Docket: 2012-2276(IT)APP

BETWEEN:

1682320 ONTARIO LIMITED,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on April 8, 2013 at London, Ontario

By: The Honourable Justice J.M. Woods

Appearances:

Agent for the Applicant:	Nancy Sauro
Counsel for the Respondent:	Paul Klippenstein

ORDER

Upon application, it is ordered that the time within which a notice of objection may be served is extended to the date of this Order, and the notice of objection served on September 8, 2011 is deemed to have been served on the date of the Order. Each party shall bear their own costs.

Signed at Ottawa, Ontario this 25th day of April 2013.

"J. M. Woods"

Woods J.

Citation: 2013 TCC 126
Date: 20130425
Docket: 2012-2276(IT)APP

BETWEEN:

1682320 ONTARIO LIMITED,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Woods J.

[1] 1682320 Ontario Limited (the "applicant") applies for an extension of time to serve a notice of objection under the *Income Tax Act*. The taxation year at issue ended on November 30, 2008.

[2] The central issue to be decided is whether a notice of objection should be considered as an application to extend time. I have concluded that it should in this particular case.

Applicable legislation

[3] The legislative requirements for an extension of time are set out in subsection 166.2(5) of the *Act*. It is reproduced below together with related provisions.

> **166.1(1) Extension of time by Minister.** Where no notice of objection to an assessment has been served under section 165, nor any request under subsection 245(6) made, within the time limited by those provisions for doing so, the taxpayer may apply to the Minister to extend the time for serving the notice of objection or making the request.
>
> **(2) Contents of application.** An application made under subsection (1) shall set out the reasons why the notice of objection or the request was not served or made, as the case may be, within the time otherwise limited by this Act for doing so.

(3) How application made. An application under subsection (1) shall be made by being addressed to the Chief of Appeals in a District Office or a Taxation Centre of the Canada Revenue Agency and delivered or mailed to that Office or Centre, accompanied by a copy of the notice of objection or a copy of the request, as the case may be.

[…]

(5) Duties of Minister. On receipt of an application made under subsection (1), the Minister shall, with all due dispatch, consider the application and grant or refuse it, and shall thereupon notify the taxpayer in writing of the Minister's decision.

[…]

166.2(1) Extension of time by Tax Court. A taxpayer who has made an application under subsection 166.1 may apply to the Tax Court of Canada to have the application granted after either

(a) the Minister has refused the application, or

(b) 90 days have elapsed after service of the application under subsection 166.1(1) and the Minister has not notified the taxpayer of the Minister's decision,

but no application under this section may be made after the expiration of 90 days after the day on which notification of the decision was mailed to the taxpayer.

(2) How application made. An application under subsection (1) shall be made by filing in the Registry of the Tax Court of Canada, in accordance with the provisions of the *Tax Court of Canada Act*, three copies of the documents referred to in subsection 166.1(3) and three copies of the notification, if any, referred to in subsection 166.1(5).

[…]

(5) When application to be granted. No application shall be granted under this section unless

(a) the application was made under subsection 166.1(1) within one year after the expiration of the time otherwise limited by the Act for serving a notice of objection or making a request, as the case may be; and

(b) the taxpayer demonstrates that

> (i) within the time otherwise limited by this Act for serving such a notice or making such a request, as the case may be, 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 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 166.1(1) as soon as circumstances permitted.

Positions of parties

[4] The respondent submits that an extension should not be given because the requirement in paragraph 166.2(5)(a) has not been satisfied. In brief, it is submitted that the applicant did not apply for an extension with the Minister within the required time period.

[5] The representative for the applicant acknowledges that the requirement in paragraph 166.2(5)(a) is not satisfied. However, she submits that the circumstances justify the extension being granted on grounds of fairness.

Background

[6] According to the applicant, the substantive issue in the appeal involves a double counting of income. The representative for the applicant, who is from H&R Block and handled the objection for the applicant, stated that the reassessment at issue changed a capital gain to ordinary income but failed to remove the capital gain when making the adjustment. The applicant does not object to the characterization as ordinary income, but submits that the capital gain should be reversed to avoid double counting.

[7] The representative for the applicant contacted the Canada Revenue Agency (CRA) on several occasions in order to have this purported error corrected. A chronology of the relevant events is set out below.

a) On November 2, 2010, the Minister made the reassessment at issue.

b) On February 17, 2011, the representative for the applicant requested a change to the return to adjust for the double counting error.

c) Following this request, the representative had several discussions with the CRA and was eventually informed that a formal objection would be necessary.

d) On September 8, 2011, a notice of objection was served.

e) By letter dated November 16, 2011, the CRA informed the applicant that the objection was not filed within the 90-day deadline and that an application to extend time could be made. The letter stated that the application must be made no later than one year after the date the objection had to be filed.

f) On February 16, 2012, an application to extend time to serve an objection was made.

g) By letter dated April 20, 2012, the CRA informed the applicant that the application could not be granted because the deadline for making the application expired on January 31, 2012.

h) On May 25, 2012, this application was filed with the Court.

[8] The representative for the applicant explained the reason for not complying with the deadline set out in the CRA letter dated November 16, 2011 by stating that, in her experience, the CRA provided relief notwithstanding that the deadline had expired. She indicated that her prior experience was with taxpayers who were individuals and she was not aware that there were different rules for corporations. She also explained the delay by stating that the principal of the applicant was often out of the country and unavailable to give instructions.

Discussion

[9] The applicant has requested that the extension be granted on grounds of fairness. Such relief cannot be given by this Court because it cannot waive a requirement mandated by Parliament. The comment below from *Dewey v The Queen*, 2004 FCA 82, is applicable, even though it was made in a different context.

> [3] Section 167 of the *Income Tax Act* permits the Tax Court to extend the time for commencing an appeal to the Tax Court, if a number of the conditions are met. A failure to meet any one of the conditions is fatal to the application.

[10] Although relief cannot be granted on this ground, at the hearing I asked counsel for the respondent to address whether the requirement in paragraph 166.2(5)(a) was satisfied by the service of a notice of objection on September 8, 2011. My consideration of this issue, as well as the other the requirements in subsection 166.2(5), are set out below.

Prior application to Minister

[11] By virtue of paragraph 166.2(5)(a), the extension cannot be granted unless the applicant has previously applied to the Minister for an extension of time. The application to the Minister has to be made within one year from the deadline for serving a notice of objection. The deadline in this case is January 31, 2012.

[12] If the applicant's notice of objection served on September 8, 2011 is considered as an application to extend time, this requirement is satisfied.

[13] On occasion, this Court has considered that an application to extend time has been made even though the relevant document does not explicitly state that it is an application to extend time: *Haight v The Queen*, 2000 DTC 2571 and *Fagbemi v The Queen*, 2005 DTC 955.

[14] In *Haight*, Bell J. concluded that it was not necessary for the taxpayer to specifically refer to an extension of time. It was sufficient if the documentation expresses that the taxpayer wants his tax affairs reviewed for the relevant year.

[15] The Crown in *Haight* argued that the relevant document could not be considered an application to extend time unless the condition set out in subsection 166.1(2) is satisfied, namely, that the document provide a reason why the notice of objection was not filed in time. This argument suggests a very narrow interpretation of an application to extend time and Bell J. rejected it. I agree with the reasons he provided which are set out below.

> [28] […] Section 166.1 obviously is designed to afford relief to a taxpayer who disagrees with an assessment. Although it sets out specific requirements it should not, in these circumstances, be interpreted to foreclose the possibility of an earnest taxpayer, unsophisticated in tax matters, being able to proceed with an appeal. That is simply unjust. […]

[16] The conclusion in *Haight* reflects the general preference of courts, based on principles of fairness, that disputes be determined on their merits rather than on procedural grounds. The Tax Court in particular has been very reluctant to deprive a taxpayer of a day in court on the merits unless the circumstances clearly require it.

[17] I have concluded that the notice of objection filed by the applicant satisfies the requirement in paragraph 166.2(5)(a). I now turn to the other conditions in subsection 166.2(5).

Bona fide intention to object

[18] Subparagraph 166.2(5)(b)(i) requires that an applicant demonstrate that, within the time period for making the objection, the applicant was either unable to object or had a *bona fide* intention to do so.

[19] In this case, the representative for the applicant first applied to the CRA to correct the purported double counting error just two weeks after the 90-day deadline for filing an objection. The applicant obviously formed an intention to object prior to this action being taken, and it is reasonable to infer that this intention was formed within the 90-day deadline. It is appropriate to consider that subparagraph 166.2(5)(b)(i) is satisfied.

Is it just and equitable to grant application?

[20] By virtue of subparagraph 166.2(5)(b)(ii), an extension cannot be granted unless it is just and equitable to do so. In considering this requirement, it is relevant to consider the possibility of prejudice to each of the parties. The applicant obviously could be prejudiced if it is deprived of having its objection considered on the merits. It is seeking to have a double counting error corrected. This is not a frivolous complaint. As for the Crown, I do not see any material prejudice if the application is granted.

[21] I would also comment that this is not a situation where a taxpayer sat back and did nothing for a long period of time. The applicant hired a tax specialist who notified the CRA of the double counting issue just two weeks after the 90-day deadline had passed.

[22] The requirement in subparagraph 166.2(5)(b)(ii) is satisfied.

Was application made as soon as circumstances permit?

[23] Subparagraph 166.2(5)(b)(iii) requires that the application be brought as soon as circumstances permit.

[24] It appears that the representative actively pursued this matter throughout and that the notice of objection was filed when the representative was informed that this was necessary.

[25] It could be argued that there was an inordinate delay when the applicant failed to act on a timely basis upon being notified of the deadline in the CRA letter dated November 16, 2011. However, this is not relevant. The only question is whether there was delay in serving the application to extend time, which was served on September 8, 2011.

[26] The requirement in subparagraph 166.2(5)(b)(iii) is also satisfied.

Conclusion

[27] I am satisfied that the application should be granted and that an extension should be given to the date of the attached Order. In addition, the notice of objection served on September 8, 2011 will be deemed to have been served on a timely basis on the date of the Order. Each party shall bear their own costs.

Signed at Ottawa, Ontario this 25th day of April 2013.

"J. M. Woods"

Woods J.

CITATION:	2013 TCC 126
COURT FILE NO.:	2012-2276(IT)APP
STYLE OF CAUSE:	1682320 ONTARIO LIMITED and HER MAJESTY THE QUEEN
PLACE OF HEARING:	London, Ontario
DATE OF HEARING:	April 8, 2013
REASONS FOR ORDER BY:	The Honourable Justice J.M. Woods
DATE OF ORDER:	April 25, 2013

APPEARANCES:

Agent for the Applicant:	Nancy Sauro
Counsel for the Respondent:	Paul Klippenstein

COUNSEL OF RECORD:

For the Appellant:	
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Firm:	
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario