers"

Angers J.

Translation certified true
on this 14th day of November 2008.

Brian McCordick, Translator

Citation: 2008 TCC 510
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2007-631(GST)APP

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REASONS FOR JUDGMENT

Angers J.

[1] These are two motions heard on common evidence. Although the Applicant and John Elie Ward are the appellants in case 2007-631(GST)APP, this motion is the Applicant's alone. He seeks to extend the time for appealing in the two matters in question. He bases his motion on section 12 of the *Tax Court of Canada Rules (General Procedure)* ("the Rules"), which provides as follows:

Extension or Abridgement

12 (1) The Court may extend or abridge any time prescribed by these rules or a direction, on such terms as are just.

(2) A motion for a direction extending time may be made before or after the expiration of the time prescribed.

(3) A time prescribed by these rules for filing, serving or delivering a document may be extended or abridged by consent in writing.

[2] In the income tax case (2007-652(IT)APP), the Applicant was reassessed on April 20, 2004, for the 2000 and 2001 taxation years, and on June 23, 2005, for the 2002 taxation year. He filed a notice of objection on May 25, 2004, but only for the 2000 and 2001 taxation years. On February 10, 2006, the Minister of National Revenue ("the Minister") confirmed his assessment for 2000 and 2001.

[3] In the goods and services tax case (2007-631(GST)APP), the assessment for the period of January 1, 2000 to December 31, 2001, was made on May 5, 2004, and the Applicant and John Elie Ward filed their notice of objection on May 25, 2004. The Minister confirmed the assessment on February 10, 2006.

[4] In both matters, the Applicant therefore had 90 days to appeal starting on February 10, 2006, but he did not do so. On December 21, 2006, he applied to this Court under subsection 167(1) of the *Income Tax Act* ("the Act") for an order extending the time within which an appeal could be instituted for the 2000, 2001 and 2002 taxation years in his income tax case. On January 11, 2007, the Applicant and John Elie Ward made a similar application to this Court under subsection 305(1) of the *Excise Tax Act* ("the ETA") in his goods and services tax case.

[5] Both applications were heard on June 11, 2007. The Applicant and John Elie Ward were represented by counsel, and an agreement was reached by the parties. The Applicant withdrew his application for an order extending the time within which he could appeal his income tax assessment for the 2002 taxation year and, in return, the Minister's representative did not oppose the applications in either case, except, of course, for the assessment for the 2002 taxation year in the income tax case.

[6] On July 9, 2007, this Court made an order in each case allowing the applications based on the parties' agreement, and it gave the Applicant and John Elie Ward 90 days to institute an appeal in each case, that is, until October 7, 2007. A copy of each order was mailed to the parties on July 10, 2007.

[7] The Applicant and John Elie Ward did not file a notice of appeal for either case within the time granted by this Court's orders. A notice of change of counsel for the Applicant was signed on February 26, 2008, and filed with the Court on April 4, 2008. The applications for the instant motions were filed on April 23, 2008.

[8] In support of his motion, counsel for Robert John Ward filed Mr. Ward's affidavit explaining the basis for his appeal. On the question of delay, he stated the following at paragraphs 10 and 11:

[TRANSLATION]

I had retained Aline Morin to represent me in this case, but she neglected to file the appeal book, and I subsequently had to be represented by another counsel, Marc Cormier.

He told me that the time limit for filing the notice of appeal had passed.

[9] The affidavit was signed on April 22, 2008. At the hearing, Robert John Ward was cross-examined by counsel for the Respondent. He admitted that he had been present on June 11, 2007, for the hearing of the motions for an extension of time. He also admitted that he had prepared the motions in question himself for both cases on December 21, 2006, and January 11, 2007, and that Ms. Morin had not been retained as counsel until two days before the motions were heard, that is, on June 9, 2007.

[10] According to Robert John Ward, Ms. Morin was supposed to file the notices of appeal and had been instructed to do so. However, he admitted that he had not subsequently verified whether she had done so. He realized that the notices of appeal had not been filed when a motion for contempt of court was heard by this Court on February 4, 2008, in two other related ETA cases in which, according to him, his counsel had also been supposed to file a notice of appeal but had not done so. The contempt motion was filed in January 2008 further to this Court's orders of October 4, 2007, granting the applicants 30 days to file their notice of appeal, which they failed to do.

[11] The same therefore applies to the instant motion. The Applicant did not meet the time limit set out in the Act and the ETA and was granted a 90-day extension by this Court, but he did not take advantage of that extension.

[12] In support of his motion, counsel for the Applicant referred to the Applicant's misunderstanding with his former counsel regarding the instructions he had given her, his lack of understanding of the procedures and his disability following a car accident. Relying on *Spensieri v. Canada*, [2001] T.C.J. No. 410, he argued that it is in the interests of justice that the Applicant's appeals be heard.

[13] The Respondent argued that the Applicant did not file his motion within the time limited by subsection 167(1) of the Act and subsection 305(1) of the ETA and that he adduced no evidence to meet the tests set out in those subsections.

[14] The limitation periods for appealing assessments made under the Act and the ETA are established by those two statutes and not by the Rules, whether the general procedure or the informal procedure applies. Those two statutes also contain provisions permitting a taxpayer or person to apply for an order extending the time within which an appeal may be instituted where the taxpayer or person has not instituted an appeal under section 169 of the Act or section 306 of the ETA within the time limited by those sections for doing so. In both cases, the application must, *inter alia*, be made within one year after the expiration of the time otherwise limited by those sections for appealing (paragraphs 167(5)(a) of the Act and 305(5)(a) of the ETA) and must meet the stated requirements.

[15] The Applicant availed himself of those provisions and, after obtaining an order granting an extension of time, he failed to take advantage of that extension and did not file his notices of appeal within the time limit set by this Court. More than a year has now passed since the expiration of the time limit for appealing in the two cases, which means that the two statutes' provisions under which an extension can be sought are no longer available to the Applicant. This motion to vary an order is therefore his only remaining option.

[16] In *Spensieri, supra*, an application for an extension of time in which to file an appeal had been allowed and the applicant had filed her notice of appeal within the time limit set by the Court but had neglected to pay the filing fee required by the Rules. Sections 7 and 9 of the Rules were applied to extend the time for paying the filing fee. Judge Bowman found that the Rules clearly gave the Court the power to extend the time for paying the filing fee, and he added the following:

14 I might add that precisely the same result will be achieved if I treat this motion as an application under section 167 of the *Income Tax Act* for an extension of time to file an appeal. The appellant is within the time to do so and section 167 no longer contains a prohibition against granting an extension of time if the court had previously granted such an extension from the same assessment.

[17] However, this is not the situation here, since we are clearly outside the time limits established by the two statutes for applying for an extension of time to file an appeal in each case. In my view, this is a major difference from *Spensieri*. In *Spensieri*, the notice of appeal had been filed within the time granted by the Court, which is not the case here.

[18] What seems to emerge from *Spensieri* is that an order extending a time limit provided for in the Rules can be varied if the conditions set out in section 167 of the

Act and section 305 of the ETA are met, that is, the application is made within one year after the expiration of the time limit for appealing. Sections 7 and 9 of the Rules do not make it possible to change the limitation periods established by each of those statutes and, for that matter, neither does section 12.

[19] The limitation period for appealing that these motions seek to extend is established not by the Rules but rather by the two statutes in question. The direction (order) was made on conditions allowing an extension of time to be applied for under those two statutes within one year after the expiration of the time limit. It was therefore not made under the Rules of this Court.

[20] The case law has clearly established that the Court has no jurisdiction to extend a time limit set by statute. The Applicant did not meet the time limit for appealing set out in the Act and the ETA, nor did he take advantage of the extension of time granted by order of this Court as provided for in those two statutes. He is now clearly outside the time limits established by those two statutes. In my view, varying the order of July 9, 2007, at this time would do indirectly what it is no longer possible to do directly.

[21] It must be recalled that this motion concerns the extension of a time limit set by an order that was made in accordance with the time limit established by the two statutes in question. As Muldoon J. stated in *Bertold v. Canada*, [1997] F.C.J. No. 241, a further order not contemplated by a statute's procedural code appears to be impermissible.

[22] The motions are dismissed.

Signed at Edmundston, New Brunswick, this 17th day of September 2008.

"François Angers"

Angers J.

Translation certified true
on this 14th day of November 2008.

Brian McCordick, Translator

CITATION: 2008 TCC 510

COURT FILE NOS.: 2007-652(IT)APP
2007-631(GST)APP

STYLES OF CAUSE: Robert John Ward and Her Majesty the Queen

PLACE OF HEARING: Miramichi, New Brunswick

DATE OF HEARING: May 15, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice François Angers

DATE OF JUDGMENT: September 17, 2008

APPEARANCES:

Counsel for the Applicant: Marc Cormier
Counsel for the Respondent: Catherine McIntyre

COUNSEL OF RECORD:

For the Applicant:

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