

Docket: 2014-4122(IT)APP,

BETWEEN:

MARK AMRITE,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on common evidence with the appeals of *Jean-Paul J. Léger* (2014-4136(IT)APP), *Roger Léger* (2014-4137(IT)App), *Tony D'Souza* (2014-4138(IT)App) and *Elizabeth D'Souza* (2014-4139(IT)App), on November 14, 2017, at Toronto, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Agent for the Appellant: Robert Mattacchione  
Counsel for the Respondent: Suranjana Bhattacharyya

---

**JUDGMENT**

The application for an order to extend the time within which a notice of appeal may be filed with the Minister of National Revenue with respect to the reassessment made under the *Income Tax Act* for the applicant's 2002 taxation year is dismissed without costs in accordance with the attached reasons for judgment.

Signed at Kingston, Canada, this 22nd day of January 2018.

“Rommel G. Masse”

---

Masse D.J.

Docket: 2014-4136(IT)APP

BETWEEN:

JEAN-PAUL J. LÉGER,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on common evidence with the appeals of *Mark Amrite* (2014-4122(IT)APP), *Roger Léger* (2014-4137(IT)App), *Tony D'Souza* (2014-4138(IT)App) and *Elizabeth D'Souza* (2014-4139(IT)App), on November 14, 2017, at Toronto, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Agent for the Appellant: Robert Mattacchione  
Counsel for the Respondent: Suranjana Bhattacharyya

---

**JUDGMENT**

The application for an order to extend the time within which a notice of appeal may be filed with the Minister of National Revenue with respect to the reassessment made under the *Income Tax Act* for the applicant's 2003 taxation year is dismissed without costs in accordance with the attached reasons for judgment.

Signed at Kingston, Canada, this 22nd day of January 2018.

“Rommel G. Masse”

---

Masse D.J.

Docket: 2014-4137(IT)APP

BETWEEN:

ROGER LÉGER,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on common evidence with the appeals of *Mark Amrite* (2014-4122(IT)APP), *Jean-Paul J. Léger* (2014-4136(IT)APP), *Tony D'Souza* (2014-4138(IT)App) and *Elizabeth D'Souza* (2014-4139(IT)App), on November 14, 2017, at Toronto, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Agent for the Appellant: Robert Mattacchione  
Counsel for the Respondent: Suranjana Bhattacharyya

---

**JUDGMENT**

The application for an order to extend the time within which a notice of appeal may be filed with the Minister of National Revenue with respect to the reassessment made under the *Income Tax Act* for the applicant's 2003 taxation year is dismissed without costs in accordance with the attached reasons for judgment.

Signed at Kingston, Canada, this 22nd day of January 2018.

“Rommel G. Masse”

---

Masse D.J.

Docket: 2014-4138(IT)APP

BETWEEN:

TONY D'SOUZA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on common evidence with the appeals of *Mark Amrite* (2014-4122(IT)APP), *Jean-Paul J. Léger* (2014-4136(IT)APP), *Roger Léger* (2014-4137(IT)App) and *Elizabeth D'Souza* (2014-4139(IT)App), on November 14, 2017, at Toronto, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Agent for the Appellant: Robert Mattacchione  
Counsel for the Respondent: Suranjana Bhattacharyya

---

**JUDGMENT**

The application for an order to extend the time within which a notice of appeal may be filed with the Minister of National Revenue with respect to the reassessment made under the *Income Tax Act* for the applicant's 2002 taxation year is dismissed without costs in accordance with the attached reasons for judgment.

Signed at Kingston, Canada, this 22nd day of January 2018.

“Rommel G. Masse”

---

Masse D.J.

Docket: 2014-4139(IT)APP

BETWEEN:

ELIZABETH D'SOUZA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on common evidence with the appeals of *Mark Amrite* (2014-4122(IT)APP), *Jean-Paul J. Léger* (2014-4136(IT)APP), *Roger Léger* (2014-4137(IT)App) and *Tony D'Souza* (2014-4138(IT)App), on November 14, 2017, at Toronto, Ontario.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Agent for the Appellant: Robert Mattacchione  
Counsel for the Respondent: Suranjana Bhattacharyya

---

**JUDGMENT**

The application for an order to extend the time within which a notice of appeal may be filed with the Minister of National Revenue with respect to the reassessment made under the *Income Tax Act* for the applicant's 2002 taxation year is dismissed without costs in accordance with the attached reasons for judgment.

Signed at Kingston, Canada, this 22nd day of January 2018.

“Rommel G. Masse”

---

Masse D.J.

Citation: 2018 TCC 11  
Date: 20180122  
Dockets: 2014-4122(IT)APP,  
2014-4136(IT)APP, 2014-4137(IT)APP,  
2014-4138(IT)APP, 2014-4139(IT)APP

BETWEEN:

MARK AMRITE,  
JEAN-PAUL J. LÉGER,  
ROGER LÉGER,  
TONY D'SOUZA,  
ELIZABETH D'SOUZA,

Applicants,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Masse D.J.

[1] These five applications were heard on common evidence.

[2] Each of the five Applicants participated in a donation programme in the 2002 or 2003 taxation year and claimed corresponding donation tax credits for those years. The donation programme was promoted by Initiatives Canada Corporation (“ICC”). The Applicants’ agent in all of these applications, Robert Mattacchione, was the Chief Executive Officer of ICC. Mr. Mattacchione is also affiliated with another company called PAC Protection Corporation (“PAC”) which was involved in assisting the Applicants to appeal their reassessments.

[3] Each of these Applicants was reassessed by the Minister of National Revenue (the “Minister”) in respect of the donation arrangement, and each Applicant objected to the reassessment. After some considerable delay, each

Applicant's reassessment was confirmed by the Minister in July and August of 2014. Each Applicant had 90 days from the date of the mailing of the Notice of Confirmation within which to file a Notice of Appeal with this Court. Each Applicant failed to do so. It is their position that a lawyer, Mr. Tony DeBartolo, retained by ICC through Mr Mattachione, failed to file the Notices of Appeal in a timely fashion. Hence, each Applicant has filed an application for an order extending the time to file a Notice of Appeal with this Court pursuant to s. 167 of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the "Act").

### Issue

[4] The sole issue in all of these applications is whether each of the five Applicants should be granted an order extending the time to file a Notice of Appeal with this Court pursuant to s. 167 of the *Act* in respect of the taxation years here under consideration regarding their participation in the donation programme.

### Legislative Provisions

[5] Section 167 of the *Act* provides in part:

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.

(2) **Contents of Application** -- An application made under subsection 167(1) shall set out the reasons why the appeal was not instituted within the time limited by section 169 for doing so.

(3) . . .

(4) . . .

(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.

[6] Section 169(1) of the *Act* provides:

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 reassessment, or
- (b) . . .

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessment.

### **Analysis**

[7] Pursuant to subsection 169(1) of the *Act*, each of the Applicants had 90 days following the sending of a Notice of Confirmation by the Minister within which to file a Notice of Appeal with this Court. None of the Applicants did so. The only recourse left to the Applicants to have these matters determined by the Court on their merits is to bring an application to this Court, pursuant to section 167 of the *Act*, for an order extending the time within which to file a Notice of Appeal.



[8] In all of the instant cases, the parties have agreed that paragraph 167(5)(a) is not in issue as each of the five applications was filed within the one year extended time limit. The parties have also agreed that subparagraph 167(5)(b)(iv) is not in issue on the basis that there are reasonable grounds for the underlying appeal of the donation arrangement. Thus, the only issues relate to the application of subparagraphs 167(5)(b)(i), (ii) and (iii) to these five applications. The Applicants must show that:

- (a) they were unable to act or to instruct another to act in their name **OR** they had a *bona fide* intention to appeal within the 90-day period allowed by subsection 169(1) to appeal;
- (b) it would be just and equitable to allow the application given the reasons set out in the application and the circumstances of the case; and
- (c) the applications were made as soon as circumstances permitted.

[9] Subsection 167(2) of the *Act* provides that the applications must set out the reasons why the appeal was not instituted within the time limit (90 days) set out in section 169. Each Applicant sets out exactly the same reason for their application:

Agent had believed that the legal representative had filed an appeal for the appellant. However, the legal representative had not filed within the 90 days requirement, therefore the need to request to submit at this time.

[10] Each application had attached to it, a Notice of Appeal that was identically worded to all the others except for the Applicant's name and address, the applicable taxation year and the date of confirmation of the reassessment. The pertinent taxation year was 2002 for each Applicant except for Roger Léger and Jean-Paul J. Léger where the taxation year was 2003. The statement of facts and grounds for appeal consist of just one page and are also identical one to the others.

[11] The Minister did not call any witnesses at the hearing of these matters but did file affidavits sworn by Michael Hwang, an Officer in the Toronto Litigation Office of the Canada Revenue Agency (the "CRA") for each of the five applications. These affidavits set out the timelines for each Applicant as follows:

**Mark Amrite – 2002 Taxation Year**

Date of last Notice of Reassessment:	January 2, 2014
Confirmation date:	July 17, 2014
90-day deadline:	October 15, 2014
Application filing date:	November 19, 2014
# of days late:	35

**Jean-Paul J. Léger – 2003 Taxation Year**

Date of last Notice of Reassessment:	April 17, 2014
Confirmation date:	July 21, 2014
90-day deadline:	October 20, 2014
Application filing date:	November 19, 2014
# of days late:	30

**Roger Léger – 2003 Taxation Year**

Date of last Notice of Reassessment:	March 27, 2014
Confirmation date:	July 21, 2014
90-day deadline:	October 20, 2014
Application filing date:	November 19, 2014
# of days late:	30

**Tony D'Souza – 2002 Taxation Year**

Date of last Notice of Reassessment:	November 15, 2014
Confirmation date:	August 8, 2014
90-day deadline:	November 6, 2014
Application filing date:	November 19, 2014
# of days late:	13

**Elizabeth D'Souza – 2002 Taxation Year**

Date of last Notice of Reassessment:	November 15, 2014
Confirmation date:	August 8, 2014
90-day deadline:	November 6, 2014
Application filing date:	November 19, 2014
# of days late:	13

[12] The Applicant Mark Amrite, was not present at the hearing and did not testify. However, an affidavit sworn by him on November 13, 2017 was filed with the Court as Exhibit A-4. In his affidavit, he affirms that he participated in the Initiatives Canada Corporation/Canadian Literacy Initiatives Donation Programme in 2002. He was reassessed by the CRA in 2006 and was denied the tax credits related to this donation programme. Upon receipt of his reassessment, he contacted PAC and was provided with details on how to file an objection. He filed a Notice of Objection which was subsequently disallowed by the CRA by way of a Notice of Confirmation dated July 17, 2014. He forwarded his Notice of Confirmation and other documents received from the CRA to PAC. He was informed by PAC that they would deal with filing an appeal to the Tax Court of Canada. According to PAC, a lawyer had been retained to act on behalf of many other participants in the donation programme to deal with all of the appeals. Mr. Amrite was informed that his file would be forwarded to the lawyer. He later became aware of problems

surrounding the lawyer and his failure to file a Notice of Appeal in a timely fashion and that a request for extension of time would be pursued by PAC. Mr. Amrite affirms that he never had reason to believe that there would be any problems or concerns surrounding his appeal.

[13] Mr. Amrite dealt primarily with a person named Donna DuSomme from PAC who holds the position of Reassessment Manager. On May 22, 2014, Mr. Amrite emailed Donna DuSomme advising that the CRA had sent him a letter of settlement. The next day Donna DuSomme replied that the applicant would soon be getting a Notice of Confirmation and at that time, PAC would prepare and file an appeal on his behalf. On March 4, 2015, Mr. Amrite's father emailed Donna DuSomme inquiring about his own appeal and that of his wife. He also indicated that he had visited the Tax Court of Canada website and he did not see any reference to his son's appeal. The next day Donna DuSomme wrote back indicating that an appeal had indeed been filed for Mark, his son, the Applicant in this matter. In fact, this was simply not so. It was not an appeal that had been filed but rather an application to extend time to file an appeal. These emails are included as part of Exhibit A-1.

[14] The Applicant Jean-Paul J. Léger, also was not present and did not testify. However, his affidavit is before the Court as Exhibit A-5. He also participated in the donation programme in the 2003 taxation year and his tax credits related thereto were also refused by the CRA. He contacted PAC and was provided with details on how to file an objection. He filed a Notice of Objection which was subsequently disallowed by the CRA by way of Notice of Confirmation dated July 21, 2014. He forwarded his Notice of Confirmation and other documents received from the CRA to PAC. He was informed by PAC that they would file an appeal with the Tax Court of Canada. According to PAC, a lawyer had been retained on behalf of all the participants in the donation programme to deal with all of the appeals. From April to July 2014, he faxed and emailed documentation regarding his Notice of Objection and Notice of Confirmation and he was informed that his file would be forwarded to the lawyer. He became aware of problems with his appeal when he received correspondence from the CRA that the amount in dispute was owed and collectable. He contacted PAC and was told that there were problems regarding the lawyer filing a Notice of Appeal on time. He was told that a request for extension of time had been filed by PAC with the Court. He affirms that since being reassessed, he has corresponded with PAC without issue and he never had reason to believe that there would be any problems or concerns surrounding his appeal.

[15] Exhibit A-1 contains emails exchanged between Donna DuSomme and Jean-Paul J. Léger and his wife in early May 2014 providing the Applicant with instructions on how to complete a Notice of Objection. It does not make any reference at all to filing an appeal to the Tax Court of Canada or to making an application for an extension of time.

[16] The Applicant Roger Léger, also was not present and did not testify at the hearing. His affidavit was filed with the Court as Exhibit A-3. He indicates that he also participated in the donation programme. He also was reassessed by the CRA and denied tax credits related to the donation programme for his 2003 taxation year. He also filed a Notice of Objection with the help of PAC which was subsequently denied. He received a Notice of Confirmation dated July 21, 2014 and forwarded all documents to PAC. He was informed that a lawyer had been retained to handle the appeals on behalf of all participants in the programme. From April to July 2014, he faxed and emailed PAC, documentation regarding his Notice of Objection and Notice of Confirmation and he was informed that his file would be forwarded to the lawyer. He became aware of problems with his appeal when he received correspondence from the CRA that the amount of tax in dispute was owed and collectable. He contacted PAC and was told of the problems surrounding the lawyer and his lack of timely filing. He was told that a request for extension of time had been filed by PAC. He affirms that since being reassessed, he has corresponded with PAC without issue and he never had reason to believe that there would be any problems or concerns surrounding his appeal.

[17] Exhibit A-1 contains emails exchanged between Donna DuSomme and Rosella Léger, Roger's wife, in late May 2014 in relation to her 2003 Notice of Objection and the extent of her insurance coverage. There are also emails between Roger Léger and Donna DuSomme at the end of July 2014, regarding the 2003 Notice of Objection of Roger Léger. This email refers to a total of seven documents that are attached. Although none of these emails make reference to a Notice of Confirmation or filing an appeal to the Tax Court of Canada or making an application for an extension of time, given the date, it is likely that one of those documents was his Notice of Confirmation since that was dated July 21, 2014.

[18] The Applicant Tony D'Souza, was present and did testify on behalf of himself and his spouse, the Applicant Elizabeth D'Souza. They also were donors to the donation programme for the 2002 taxation year. He testified that when they were reassessed for that year, he and his wife prepared and filed Notices of Objection with the assistance of Donna DuSomme from PAC. In due course, they received Notices of Confirmation dated August 8, 2014 which he forwarded on to

PAC. It was his expectation that PAC would file Notices of Appeal with the Tax Court. He did not follow up with PAC on the progress of these matters since he had confidence that PAC was taking care of everything and that things were being done on time. He believed that he was covered by a warranty programme and that PAC would take the necessary steps to retain legal counsel and file an appeal. He was made aware of the problem regarding an extension of time to file an appeal but he left it up to the professionals to take care of the problem. He states that he received offers of settlement from the CRA but he refused such offers and sent them on to PAC to take care of them. He was quite comfortable dealing with his tax problem in the context of a group of appellants. He identified two strings of emails that are contained in Exhibit A-1. One string of emails dates from the end of January 2014 and the other string dates from the middle of May 2014. Both of these relate to the preparation and filing of Notices of Objection, not appeals, since they predate the Notices of Confirmation.

[19] In cross-examination, he confirmed that he received a Notice of Confirmation on August 8, 2014. He also confirmed that he was aware that he had 90 days from that day to file a Notice of Appeal. However, he did not keep track of the date by which he had to file. He simply left it to PAC to look after. He does not recall doing any follow-up with Donna DuSomme and he did not follow up with the CRA or with the Court. He himself took no action between the limitation date for filing an appeal and the date that the application for extension of time was filed. He did not contact a lawyer nor did he contact Mr. DeBartolo, the lawyer hired by PAC to file the appeals. In fact, he has never met Mr. DeBartolo.

[20] Donna DuSomme testified. She first started working for PAC in 2013. She was the contact person for PAC whenever their clients got reassessed by the CRA. She would direct the clients on how to prepare and file Notices of Objection. There were many clients and thus there was a large volume of Notices of Objection to be filed. It was around March and April 2014 that she received an influx of calls from clients wondering why they were being contacted by CRA demanding payment. Clients began to receive Notices of Confirmation and they were sending the notices to her on practically a daily basis. At first, she did not even know what these Notices of Confirmation were and neither did some of the clients. She did not know what steps had to be followed to challenge these notices. She and a co-worker, Cheri Durst, went to Mr. Mattachione, their superior, for guidance and instruction. She was told that a lawyer, who we now know was Tony DeBartolo, was being hired to file appeals of the reassessments with this Court on behalf of their clients. She scanned the documents provided to her by the clients and either emailed or faxed them to Mr. DeBartolo. She knew that these appeals were time-

sensitive. She would request that Mr. DeBartolo confirm receipt of these documents. There was some communication with his office but then this stopped. She later found out that some of the files had gone beyond the time prescribed for filing an appeal because Mr. DeBartolo had not filed the appeals in a timely manner. She then learned how to draft and file applications for an extension of time to appeal and did so for these clients. She kept track of the appeals and applications by the use of spreadsheets but this was a confusing and unreliable process since she did not have complete information from all of the clients. She did not know which files were being appealed by DeBartolo and which files were not. She had to communicate with the Court in order to find out.

[21] She testified that she did not really remember some of the Applicants in the matters before this Court. That only stands to reason since there were many Applicants and it was a long time ago. She testified that the primary means of communication with the PAC clients was by way of email; yet, there are very few emails that have been filed with the court describing the steps taken other than the few emails that have been produced as Exhibit A-1. She acknowledges that a lot of clients did not follow up on their appeals. She supposes that they all presumed that PAC would take care of things.

[22] Ms. DuSomme testified that on March 27, 2014, she received communication from Mr. DeBartolo's office that she was not to send him any more files or faxes until he had heard from Mr. Mattacchione. She advised Mr. Mattacchione of this, that same date. This is a clear indication to me that there was a problem with the solicitor-client relationship. She never did receive any communication from Mr. DeBartolo to resume sending files to him. However, even though Mr. DeBartolo did not want to receive any more faxes, she kept on sending them to him on instruction from Mr. Mattacchione. It is her evidence that all PAC did, was forward Notices of Confirmation to Mr. DeBartolo and not really anything else. Mr. DeBartolo was the only lawyer hired to handle the appeals – no other counsel or legal representative was hired.

[23] Tony DeBartolo is a tax lawyer practicing in Mississauga, Ontario. He was called to the bar in 2006. He is familiar with the donation programme that was the subject of reassessment in the present cases. He testified that on November 8, 2013, he was retained by Robert Mattacchione, on behalf of and as Chief Executive Officer for ICC. This retainer agreement can be found in Exhibit A-2 at Tab 1. Currently, there is a civil litigation between Mr. DeBartolo as plaintiff (defendant by counterclaim) against ICC, PAC and Roberto Mattacchione as

defendants (plaintiffs by counterclaim). Exhibit A-2 is Mr. DeBartolo's affidavit of production of documents in relation to this litigation.

[24] The retainer agreement is in anticipation of litigation before the Tax Court of Canada between the CRA and all the donors who participated in the donation programme for the 2002, 2003 and 2004 taxation years. It is to be noted that, according to this agreement, Mr. DeBartolo's client is ICC and not the individual taxpayers who participated in the donation programme. The agreement sets out a non-exhaustive menu of services to be provided to ICC in relation to this anticipated litigation. Mr. DeBartolo's hourly rate was \$300 for his services and \$100 for his legal assistants. Disbursements and harmonized sales tax are extra. Paragraph 5 of the agreement provides that accounts are to be paid in full no later than 30 days from the date of invoice. Paragraph 9 provides for an initial retainer deposit of \$10,000. Interim billings will be drawn on the initial retainer. According to paragraph 11, should the balance of the retainer funds fall below \$5,000, then upon request by Mr. DeBartolo, the retainer is to be replenished in the amount of \$10,000. Work on any file will be stopped until the amount requested has been paid. According to paragraph 12, if the retainer is not replenished, then Mr. DeBartolo may take action to have himself removed as solicitor of record in any court action. Mr. DeBartolo made it clear that he was unwilling to do any work without being properly retained and paid. On November 11, 2013, PAC provided Mr. DeBartolo with an initial cheque in the amount of \$10,000. That is all that was ever paid.

[25] Initial discussions between Mr. Mattachione and Mr. DeBartolo were to the effect that there were tax appeals that had to be filed and they had to be filed quickly. Mr. DeBartolo told Mr. Mattachione to send the files to his office and the appeals would be filed quickly. Mr. DeBartolo testified that he would receive faxes from Donna DuSomme and he coordinated matters with her. Every time she received a Notice of Confirmation from a donor, he would ask her to provide him with the complete file to permit him to draft a Notice of Appeal. The flow of paperwork commenced immediately after being engaged. Donna DuSomme would send him everything and if he was missing something, he would apprise her of such and he would confirm when he was in receipt of it.

[26] Mr. DeBartolo did file Notices of Appeal on behalf of about 25 donors as well as applications for extension of time to appeal with the Tax Court of Canada. There were no problems in filing these appeals and applications. In reporting to Mr. Mattachione by email, Mr. De Bartolo made it clear that in the future, it was very important that any appeals be filed within 90 days of the date of a Notice of

Confirmation. He requested that any material be forwarded to him within that 90-day period.

[27] It did not take long for the solicitor-client relationship to break down. On Nov. 25, 2013, Mr. DeBartolo rendered an interim account in the amount of \$7,932.60 for work done to date and requested a further amount of \$10,000 (see Exhibit A-2, Tab 3 and 4). The requested amount was not paid. On January 9, 2014, Mr. DeBartolo emailed Mr. Mattacchione requesting further retainer monies in order to continue working. Mr. DeBartolo warned that more appeals needed to be filed with the Tax Court of Canada and that the deadline for filing was fast approaching – these appeals were very time-sensitive. Mr. DeBartolo confirmed that he stopped working on the appeals until he receives more retainer funds (see Exhibit A-2, Tab 5). Mr. Mattacchione responded by email dated Thursday January 9, 2014, that funds would be provided the following Monday (Exhibit A-2, Tab 6). No funds were forthcoming. On January 20, 2014, Mr. DeBartolo provided another interim account in the amount of \$56,879.60 for filing applications for extension of time and Notices of Appeal with the Tax Court of Canada on behalf of 24 taxpayers who had participated in the donation programme. Although Mr. Mattacchione acknowledged receipt of the invoice, no funds were forthcoming. On January 27, 2014, Mr. DeBartolo again exchanged emails with Mr. Mattacchione reiterating that he had stopped working on donors' files and would not be doing any further work until he received payment and that the deadlines for filing were fast approaching. Mr. Mattacchione indicated that he was working to obtain payment. It should be noted that another lawyer, one Mr. Robert Kepes, was holding substantial funds as a defence fund on behalf of the donors and therefore funds could have been easily transferred from Mr. Kepes to Mr. DeBartolo. However, no funds were in fact transferred to Mr. De Bartolo in spite of Mr. Mattacchione's undertaking to do so. From then on, there followed much correspondence from Mr. DeBartolo to Mr. Mattacchione regarding requested payment of invoices and replenishment of his retainer. Mr. DeBartolo consistently reminded Mr. Mattacchione that the appeals were time-sensitive and failure to act could adversely affect the interests of the taxpayers. Mr. DeBartolo's emails were ignored and no funds were paid. Mr. De Bartolo has not done any more work on any new files since February 2014, just as he stated in his correspondence. However, he was counsel of record on some appeals that had already been filed with the Court and he continued to do some work on those files but not any new ones. Finally, after a telephone conversation of January 27, 2015, more than a year after the initial retainer was exhausted, Mr. DeBartolo sent an email dated February 2, 2015, indicating that if he did not receive payment in full by the following Friday, he would bring an application to be removed as counsel of



record on those files for which he was indicated as counsel of record before the Tax Court of Canada and he would not go back on the record. All of this correspondence is contained in Exhibit A-2. As of August 14, 2015, the outstanding balance on account of services rendered by Mr. DeBartolo to ICC was \$80,938.80. None of this has been paid to date. The dispute over amounts owing for services rendered gave rise to the litigation between Mr. DeBartolo and Mr. Mattachione and related companies.

[28] Mr. DeBartolo did, in fact, apply to remove himself from the record on all of those files for which he was indicated as counsel of record and he so indicated to the individual donors in correspondence to them, that they should seek other representation. Mr. DeBartolo has never met any of the donors and he is categorical in his assertion that he was not retained by any of the donors. He was only retained by ICC.

[29] As I have previously indicated, the parties are in agreement that paragraph 167(5)(a) is not in issue, as each of the five applications was filed within the one-year extended time limit. The parties have also agreed that subparagraph 167(5)(b)(iv) is not in issue on the basis that there are reasonable grounds for the underlying appeal of the donation arrangement. Thus, the only issues relate to the application of subparagraphs 167(5)(b)(i), (ii) and (iii) for these five applications. In order to succeed, the Applicants must satisfy each and every one of the following criteria:

- (a) they were unable to act or to instruct another to act in their name **OR** they had a *bona fide* intention to appeal within the 90-day period allowed by subsection 169(1) to appeal;
- (b) it would be just and equitable to grant the application given the reasons set out in the application and the circumstances of the case; and
- (c) the applications were made as soon as circumstances permitted.

[30] On the entirety of the evidence, I am satisfied that the Applicants had a *bona fide* intention to appeal within the 90-day period limited by subsection 169(1) of the *Act*. The Respondent is not contesting this branch of the criteria.

[31] The Respondent does contest that the Applicants filed their applications as soon as circumstances permitted as required by subparagraph 167(5)(b)(iv) of the *Act*. In *Pennington v. M.N.R.*, 87 DTC 5107, the Federal Court of Appeal held that the requirements in the *Act* to file the application as soon as circumstances permitted meant that the taxpayer has to make his application as early as under the

particular circumstances, he could reasonably be expected to get an application ready and file it.

[32] In *Kolmar v. R.*, 2003 TCC 829, Justice Rip of this Court observed at paragraph 15 that if a taxpayer is late in filing a notice of appeal, the taxpayer must act with diligence to apply for an extension of time to appeal and file a Notice of Appeal. In *Carrier c. R.*, 2005 TCC 182, at paragraphs. 21 and 24, Justice Tardif of this Court held that, even if an Applicant's representative admits that an oversight which resulted in missing a filing date, was his, the Applicant must bear responsibility for the representative's oversight because it was his duty to ensure that his representative would be able to act within the prescribed time limit.

[33] In the case of Mr. Amrite, he overshot the 90-day period limited by subsection 169(1) of the *Act* by 35 days. J.P. Léger and Roger Léger were 30 days late. Mr. and Mrs. D'Souza were 13 days late. There is scant evidence that the Applicants themselves took any steps to file their appeals on time other than entrusting PAC to do so. PAC did not do so. I conclude that the Applicants were not diligent in following up on the efforts of PAC to file their appeals. PAC seeks to place the blame for the late filing on Mr. DeBartolo. However, it is clear on the entirety of the evidence that the solicitor-client relationship had broken down as early as January 9, 2014, when Mr. DeBartolo confirmed that he would do no more work until his retainer was replenished and put in good standing. This is well before the dates of the Notices of Confirmation and very much before the 90-day deadline. PAC knew these matters were time-sensitive and that it was having problems with its legal representative long before the Applicants received their Notice of Confirmation. Yet, little or no effort was made by ICC, PAC or Mr. Mattacchione to mend the solicitor-client relationship or to retain other counsel or to otherwise take steps to file the appeals on time even though there was more than sufficient time to do so. PAC was negligent in discharging its duties to its clients. The Applicants must bear responsibility for PAC's negligence since it was their duty to ensure that PAC would act within the prescribed time limit.

[34] I am satisfied that the Applicants and PAC have not adequately demonstrated that they were diligent in filing their appeals. In my view, each of the five Applicants and PAC had ample time to file the Notices of Appeal with this Court within the 90-day time limit for doing so, pursuant to section 169 of the *Act*. They have not adequately explained why their appeals were filed beyond the 90-day time limit and why they were delayed beyond that time limit. Had the Applicants and PAC exercised even a modicum of diligence, these applications for extension of time would not have been necessary in the circumstances of each of

these cases. These applications were therefore not filed as soon as circumstances permitted. To file an application under section 167 of the *Act*, an Applicant has the onus of establishing that each of the criteria set out in subsection 167(5) of the *Act* has been met. A failure to meet any one of the criteria is fatal to the application (see *Dewey v. Canada*, 2004 FCA 82 at paragraph 3). Therefore, these applications should be dismissed on a consideration of this branch of the criteria alone.

[35] Alternatively, I am also not satisfied that it would be just and equitable to allow the extensions of time, given the reasons set out in the applications and the circumstances of these cases. I come to this conclusion for the following reasons:

It has been held that the negligence or carelessness of a taxpayer's lawyer does not amount to just and equitable grounds for granting an extension of time to file a Notice of Appeal under the *Excise Tax Act* (see *Bouganim v. Canada*, [2010] T.C.J. No. 449). It is clear that a simple mistake made by a representative or lawyer acting on behalf of an Applicant will not disentitle the Applicant to relief. However, negligence or carelessness of the taxpayer's representative or lawyer, certainly may. In *Di Modica v. Canada*, [2001] T.C.J. No. 620 (Q.L.), the issue was whether the lawyer's negligence could be a just and equitable reason for granting an application for an extension of time for serving a Notice of Objection. The provisions contained in subsection 166.2(5) of the *Act* for granting an extension of time to file a Notice of Objection are similar to the provisions contained in section 167(5) of the *Act* for granting an extension of time to file a Notice of Appeal. It was argued that the Applicant acted diligently and should not be punished for the omissions of the law firm she had retained. In dismissing the application, Justice Lamarre Proulx of this Court observed at paragraph 16:

[16] It is in my view that an error by counsel can be a just and equitable reason for granting an extension of time if counsel otherwise exercised reasonable diligence required of a lawyer. I do not think that the state of the law is such that counsel's negligence or carelessness can constitute a just and equitable reason for granting the requested extension within the meaning of subparagraph 162.2(5)(b)(ii) of the Act.

[Emphasis added].

[36] Therefore, although a mistake made by an agent or counsel acting on behalf of an Applicant is not fatal to an application for an extension of time, an agent or counsel acting on behalf of an Applicant must otherwise demonstrate reasonable diligence. Negligence or carelessness of an agent or counsel does not constitute a just and equitable reason for granting an extension of time to appeal.

[37] The cases at bar are practically identical to the situation in *Sapi et al. v. Canada*, 2016 TCC 239, a decision of Justice Visser of this Court. The only difference is that in *Sapi*, Mr. DeBartolo did not testify whereas he did before this Court in the five applications at bar. Given the testimony that I heard from Mr. DeBartolo, the result must be the same as in *Sapi*. Justice Visser of this Court observed as follows at paragraph 37 of *Sapi*:

. . . It is my view that the Applicants have not established that it would be just and equitable to grant their Applications given the reasons set out in their Applications and the circumstances of their cases. It is my view that the alleged failure of PAC and Mr. De Bartolo to file the Applicants' appeals on a timely basis within the appeal period is not a just and equitable reason to grant the Applications in the circumstances of this case. While there is insufficient evidence in this case to establish that Mr. De Bartolo was negligent or careless, or that he even had been engaged to act on behalf of the Applicants, it is my view that the Applicants have not established that PAC or Mr. De Bartolo acted with reasonable diligence as required in the *De Modica* case. PAC was purportedly engaged to assist the Applicants in filing their appeals. It failed to do so, and failed to properly engage counsel to assist it in doing so. There is no evidence that it actively monitored the status of the appeal filings on a case-by-case basis, or that it set in place procedures for doing so. There is also no evidence that it was properly staffed to handle the volume of appeals it took on or that it engaged a sufficient number of counsel, of which there are no shortage in Ontario or Canada, to assist it in filing and handling the appeals it had taken on.

[38] I agree with Justice Visser and I arrive at the same conclusion based on all the evidence that I have heard. In the cases before me, I do not find that Mr. DeBartolo was in fact negligent; he was simply standing firm that he would do no work on new files unless he was paid – not an unreasonable position to take. Even if it can be found that Mr. DeBartolo was negligent, I am driven to the conclusion that ICC, PAC and/or Mr. Mattacchione demonstrated great negligence in failing to file the applications for extension of time. PAC dithered and delayed, providing Mr. DeBartolo with no additional retainer funds and did nothing to honour the terms of the retainer agreement even though it knew that time was of the essence and even though it knew that Mr. DeBartolo would do no further work without being paid. No efforts were made to retain alternate counsel or legal representation once the relationship with Mr. DeBartolo broke down even though other counsel, such as Robert Kepes, was undoubtedly available. I am of the view, as was Justice Visser in *Sapi*, that each of the five Applicants also failed to take adequate steps to follow up with PAC to ensure that their respective Notices of Appeal were filed on a timely basis. Any neglect or carelessness by ICC, PAC, Mr.

Mattacchione or any counsel engaged to file the appeals in question, is not a just and equitable reason to grant these five applications.

[39] Justice Visser, in *Sapi*, went on to observe at paragraphs 44 of his reasons for judgment:

[44] Overall, it is my view that each of the Applicants provided their respective Notice of Confirmation to PAC on a timely basis, and then simply trusted PAC to attend to their appeals without adequately following up with PAC to ensure their appeal was so filed. Unfortunately, their trust in PAC was misplaced, as PAC did not insure their appeals were filed on a timely basis or take adequate steps in doing so. While PAC has attempted to deflect blame to Mr. DeBartolo, who did not testify, it is my view that any neglect or carelessness by either PAC or any counsel it engaged to file the appeals in question is not a just and equitable reason to grant these four Applications.

[40] I agree with Justice Visser. In the circumstances of these cases, the neglect or carelessness of the Applicants, ICC, PAC, Mr. Mattacchione or Mr. DeBartolo in failing to file the appeals in question, is not a just and equitable reason to grant these applications for an extension of time to file an appeal.

### **Conclusion**

[41] For all of the above noted reasons, each of these five applications for an order extending the time within which an appeal may be instituted is dismissed, without costs.

Signed at Kingston, Canada, this 22nd day of January 2018.

“Rommel G. Masse”

---

Masse D.J.

CITATION: 2018 TCC 11

COURT FILE NOS.: 2014-4122(IT)APP, 2014-4136(IT)APP,  
2014-4137(IT)APP, 2014-4138(IT)APP,  
2014-4139(IT)APP

STYLES OF CAUSE: Mark Amrite and HMQ  
Jean-Paul J. Léger and HMQ  
Roger Léger and HMQ  
Tony D'Souza and HMQ  
Elizabeth D'Souza and HMQ

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 14, 2017

REASONS FOR JUDGMENT BY: The Honourable Rommel G. Masse, Deputy  
Judge

DATE OF JUDGMENT: January 22, 2018

APPEARANCES:

Agent for the Appellants: Robert Mattacchione  
Counsel for the Respondent: Suranjana Bhattacharyya

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Nathalie G. Drouin  
Deputy Attorney General of Canada  
Ottawa, Canada