

Docket: 2018-4119(IT)APP

BETWEEN:

GHYSLAIN GAUTHIER,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Application heard on April 8, 2019, at Montréal, Quebec.

Before: The Honourable Justice Guy R. Smith

Appearances:

For the applicant: The applicant himself

Counsel for the respondent: Justine Allaire-Rondeau

ORDER

The application for an order extending the time within which to appeal the assessment of July 24, 2014, made pursuant to the *Income Tax Act* for the 2009 and 2010 taxation years is dismissed without costs in accordance with the attached reasons for order.

Signed at Ottawa, Canada, this 13th day of May 2019.

“Guy R. Smith”

Smith J.

Citation: 2019 TCC 115
Date: 20190513
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REASONS FOR ORDER

Smith J.

[1] Ghyslain Gauthier, the applicant in this case, has applied for an extension of the time within which to submit notice of appeal concerning reassessments dated July 24, 2014, for the 2009 and 2010 taxation years. These reassessments were confirmed by the Minister of National Revenue (the “Minister”) on May 16, 2016, and the application for an order extending the time is dated October 24, 2018, or 29 months later.

[2] The Minister opposes this request.

[3] The Court considered the following essential facts:

- a) On July 21, 2011, the Minister issued a notice of assessment for the 2009 taxation year. This was the original assessment;
- b) On December 19, 2011, the Minister issued a notice of assessment for the 2010 taxation year. This was also an original assessment;
- c) On July 24, 2014, the Minister issued notices of reassessment for the 2009 and 2010 taxation years;

- d) The applicant, through his accountant, Raymond Frenette, filed notice of objection on October 31, 2014. It is agreed that the notice of objection was filed within the time prescribed by the *Income Tax Act*, RSC (1985), c. 1 (5th Supp.) (the “Act”);
- e) Between 2011 and 2015, and possibly until the spring of 2016, the applicant was on long-term medical leave for issues including depression and psychiatric disorders. The Minister does not challenge this, particularly the period between 2011 and 2015;
- f) In late 2015 or early 2016, the applicant learned that his accountant could no longer represent him due to cancer. He picked up his files and subsequently turned them over to another accountant, Georges Tremblay of the accounting firm Gagnon, Tremblay Inc.;
- g) In February 2016, Mr. Tremblay reviewed the file and submitted amended returns for the 2009 and 2010 tax years;
- h) On May 16, 2016, the Minister confirmed the notice of assessment of July 24, 2014;
- i) The applicant adds a summary of the facts in paragraph 11 of the application for an extension:

[TRANSLATION] I instructed my accountant, Georges Tremblay, to follow up and dispute the notice of assessment from the CRA and Revenu Québec. Mr. Tremblay did not lodge any notice of objection nor did he apply for an extension of the time limit for appealing (which I am doing in this case).

Appeal procedure under the Act

[4] Before reviewing the applicant’s submissions, I will provide a brief overview of the pertinent legislative provisions in the Act.

[5] Under subsection 169(1), a taxpayer must serve notice of appeal to the Tax Court of Canada within 90 days from the day the Minister has confirmed the assessment. It is presumed at this point that the taxpayer has already filed notice of objection, which was done in this case, by the first accountant, Mr. Frenette.

[6] According to subsection 167(1), where a taxpayer has not instituted an appeal under subsection 169(1), that is, filed notice of appeal before expiration of the 90-day period, the taxpayer may make an application to the Court for an order extending the time within which the appeal may be instituted. Paragraph 167(5)(a) states that the application must be made within one year after expiration of the 90-day period.

[7] Subsections 167(1) and (5) of the Act stipulate as follows:

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.

...

- (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.

[8] If a taxpayer cannot meet the condition set out in paragraph 167(5)(a), then there is no cause to determine whether the taxpayer can meet the conditions in paragraph 167(5)(b).

[9] In this case, the applicant consequently had until August 14, 2016, to file notice of appeal and until August 14, 2017, to file his application for an extension.

[10] As Lamarre J. (as she then was) noted in *Moon v. The Queen*, 2010 TCC 393 (tab 3 of respondent's book of authorities):

[11] Once it has been found that the application for an extension of time was not made within the one-year limit imposed by paragraph 167(5)(a) of the [Act], this Court has no discretion to extend that time and the question whether it would be just and equitable to grant an extension of time may not be raised [...]

[11] In conclusion, since the application for an extension was not filed "within one year after the expiration of the time limited by section 169 for appealing," as noted by Lamarre J., the Court "does not have discretion to extend this time [...]."

Issue of agency

[12] The applicant argues that he submitted the correspondence and documentation received from the Canada Revenue Agency ("CRA") to his accountants, Mr. Frenette and Mr. Tremblay, and relied on them to respond appropriately in accordance with the Act. The applicant argues that he cannot be held responsible for their failure to fulfil their professional duties.

[13] This argument has been the subject of multiple decisions by this Court, notably *Lamothe v. The Queen*, 2001-3019(IT)APP (tab 4 of respondent's book of authorities), in which Lamarre-Proulx J.T.C.C. stated as follows:

[26] I do not have to determine whether the accountant or the applicant was negligent in the circumstances of the instant case. These are not relevant factors. I described the evidence that was presented since it had been presented. However, as the Federal Court of Appeal held in *Minuteman Press of Canada Company Limited, supra*, once it has been determined that no application was made for an extension within one year after the expiration of the time limited by section 169, the question of whether or not it would be just and equitable to grant an extension of time does not arise.

[27] On the one hand, the notices of confirmation for the taxation years in issue were sent in accordance with the Act and were received by the applicant. On the

other hand, the applications for an extension of time for each of those years were filed after the one-year time limit provided for in paragraph 167(5)(a) of the Act. The Court does not have the discretion to extend that time, which is a strict time limit. The only discretion it has is to extend the 90-day period provided for in subsection 169(1) of the Act, which is not the time limit at issue here.

[My emphasis.]

[14] The applicant argues that his first accountant failed in his professional duties; however, based on the facts presented, the accountant did duly file notice of objection to the reassessment of July 24, 2014, within the time frame prescribed in the Act.

[15] Did the second accountant fail in his professional duties? It is not up to this Court to analyze this issue since, as indicated in the aforementioned decision, as soon as it is established that an application for an extension was not filed within the one-year period, “the Court does not have the discretion to extend that time.”

Prescribed assessments?

[16] The applicant submits alternatively that the assessment of July 24, 2014, was prescribed since it was issued after the normal reassessment period. The applicant maintains that there was no erroneous presentation of facts, misrepresentation or so on such that the Minister could not make a reassessment outside of the usual prescription period.

[17] Although he did not cite the applicable provision, the Court must presume that he is referring to subsections 152(3.1) and (4) of the Act, which provide that the Minister may not make an assessment after expiration of the normal prescription period, or three years after sending the original notices of assessment.

[18] The Court finds this argument to be inadmissible since it was not raised in the application for the extension. Regardless, this is a substantive argument and, as noted by Lamarre J. *supra*, as soon as the Court concludes that an application for an extension was not filed within the prescribed period, it has no discretion to study substantive issues to determine whether it would be fair and reasonable to grant an extension of the time.

Parallel proceedings

[19] Third and alternatively, the applicant argues that the Minister is bound by the decision rendered in another tax dispute case (2018-121(IT)I), in which the applicant claims the Minister agreed to grant an applicant the universal child care benefit and Canada child benefit for the 2009, 2010 and 2011 taxation years.

[20] The CRA's decision in that matter is dated February 1, 2019, in response to the applicant's notice of objection of September 20, 2018, to notices of determination dated September 7, 2018.

[21] Based on the applicant's notice of objection, he indicated that he was on medical leave and for all intents incapacitated, and that the time period had been interrupted and did not resume until he had recovered.

[22] He asked the Minister to consider his application retroactively.

[23] The Court notes that the Minister's decision, which was entered into evidence, does not include reasons, making it impossible to conclude with certainty as to why the Minister approved the application. Moreover, contrary to the present case, there was no agent or third party acting on the applicant's behalf.

[24] Clearly, the Court is not bound by a decision made by the CRA in another matter, even if it involves the same taxpayer. The Court finds ultimately that the Minister's decision in another appeal case is not relevant.

Suspension of time period

[25] Finally, and alternatively, the applicant cites sections 2904 and 2925 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("CCQ"), which provide as follows:

2904. Prescription does not run against persons if it is impossible in fact for them to act by themselves or to be represented by others.

...

2925. An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise determined.

[26] First, the Court finds this argument to be inadmissible in that it is not cited in the application for the extension and was raised only at the hearing. This being the

case, the Court agreed nevertheless to consider written submissions from both parties, since this was an unusual issue in the context of an application for an extension before this Court.

[27] At first glance, it has been clearly established that the Court must defer to the applicable laws of the provinces, including Quebec, the applicant's place of residence, with respect to civil law matters, notably matters of competency and capacity.

[28] As the respondent states in its written submissions, the *Interpretation Act*, RSC (1985), c. I-21, protects the principle of complementarity between federal law and the private law of the various provinces. Section 8.1 provides as follows:

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

[29] That being said, as noted by the respondent, it is appropriate to refer to this provision "when it is 'necessary' to do so, except where 'otherwise provided by the law'" (*Bouchard v. Canada (Attorney General)*, 2009 FCA 321, para 17).

[30] The applicant argues that the aforementioned provisions of the CCQ prevail over the provisions of the Act with respect to the appeal process and that the time periods prescribed for serving notice of appeal and for submitting an application to extend the time are suspended due to his incapacitation for a period of three years.

[31] As noted by the respondent, the onus is on the applicant to show that "it is necessary to refer to a province's rules" within the meaning of section 8.1, *supra*.

[32] However, the Act already provides a time limit for serving notice of appeal or submitting an application for an extension. There is consequently no cause for referring to provincial law (*Markevich v. Canada*, [2003] 1 SCR 94, 2003 SCC 9).

[33] The time periods provided by the Act in relation to the appeal mechanism concerning decisions of the Minister in tax matters are [TRANSLATION] "clear and unambiguous," as the respondent notes. The period of "three years" provided by section 2925 of the CCQ applies only "if the prescriptive period is not otherwise determined," which is not the case.

[34] The applicant argues that he was incapacitated between 2011 and 2015, which the respondent does not dispute. However, section 2904 of the CCQ applies only where it is impossible for a person “to be represented by others.”

[35] It is appropriate to review the facts in this instance.

[36] Clearly, Mr. Frenette filed notice of objection to the reassessment of July 24, 2014, following which the Minister confirmed this assessment on May 16, 2016.

[37] It is not disputed that the applicant received the notice of confirmation and provided it to his new accountant, Georges Tremblay. Meanwhile, as noted above, the applicant acknowledges in paragraph 11 of his application for an extension that he had instructed Mr. Tremblay to follow up and dispute the notice of assessment from the CRA, which Mr. Tremblay did not do, “nor did he apply for an extension of the deadline for appealing,” also according to paragraph 11.

[38] As indicated previously, the deadline for filing notice of appeal was August 14, 2016, but the applicant’s agent at that time failed to do so, opting instead to file amended tax returns for the 2009 and 2010 taxation years.

[39] The applicant states that he was on medical leave and incapacitated between 2011 and 2015, but this clearly did not prevent him from going to pick up his file from Mr. Frenette and appointing a new accountant, Mr. Tremblay.

[40] The prescription period at issue, the 90-day period for filing notice of appeal, began on May 16, 2016, by which time the applicant had, based on his testimonial evidence, appointed Mr. Tremblay.

[41] As noted in *Lamothe v. The Queen, supra*, it is not the role of this Court to determine whether Mr. Tremblay was negligent in his duties.

[42] Moreover, as Tardif J. noted in *Carrier v. Canada*, 2005 TCC 182 (tab 7, respondent’s book of authorities) at paragraph 19:

19 [...] Even if the appellant’s representative admits that the oversight was his, the applicant must bear responsibility for his agent’s oversight because it was his duty to ensure that the agent would be able to act within the prescribed time limits.

[43] The Court must conclude that it was not due to any particular incapacity that it was impossible for the applicant to act by himself as of May 16, 2016, making section 2904 of the CCQ inapplicable to this case.

[44] In its written submissions, the respondent adds that section 2878 of the CCQ provides two types of deadlines: the limitation period and the period for extinction of right.

[45] In the recent decision *Andreou c. Agence du Revenu du Québec*, 2018 QCCA 695 (“Andreou”), the Court of Appeal of Quebec had to examine the nature of the time to appeal provided in the *Tax Administration Act*, S.Q. c. A-6.002, which sets out provisions for appealing a decision of the Agence du Revenu du Québec to the Court of Quebec that are similar to the provisions of the Act. The Court of Appeal concluded that the time period in question was a period for extinction of right rather than a limitation period. The distinction was explained as follows:

[10] [TRANSLATION] A limitation period may be suspended or interrupted, whereas a period for extinction of right may not. This difference arises from the fact that a limitation applies to private interests, whereas extinction of a right relates to public order. A period for extinction of right ‘not only prevents the possibility of invoking legal remedies, it also results in loss of the right itself.’ Mr. Andreou acknowledged that his case involved a period for extinction of right.

[46] Consequently, even if the Court concluded that the applicant was unable to act by himself due to some form of incapacity and could not “be represented by others,” according to the wording of section 2904 of the CCQ, the periods provided by sections 167 and 169 of the Act are periods for extinction of right that cannot be “suspended or interrupted.” Expiration of these periods consequently results in “loss of the right itself.”

Conclusion

[47] To summarize, the time periods provided by Parliament are fixed, and the Court does not have discretion to extend these periods.

[48] Insofar as the period for filing an application to extend the time limit is a “period of extinction of right,” it cannot be “suspended or interrupted,” and sections 2904 and 2925 of the CCQ consequently do not apply in this instance.

[49] For these reasons, the application to extend the time limit is dismissed.

Signed at Ottawa, Canada, this 13th day of May 2019.

“Guy R. Smith”

Smith J.

CITATION: 2019 TCC 115

DOCKET: 2018-4119(IT)APP

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HER MAJESTY THE QUEEN

PLACE OF HEARING: Montréal, Quebec

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DATE OF ORDER: May 13, 2019

APPEARANCES:

For the applicant: The Appellant himself

Counsel for the respondent: Justine Allaire-Rondeau

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