

Docket: 2018-2718(GST)APP

BETWEEN:

RUTH KIRSCHKE,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on December 3, 2018 at Hamilton, Ontario

Before: The Honourable Justice K.A. Siobhan Monaghan

Appearances:

For the Applicant: The Applicant herself

Counsel for the Respondent: Kevin Hong

ORDER

In accordance with the attached reasons for order:

The application for an Order extending the time within which a Notice of Objection may be served with respect to reassessments made under the *Excise Tax Act* for the reporting periods ending December 31, 2010, December 31, 2011, December 31, 2012, December 31, 2013 and December 31, 2014 is dismissed on the grounds that no extension is necessary as the notice of objection was timely filed by the Applicant.

Signed at Ottawa, Canada, this 29th day of March 2019.

“K.A. Siobhan Monaghan”

Monaghan J.

Citation: 2019 TCC 68
Date: 20190329
Docket: 2018-2718(GST)APP

BETWEEN:

RUTH KIRSCHKE,

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Respondent.

REASONS FOR ORDER

Monaghan J.

I. INTRODUCTION

[1] The Applicant, Ruth Kirschke, seeks an extension of time to serve a notice of objection to reassessments issued on June 14, 2016 by the Minister for the reporting periods ending December 31, 2010, December 31, 2011, December 31, 2012, December 31, 2013 and December 31, 2014. She served a notice of objection to these reassessments on May 24, 2016, almost two years after the date of the reassessments.

[2] The Respondent's position is that the Applicant's application must be dismissed because the preconditions to the application outlined in the *Excise Tax Act* (the "ETA") have not been met. In particular, this Court may not extend the time for filing an objection unless an application to extend that time was served by the taxpayer on the Minister within the one-year period that follows the period for filing a notice of objection. The Respondent contends the Applicant did not make any such application.

[3] However, in this case, Ms. Kirschke claims she never received the reassessments, because they were mailed to the wrong address, and accordingly they were not properly sent to her. Thus, the issue in this application is whether the

Respondent's notices of reassessment were validly sent to Ms. Kirschke such that her notice of objection was not served on the Minister on a timely basis.

II. BACKGROUND

[4] Prior to 2010, the Applicant carried on a restaurant business as a sole proprietor in Ontario. As proprietor of that business, the Applicant was a registrant under the ETA and was required to collect harmonized sales tax ("HST").

[5] Although Ms. Kirschke was uncertain of the exact date on which she ceased operating the restaurant business, she testified that it was sometime before 2010. Nonetheless, she decided not to close the HST account because she thought that she might restart that business in a different location. Ms. Kirschke said that, at that time, she spoke with a representative of the Canada Revenue Agency ("CRA"). She said she explained the nature of her ongoing business to him as real estate financing and mentioned mortgages, investments and insurance as her planned sources of income. She said he advised her that, provided she continued to file nil HST returns, she could keep the HST account open. She said he told her it was very important that she continue filing HST returns, and that, as long as she did, there was no issue in keeping the account open. He also told her that her HST account was linked to her social insurance number and her profile. This made sense because the restaurant business had been carried on by her personally, not through a corporation.

[6] In accordance with that advice, Ms. Kirschke filed nil HST returns for each of the 2010, 2011, 2012, 2013 and 2014 annual reporting periods. Each was initially assessed as filed. Ms. Kirschke did not file a HST return for the 2015 reporting period.

[7] In early 2015, Ms. Kirschke moved from a home on Rosette (the "old address") to a home on Blue Springs (the "new address"). She advised the CRA of her new address on or about March 26, 2015 by filing her 2014 income tax return using the new address. Ms. Kirschke concedes that she did not separately notify CRA of the new address for HST purposes, as she had been told that both her accounts were linked to her profile. She was not aware that she had to separately update the address for HST purposes.

[8] The CRA records relating to the Applicant's income tax account show the new address effective March 26, 2015, but the HST address is not updated until March 6, 2018. As Ms. Kirschke did not file a HST return for any reporting period after the one ending December 31, 2014, she did not file a HST return using the new address.¹ She said the HST account was closed effective March 6, 2018 when she gave CRA verbal authorization to do so during her call to CRA following receipt of a collection letter, as described below.

[9] In 2016, the Respondent apparently noticed that Ms. Kirschke had reported business income in her 2010-2014 income tax returns, notwithstanding that she was filing nil HST returns. This appears to be part of what is termed the "Notional Reversal Review Project" by the CRA.

[10] No one from the CRA testified at the hearing, but two affidavits were filed by the Respondent. Exhibit D to Sarah Faria's affidavit is described as a printout of the discussions between the Minister, Ms. Kirschke and Ms. Kirschke's representative (her accountant) which were electronically recorded on the Minister's system titled *Notes for Business*. The first part of the content of this document may be summarized as follows:

The CRA contacted Ms. Kirschke by telephone on March 24, 2016 and left a voicemail. On March 29, 2016 the CRA reached Ms. Kirschke by telephone and asked her why she was filing nil HST returns, but also reporting gross business income ("GBI") on her T1 returns. Ms. Kirschke explained that she was earning real estate commissions;² the CRA officer explained that income was nonetheless taxable, but Ms. Kirschke was uncertain that she understood and suggested that the CRA representative speak with her accountant, Jose Callejas. Although Ms. Kirschke's accountant was not authorized on the file, relying on the verbal authorization from Ms. Kirschke, the CRA representative contacted Mr. Callejas. He advised the CRA representative that he only filed Ms. Kirschke's income tax

¹ She claims her 2014 nil HST return, the last HST return she filed, was filed before March 26, 2015. The Respondent presented no evidence relevant to this fact and so I accept that Ms. Kirschke's assertion is true. Had she filed it after she moved, I am certain she would have used the new address.

² As discussed later in these reasons, Ms. Kirschke disputes she ever would have said this because that is not the nature of her business income.

returns and was not familiar with the HST account. The CRA representative suggested that the accountant contact his client to look into the matter and gave him a week to do so. Having not heard from him, the CRA representative followed up with the accountant who reported he had not been able to reach his client.³ The note in the file states “Given one more week, if no response will send letter”. No response was received from the accountant and so a letter dated April 19, 2016 was sent to Ms. Kirschke, with a bring-forward date of 35 days.

[11] The April 19, 2016 letter (the “30-day letter”) was addressed to the old address – the one she used for tax purposes before March 26, 2015. The letter asked her to provide information relating to her business/professional income within 30 days, failing which the CRA would reassess her returns using the information it had. Ms. Kirschke testified that she never received this letter and therefore never responded to it.

[12] The CRA’s *Notes for Business* document describes further actions, which may be summarized as follows:

On May 24, 2016 the CRA representative telephoned the accountant but was unable to reach him. They finally spoke on May 30, 2016 when the accountant advised the CRA representative that the HST account was supposed to have been closed but was not. The CRA representative advised the accountant that closing the account could be considered after the review was completed but the immediate issue was whether there is a discrepancy between the HST returns and the GBI on the T1 returns. The accountant said he did not know and the CRA representative told the accountant a letter had been sent to Ms. Kirschke allowing 30 days for a response but that the CRA has not heard anything. The CRA offered another week for a response, failing which an assessment would be issued based on the information the CRA had. The accountant said he would contact Ms. Kirschke and ask her to call the CRA. The file had a bring-forward date of one week. On June 6, 2016 the note is “No further response. Assessed 2010-2014 based on GBI reported on T1 returns”.

³ The date this follow-up conversation occurred is not identified in the *Notes for Business* document.

[13] Thus, the reassessments dated June 14, 2016 were issued in respect of the 2010, 2011, 2012, 2013 and 2014 reporting periods. A reassessment dated September 1, 2016 was issued in respect of the 2015 reporting period. These reassessments were mailed to Ms. Kirschke at the old address. The Minister subsequently reassessed the 2015 reporting period to reflect nil liability by notice of reassessment dated March 7, 2018. However, no additional reassessments of the 2010-2014 reporting periods were issued. Ms. Kirschke testified that she only learned of the reassessments when she received CRA collection letters in 2018, addressed to her at the new address.⁴ At that time, she immediately contacted the CRA who advised her of the reassessments.

[14] Ms. Kirschke objects to the June 14, 2016 reassessments, on the basis that the 2010 – 2014 annual reporting periods should be treated in the same way the reporting period ending December 31, 2015 was treated in the March 7, 2018 reassessment.

[15] The CRA apparently did not attempt to reach Ms. Kirschke directly by telephone after March 29, 2016, notwithstanding that the CRA's *Notes for Business* confirms her accountant advised the CRA that he was not familiar with the HST returns and that he did not know why there was a discrepancy between Ms. Kirschke's T1 and HST returns.

[16] Ms. Kirschke said that she does not recall the March 29, 2016 telephone call described in the CRA's *Notes for Business* but also said that, had she received a telephone call from CRA, she might not have paid any attention to it because she thought the CRA only dealt with taxpayers in writing. She referred to the publicity about telephone scams in which taxpayers receive telephone calls from people claiming to be from the CRA. Ms. Kirschke testified that, had she received a letter from the CRA, she would have responded immediately.

[17] Ms. Kirschke said that she never would have described her business as generating real estate commissions. She is a mortgage broker and mortgage broker

⁴ The first of these letters was dated February 26, 2018, more than a week before the address for her GST/HST account was updated in the CRA electronic database. No explanation was offered by the Respondent as to why a letter regarding HST was sent to the new address before that new address was updated in the CRA electronic database.

commissions are exempt from HST. However, I can understand how someone making notes of a call, having heard mortgage broker, might have written down real estate broker.

[18] Ms. Kirschke testified that her accountant only took care of her income tax returns, not her HST returns. She filed the HST returns herself and, consistent with the advice of the CRA representative, filed nil HST returns for the 2010, 2011, 2012, 2013 and 2014 reporting periods.

[19] As to her HST account not being closed until 2018,⁵ Ms. Kirshke testified she thought the account had been closed, which is why she stopped filing nil returns. She said she had instructed her accountant to close it. The *Notes for Business* also describe Ms. Kirschke's accountant telling the CRA that the HST account was supposed to have been closed.

[20] I found Ms. Kirschke to be a very credible witness and the documents put into evidence, including the CRA's *Notes for Business*, were consistent with her testimony. She did not falter under cross-examination; her answers were straightforward and forthright. Accordingly, I believe that Ms. Kirschke did not receive the 30-day letter or the notices of reassessment addressed to her at the old address - one she had moved from more than a year before either was mailed to her. I am also satisfied that, had she received them, she would have filed her notice of objection immediately. Ms. Kirschke contacted CRA immediately upon receiving the first collection letter, and thereafter promptly served a notice of objection.

[21] As noted above, two affidavits were filed by the Respondent. Joanne Myers' affidavit, regarding the mailing of the reassessments, is not particularly relevant to the application because Ms. Kirschke is not claiming that the reassessments were not mailed but rather that she did not receive them because they were sent to the old address. The only statement in that affidavit of any relevance is "It is the practice of the Agency [CRA] to automatically address an Assessment Notice to the address on record in the Agency's electronic database". It does not state the

⁵ According to the CRA records, the account was closed on March 6, 2018, effective December 31, 2017. As noted above, March 6, 2018 is also the effective date in the CRA electronic database for the new address in her GST/HST account.

address to which the notices of reassessment were sent or whether the notices were returned as undeliverable. It is completely silent on those factual matters. Further, it does not explain what “the address on record in the Agency’s electronic database” is or how and when addresses in that database are, or should be, updated.

[22] Ms. Faira’s affidavit has attached, as Exhibits A and B, copies of the reassessments. The address on those reassessments is the old address, which the affiant swore was Ms. Kirschke’s “mailing address of record on her GST/HST account number”. Ms. Faira’s affidavit also states that Ms. Kirschke’s mailing address of record on her T1 personal account was changed on March 26, 2015 to the new address. The page with the title “Business Number System Retrieve Address History”, in Exhibit C to Ms. Faira’s affidavit, which is described as an electronic printout of Ms. Kirschke’s mailing address history, has a Y next to the “Returned Mail Indicator” field for the address to which the reassessments were mailed. This raises the question whether the 30-day letter or the notices of reassessment were returned to the CRA. Yet, Ms. Faira’s affidavit does not deal with that; her affidavit is completely silent on that question.

[23] Similar to Ms. Myers’ affidavit, Ms. Faira’s affidavit does not explain how and when addresses in the CRA electronic database are or should be updated or whether the HST and income tax accounts of a single taxpayer are linked or how they interact or relate to each other, if at all. The Respondent provided no evidence regarding a taxpayer’s obligation to separately update addresses for income tax and HST purposes or even what CRA’s policy is in that regard.

[24] I have no evidence from the Respondent to refute Ms. Kirschke’s contention that she was told the accounts were linked. I have no evidence from the Respondent regarding the reasonableness of Ms. Kirschke’s assumption that updating her address with the CRA once was sufficient for all of her tax purposes. As mentioned above, the CRA’s collection letter, containing her HST business number, was addressed to the new address notwithstanding that it was dated before that address appears as her mailing address in the CRA electronic database for her HST account. That leaves me with some doubt about the CRA’s practice. Why did the CRA choose to use that address even though it was not the mailing address in its electronic database for HST purposes?

[25] I confess I am also troubled by the fact that, after March 29, 2016, the CRA made no attempt to reach Ms. Kirschke by telephone, but rather continued to have conversations exclusively with Ms. Kirschke's accountant, notwithstanding that he told the CRA representative he was neither responsible for, nor familiar with, Ms. Kirschke's HST filings. And, despite speaking exclusively to him, the CRA sent the 30-day letter and the notices of reassessment only to her, without copying her accountant. While the CRA told the accountant about this correspondence, there is no evidence the CRA either provided him with copies (or even offered to do so) or asked him to confirm Ms. Kirschke's address. Yet, the CRA apparently relied entirely on him to contact Ms. Kirschke about this correspondence, and there is that troubling Y next to the returned mail indicator field.

III. ANALYSIS

[26] It is not enough that Ms. Kirschke establish that she did not receive the notices of reassessment in 2016. Subsection 334(1) of the ETA provides that anything sent by first class mail, or its equivalent, is deemed received by the person to whom it was sent on the day it was mailed. This provision creates an irrebuttable presumption. In other words, the Minister must prove that the notices of reassessment were sent to, and not that the notices were received by, the taxpayer.⁶

[27] However, in this case, it is not the mailing of the reassessments that is in doubt, but rather whether the address to which they were sent is the correct address. In order for the presumption under subsection 334(1) of the ETA to apply, the address used by the CRA must be the correct one. A notice of reassessment sent to an incorrect address is not deemed to have been received.

[28] In *Scott v. M.N.R.*,⁷ Thurlow J. stated the following:

...Parliament never intended that such a notice could be given effectively by the "mailing" of it to the taxpayer at some wrong or fictitious address and I find nothing in the statute to suggest that Parliament intended that a taxpayer should be bound by an assessment or fixed with notice of an assessment upon the posting of

⁶ *Schafer v. Canada*, 2000 D.T.C. 6542 (F.C.A.).

⁷ *Scott v. M.N.R.*, 60 D.T.C. 1273 (Exchequer Court of Canada).

a notice thereof addressed to him elsewhere than at his actual address or at an address which he has in some manner authorized or adopted as his address for that purpose. ... In the present case, the notice of re-assessment which was put in the mail on May 28, 1957, while directed to the appellant, was not directed to his actual address nor was it directed to either of the addresses stated in his 1952 income tax return.

[29] Where a taxpayer asserts that a notice of assessment was sent to the wrong address, otherwise than by virtue of some failure on the part of the taxpayer, the Respondent must introduce evidence sufficient to prove, on a balance of probabilities, that the notice of assessment was sent to the address the CRA properly had on file.⁸ Was the old address one the CRA properly had on file or was the new address the proper address on file?

[30] In *Carvalho v. The Queen*,⁹ the Court warned taxpayers that they have an obligation to ensure that their correct address is known to the tax authorities. But how does that apply in this case, where the taxpayer did advise CRA of her new address, but the change was recorded by CRA in its electronic database only on her income tax account, not her HST account? Ms. Kirschke had been advised by CRA that the two tax accounts were linked to her profile. Following her move to the new address she did not file any further HST returns and so did not “naturally” file using her updated address.

[31] Moreover, I cannot help but wonder what the CRA would have done had Ms. Kirschke cancelled her HST account in 2015 before she moved, as had been intended. It would not seem reasonable to require a taxpayer who has closed an HST account to separately continue to inform CRA of his or her updated address for that account. In my view, in such a case, a taxpayer would quite reasonably conclude that the CRA would look to the most current address on file for the taxpayer’s open tax account. That also appears to be what the CRA did when it came time to send Ms. Kirschke a collection letter.

⁸ *Mpamugo v. The Queen* 2016 TCC 215, aff’d 2017 FCA 136.

⁹ 2007 TCC 209. See also, *Bowen v. MNR*, 91 D.T.C. 5594 (F.C.A.) and *Doncaster v. The Queen* 2015 TCC 127 (Informal Procedure).

[32] A number of cases have considered whether the address to which a taxpayer's assessment has been addressed is a correct address, but none of them apply here.¹⁰ In *Bhatti v. MNR*,¹¹ a reassessment mailed to the taxpayer's old address was found invalid as the taxpayer had updated his address on his most recent income tax return. But that case dealt with only one type of tax account. In contrast, in *Austin v. The Queen*,¹² the taxpayer had not provided an updated address for himself, although he had for his wholly-owned corporation. Not surprisingly, that was insufficient because Mr. Austin and his corporation were two different taxpayers, not a single taxpayer with more than one type of tax account.¹³ In Ms. Kirschke's case, there is a single taxpayer. In *Schafer*,¹⁴ the Minister used the books and records address, rather than the mailing address and that was determined to be the incorrect address.

[33] In my view, given the conversation that Ms. Kirschke had with the CRA representative who assured her that her income tax and HST accounts were linked with her profile, it was reasonable for her to have assumed that, once she updated her address with CRA, that update would apply to all accounts linked to her profile. Indeed, it was because of her income tax filings (reporting GBI) that the CRA determined that it was appropriate to investigate her HST returns. In other words, it was her income tax account – which had the new address – that sparked CRA's interest in her HST account.

¹⁰ See, for example, *Le Sage au Piano Limited Partnership v. The Queen*, 2014 TCC 319; *236130 British Columbia Ltd. v. The Queen*, 2006 FCA 352; and *Katepwa Park Golf Partnership v. The Queen*, [2000] 3 C.T.C. 2043. The closest is *Gyimah v. The Queen*, 2010 TCC 621.

¹¹ [1981] C.T.C. 2555 (T.R.B.).

¹² 2010 TCC 452.

¹³ I acknowledge that in *Newell v. The Queen*, 2010 TCC 196 the Court stated that GST and income tax are two separate matters and suggested that a proper change of address notice is required in respect of each. However, in that case, the taxpayer's evidence that he gave the CRA notice of his address change was not persuasive. Moreover, it was a decision under the informal procedure rules.

¹⁴ *Supra*, note 6.

[34] The Respondent led no evidence regarding the means by which a single taxpayer's tax accounts are linked or how address updates are or should be reflected in the CRA electronic database. I have no evidence regarding the CRA practice for updating addresses in the CRA electronic database.

[35] As a result, I find that the reassessments mailed to Ms. Kirschke in 2016 were not mailed to a correct mailing address. They were sent to an address which she had advised CRA, more than a year earlier and in a tax context, was no longer her address.

[36] However, that a notice of assessment is mailed to the wrong address does not end the matter. Other communication of a notice of reassessment may be sufficient communication of the assessment.¹⁵ The evidence suggests Ms. Kirschke first learned of the reassessments in late February or early March, 2018. Ms. Kirschke submitted to the Court a copy of CRA's February 26, 2018 collection letter on which she made notes of a telephone call she had with a representative of the CRA. Those notes suggest the call occurred on March 6, 2018. Therefore, I am satisfied she had actual notice of the June 14, 2016 reassessments no later than March 6, 2018 when she spoke with the CRA, and possibly deemed notice of them no later than February 26, 2018.¹⁶ According to Ms. Faria's affidavit, Ms. Kirschke's notice of objection to those reassessments was served on May 24, 2018, which is less than 90 days after February 26, 2018. Accordingly, I find that her notice of objection was filed within 90 days of the reassessments being validly sent (i.e. communicated) to Ms. Kirschke.

[37] Subsection 298(1) of the ETA requires a notice of assessment for a reporting period to be issued within four years of the later of the day the return for the period was filed or was required to be filed, absent on exception to that limitation period applying. Neither Ms. Kirschke nor the Respondent provided any evidence regarding the date Ms. Kirschke filed her HST returns for the 2010-2014 annual reporting periods. Accordingly, I make no determination as to whether February

¹⁵ *Grunwald v. R.*, 2005 FCA 421, [2005] G.S.T.C. 192, 2006 D.T.C. 6016 (F.C.A.); *Universal Aide Society v. Minister of National Revenue*, 2009 FCA 107, 2009 D.T.C. 5084 (F.C.A.); *Austin v. R* 2010 TCC 452.

¹⁶ Subsection 334(1) of the ETA. The subject line of the letter is "Legal warning about your GST/HST debt of \$17,648.85" but does not explain how the debt arose.

26, 2018 is a date within the period which the Minister is entitled to reassess any or all of the five reporting periods. However, because I have decided that her notice of objection was timely filed, that question, if appropriate, may be addressed in the context of her objection to the reassessments.

[38] Accordingly, the application for an order extending the time within which Ms. Kirschke may serve a notice of objection to reassessments dated June 14, 2016 for her reporting periods ending December 31, 2010, 2011, 2012, 2013 and 2014 is dismissed on the grounds that no extension is necessary because the notice of objection was timely filed by Ms. Kirschke.

[39] No costs will be awarded to either party.

Signed at Ottawa, Canada, this 29th day of March 2019.

“K.A. Siobhan Monaghan”

Monaghan J.

CITATION: 2019 TCC 68

COURT FILE NO.: 2018-2718(GST)APP

STYLE OF CAUSE: RUTH KIRSCHKE v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Hamilton, Ontario

DATE OF HEARING: December 3, 2018

REASONS FOR ORDER BY: The Honourable Justice K.A. Siobhan
Monaghan

DATE OF ORDER: March 29, 2019

APPEARANCES:

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Counsel for the Respondent: Kevin Hong

COUNSEL OF RECORD:

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