

**Citation: 2013 TCC 185**

**Date: 20130612**

**Docket: 2013-303(IT)G**

BETWEEN:

KIRK HAYNES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**AMENDED REASONS FOR ORDER**

**(The reasons are amended solely to add a citation. The text has not been changed.)**

Woods J.

[1] The Crown brings a motion for:

1. An Order under paragraph 58(1)(b) of the *Rules* striking out the Notice of Appeal on the ground that it discloses no reasonable grounds for appeal;
2. In the alternative, an Order under paragraph 53(b) of the *Rules* striking out the Notice of Appeal on the ground that the Notice of Appeal is scandalous, frivolous or vexatious;
3. In the alternative, an Order under paragraph 53(c) of the *Rules* striking out the Notice of Appeal on the ground that the Notice of Appeal is an abuse of process;
4. In the alternative, an Order under section 169 of the *Act* striking out the Notice of Appeal on the ground that it was commenced out of time;
5. In the further alternative, an Order requiring the Appellant to seek an extension of time to file a Notice of Appeal which does comply with the *Rules*, and providing the Respondent with 60 days from the date of service of the Notice of Appeal to file a Reply;
6. In the alternative, an Order extending the time to file a Reply to the Notice of Appeal pursuant to Rule 44(1)(b) of the *Rules* to 60 days after the

determination of this motion; and,

7. Costs of this motion.

[2] It is appropriate to first consider whether the appeal was commenced out of time.

[3] Under subsection 169(1) of the *Income Tax Act*, an appeal is required to be instituted within 90 days from the mailing of the notice of confirmation. The provision reads:

**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 reassessed, or

(b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

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

(Emphasis added)

[4] According to the notice of appeal, the notice of confirmation was dated October 19, 2012. Under the *Act*, this is the deemed date of mailing provided that the notice was mailed. It is not in dispute that the notice was mailed, and it was responded to by notice of appeal filed with the Court on January 22, 2013. It appears that Mr. Haynes filed the notice of appeal a few days after the 90-day deadline had expired.

[5] In written submissions filed at the hearing, Mr. Haynes submits that the notice of appeal should be considered to be filed on a timely basis because:

- a) section 11(b) of the *Tax Court of Canada Rules* provides that the December holiday period is to be excluded from the calculation of time; and
- b) the Court has jurisdiction under section 12(1) of the Rules to allow the notice of appeal to stand.

[6] These provisions do not assist in extending the 90-day deadline set out in the *Act* because they only apply for purposes of the Rules or a direction. The provisions do not, and cannot, modify the deadline imposed by Parliament under the *Act*.

[7] The limited application of the Rules is apparent on their face. They are reproduced below:

*Computation*

11. In the computation of time under these rules or a direction, except where a contrary intention appears,

(a) [...]

(b) the period beginning on December 21 in any year and ending on January 7 of the next year shall be excluded

*Extension or Abridgement*

12. (1) The Court may extend or abridge any time prescribed by these rules or a direction, on such terms as are just.

[8] The deadline set out in section 169 of the *Act* is firm and it was missed by a few days. As the result, the appeal will be quashed.

[9] However, this is not the end of the matter because the time has not expired for Mr. Haynes to make an application to extend time to appeal. This application may be made pursuant to section 167 of the *Act* which provides:

**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 (1) shall set out the reasons why the appeal was not instituted within the time limited by section 169 for doing so.

**(3) How application made** - An application made 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 application

accompanied by three copies of the notice of appeal.

**(4) Copy to Deputy Attorney General** - The Tax Court of Canada shall send a copy of each application made under this section to the office of the Deputy Attorney General of Canada.

**(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.

[10] Section 167 sets out several conditions that must be satisfied before an extension of time may be granted by the Court. I would note in particular that Mr. Haynes must demonstrate that it is just and equitable for the extension to be granted and that there are reasonable grounds for the appeal.

[11] The notice of appeal that was previously filed by Mr. Haynes has several serious defects that would make it difficult to satisfy these requirements. I suggested to Mr. Haynes at the hearing that his application to extend time be accompanied by an amended notice of appeal.

[12] As for costs, it is appropriate to award costs to the respondent in respect of this motion. The notice of appeal that was filed with the Court has many obvious deficiencies, one of which was that it was filed out of time without an extension being requested. These deficiencies were set out in the Crown's notice of motion, but no action was taken to remedy them prior to the hearing. Costs in respect of the motion are awarded to the respondent in the amount of \$350, which shall be paid no

later than June 10, 2013.

[13] The parties agreed to have an application to extend time heard in Edmonton during the first week of July. The Registry is directed to schedule the hearing on July 5, 2013 at 1 p.m., provided that the application is filed no later than June 10, 2013.

**These Amended Reasons for Order are issued in substitution of the Reasons for Order dated May 17, 2013.**

Signed at **Ottawa, Ontario** this **12th** day of **June** 2013.

“J. M. Woods”

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Woods J.

COURT FILE NO.: 2013-303(IT)G

STYLE OF CAUSE: KIRK HAYNES and  
HER MAJESTY THE QUEEN

PLACE OF HEARING: Fort McMurray, Alberta

DATE OF HEARING: May 14, 2013

REASONS FOR ORDER BY: The Honourable Justice J.M. Woods

**DATE OF AMENDED REASONS  
FOR ORDER: June 12, 2013**

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Robert Neilson

COUNSEL OF RECORD:

For the Appellant:

Name: n/a

Firm:

For the Respondent: William F. Pentney  
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