Dockets: 2014-17(CPP)APP
2014-18(EI)APP

BETWEEN:

BREATHE E-Z HOMES LTD.,

Applicant,

and

MINISTER OF NATIONAL REVENUE,

Respondent.

Application heard on March 6, 2014, at Toronto, Ontario
Before: The Honourable Justice Randall S. Bocock

Counsel for the Applicant:	Dale Barrett
Counsel for the Respondent:	Roxanne Wong

ORDER

UPON HEARING *vive voce* testimony from the Applicant's president and Applicant's counsel staff members;

AND UPON READING the affidavits filed by Respondent's counsel and hearing submission from both counsel;

NOW THERFORE THIS COURT ORDERS THAT:

1. the request to extend the time to file notices of objection dated October 18, 2013 and the grounds for such objections are deemed to have been filed with the Tax Court of Canada on October 24, 2013, as a request for an extension to file a notice of appeal;

2. the grounds for the extension request contained in the letter of Applicant's counsel dated October 18, 2013, are deemed to have been amended by and to include those grounds for appeal contained in the proposed Notice of Appeal filed with the Tax Court of Canada on January 3, 2014;

3. the application to extend time to file a Notice of Appeal is granted and the Notice of Appeal referenced above is deemed to have been served, filed and shall constitute the Notice of Appeal;

4. in accordance with the reasons for order attached, the parties may make written submissions, if any, on costs on or before May 31, 2014; and,

5. the Respondent shall have 60 days after the issuance of this Court's cost order within which to file a Reply to the Notice of Appeal.

Signed at Vancouver, British Columbia, this 25th day of April, 2014.

"R. S. Bocock"

Bocock J.

Citation: 2014 TCC 122
Date: 20140425
Dockets: 2014-17(CPP)APP
2014-18(EI)APP

BETWEEN:

BREATHE E-Z HOMES LTD.,

Applicant,

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MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR ORDER

I. Issue:

[1] In these two applications requesting the extension of time within which to file notices of appeal there is only one legal issue: are the failed attempts of one's legal counsel to file a timely and proper notice of appeal sufficient excuse to extend what is otherwise a jurisdictionally fatal time limitation?

II. Facts:

[2] On June 13, 2013, the Applicant, in response to Notices of Objection previously filed, received a Canada Revenue Agency ("CRA") decision letter varying certain assessments (the "Decision"). During August of that same year, the Applicant retained legal counsel to appeal the Decision because the Applicant disagreed that it was an employer required to pay premiums for certain service providers under the *Canada Pension Plan*, RSC 1985, c C-8 and the *Employment Insurance Act*, SC 1996, c 23. After receiving a notice of arrears and responsively calling the CRA in late August, the president of the Applicant sent an email dated September 3, 2013, addressed to lawyers at the retained law firm reminding them of the "deadline to file an appeal". The

president identified the deadline as September 13, 2013 (it was really the 11th of September). Legal counsel failed to file a notice of appeal before that first 90 day period following the Decision as prescribed under subsections 28(1) and 103(1) of both the *CPP* and *EI Act*. Instead on October 18, 2013, legal counsel wrote to CRA requesting a discretionary extension to file a notice of objection to the re-assessments. Identifying that legal counsel had served a notice of objection on the CRA, but had not filed a notice of appeal with the Tax Court, an employee of the CRA telephoned the law firm on October 30, 2013. The employee left a message with Applicant's counsel's receptionist generally identifying that an objection had previously been filed, the Decision rendered and a notice of appeal was now required. The receptionist placed the phone message in the file, but otherwise did not advise other staff or lawyers of the phone call. No notice of appeal was filed before December 10, 2013, being the expiration of the second 90 day discretionary period following the Decision. Ultimately, in late December 2013, legal staff at the law firm identified the error and filed the extension request and a proposed notice of appeal with the Court on January 3, 2014.

[3] The Applicant was unaware of the omissions by its counsel until two or so weeks before this application hearing. The Applicant did not review documentation filed on his behalf. During testimony the president of the Applicant only generally recalled that he was "filing an appeal".

[4] In summary, the following mistakes were made by Applicant's counsel:

a) failing to notice that the June 13, 2013, confirmation letter of the Minister responded to a previously filed notice of objection;

b) missing the "as of right" deadline of September 11, 2014, to file a Notice of Appeal (or for that matter even a notice of objection);

c) erroneously filing a request for extension to file an objection with the CRA received on October 24, 2013, rather than filing an extension and notice of appeal with the Tax Court of Canada.

d) failing to heed the gratuitous phone call to legal counsel's office from the CRA employee on October 30, 2013;

e) missing the "discretionary extension" deadline of December 10, 2013; and lastly,

f) failing to report to the Applicant the various actions, filings and, regrettably, omissions along the way the reporting of which may have led to additional warnings by the Applicant regarding the above-noted mistakes.

[5] Legally the appellant has a 90 day "as of right" period following a decision within which to file a notice of appeal and, if an appellant misses that deadline, a further period of 90 days within which an application may be brought under the *EI Act* and the *CPP*, both of which statutes incorporate by reference the following applicable wording of the *Income Tax Act* ("*Act*"):

> ***167(5) When order to be made*** *- No order shall be made under this section unless*
>
> *(*b*) the taxpayer demonstrates that*
>
> *(i) within the time otherwise limited by* [.....] *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*.

[6] The single, but very material difference between subsection 167(5) of the *Act* and subsection 28(1) and 103(1) of the *CPP* and *EI Act* is the much shorter period of 90 days under the latter statutes as opposed to the one year period described in paragraph 169(5)(*a*) of the *Act* during which period one must bring an application to extend.

III. **Submission**:

a) Applicant's Counsel

[7] The submissions by Applicant's counsel regarding the extension of time within which to file a Notice of Appeal may be summarized as follows:

a) the Applicant had a clear and enduring *bona fide* intention to appeal witnessed by its retainer of counsel, instructions to proceed and its further directing mandate sent by email of September 3, 2013;

b) the Applicant's Notice of Appeal was filed on January 3, 2014, being the first opportunity circumstances permitted for the filing of the Notice of Appeal because that date represented the first occasion after which "legal staff" at the Applicant's counsel's office became aware of its deficiency of serving the CRA with the superfluous notice of objection dated October 18, 2013;

c) the Applicant's notice of objection in October also included a request for an extension of time to file (albeit that of a notice of objection); and,

d) the Applicant itself was of the belief that it was simply awaiting a date for hearing evidenced by the testimony of the president of the Applicant that he only learnt of counsel's errors two or so weeks before the application hearing.

[8] Applicant's counsel submits that the Applicant was under a reasonable misapprehension that all had been done to perfect its appeal rights: *Seater v. Her Majesty the Queen*, 1 C.T.C. 2204. Once the error was detected in late December, it was corrected with all due dispatch: *Big Bad Voodoo Daddy v. Her Majesty the Queen*, 2010 TCC 12. Lastly, no prejudice has been occasioned to the Respondent.

[9] In summary, Applicant's counsel says that the Applicant's otherwise diligent pro-active and reasonable steps, suspended the countdown of the 90 day extension limitation from October 18, 2013 until the Applicant had actual

notice of the errors. The knowledge by the Applicant's lawyers *per se* was insufficient when not communicated to the Applicant and therefore the filing on January 3, 2013, was within the "extended" statutory period of 90 days.

b) Respondent's Counsel

[10] Respondent's counsel states that the Applicant failed to take every necessary action to appeal, insufficiently reviewed the documents to reasonably rely upon the ineffective steps taken and did not appreciate, *qua* Applicant, the difference between an objection and an appeal. In short, without justification, the Applicant resiled to a position of insouciance which is not objectively supported by the facts: no reporting back from counsel, lack of continued reaction by way of client emails reminding its lawyers to act and the passage of time without the client prompting reminders in the face of inaction.

[11] Further, the Respondent submits that even if reliance on professionals is afforded, the Applicant's mistaken belief became unreasonable once the gratuitously helpful call from CRA was made to the office of Applicant's counsel (*Hickerty v. Her Majesty the Queen*, 2007 TCC 482). By providing such warning, the interceding incorrect step was identified and ought to have been corrected: *Chu v. Her Majesty the Queen*, 2009 TCC 444; *Castle v. Her Majesty the Queen*, 2008 D.T.C. 2821. Once counsel's mistaken belief was dispelled by the phone call, the alleged standstill period within which the 90 day limitation ceased to run was rescinded, the limitation period was reinstated and the new deadline was extended for a period of no more than 12 days. Even if one employs that brief standstill period, the new date for filing the extension application would have been December 22, 2013. Nonetheless, that date was still missed.

IV. **Analysis and Decision**:

[12] The Respondent in final submissions withdrew its previous challenge related to the Applicant's *bona fide* intention to appeal. Moreover, the Court has concluded that, aside from the primary time limitation issue, the Applicant has otherwise satisfied the other requirements of subsections 167(5)(ii), (iii) and (iv).

[13] As to *bona fide* intention, the Applicant was clear from the outset of its desire and resolve to appeal. In the first instance, the Applicant's accountant filed the notice of objection, the partial rejection of which by the Minister in the Decision necessitated that the next step was to be that of an appeal (the very one ill managed by the Applicant's retained lawyers). Within the first "as of right" 90 day period following the Decision, the Applicant retained a law firm, signed a business consent form which nominated counsel as agent, contacted CRA within that same period and confirmed in writing its instructions to counsel of "our deadline to file for the appeal".

[14] On this issue of filing the appeal as soon as circumstances permitted, satisfaction may be taken from the fact that the Applicant never actually became aware of the fact that an appeal had not been filed before the deadline until very recently. Moreover, counsel did file the appeal as soon as a review of the file revealed that only an objection had been served and an appeal had not been filed. That date was January 3, 2014. The issue of the phone call of October 30, 2013, by necessity, will be analyzed subsequently in connection with its impact on dispelling the reasonable basis for the mistaken belief that an appeal had been initiated.

[15] Aside from the time limitation there would appear to be *prima facie* grounds for the appeal and, at the very least, the Respondent has not suggested otherwise.

[16] Lastly, and again subject to the timing issue and its impact on jurisdiction, the Court concludes that it would otherwise be just and equitable to grant the Order for extension. Swaying justice and equity to the Applicant are the facts referenced in the determination of a *bona fide* intention and the following:

a) the Applicant recognized its lack of expertise in this area, retained accountants and then tax lawyers to attend to the appeal process;

b) the Applicant, when acting without professionals, submitted documents, answered calls and solicited the assistance of CRA when served with notices of assessments, statements of arrears and other information;

c) the Applicant pursued its remedies diligently and without committing a single error or omission on its own, as opposed to vicariously through tax counsel; and,

d) the Applicant was assured by counsel all was in hand and, when it was not, otherwise simply received no reports from counsel on procedural steps taken related to the appeal.

[17] However, unless this Court holds that the Applicant constructively and effectively commenced an appeal within the requisite 180 days after the Decision, then this Court lacks jurisdiction to make an order pursuant to subsections 28(1) and 103(1) of the *CPP* and *EI Act*, respectively.

[18] Generally, the authorities may be divided into several categories: deadlines completely missed by even a few days for no reason; incomplete or incorrect interceding acts by a taxpayer to appeal or object; and, mishandled objections or appeals prosecuted by professional advisors.

[19] Those cases dealing with missing the deadline by a matter of days, in the absence of any interceding but vain attempt to perfect an appeal, are the subject of definitive and settled law. In the absence of any indication of a positive action, however futile, no application may be imputed, implied or constructed. This is true even where the notice of reassessment was not received because of postal disruption (*Carlson v. R*, 2002 FCA 145) and to such an extent that extending only one day beyond the statutory period will not afford discretion to extend the statutory limited period (*Edgelow v. R*, 2011 TCC 255) because the Court lacks jurisdiction to do so given the mandatory language in subsection 167(5): *Carlson*, s*upra*. Where it is a professional advisor who also fails to undertake any action to indicate in some meaningful form an intention to object or appeal within the statutorily limited period for

doing so, the Applicant will also fail: *Chu v. R*, 2009 TCC 444 at paragraph 19 and 20.

[20] In contrast, where a taxpayer has undertaken reasonable actions, albeit incorrectly, to file an objection or appeal in some form with some logical entity, the Court has been prepared to find that such steps act as a standstill which freezes the countdown of time during that period within which a taxpayer was under a reasonable misapprehension that an appeal has been perfected (*Hickerty, supra* at paragraph 12).

[21] Documents not meeting the precise procedural requirements and/or otherwise sent to the wrong party, provided same are sent within the requisite time frame to some party relevant and involved in the proceedings, constitute actions requiring the Court to analyze the saving provisions of its rules to determine whether an application or appeal may have been constructively received by virtue of the inchoate step: *Cheam Tours Ltd. v. MNR*, 2008 TCC 18 at Paragraphs 14, 15 and 18. The Court may be prepared to construe the actions of the taxpayer as being reasonably sufficient to virtually constitute an application to extend the time to bring the appeal. Inexplicably misplaced or wrongly addressed documents are to be assigned the highest benefit of doubt in order to have an applicant's appeal heard on it merits: *Miniotas v. Her Majesty the Queen*, 2011 TCC 43 at paragraphs 28 and 48. A letter filed by the taxpayer with the CRA instead of the court, where the taxpayer is confused, if filed within the requisite time, may be deemed to be a notice of appeal filed with the Tax Court by virtue of the discretion embedded in the 27(3) of the *EI Tax Court Rules*: *Pham v. MNR*, 2009 TCC 235 at paragraph 10.

[22] However, where there is some questionable conduct, uncertain intention or equivocal facts allocable to the taxpayer, the Court will refrain from exercising such finite discretion which must be rooted in the clearly apparent intention, good faith and reasonable diligence of the taxpayer. For example, the presence of evasive or uncooperative behavior, sophisticated knowledge or experience, general insouciance and lack of dispatch upon learning of any deficiency will destroy the foundations of a reasonable misapprehension of a perfected appeal: *Gidda v. R*, 2013 TCC 190 at paragraphs 13 through 16.

[23] Similarly, inattentiveness and wilful blindness to one's affairs for an unreasonable period will have the same effect, irrespective of incomplete or incorrect filings: *Castle v. R*, 2008 DTC 2821 at paragraph 37.

[24] Mishandled appeals by professional advisors are empirically the most challenging category for courts to entertain and, no doubt, the most frustrating for clients to endure. Taxpayer clients, identifying they are in the midst of complicated, procedurally top-heavy and time-sensitive litigation, seek out professional advisors. Taxpayers frequently retain accountants, financial advisors or friends in informal matters or CPP and EI appeals to be their agents; in the present case the Applicant retained a known and self proclaimed firm of tax law specialists, regrettably with no appreciably enhanced service, and perhaps even less than that which self-representation may have rendered. Certain authorities assist taxpayers provided the taxpayer acts in good faith, possesses little knowledge of the relevant area or topic and such delegation of rights to the professional advisor was ostensibly reasonable and supportable in the circumstances: *Seater v. Her Majesty the Queen*, [1997] 1 CTC 2204 at paragraph 10. Similarly, erroneous or misguided confirmation by a professional advisor of acting correctly followed by immediate remedial steps to correct a deficiency, once revealed, will convince the Court of a reasonable degree of diligence in the exercise of rights: *Gorenko v. Her Majesty the Queen*, 2002 DTC 2025 at paragraphs 19 and 20. Moreover, where a taxpayer has delegated the responsibility of dealing with reassessments to the professional advisor and there are no circumstances which could have allowed the taxpayer to know more than it did because of a re-direction of CRA correspondence and dealings from the taxpayer the professional advisor, then it is unfair for the taxpayer not to have the appeal determined on its merits: *Big Bad Voodoo Daddy v. Her Majesty the Queen*, 2010 TCC 12 at paragraph 10 which cites with approval at paragraph 11, *Gorenko, supra*.

[25] The following factual particularities based upon the authorities referenced above, will afford the present Applicant its day in Court in order to present the merits of its appeals:

a) the taxpayer at every step in the process, when acting without faulty direction and assistance, did what it reasonably could to object to and appeal the re-assessments: directing its accountants, retaining tax lawyers, executing the appropriate consents, confirming all advices received directly

from the CRA and taking all such foregoing steps within the 90 day "as of right" appeal period following the Decision:

b) in retaining professional advisors, as opposed to having its director or officer conduct the appeal, the Applicant picked an advertised, self-proclaimed firm of tax lawyers;

c) at no time was the taxpayer obstructionist with the CRA, lax in instructing counsel nor anything other than forthright before this Court;

d) when requested by counsel, the Applicant responded forthwith;

e) when under the reasonably held misapprehension all was proceeding according to right and rite, it awaited a reasonably short amount of time for its court date; and,

f) by comparison to some taxpayers before this Court, the Applicant was diligent and mindful of the deadlines and time frames of which it was made aware.

[26] There is little else that the taxpayer could have reasonably done given the relatively short time frame between instruction and the date when this application was heard when coupled with the all too normal practice of uncommunicative counsel.

[27] The same is not true of Applicant's counsel. The list of multiple omissions is stark given the short period of the retainer, even though counsel did manage to file an interceding notice of objection and request for extension, admittedly in the wrong format and wrong forum. Although not entirely clear, this error seemed to arise from a mistake of fact concerning whether a previous notice of objection had been filed. Moreover, the omissions do not derogate from the fact that the identifiable missteps were taken during the period of 180 days next following the Decision. Moreover, the telephone call of October 30, 2013 by the CRA, was simply that: a phone message which through inadvertence of clerical staff itself was not disclosed to anyone who may have understood its import. Until December 30, 2013, the Applicant and (less convincingly)

counsel were of the reasonable but mistaken view that what needed to be done had been done. Counsel, upon discovering otherwise, did act with considerable speed to file the proper application to extend and notice of appeal with the proper entity, this Court.

[28] The facts of this application create an unusual situation. An incorrect assumption and inexplicable delay by a professional advisor led to a mistake of fact: the filing of the redundant, second notice of objection with a request to extend. The misfiled revelation of that error --the phone message-- prevented discovery of the previous error. The non-disclosure and non-reporting throughout of actions taken by counsel (the missed 90 day "as of right" deadline and the filing of the incorrect notice of objection) prevented the possible, but inverted obligation of the Applicant to identify the missteps of counsel. These causally interdependent errors of judgment, none of which were committed by the taxpayer, all procedurally robbed the otherwise pro-active, cooperative and reasonably mistaken Applicant of its opportunity to perfect its appeal rights and access the curative provisions for remedying same had it been aware of the initial missteps and tardiness.

[29] Therefore, given the inchoate appeal approximated by the superfluous objection and the necessary request for an extension dated October 18, 2013 this Court will deem the request for extension and the notice of objection (filed with the CRA) to have been received by the Court on October 24, 2013 as a notice of appeal, now amended by the grounds of appeal contained within the proposed notice of appeal received with this application. It does so because the missteps were steps nonetheless. These actions, admittedly incomplete, give the Court jurisdiction to deploy its authority and discretion under sections 5.2 and 27 of both the *CPP* and *EI Act Rules of Procedure* of this Court to correct the errors in such a unique situation.

[30] Costs ought to be awarded, but the Court is mindful that this application relates to *CPP* and *EI Act* matters where there is no authority to order costs relative to the result of an appeal. Also, the Applicant seems to have been a victim of befuddled counsel and bad circumstance. However, given the number of missteps and omissions committed, costs thrown away should be ordered against Applicant's counsel personally for a fixed amount. The Court may do so by virtue of the inherent jurisdiction as a superior court of record to regulate its own processes; such a cost order reflects procedural delay rather than a

results oriented award at disposition of the matter. The Court will allow some time for submissions by counsel after which time it will render a decision and fix such costs in favour of the Respondent to be paid by Applicant's counsel personally. Also, the Respondent shall have 60 days after the issuance of the cost order to file a Reply. As mentioned above, this is a factually unique application. For the sake of taxpayers who retain and pay good money for tax counsel to prosecute appeals, hopefully it remains so.

Signed at Vancouver, British Columbia, this 25th day of April, 2014.

"R. S. Bocock"

Bocock J.

CITATION:	2014 TCC 122
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