Docket: 2012-1511(IT)APP

BETWEEN:

PATRICK POULIN,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on September 21, 2012 at Winnipeg, Manitoba

Before: The Honourable Justice J.E. Hershfield

Appearances:

For the Applicant:	The Applicant himself
Counsel for the Respondent:	Rosanna Slipperjack-Farrell

ORDER

Having heard the parties with respect to an application for an Order extending the time within which a Notice of Objection from the reassessment made under the *Income Tax Act* for the 2006 taxation year may be served;

And having read the materials filed, and having heard what was alleged and argued by the parties;

IT IS ORDERED THAT:

The application is allowed, without costs, for the reasons set out in the attached Reasons for Order, and the time within which the said Notice of Objection may be served is hereby extended to the date of this Order and the Notice of Objection received with the application, is deemed to be a valid Notice of Objection.

Signed at Ottawa, Canada this 12th day of April 2013.

"J.E. Hershfield"

Hershfield J.

Citation: 2013 TCC 104
Date: 20130412
Docket: 2012-1511(IT)APP

BETWEEN:

PATRICK POULIN,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Hershfield J.

[1] The Applicant seeks an extension of time to file a Notice of Objection to a Notice of the Reassessment dated October 13, 2009. That reassessment concerns the Applicant's 2006 taxation year.

[2] The Applicant testified at the hearing that he mailed a Notice of Objection to the Canada Revenue Agency ("CRA") on October 19, 2009. He recalled receiving the subject reassessment while living in Thompson, Manitoba and that without delay he prepared the Notice of Objection and personally took it to the post office in Thompson, had it weighed, stamped and deposited for delivery.

[3] The Applicant submitted a copy of the Notice of Objection that he maintains was mailed on October 19, 2009. It was signed and dated that date.

[4] The Respondent tendered the affidavit of an appeals officer in the appeals division of the Winnipeg Tax Services Office of the CRA. The affidavit asserts that the affiant has "charge of the appropriate records and knowledge of the practices of the CRA."

[5] As well, the affiant asserts that he examined the records and as such has knowledge of the matters deposed to by him.

[6] The affidavit confirms the date of issuance of the reassessment of the Applicant's 2006 taxation year and asserts that the Notice of Objection dated October 19, 2009 was not received by the CRA until April 28, 2011. That assertion is drawn from the CRA's copy of the Notice of Objection dated October 19, 2009 but the copy was stamped as received by the appeals division Burnaby-Fraser Tax Services Office on April 28, 2011.

[7] The Respondent relies on the April 28, 2011 receipt date in asserting that the Notice of Objection was served more than one year and 90 days after the issuance of the Notice of Reassessment. If I accept that the Notice of Objection was not served on the Minister of National Revenue (the "Minister") until April 28, 2011 then clearly the application is out of time and this Court has no jurisdiction to grant the extension requested. The Crown relied on *Johnson v. The Queen*[1] as authority for this position.

[8] The sole issue in this appeal then is whether the Minister was served within the time limits set out in paragraph 166.2(5)(*a*) of the *Income Tax Act* (the "*Act*"). That paragraph, referring back to section 166.1 of the *Act*, sets out the time limit referred to above, namely, that the Minister must be served with the Notice of Objection within one year and 90 days from the date of the Notice of Reassessment as prescribed in paragraph 166.1(7)(*a*).

[9] The Applicant's testimony as to the asserted date of mailing the Notice of Objection is credible. The affiant of the affidavit relied on by the Respondent was not at the hearing. His not being available for cross-examination is, in this case, problematic in my view. However, before dealing with that concern, it is necessary that I relay more of the Applicant's testimony and the supporting evidence that he tendered as exhibits at the hearing.

[10] The Applicant's evidence was that he was aware of the need to file timely notices of objection. He had been reassessed for 2005, 2006, 2007 and 2009. He produced copies of his notices of objection in respect of each of these years. They were all dated within weeks of the date of reassessment. Those respecting the 2006, 2007 and 2009 years were sent to the Chief of Appeals at the Western Intake

[1] 2009 TCC 496, 2009 DTC 1318.

Centre in Surrey, British Columbia. The objection in respect of the 2005 year was sent to the Chief of Appeals of the Sudbury Tax Centre.

[11] The only evidence contradicting such timely responses to reassessments is correspondence from the CRA in July and November of 2011 denying timely receipt of notices of objection for 2006 and 2007.

[12] The July letter caused the Applicant to file an application for an extension of time with the Minister for both 2006 and 2007. The application in respect of the 2006 year was refused as being out of time and the application in respect of the 2007 year was allowed.

[13] I have no reason not to accept the Appellant's testimony that he mailed the Notice of Objection in respect of the reassessment for his 2006 taxation year on or about October 19, 2009. That alone, in this case, may be sufficient to allow the application even though the *Act* puts emphasis on the date of service, or date of receipt, of a notice of objection not on the date of mailing. The Applicant's testimony leads me to believe the date of receipt would have been in October, 2009. Going further, I am dubious as to the adequacy of the evidence provided by the Respondent as to the date the Minister received the Notice of Objection.[2]

[14] There are two reasons for my having doubts as to the adequacy of the evidence provided by the Respondent as to the date the Minister received the Notice of Objection for 2006. First, a question arises concerning the mailing address to which the Notice of Objection was said to have been sent in October 2009. This in turn, raises a second question concerning the adequacy of the affidavit relied on by the Respondent.

[15] As to my first concern regarding the mailing address, I note that the Notice of Objection in respect of the 2005 reassessment, addressed to the Chief of Appeals of the Sudbury Tax Centre, was not suggested as having been served late. In 2006 and 2007 and 2009, the Notices of Objection were sent to the Chief of Appeals at the Western Intake Centre in Surrey, British Columbia. The objections for 2006 and 2007 were said to be late filed. It does not strike me as a coincidence

[2] See *Burke v. Canada*, 2012 TCC 378 where Justice Miller referring to cases such as *Schafer v. Canada*, [1998] G.S.T.C. 60, [1998] T.C.J. No. 459 endorses the view that a witness who gives evidence of the date of mailing provides a higher level of certainty as to that date than the evidence of an officer of such a large organization as the CRA.

that mail to the Western Intake Centre in Surrey was said to be late filed two years in a row.

[16] The Applicant testified that he was advised by an auditor (Sherry Quass) in the Winnipeg Tax Services Office to send his objection to the Surrey office. He had contacted Ms. Quass in response to a letter she sent, dated October 13, 2009, requesting that he provide further information with respect to his 2007 return. That letter, entered as an exhibit, set out very detailed information requirements pertaining to a donation program in respect of which the Applicant received a donation receipt which he claimed in his 2007 taxation year. The 2006 reassessment appears to concern the same issue.

[17] I am of the view that the CRA letter, dated in October 13, 2009, lends support to the Applicant's testimony that the Notice of Objection in respect of the 2006 year was sent to the Chief of Appeals at the Surrey office as instructed Ms. Quass. Indeed, the Respondent's own copy of the Notice of Objection, referred to above and receipt stamp dated April 28, 2011, clearly shows that it was addressed to the Chief of Appeals at the Western Intake Centre in Surrey, British Columbia.

[18] At this point, I note that subsection 165(2) requires that notices of objection be served by being addressed to the Chief of Appeals in any District Office or Taxation Centre. I have no reason to believe that there was not a Surrey office that would meet that requirement and, in any event, the Respondent has not asserted otherwise;[3] nor does the affidavit deal with that question – the question being: what might have happened to the Notice of Objection if it had been sent to the Surrey office? The Respondent's copy of the Notice, showing the addressee as Chief of Appeals at Western Intake Centre, Surrey British Columbia, is stamped as received by the Burnaby-Fraser Tax Services Office. The problem here then is that knowing the receipt date in one office, does not address the receipt date in another office where, according to the evidence, it was first sent. That is, the Court has no evidence to address the question of if and when the Notice of Objection was received by an office in Surrey, to contradict the evidence that it was sent there.

---

[3] Subsections 165(6) and 166.1(4) empower the Minister to waive the requirements as to the manner and place of service. If there was a problem here with the place of service, the Minister might have considered the exercise of that power. Indeed, it strikes me that in cases such as this, an application for an extension of time should be taken as a request for such consideration. That would create a sequence of events that leaves the applicant recourse to this Court as one of last resort subject to the jurisdiction of the Federal Court to review the manner in which the Minister's discretionary power was exercised. I will say more about the Minister's discretionary powers in the context of subsection 221(2.1) later in these Reasons.

[19] That, together with the credible evidence of the Applicant as to when the Notice of Objection was mailed leads me to conclude that the Applicant must be given the benefit of the doubt in this case as to when it was received subject to my addressing my second question concerning the adequacy of the affidavit relied on by the Respondent.

[20] It is commonly accepted that statements in an affidavit of an officer of the CRA, who is familiar with the practices of the CRA and who has access to the appropriate records, can be taken as evidence of those statements. Indeed, the *Act* makes specific provision for this in subsections 244(9) and (10).

[21] Subsection 244(9) reads as follows:

> **244(9) Proof of documents** -- An affidavit of an officer of the Canada Revenue Agency, sworn before a commissioner or other person authorized to take affidavits, setting out that the officer has charge of the appropriate records and that a document annexed to the affidavit is a document or true copy of a document, or a print-out of an electronic document, made by or on behalf of the Minister or a person exercising a power of the Minister or by or on behalf of a taxpayer, is evidence of the nature and contents of the document.

[22] The affidavit in this case appears to meet the requirements of this subsection. However, even if I accept that the affiant in this case had charge of all the appropriate records – although I have doubts as to that – all it establishes is that the Burnaby-Fraser Tax Services Office did not receive the Objection until April 28, 2011. That is, this provision only permits the document annexed to the affidavit to be received as evidence of its contents. It does not address the issue of if and when the Surrey office received it. That is, it leaves room for the consideration of other evidence that suggests an earlier receipt date at a different office. Allowing evidence of one receipt date does not prove that there is no other receipt date.

[23] That concern is addressed in subsection 244(10) which provides as follows:

> **244(10) Proof of no appeal** -- An affidavit of an officer of the Canada Revenue Agency, sworn before a commissioner or other person authorized to take affidavits, setting out that the officer has charge of the appropriate records and has knowledge of the practice of the Agency and that an examination of those records shows that a notice of assessment for a particular taxation year or a notice of determination was mailed or otherwise communicated to a taxpayer on a particular day under this Act and that, after careful examination and search of those records, the officer has been unable to find that a notice of objection or of

> appeal from the assessment or determination or a request under subsection 245(6), as the case may be, was received within the time allowed, shall, in the absence of proof to the contrary, be received as evidence of the statements contained in it.

[24] The affidavit in question does include a statement that a search revealed no earlier receipt of a notice of objection. In the absence of proof to the contrary then, it appears that I would have to accept that the April 28, 2011 receipt date was the earliest date the Notice of Objection was received. However, in this case there is evidence to the contrary.

[25] Since the evidence supports a finding that the place where the Notice of Objection was first sent was Surrey, British Columbia and that the receipt date attested to in the affidavit is a date that reflects a subsequent receipt and since the first receipt date is the relevant date for the purposes of applying the time limits set out in the *Act*, I am inclined to give the Applicant the benefit of the doubt by finding that the Notice of Objection was more likely than not received by the Surrey Office in or about October 2009. I have no evidence to the contrary. That being the case, the application can and should be allowed.

[26] However, before closing, more needs to be said about the sufficiency of the affidavit relied on by the Respondent in this case. Recent authorities have questioned whether the affidavit relied on by the Crown had been sworn by the appropriate affiant. The most recent authority is the case of *Carcone v. The Queen*.[4] That case also dealt with an application brought pursuant to section 166.2 of the *Act*. However, in that case the issue was whether the reassessments were mailed to the applicant on the date asserted by the Minister – a date evidenced by way of an affidavit of an officer of the CRA.

[27] In that case Justice D'Arcy noted that the onus of proof as to the mailing date of the reassessment was on the Crown.[5] The onus is not different in regard to the date of receipt of a notice of objection. Only the CRA would be possessed of such information.

[28] In that case Justice D'Arcy found that the Crown could not rely on subsections 244(9) and (10) as the affiant of the relied upon affidavit did not state in the affidavit that he had charge of the appropriate CRA records. I find that the Crown can not rely on those subsections of the *Act* for other reasons. However,

---

[4] 2011 TCC 550, [2012] 2 C.T.C. 2043.

[5] At paragraph 19.

what is relevant to me about Justice D'Arcy's decision is that it discusses the reliability and necessity of affidavit evidence in the context of CRA mailroom practices where the application of subsections 244(9) and (10) have been brought into question. There is as much to be said of the reliability of evidence of mailroom practices in the context of the CRA's receipt of mail (the present case) as there is in the context of the CRA's sending mail (the case in *Carcone*).

[29] In *Carcone* the affiant had no direct knowledge of mailroom practices. I have no information as to whether the affiant in the case at bar, an appeals officer in Winnipeg, had any idea of the practices of mailrooms in Surrey in the case of mail received there when it was not to be dealt with there. Would it have been forwarded back to Sudbury where the 2005 objections were processed? The affiant was neither the last nor first person in the chain of mailroom personnel who could answer such questions. I have no evidence that the affiant in this case checked the records of offices other than the Burnaby-Fraser office even though the Objection on its face indicated that it was sent to Surrey, not the Burnaby- Fraser office. If reliability is a factor, the affidavit in this case stating knowledge of CRA practices is not specific enough given that the CRA is relying on the receipt date at the Burnaby-Fraser office. Even if the affiant testified, and in this case I see no reason why he could not have testified, his evidence of what happens in the case of mail being shuffled from office to office would be even less reliable than hearsay if he did not even enquire about what the Surrey office might have done had it received the objection.

[30] As in *Carcone*, the evidence here does not support a finding that the evidence in the affidavit was reliable. As Justice D'Arcy said "It is my view that, at a bare minimum, the tests of reliability and necessity require the Respondent to produce a witness who has knowledge of the CRA's mailing practices with respect to notices of assessment."[6] The same must apply to the CRA's practices regarding the receipt of mail such as notices of objection and knowledge of mailing practices must address the circumstances of each case. The circumstances in the case at bar are not normal. They require the Respondent to produce a witness who has knowledge of the CRA's mailing practices in such circumstances. This was not done and I am not satisfied that the affiant in this case was informed of the specific practices that were relevant to circumstances in this case.

[6] At paragraph 40.

[31] I do not wish this decision to be taken as undermining Parliament's intention to ensure a workable administrative regime by invoking bright line limitation periods and evidentiary rules that fix critical dates relating to those limitation periods in a manner that comes close to deeming an unaccountable acceptance of CRA's search of records as being final and determinative. On the other hand, depriving taxpayers of their day in court is a serious issue and cases like *Carcone* are only meant to guard against that possibility where doubts exist as to the reliability of the evidence that purports to fix those critical dates.

[32] There is also a question here of guarding against one rule applying to litigants represented by counsel in respect of monetarily significant assessments and another applying to self-represented persons even though the relative monetary significance of an assessment to the self-represented litigant may be greater than that of the represented litigant. *Carcone* underlines the value of an effective cross-examination of a CRA affiant. Making access to the courts easier for ill-equipped self-represented persons serves little purpose unless the CRA and the Department of Justice ("DOJ") level the playing field by scrutinizing affidavits more carefully in order to assist the Court in ensuring that the principles in *Carcone* are addressed for self-represented litigants. No less is required to comply with the principles set out in the Canadian Judicial Council publication in 2006: Statement of Principles on Self-Represented Litigants.

[33] Further still, addressing the responsibility of the CRA and the DOJ, I note again that the Minister has been empowered by Parliament to waive certain statutory requirements.[7] In addition to subsections 165(6) and 166.1(4), there is a broader, more general, discretionary provision, namely subsection 220(2.1) which empowers the Minister to waive the filing of a notice of objection or in effect to waive statutory deadlines.

[34] In my view, that broader provision requires the Minister to consider the application of such power prior to it being brought before this Court. This is the process that Parliament statutorily imposed on the Minister, and by extension, on this Court. While it is not for this Court to suggest that it has the jurisdiction to consider the manner in which the Minister's powers are exercised, the timing of the exercise of her discretionary powers under section 220, in my view may well fall within the jurisdiction of this Court. In other words, all I am suggesting is the Minister must undertake that which Parliament has empowered her to do in an

[7] See footnote 3 above.

effective sequence. The effective sequence of actions under the subject provision, subsection 220(2.1), is for the Minister to consider its application before this Court closes that door.

[35] Indeed, at several hearings, and in one reported case, I have suspended judgment suggesting that the DOJ refer an application for an extension of time back to the Minister for consideration prior to my disposing of it.[8] The first response to that suggestion in that reported case was that I had no power to "order" the Minister to do any such thing. That response was then followed by recitations of the law to the effect that, on the facts before me, I had no jurisdiction to allow the application.

[36] Still, although the end result of that application may have been to give effect to my concerns,[9] I can not help but observe that a suggestion or recommendation from the Bench, that a further avenue be pursued, is not an "order". More recently, a DOJ lawyer made a recommendation that may well have resolved this type of deadlock. Indeed, she agreed at the hearing to take steps to initiate a resolution to an applicant's time barred application for an extension of time to file an objection by having him agree to seek a Ministerial review.[10] This appeared to be an appropriate approach given my concerns at that hearing as to the "fairness" of the underlying assessment given what seemed to be a case of a clerical error causing double taxation.

[37] While I was impressed with this initiative to break this deadlock between the Court and the DOJ, I remain unimpressed with the CRA and DOJ for not following a request of the Court. As pointed out in *Knight v. The Queen*,[11] nothing in subsection 220(3.1) precludes the Minister from acting on her own initiative even without an application. The same can be said of subsection 220(2.1). Even if there is no duty on the Minister to review all stale–dated applications, as I suggested above, the Minister should not resist utilizing her administrative powers when a

---

[8] 2011 TCC 569, 2012 DTC 1046.

[9] In spite of the DOJ's defensive reaction, no doubt aimed at reminding me of my limited jurisdiction and raising a red, as opposed to a white flag, the DOJ advised me that they had another approach that would resolve my concerns. Eventually, the application was withdrawn. I received no explanation. Perhaps the CRA reassessed – starting the objection time period afresh. That is pure speculation, but if that was the case, two thumbs up for counsel for the respondent in that case.

[10] That application remains undecided and unresolved.

[11] 2012 TCC 118, 2012 DTC 1144 at footnote 29.

potential unfairness is brought to her attention from any credible source. If the exercise of that power does not recognize that the circumstances being reviewed merit a reassessment or a waiver of a filing requirement, only the Federal Court has jurisdiction to conduct a judicial review. Barring that recourse being effective, this Court then has no jurisdiction beyond hearing the application and applying the law.

[38] In short, I am troubled by what has appeared to me to be an inevitable reluctance of the CRA and the DOJ to assist the course of justice by pursuing administrative relief before closing same off by insisting that the Tax Court of Canada just comply with strict statutory deadlines and say no more. The *Act* contemplates a sequence that dictates that the open-ended discretion of the Minister must, in effect, precede a final dispensation by the Court. There should be no need, in a case where this Court feels it is warranted that such sequence be followed, for it to consider the possibility of an Order imposing a particular sequence of procedural steps so as to afford a taxpayer the benefit of a sequence that had to have been contemplated by Parliament given that the purpose of granting the Minister discretion in provisions like sections 220 was to help to ensure just and fair results where warranted. That the Minister *may* grant relief under the subject provision does not necessarily suggest that there is no duty on her to consider whether the circumstances of any given case warrant a review.

[39] While it is clear that the Federal Court has jurisdiction to consider the parameters of a Minister's duties under section 220, it is my view that this Court should not be forced to preclude the application of such provisions until the powers to act pursuant to those provisions have been diligently considered - at least where, as stated above, a credible source requests a fairness review.

[40] Indeed, the inherent powers of a superior court, even a statutory court like the Tax Court of Canada, may well justify such requests be made as an "order". As a superior court of record, this Court enjoys an inherent jurisdiction in respect of its own processes and, in my view, that should include insisting on a particular sequence of events contemplated by the *Act*. While it is often said that such jurisdiction is limited by reason of this Court being a statutory court with specific and limited powers and jurisdiction, such limitations can not, in my view, frustrate a need to impose a proper sequence of events. In *R. v. Cunningham*, [2010] 1 S.C.R 331, at paragraph 18, Rothstein J., writing for the Court, stated that inherent jurisdiction includes ensuring that the machinery of the Court functions in an orderly and effective manner. In the next paragraph, referring to statutory courts and other statutory tribunals, he states: "courts can apply a doctrine of jurisdiction by necessary implication".

[41] In my view, it is a necessary incident of this Court's jurisdiction to insist on an effective sequence of actions in appropriate cases as contemplated by the *Act*. Otherwise, the function of this Court can be abused.

[42] In any event, for the reasons expressed above, I accept that the Notice of Objection was mailed on October 19, 2009 and more importantly I find that on a balance of probability it was served on the CRA as required by the *Act* within 90 days of the issuance of the subject reassessment. Accordingly, the application is allowed, without costs.

Signed at Ottawa, Canada this 12th day of April 2013.

"J.E. Hershfield"

Hershfield J.

CITATION:	2013 TCC 104
COURT FILE NO.:	2012-1511(IT)APP
STYLE OF CAUSE:	PATRICK POULIN AND THE QUEEN
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	September 21, 2012
REASONS FOR ORDER BY:	The Honourable Justice J.E. Hershfield
DATE OF ORDER:	April 12, 2013

APPEARANCES:

For the Applicant:	The Applicant himself
Counsel for the Respondent:	Rosanna Slipperjack-Farrell

COUNSEL OF RECORD:

For the Applicant:	N/A
Name:	
Firm:	
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada