Docket: 2017-4912(GST)APP

BETWEEN:

ROSS JOHNSON,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on August 30, 2018 at Hamilton, Ontario

Before: The Honourable Justice Guy R. Smith

Appearances:

Agent for the Applicant:	Wilfred Davey
Counsel for the Respondent:	Rhoda Lemphers

ORDER

The Application to extend time to file a notice of appeal made under the *Excise Tax Act*, with respect to the 2005 taxation year is dismissed, with costs to the Respondent, in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 16th day of January 2019.

"Guy R. Smith"

Smith J.

Citation: 2019 TCC 13
Date: 20190116
Docket: 2017-4912(GST)APP

BETWEEN:

ROSS JOHNSON,

Applicant,

and

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REASONS FOR ORDER

Smith J.

I. Introduction

[1] This matter involves an application to extend time within which an appeal may be instituted under the provisions of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the "ETA"), the *Excise Act*, 2001, S.C. 2002, c. 22 (the "EA") and the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.) (the "CA") for the purposes hereof, I have assumed that the Application was filed under the provisions of the ETA.

[2] The extension of time to file an appeal was sought in connection with a letter from the Canada Revenue Agency ("CRA") dated March 31, 2017. At the conclusion of the hearing, it became apparent that the Applicant had also filed an application for a rebate of "[a]mounts paid in error or delivered to a reserve". That application was dated November 1, 2017.

II. Background

[3] Mr. Johnson is a member of the Six Nations Grand River Territory (the "Reserve"). He testified on his own behalf and explained that he operated a wholesale business under the name R.J. Wholesaler.

[4] He claims that he ordered cigarettes from a company located in Germany. The goods were shipped to the Hamilton Harbour in August 2005 and then

transported to his residence on the Reserve. Prior to the actual delivery, his custom broker, Livingston International Brokers, informed him that he would have to pay a total of $394,536.15 calculated as follows:

Excise Tax	$355,836.99
Duty	$ 8,250.94
GST	$ 30,106.68

[5] The Applicant indicates that he initially objected to payment of the amounts in question given his understanding that he was a status Indian as defined in the *Indian Act*, R.S.C. 1985, c. I-5 (the "Indian Act"). He claims that a few meetings took place with CRA in the years that followed the transactions and he expected that he would eventually be provided with a refund. He had only a vague recollection of these meetings and could not recall when they took place.

[6] A review of the documents tendered as evidence indicates that the Applicant was the subject of an audit or "Custom Compliance Verification" by the Canada Border Services Agency ("CBSA") as evidenced by the letter from the CBSA dated May 23, 2007 (Exhibit A-6). The Applicant responded with a letter dated September 10, 2007 claiming an exemption from the application of the ETA, EA and CA (Exhibit A-4) on the basis of section 87 of the Indian Act. It is unclear whether the Minister provided a response.

[7] In any event, it appears that no further steps were taken by the Applicant until his letter of February 8, 2017 addressed to the Commissioner for CRA, leading to the response of March 31, 2017 wherein the Minister indicated that:

> (…)
>
> As stated in information Bulletin B-039, there is no tax exemption under section 87 of the *Indian Act* on goods imported in Canada by Indians. Goods imported by an Indian or a sole proprietorship owned by an Indian are subject to the normal import rules. This applies even if, after importation, the goods are delivered to a reserve by the vendor's agent.

III. Application for extension of time

[8] The CRA letter of March 31, 2017 is appended to the Application though it is not clear if the Applicant is seeking an extension of time to file a Notice of

Objection or a Notice of Appeal as it refers to both. The Application also refers to "Notices of GST/HST Assessment file # Case SP0378".

[9] A review of the correspondence tendered as evidence suggests that "Case SP03878" refers to the CBSA compliance verification which lead to the issuance of a "review and redetermination" by CBSA in their letter of June 19, 2017, a copy of which was not provided to the Court but is referenced in the Applicant's letter of September 10, 2007.

[10] At the hearing of the matter, the Respondent filed the affidavit evidence of Dwayne Mockler, employed by CRA. He declared that i) no assessment or reassessment had been issued by CRA in connection with either the Applicant or R.J. Wholesaler under either the ETA or EA for any taxation period in 2005, and that ii) there was no record of any collection assessments and iii) no record of a notice of objection and no notice of confirmation issued to the Applicant or R.J. Wholesaler under the provisions of the ETA, EA or CA in connection with the 2005 taxation year.

[11] Mr. Mockler also deposed that the GST/HST registration number that appeared on the Application was not valid or active but that a GST/HST number had been issued to the Applicant on January 1, 2016.

[12] It is obvious that with the passage of time, there is some confusion as to what actually transpired. I must conclude that the CRA letter of March 31, 2017 was meant to provide the Applicant with an update or information in response to his letter of February 8, 2017, and consequently that it was not a notice of assessment or reassessment as that term is understood. It is more likely that the letter from CBSA dated June 19, 2007 (a copy of which was not provided to the Court) was a determination by CBSA. If that was the case, then the Applicant's letter of September 10, 2007 may be interpreted to be a notice of objection.

[13] The ETA, EA and CA all contain provisions requiring that a person who has been assessed and "who objects to the assessment may (…) file with the Minister a notice of objection in the prescribed form and manner setting out the reasons for the objection and all relevant facts". This is set out in subsections 301(1.1) of the ETA, 195(1) of the EA and 97.48(1) of the CA. The Minister must then "with all due dispatch, reconsider the assessment and vacate or confirm the assessment or

make a reassessment": subsections 301(3) of the ETA, 195(8) of the EA and 97.48(8) of the CA. However, section 306 of the ETA provides as follows:

> 306 A person who has filed a notice of objection to an assessment under this Subdivision may appeal to the Tax Court to have the assessment vacated or a reassessment made after either
>
> (a) the Minister has confirmed the assessment or has reassessed, or
>
> (b) one hundred and eighty days have elapsed after the filing of the notice of objection and the Minister has not notified the person that the Minister has vacated or confirmed the assessment or has reassessed,
>
> but no appeal under this section may be instituted after the expiration of ninety days after the day notice is sent to the person under section 301 that the Minister has confirmed the assessment or has reassessed.

[14] Similar provisions are contained in the EA and CA. In this instance, the "notice of objection", is dated September 10, 2007 meaning that the Applicant had 180 days or until on or about March 10, 2008 to file an appeal with this Court. The Applicant also had one year to seek an extension of time to file an appeal: subsections 305(5) of the ETA, 199(5) of the EA and 97.52(5) of the CA.

[15] While I am prepared to accept that the letter of September 10, 2007 was a valid Notice of Objection, it is apparent that the Applicant neither filed an appeal nor sought an extension of time to do so in accordance with the mandatory time periods noted above. And since these time periods have been established by Parliament, this Court has neither the discretion nor the authority to accept the Notice of Appeal as filed nor to grant an extension of time to do so.

IV. The rebate application

[16] As indicated above, it became apparent at the conclusion of the hearing that the Applicant had filed a rebate application for the amounts alleged to have been paid in error. The parties were asked to make written submissions.

[17] The Respondent acknowledges receipt of a "General Application for Rebate of GST/HST dated November 1, 2017" and indicates that a Notice of Assessment was issued to the Applicant on December 21, 2017. It disallowed the claim for a rebate on the basis that, *inter alia*, it referred to a transaction that took place in

August 2005 and the rebate application was received on October 31, 2017. More specifically, the Respondent argues that the rebate application was filed more than "two years after the day the amount was paid or remitted by the person", contrary to subsection 261(3) of the ETA which provides as follows:

> (3) A rebate in respect of an amount shall not be paid under subsection (1) to a person unless the person files an application for the rebate within two years after the day the amount was paid or remitted by the person.
>
> (My Emphasis.)

[18] The Applicant acknowledges in his written submissions that he "received a registered letter" from CBSA on June 19, 2007, but that he received no further correspondence since that date. He argues that:

> (…)
>
> Where CRA must issue its initial assessments in cases like this one within a reasonable time, giving the taxpayer the right to challenge the correctness of the assessment, if he or she chooses – a right that the taxpayer could not exercise, while CRA was delaying the assessment to achieve if (sic) improper objectives.

[19] The Applicant also included arguments as to the constitutionality of any legislation that would "interfere with the rights of Indians on a reserve pursuant to section 87 of the Indian Act". I find that these are substantive law arguments that are best left to a trial judge and I do not intend to address them in the context of this Application. I conclude that there is a good reason not to do so since the only issue before the Court is whether, in the context of this Application, an order should issue extending the time to file an appeal.

[20] Since the Notice of Assessment is dated December 21, 2017, the Applicant had no more than twelve months to file the Application to extend the time to file an appeal. I am satisfied that he has done so. However, subsection 305(5) of the ETA provides as follows:

> (5) No order shall be made under this section unless
>
> (a) the application is made within one year after the expiration of the time otherwise limited by this Part for appealing; and

> (b) the person demonstrates that
>
> (i) within the time otherwise limited by this Part for appealing,
>
> (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 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 it to be made, and
>
> (iv) there are reasonable grounds for appealing from the assessment.
>
> (My Emphasis.)

[21] The obvious concern for the Court and what might be characterized as the "elephant-in-the-room", is the fact that the alleged transaction took place in August 2005. The rebate application was filed on November 1, 2017, being more than twelve years after the fact.

[22] In accordance with subparagraph 305(5)(b)(ii) of the ETA, the Court must consider the reasons given and the circumstances of the case to determine whether "it would be just and equitable to grant the application". I find that the Applicant has not provided a credible explanation for the inordinate lapse of time between the alleged transactions and the filing of the rebate application such that the Court is unable to conclude that it would be "just and equitable to grant the extension".

[23] Moreover, subparagraph 305(5)(b)(iv) imposes an obligation on the Court to consider, on the basis of the evidence before it, whether "there are reasonable grounds for appealing the assessment". Since the Court must only conclude that there are "reasonable grounds", I find that the bar is quite low and that any doubt should favour granting the application and leaving the matter to the trial judge. However, in this instance, there is no doubt that the inordinate lapse of time referred to above runs afoul of subsection 261(3) of the ETA and would be fatal to the Applicant's appeal. To be clear, I find that the Applicant has no reasonable

prospects of success and in that sense, there are no “reasonable grounds for appealing from the assessment”.

[24] I conclude by referring to the decision of *Horseman v. R.*, 2018 FCA 119, which was an appeal from a decision of this Court (*Horseman v. R.*, 2017 TCC 198) dismissing the appellant’s application for an extension of time to file a notice of appeal under the ETA. The Federal Court of Appeal noted that “the appellant intended to raise arguments based on the constitutional and treaty rights of indigenous peoples” and indicated that:

> 3 In dismissing the appellant's application, the Tax Court found (at para. 37) that the appellant had not filed a valid objection to the assessment, a statutory prerequisite for an appeal to the Court, and was now out of time. Further, the Tax Court held (at para. 24) that the provisions of the Act concerning objections and appeals apply even where a person intends to raise arguments based on the constitutional rights of Indigenous peoples. In this regard, the Tax Court emphasized (at para. 23) that the appellant was making "a private claim [...], seeking monetary relief in respect of his personal tax situation." The appellant appeals to this Court.
>
> 4 In our view, the appeal must fail. In private, personal claims such as this, procedural and jurisdictional provisions apply and must be obeyed even where the constitutional rights and treaty rights of Indigenous peoples are asserted: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372 at para. 13; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 at para. 134. This case law is a subset of a larger body of case law requiring that those asserting personal, private claims founded upon constitutional rights must still comply with statutory limitation periods and other procedural and jurisdictional requirements: see, e.g., *Mills v. The Queen*, [1986] 1 S.C.R. 863 at page 953; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181; *St. Onge v. Canada*, 2001 FCA 308, 288 N.R. 3; *Newman v. Canada*, 2016 FCA 213, 406 D.L.R. (4th) 602 and the many cases cited therein.
>
> 5 The appellant notes that the exemption from taxation contained in subsection 87(1) of the *Indian Act*, R.S.C. 1985, c. I-5 opens with the words "[n]otwithstanding any other Act of Parliament...". He submits that this means that the procedural and jurisdictional requirements in the *Excise Tax Act* do not apply.
>
> 6 We disagree. The opening words of section 87 prevent other Acts of Parliament imposing taxes contrary to the substantive exemption granted by section 87. They

> do not displace procedural and jurisdictional requirements such as where, when and how a proceeding is to be brought. Were it otherwise, what would stop a person from going directly to the Supreme Court of Canada at any time, perhaps a decade or more later, to claim the section 87 exemption at first instance?
>
> 7 The Tax Court was correct in concluding that the application for an extension of time to file a notice of appeal must be dismissed. The Tax Court has jurisdiction over such an application only where the requirements of the *Excise Tax Act*, above, ss. 301-307 are met, including the requirement that a valid notice of objection be filed: *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 12. One was not filed here.

(My Emphasis.)

V. Conclusion

[25] For all the forgoing reasons, the application to extend time to file a notice of appeal is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 16th day of January 2019.

"Guy R. Smith"

Smith J.

CITATION:	2019 TCC 13
COURT FILE NO.:	2017-4912(GST)APP
STYLE OF CAUSE:	ROSS JOHNSON v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	August 30, 2018
REASONS FOR ORDER BY:	The Honourable Justice Guy R. Smith
DATE OF ORDER:	January 16, 2019

APPEARANCES:

Agent for the Applicant:	Wilfred Davey
Counsel for the Respondent:	Rhoda Lemphers

COUNSEL OF RECORD:

For the Applicant:

Name:

Firm:

For the Respondent: Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Canada