Docket: 2011-307(GST)APP

BETWEEN:

LEAH DIOME,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on October 26, 2011, at Montreal, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Applicant:	Étienne Retson Brisson Boriana Christov
Counsel for the Respondent:	Marc Lesage

ORDER

The application for an order extending the time to file an objection with regard to a notice of assessment made under the *Excise Tax Act* is dismissed in accordance with the attached Reasons for Order.

Signed, this 15th day of February 2012.

"François Angers"

Angers J.

Citation: 2012 TCC 9
Date: 20120215
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LEAH DIOME,

Applicant,

and

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Respondent.

REASONS FOR ORDER

Angers J.

[1] A notice of assessment pursuant to the Canadian *Excise Tax Act* (*ETA*) was sent to the applicant on or about December 16, 2009. On April 8, 2010, the applicant was sent an official demand for payment of the tax debt. On or about May 3, 2010 the applicant retained legal counsel, and on May 14, 2010 an application to extend the time for filing an objection to the notice of assessment was made to the Minister of National Revenue (the Minister). The request was refused on January 6, 2011. The applicant now seeks an order from this Court that the application be granted and that the request for an extension of time be deemed a valid request. The application herein is dated January 27, 2011.

[2] An application for such an order is granted if the conditions set out in subsection 304(5) of the *ETA* are met. That subsection reads as follows:

> (5**) When application to be granted** – No application shall be granted under this section unless
>
> > (*a*) the application was made under subsection 303(1) within one year after the expiration of the time otherwise limited by this Part for objecting or making a request under subsection 274(6), as the case may be; and
> >
> > (*b*) the person demonstrates that

> (i) within the time otherwise limited by this Act for objecting,
>
> > (A) the person was unable to act or to give a mandate to act in the person's name, or
> >
> > (B) the person 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 303(1) as soon as circumstances permitted it to be made.

[3] The applicant is a member of the Mohawk Nation and a status Indian for the purposes of the *Indian Act*. She resides on the Kahnawake Indian Reserve where she carries on a business which consists of a convenience store and a gas station. The applicant has been a registrant under the *ETA* since 2004-2005, and the permit to operate the business is in her name.

[4] In October 2008, Jeannot Vachon, an auditor with Revenu Québec was given a mandate to audit the applicant's business with respect to provincial sales tax (PST) and goods and services tax (GST) remittances going back to 2007 and including 2008. At that time, the applicant was under an obligation to file quarterly reports. None was filed for the gas station for 2007 and only one had been filed in 2006. The auditor contacted the applicant to request the accounting documents relating to the business and sent her a letter requesting them. He did not receive a reply, but the applicant requested, in December 2008, an extension of time to mid-January 2009 to comply. The documents requested were never produced.

[5] In May of 2009, the auditor sent the applicant an official requirement to provide documents, but did not receive anything. In October 2009, he prepared an estimated assessment and sent it by certified mail to the applicant at the same address as that which was on file; that address has been confirmed by the applicant and has not changed over the years. Again, he did not hear from the applicant. The applicant is still registered under the *ETA* and still does not file her quarterly reports.

[6] A notice of assessment was issued to the applicant on December 16, 2009. Daniel Gagnon head of the mailing department, fully explained the process followed by Revenu Québec in sending out notices of assessment and any other

communication. I do not intend to go through all the details of that process. Suffice it to say that I am satisfied that the notice of assessment in this particular case was mailed, and therefore sent to the applicant, on the date of the assessment.

[7] In March 2010, the applicant's file was transferred to the collection section of Revenu Québec and on March 10, 2010 a letter was sent to the applicant requesting payment. Revenu Québec did not hear from the applicant. On April 8, 2010, garnishee orders were issued to two third parties in order to collect from them any monies they may have owed the applicant. A lawyer acting for the applicant eventually contacted Revenu Québec on April 29, 2010 and on May 10, 2010 to request information pertaining to the garnishee orders issued to the third parties and a statement of account. These documents were sent to the lawyer along with a copy of the notice of assessment.

[8] The applicant's mother is in charge of the day-to-day operation of the business. Whenever the applicant receives mail that has to do with the business, she hands it over to her mother. She cannot fully remember if she became aware of this matter as she says she was going through some rough times in the fall of 2010. She did give her mother some papers. She recalls having been a registrant since 2004 or 2005. She filed an application to be registered and says she must have seen the application when it was presented to her, but she does not know when that may have been. She recalls speaking with the auditor assigned to her case and having gone to his office, but does not recall any discussions about a GST assessment.

[9] Her address and that of the business have remained the same since 2008. In December of 2009, a friend of hers would pick up her mail, open it and stack it, after which the applicant gets to see it. She does not know if she received the notice of assessment but admits that she is cognizant of the fact that sometimes letters from Revenu Québec are sent to her. She does not recall having received the estimated assessment. She testified that she did file GST returns and that she does receive the forms for remittances, but does not handle the paperwork for the gas station. She does not know the numbers for the business, nor is she aware of the third party garnishee orders.

[10] As said earlier, the applicant's mother operates the business on a day-to-day basis. The applicant has the licence that allows them to buy the gas for the station. All mail from the government goes to the applicant and her mother gets it from the applicant.

[11] The applicant’s mother acknowledges having received during the winter and spring of 2010, what she calls "government affairs," some of which were in French. She knows that her daughter got notices, but since they do not pay taxes on the reserve and have never had to file anything with anybody, receiving all these documents never disturbed her. She knew, though, that others on the reserve were also getting notifications so she retained a lawyer. That is when she joined, in May 2010, a group that had a court case in progress.

[12] According to the applicant’s mother, her daughter has chosen to file her GST returns annually. The mother acknowledged that she had filed GST returns, but said she had done so under protest. She admits that she does not charge tax on gas even to non-Indians. Her position is that no one on the reserve deals with tax as Mohawks do not pay any. She had serious health problems in 2010 but was able to continue managing the business.

[13] The group that the applicant's mother says her daughter joined after consulting with a lawyer in the spring of 2010 was *Jack W. Leclaire et al*. In *Jack W. Leclaire et al v. The Attorney General of Quebec et al*., a judgment had been issued by the Quebec Superior Court on June 17, 1994 as a result of an interlocutory application made by the aforesaid group. There were eleven applicants, all with Indian status and operating gasoline retail sales outlets on the Kahnawake and Kanesatake reserves. The applicants each held a registration certificate under the *Québec Sales Tax Act* (*QSTA*). The *QSTA* requires every person with such a certificate to collect from non-Indian consumers and to remit to the Quebec Minister of Revenue (Quebec Minister) the PST on fuel. Having failed to comply with these requirements, the applicants were assessed and the province required a guarantee with respect to the amounts they each owed. The 1994 judgment was in response to the interlocutory application which was made in order to halt the collection measures taken by the Quebec Minister.

[14] The applicants argued that their ancestral rights, which are protected by the Canadian and Quebec charters of rights, exempted them from liability under the *Quebec Fuel Tax Act*, Part IX of the *ETA* and the *Quebec Retail Sales Tax Act*.

[15] The Superior Court ordered a stay of all the Quebec Minister's enforcement measures but it was done on the condition that the applicants fulfil their duty to collect and remit the tax imposed on non-Indian fuel consumers. The condition reads as follows:

> Ordonne aux requérants de percevoir et de remettre au ministre du Revenu les taxes imposées en vertu de la *Loi concernant l'impôt sur la vente en détail*, de la *Loi sur la taxe de vente du Québec* et de la *Loi sur la taxe d'accise* aux consommateurs non-Indiens qui se procurent du carburant à leur station-service et ce, dès le moment où ils recommenceront à exploiter leur commerce de vente au détail de carburant. Des rapports mensuels accompagnés des remises des montants de taxe perçus devront être remis au ministre. Le premier rapport ainsi que les montants de taxe perçus devront être remis au ministre du Revenu le 1er août 1994 et à tous les premiers jours de chaque mois par la suite jusqu'à ce qu'un jugement au fond soit prononcé.

[16] On May 25, 2010, the applicant, Leah Diome, moved the Quebec Superior Court for a declaratory judgment, for the suspension of administrative measures and for the joining of her motion with the matter of *Jack W. Leclaire et al.* for hearing. The evidence does not reveal the outcome of the motion but Exhibit A-3, dated July 7, 2010, indicates that the Quebec Superior Court issued a directive to all parties stating that the management of the two cases was being given to one judge, who would hear both cases together.

[17] The applicant's first argument relates to an obligation on the Minister to allow the extension of time for the applicant to file an objection to the assessment by virtue of the fact that the applicant is an Indian. The applicant relies on the Supreme Court of Canada decision in *Haida Nation v. British Columbia* (*Minister of Forests*), [2004] 3 S.C.R. 511, wherein that court established a general framework for the Crown's duty to consult and accommodate before aboriginal title or rights claims are decided. It is called the honour of the Crown. As soon as the Crown has knowledge of the potential existence of an aboriginal right and as soon as it contemplates conduct that might adversely affect that right, the Crown should honour its duty to consult.

[18] The content and scope of this duty vary according to the circumstances. In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, the Supreme Court of Canada wrote at paragraph 168:

> . . . The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

[Emphasis added.]

[19] In my opinion, the applicant's argument that her obligation to collect and remit GST under the *ETA* violates her aboriginal right to not be subject to any taxation has to be one of the less serious violations if indeed there is any violation of her aboriginal right at all. The *ETA* only requires a registrant to collect GST and to remit the amount thereof, which the registrant holds in trust. Other than the fact that it entails somewhat of an administrative burden, the collection and remittance of the GST does not infringe upon or affect any aboriginal rights. This is not a case where actual tax is levied on an individual with Indian status.

[20] In *R. v. Adams*, [1996] 3 S.C.R. 101, at paragraph 29, the Supreme Court of Canada reiterated its prior position adopted in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, regarding the substance of aboriginal rights. The Supreme Court cited the following passage from *Van der Peet* :

> . . . Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. . . .

[21] I do not believe that the circumstances of this case affect in any way aboriginal rights as described above and they therefore do not create an obligation on the Crown to honour its duty to consult.

[22] In my opinion, section 87 of the *Indian Act* does not release individuals with Indian status from the obligation to collect and remit the GST when they are selling goods in the commercial mainstream to non-Indian consumers. If they did supply goods and services to individuals with Indian status and collect tax from them, these same individuals could be entitled to claim a refund. In *R. v. Johnson*, 156 N-S.R. (2d) 71 (N.S. C.A.) and *Tseshaht Band v. British Columbia*, 1992 Carswell 188, 69 B.C.L.R. (2d) 1 (B.C. C.A.), it was ruled that collecting and remitting taxes on consumer sales does not in itself constitute payment of a tax. In *Tseshaht*, (*supra*) the Court stated:

> Under s. 87 of the *Indian Act*, the personal property of an Indian or a band on a reserve is exempt from taxation, and no Indian or band is subject to taxation in respect of the ownership, occupation, possession, or use of such property. The scheme of the *Motor Fuel Tax Act* and the *Tobacco Tax Act* is that the tax is payable

> by "purchasers" and "consumers" respectively when the product is purchased for personal use. The arrangements in place, whereby amounts equal to the tax to be collected by the retailer were remitted from purchaser to vendor in the distribution chain, were designed for ease of administration and accounting, but payment of such an amount was not itself payment of a "tax".

[23] In *R v. Johnson*, (*supra*), Justice Hallett found reasons to his decision in the legislative intention summed it up as follows:

> Indian retail vendors who sell tobacco products on reserves to non-natives (as does Johnson) deal with the tobacco on the same basis as all other retail vendors. Johnson, as a retail vendor, does not have a s. 87(1)(b) exemption with respect to sales to non-natives as Parliament could never have intended that an Indian dealing in the commercial mainstream, as does Johnson, would not do so on the same basis as other Canadians. Johnson, a retail vendor who sells to non-natives, must purchase tobacco from a wholesaler and pay an amount equivalent to the tax that is levied on the consumer unless he has quota under the quota system. If he imports he must have a wholesale vendor's permit. Johnson did not acquire the tobacco in question as an Indian consumer on a reserve but as a retail vendor who sells to non-natives.

[24] Before I deal with the issue of whether the applicant has fulfilled the obligations and conditions of subsection 304(5) of the *ETA*, I simply want to emphasize the fact that this Court has exclusive jurisdiction to hear and determine references and appeals on matters arising under Part IX of the *ETA*. Paragraph 12(1) of the *Tax Court of Canada Act* reads as follows:

> The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, the *Excise Act, 2001*, Part IX of the *Excise Tax Act*, the *Income Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act, 2006* when references or appeals to the Court are provided for in those Acts.

[25] The application to the Minister for an extension of time for the filing of a notice of objection was made under paragraph 303(1) of the *ETA* within one year after the expiration of the time otherwise limited by Part IX for objecting. The assessment is dated December 16, 2009 and the application was made on May 14, 2010.

[26] The next step is for the applicant to demonstrate that within the time otherwise limited by the *ETA* for objecting, namely the 90-day period after December 16, 2009,

she was unable to act or give a mandate to act in the her name or that she had a *bona fide* intention to object to the assessment or make the request.

[27] The applicant's lawyer argued that the applicant and her mother were unable to act because of ill health. Each described her state of health, but their evidence failed to establish how their health problems actually prevented them from objecting or from mandating someone to object. The applicant has clearly admitted that all mail received with regard to the operation of the business is given to her mother and that she does not handle the paperwork for the gas station. Although she does not recall having received the assessment, she is cognizant of the fact that she sometimes receives letters from Revenu Québec. In my opinion, her state of health at the relevant times would not have been a factor in light of the fact that she does not run the business and does not deal with the paperwork. Moreover, the evidence has established that the applicant's mother, despite her poor health, has continued to run and operate the business on a day-to-day basis. I therefore fail to see how their state of health made both of them unable to act in this instance or to give a mandate to act in the applicant’s name. The evidence does not disclose either that a mandate to act on the assessment was given by the applicant to her mother.

[28] On the issue of whether the applicant had a *bona fide* intention to object, the applicant's lawyer argued that the measure taken by the applicant and her mother in May 2010 by joining the group that had filed an interlocutory motion in the Superior Court of Quebec demonstrates the applicant's *bona fide* intention to object to the assessment. That may well demonstrate an intention on the applicant's part to participate in the litigation process initiated by that group, but that intention has nothing to do with the assessment issued on December 16, 2009, and even if it did have something to do with it, the step was taken beyond the 90-day period for objecting. In addition, the applicant's reaction was prompted by the fact that official demands for payment and garnishee orders against the applicant's gas supplier had been issued.

[29] The inaction of the applicant during that 90-day period appears to be consistent with her attitude towards Revenu Québec prior to the assessment being issued. I find that the applicant's general attitude with respect to her legal obligations under the *ETA* and in particular with respect to the filing of an objection to a notice of assessment to be one of indifference and/or negligence.

[30] As such, there is no evidence before me that allows me to conclude that, at any time during the 90-day period, within which she could have objected to the assessment, the applicant had any *bona fide* intention to object to the assessment. In

my opinion, this is not a situation in which an application for an extension of time to object to a notice of assessment should be granted. There is no need for me to review the other obligations given the above conclusions.

[31] The application is therefore dismissed.

Signed, this 15th day of February 2012.

"François Angers"

Angers J.

CITATION:	2012 TCC 9
COURT FILE NO.:	2011-307(GST)APP
STYLE OF CAUSE:	Leah Diome and The Queen
PLACE OF HEARING:	Montreal, Quebec
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APPEARANCES:

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