Citation: 2011 TCC 569
Date: 20111221
Docket: 2011-2377(IT)APP

BETWEEN:

SONJA MELANSON,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR SUSPENDING JUDGMENT

Hershfield J.

[1] The Applicant seeks an extension of time to file a Notice of Objection to two assessments: one for the 2005 taxation year and the other for the 2006 taxation year. The subject assessments were both dated March 17, 2009.

[2] The Respondent asserts by affidavit signed by an appeals officer of the Revenue Canada Agency (the "CRA") in September, 2011 (the "CRA's First Affidavit"), that a Notice of Objection in respect of both assessments was not served on the Minister of National Revenue (the "Minister") until January 7, 2011. The Notice of Objection was not on a T400A form but was a letter (the Applicant's "2011 Objection Letter") addressed to the Chief of Appeals at the appropriate CRA office as required under subsection 165(2) of the *Income Tax Act* (the "*Act*").

[3] The Applicant was advised by letter dated January 27, 2011 that her 2011 Objection Letter could not be accepted as it was not filed within the time required by the *Act* and that a time extension was not possible as the time to request an extension had expired as well.

[4] Notwithstanding being advised of the expiry of limitation periods, on April 14, 2011 the Applicant served the Minister with applications for extensions of time within which to file Notices of Objection for the subject years. By letter dated May

18, 2011 the Minister informed the Applicant that the time extensions could not be granted as the applications were not filed within the statutory time limits.

[5] An application for an extension of time was filed with the Court on June 30, 2011.

[6] The Respondent submits that the application to the Court is beyond the year and 90 day limitation period imposed by paragraph 166.2(5)(a) of the *Act* and an extension cannot be granted. The 90 day portion of this time limit to file an objection is set out in subsection 165(1) of the *Act* and the additional one year time allowance to apply to the Court for a time extension is covered under paragraph 166.2(5)(a) of the *Act*.

[7] The authorities supporting the Respondent's submission are numerous. Regardless, the Reply to the application asserts that the other requirements that need to be met pursuant to paragraph 166.2(5)(b) of the *Act* have not been met. The hearing of the application did not address this issue.

[8] The one year and 90 day limitation period for the subject applications ends on June 15, 2010. On the face of it then, it should be clear that the applications made in June, 2011 were well beyond the limitation periods set out in both subsections 166.1(7) (applicable to the Minister) and 166.2(5) of the *Act* (applicable to this Court).

[9] On the other hand, the uncontradicted and credible evidence of the Applicant was that the Notice of Objection in respect of both assessments said to have been served on the Minister on January 7, 2011 had been previously sent to the CRA. Indeed, she submitted a copy of the earlier correspondence (the Applicant's "First Letter") which was almost identical to the Applicant's 2011 Objection Letter. The relevant difference between this, the Applicant's First Letter, and the Applicant's 2011 Objection Letter (that the CRA's First Affidavit acknowledged was accepted as a Notice of Objection albeit late filed) was that unlike the Applicant's 2011 Objection Letter, her First Letter was not addressed to the Chief of Appeals at the appropriate CRA office as required under subsection 165(2) of the *Act*.

[10] At this point, I note that the affiant of the CRA's First Affidavit swore a second affidavit which was filed with the Court after the hearing at my request (the "CRA's Second Affidavit"). I will discuss that affidavit again shortly but for now it is important to note that it acknowledges the receipt of prior correspondence from the Applicant. Two such letters are referred to but *none are appended* to this affidavit. Two replies *are appended* to it and both give instructions as to how to

file an objection in accordance with subsection 165(2) of the *Act*. The latest of those two letters served on the CRA was received by it on June 17, 2009. The Applicant could not remember when the subject First Letter was sent and would therefore be unable to say with certainty that the letter received by the CRA on June 17, 2009 was the letter she tendered at the hearing as her First Letter. Still, the question arises as to the likelihood that this letter received on June 17, 2009 was the letter tendered at the hearing by the Applicant and identified in these Reasons as her First Letter. I find that on a balance of probability it was. The Respondent's failure to produce the June 17, 2009 letter, after being given the opportunity to do so, does little to dissuade me of this finding.

[11] Before moving on to yet another question raised by the CRA's Second Affidavit, I note here that there was yet another letter from the Applicant received by the CRA and referred to in the CRA's Second Affidavit that supports my finding that the Applicant's First Letter was sent in June, 2009. It is a March, 2011 letter and a copy of it is appended to that affidavit. It is a third letter but again it is almost identical to the Applicant's two other letters. Scrutiny of the Applicant's correspondence supports my accepting the likelihood that her letter of June 17, 2009 was the letter she tendered as her First Letter or if not, it would not have been dissimilar from any of her other letters before the Court. That is to say, I have come to the conclusion that there were three essentially identical objection letters written by the Applicant. The March 7, 2011 letter is distinct in that the indentation of the addressing directive to the Chief of Appeals is different than that of the Applicant's 2011 Objection Letter which in turn is distinct from her First Letter which was not addressed to an appeals officer. This suggests to me that the Applicant has been sending essentially the same letter to the CRA over and over with barely detectable changes.[1] That, in all likelihood, includes the letter of June 17, 2009.

[12] Yet another question raised by the CRA's Second Affidavit is why the reply to the Applicant's letter received on June 17, 2009 did not advise the Applicant that any objection would be past the 90 day time limit. It was already two days past the 90 day limit when that letter was received. That is, it might have been appropriate to advise the Applicant, at that time, that an application for an extension of time had to be made as soon as circumstances permitted but no later than June 15, 2010. A further caution that reasons for delays should be given and

[1] I have stated that the letters were essentially identical. Aside from differences in the addressing, the only other difference that I can detect is the spacing of paragraphs and where pages end. Such differences in spacing, or so it appears, is attributable only to variances in the size and spacing of the Applicant's handwriting.

that further delays could result in an application being denied, might have been appropriate as well. Had such assistance been offered and a resulting application been made, I have little doubt that the Minister would have granted an extension. Ironically, the Respondent, in a written submission to the Court, argued that even if the letter received by the CRA on June 17, 2009 was the letter the Applicant tendered at the hearing as her First Letter, it was late filed and having failed to give reasons for being late (two days), it could not have been accepted, pursuant to the requirements of subsection 166.1(2) of the *Act* as an application for an extension. That subsection requires that reasons for late filing be given in an application.

[13] This submission was made in response to my request that the Respondent assist the Court in identifying the date of the Applicant's First Letter. The reasoning was that if a letter that was later accepted as a Notice of Objection could be confirmed to have been received earlier, then the earlier receipt date might be accepted as the date the objection was received and the date of an application for an extension for the purposes of sections 166.1 and 166.2 of the *Act*. My experience has demonstrated that the CRA has, in appropriate circumstances, acceded to such reasoning in the past. However, no such concession was made in this case ostensibly because of the two day issue and the asserted need for strict compliance with subsection 166.1(2).

[14] The Respondent's argument that the Minister in this case would not accept the Applicant's June 17, 2009 letter as an application for an extension, has two components. First, as noted, it did not meet the requirement of subsection 166.1(2) that the application provide reasons for being late and second, because it did not meet the addressing requirements of subsection 166.1(3). As to the latter requirement, I note the Minister has discretion to overlook it pursuant to subsection 166.1(4). As noted earlier, it strikes me as unlikely that the Minister would have refused to grant an extension in this case. The Applicant's June 17, 2009 letter can implicitly be taken as an application for a two day extension of time to file an objection and calling on the Minister to exercise the discretion granted in subsection 166.1(4). The subject letter expresses sufficient personal hardships as to explain the delay in this case. The words "I am late because" do not have to appear in an application to satisfy the requirements of subsection 166.1(2). The Minister is certainly entitled if not required to read-in probable reasons for such a delay as might be gleaned from the correspondence.[2]

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[2] I have not mentioned the tax issue in this matter. Since there is no Reply to spell it out, I can only surmise from the correspondence in evidence that it has to do with the Canada Child Tax Credit and whether the Applicant had a cohabiting spouse during the relevant period. The Applicant's

[15] The second component of the Respondent's argument deals with the addressing requirement in subsection 166.1(3). Respondent's counsel relied on the Federal Court of Appeal decision in *Pereira v. R.*, 2008 FCA 264. The background to that case was that Justice Bell of this Court in an earlier case, *Haight v. R.*, [2000] 4 C.T.C. 2546, held that the addressing requirement in subsection 166.1(3) was directory not mandatory. Justice Bowie in *Pereira* disagreed and held it to be mandatory.[3] The Federal Court of Appeal favored Justice Bowie's finding and went so far as to say that *Haight* was wrongly decided. With respect, I do not see that decision as necessarily preventing an officer of the CRA referring a document to the appropriate section of the CRA where it is abundantly clear that the document should be read as one requiring such referral in order for it to have any effect. With respect, I do not see the subject legislative provisions or the decision in *Pereira* as going so far as to say to a CRA officer: you must return an application to an applicant with an instruction to send it to the officer upstairs because the statute says you cannot walk it up the stairs yourself.

[16] Justice Bowie in *Pereira* reasoned that it would be difficult or impossible for the agency to keep proper records and to ensure dealing with objections with due dispatch as required by subsection 166.1(5) if the addressing requirement was not mandatory. While, as confirmed by the decision of the Federal Court of Appeal, no fault can be found with that reasoning, there may be cases where CRA personnel can reasonably be expected to assist an applicant comply with the mandate in subsection 166.1(3).[4] I do not mean to ignore the administrative expediency requirement to send certain documents to the right sections of the CRA. Time sensitive documents cannot just be turned over to any CRA officer where there is a requirement to see that they are sent to the officer charged with the responsibility to monitor them. However, that is no reason for a CRA officer not to re-direct a document to assist taxpayers where the circumstances clearly warrant it.

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correspondence is a continuous plea for recognition of her having to deal with a drug addicted husband and appears on the surface, at least, to be a compelling case for a hearing to determine her living circumstances during that period.

[3] [2008] D.T.C. 2462 (T.C.C.).

[4] I note that there are two CRA receipt stamps on the Applicant's 2011 Objection letter: one January 10, 2011 from the Winnipeg office and one January 13, 2011 from the Burnaby office. This acknowledges that objections can be, and are, moved around to appropriate offices at the direction of CRA personnel.

[17] Returning to the CRA affidavits, I take exception to the affiant in the CRA's First Affidavit stating that "after careful examination and search of the records" there was no record of a Notice of Objection being filed before January 7, 2011. While that may have been a true statement in the mind of the affiant, and while no bad faith is being suggested, it is my view that a careful review of the record should have included fuller and better disclosure of the type contained in the CRA's Second Affidavit. One might hope that Respondent's counsel might have had a less defensive view of this matter had she been aware at the outset that the CRA correspondence failed to advise the Applicant that she needed to apply for an extension as opposed to telling her how to address her objections in its response to the Applicant's letter received on June 17, 2009.[5]

[18] Considering that the Minister's reply to the June 17, 2009 correspondence misdirected the Applicant, I am of the view that it would be in the interests of justice for the Minister to apply those provisions of the *Act* that would allow an extension of time to file the subject objections. I refer to the Minister as there are numerous authorities that underline that the forgiveness type provisions that extend to the Minister in provisions such as subsections 165(6), 166.1(4) and 220(2.1) of the *Act*, do not extend to this Court.[6]

[19] Two approaches are open for the Minister to take. First, I am of the view that it is open for the Minister to accept the letter received on June 17, 2009 as a late filed application for an extension and accept that the reason for being two days late was self-evident, and waive the requirements of section 166.1(3) pursuant to

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[5] In my experience, this lapse of disclosure is not common. Typically, the officers of the CRA and their legal representatives with the Department of Justice assist taxpayers in every reasonable way to help ensure that taxpayers have access to the Courts. In a recent case before me (Court file: 2011-2971(IT)APP), where an application for an extension of time had been refused for having been made after the statutory time limit, the affidavit of the CRA officer set out the dates of all correspondence received from the Applicant which disputed the assessments at issue. There were numerous references to careful examinations of CRA records with attachments of all correspondence. I was confident in that case that a self-represented litigant was afforded every chance to challenge the CRA's findings of when service had been effected. In the case at bar, where a further issue has been raised as to whether the requirements of paragraph 166.2(5)(b) have been met, such a complete record of prior correspondence is all more important.

[6] Exceptions, in which it was found that an objection not filed in strict compliance with section 165(2) was none-the-less valid include: *Wichartz v. R.*, [1994] 2 C.T.C. 2334 (T.C.C. [Informal Procedure]); *Lester v. R.*, [2005] 2 C.T.C. 2161 (T.C.C. [Informal Procedure]), and *Schneidmiller v. R.*, (2009) D.T.C. 1221 (T.C.C.).

subsection 166.1(4). As stated the Minister has more authority in respect of this approach than does this Court.

[20] The second approach is to look to subsection 220(2.1) of the *Act*.

> **220(2.1) Waiver of filing of documents --** Where any provision of this Act or a regulation requires a person to file a prescribed form, receipt or other document, or to provide prescribed information, the Minister may waive the requirement, but the person shall provide the document or information at the Minister's request.

[21] A plain reading of this provision suggests that the Minister has the power to accept the June 17, 2009 letter – the one sent just two days after the expiration of the 90 day period to file an objection – as constituting a valid notice of objection in more than one way. First, it suggests that the Minister could waive the requirements of section 166.1 to file an application for an extension as a prerequisite to granting the extension. Second it can be, and has been, interpreted as allowing the Minister the power to extend the deadline for filing a document, as the Minister can waive the requirement for a document but subsequently request it.[7] Under either of these approaches, the June 17, 2009 letter could be accepted by the Minister as an objection.

[22] In *Guest v. R.*, [2010] D.T.C. 1225 (Eng.) (Tax Court of Canada [Informal Procedure]) a prescribed form was not filed as required to claim child tax benefits. Justice Woods allowed the appeal on the basis that the Minster had not considered the discretionary provisions in subsections 122.62(2) and 220(2.1) of the *Act*. She held as follows:

> [18] Given the clear intent of Parliament that the Minister may waive or extend the notification requirement, the Minister should have given consideration to this before making the determination to disallow the benefits in their entirety.

[23] That case, like the one at bar, had an element of misdirection. The relevant guide did not describe that benefits could be denied by being late in filing the prescribed form. Arguably, allowing an appeal on this basis might well be to extend this Court's jurisdiction. I am not suggesting, at this point at least, that I would follow that lead.

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[7] The Federal Court in *Greenpipe Industries Ltd. v. M.N.R.*, [2007] 1 C.T.C. 85 (Federal Court), found that subsection 220(2.1) gives the Minister the right to waive the requirement to submit certain documents and also to extend the deadline for filing such documents. See paragraph 13.

[24] On the other hand, I am reluctant to dismiss this application with a simple criticism of the rigidity of the *Act* or of the hard line approach taken by Respondent's counsel in respect of the subject addressing requirements. Criticism together with some agile reasoning led to Justice C. Miller of this Court in *Hoffman v. R.*, 2010 TCC 267, [2010] 5 C.T.C. 2151, a General Procedure case, to find in favour of an applicant who had not properly addressed a notice of objection. In that case he remarked:

> [24] … In this case, the Notice of Objection, which Dr. Hoffman made very clear was a Notice of Objection, was delivered to the Halifax District Taxation Office, though not to the Chief of Appeals. Is it too much to expect of a District Taxation Office, that receives a notice of objection, to direct it to Appeals? This harkens back to my view of exercising some cooperation in ensuring the taxpayer can wind his way through the intricate web of tax processes. Putting the question another way: does the taxpayer lose his right to object by sending a document noted as a notice of objection to the address of the Chief of Appeals at a District Taxation Office though without stating "Chief of Appeals"? Section 165(6) of the *Act* urges upon the Minister some flexibility in accepting a valid notice of objection. It must be so disheartening to Dr. Hoffman that the Government of Canada, in the circumstances of this case, rely on this minor labelling issue to put an end to Dr. Hoffman's relentless, yet cooperative, pursuit of his claim. If the Minister refuses to exercise its discretion to accept this Notice of Objection, then I must look elsewhere. I am reluctant to disagree with Justice Miller's comments. Yet, her case dealt with a notice of objection to an assessment. Here I am dealing with an objection to a determination. It is interesting to note the difference in wording between subsection 165(1) of the *Act* which deals with an objection to assessment and states the taxpayer "may serve on a Minister a Notice of Objection in writing", and subsection 165(1.1) of the *Act* which simply says the taxpayer may object to a determination. So, does subsection 165(2) of the *Act* even apply to objections to determinations or is it limited to Notices of Objection in writing as required by subsection 165(1) of the *Act*? I do not intend to reach any hard conclusion on that issue but simply add this observation to my earlier comments about the significance of leaving off "Chief of Appeals" in this particular case, and conclude that Dr. Hoffman is not to be derailed by this omission: he has made a valid objection.

[25] The reference in this quoted paragraph to "Justice Miller" is a reference to Justice V. Miller and her decision in *Fidelity Global Opportunities Fund v. R.*, [2010] T.C.C. 108 (General Procedure). In that case Justice V. Miller followed the strict approach taken in *Pereira*. In *Hoffman*, Justice C. Miller avoided disagreeing with the strict approach taken in *Fidelity Global Opportunities* by distinguishing it. One might suggest that the distinction referred to above by Justice C. Miller in *Hoffman* as a reason not to apply *Fidelity Global Opportunities*, is not supported by the *Act* but such suggestion would, in my view, lose sight of what Justice C. Miller was really

saying in his decision: derailing objections in some circumstances should not be tolerated.

[26] *Hoffman* is this Court's most recent General Procedure case relating to this issue. It suggests that there is going to be a reluctance to see a taxpayer's entitlements derailed on the basis of some formality. *Guest* suggests even more strongly the same reluctance where the Minister has not at least undertaken, in cases such as these, to review the matter and determine the merits of exercising a discretion vested in that office by Parliament.

[27] I am sending this back to the Minister to consider the appropriateness of exercising the discretion afforded him by the various provisions of the *Act* that help ensure reasonable access to a just and fair consideration of a taxpayer's objections. This is a case that warrants such consideration and as underlined in *Guest*, the Minister has a responsibility, not an option, to do so. The Applicant took reasonable steps to comply with the law and acted on incorrect written information given by the Agency when she was told how to file an objection without being warned that she was already past the 90 day limitation period. Aside from the independent merits of the subject application which call for the exercise of the Minister's discretion, these are criterion that the Minister has used in exercising the discretion afforded by section 220(2.1).[8]

[28] This approach requires that I do not render a final decision at this time. I will render my decision as necessary upon being advised of the Minister's decision. The Minister is reminded that a decision may be required to be made before March 17, 2012.[9]

[29] In closing, I make one brief comment on the approach I have taken in sending this matter back to the Minister. One variation of such an approach might be to issue an order that the Minister perform the task suggested here as being his responsibility to perform. That is not my intention as it raises jurisdictional questions. Another variation might be to refer to these Reasons as reasons for an interim, or the first of a two part, judgment acknowledging the need for an addendum to address an issue raised in the first part. I do not profess to be

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[8] See *Dorothea Knitting Mills Ltd. v. M.N.R.*, [2005] C.T.C. 64 (Federal Court) at paragraphs 19-20.

[9] It is worth pointing out that the normal reassessment periods, as defined under subsection 152(3.1), applicable to Ms. Melanson's 2005 and 2006 taxation years will expire on March 17, 2012.

embracing any recognized approach. Simply put, I am not satisfied that rendering a judgment in this matter, at this time, is in the best interests of justice.[10]

[30] Accordingly, judgment in this matter is suspended until the Minister has advised the Court further.

Signed at Ottawa, Canada this 21st day of December 2011.

"J.E. Hershfield"

Hershfield J.

[10] For examples of two part judgments or interim orders serving the same purpose see: *Sutcliffe v. R.*, [2006] 2 C.T.C. 2267 (T.C.C. [General Procedure]), final [2007] 1 C.T.C. 2404; *Yankson v. R.*, [2005] 4 C.T.C. 2511 (T.C.C. [Informal Procedure]), final [2006] 1 C.T.C. 2391*; McCoy v. R.*, [2003] 4 C.T.C. 2607 (T.C.C. [General Procedure]), final [2003] 4 C.T.C. 2959.

CITATION:	2011 TCC 569
COURT FILE NO.:	2011-2377(IT)APP
STYLE OF CAUSE:	SONJA MELANSON AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	October 5, 2011
REASONS FOR SUSPENDING JUDGMENT BY:	The Honourable Justice J.E. Hershfield
DATE OF REASONS:	December 21, 2011

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