

Docket: 2006-428(GST)APP

BETWEEN:

DUO COMMUNICATIONS DU CANADA LTÉE,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Application heard on July 10, 2006, at Montréal, Quebec
Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Applicant: Yves Ouellette

Counsel for the Respondent: Mario Laprise

ORDER

The application for an order extending the time in which to serve the notice of objection in respect of the reassessment made on March 3, 2004, under the *Excise Tax Act*, Part IX (Goods and Services Tax) is dismissed in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 24th day of November 2006.

"Alain Tardif"

Tardif J.

Translation certified true
on this 28th day of February 2008.

Brian McCordick, Translator

Citation: 2006TCC576
Date: 20061124
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ENTRE :

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REASONS FOR ORDER

Tardif J.

[1] This is an application for an order extending the time in which to file a notice of objection to a notice of reassessment issued by the Minister of Revenue of Quebec ("the Minister") on March 3, 2004.

[2] In order to dispose of the application, the Court must assess the evidence having regard to the criteria listed in subsection 304(5) of the *Excise Tax Act* ("the Act"), which reads as follows:

(5) When application to be granted. No application shall be granted under this section unless

(a) the application was made under subsection 303(1) within one year after the expiration of the time otherwise limited by this Part for objecting or making a request under subsection 274(6), as the case may be; and

(b) the person demonstrates that

(i) within the time otherwise limited by this Act for objecting,

(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 object to the assessment or make the request,

(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, and

(iii) the application was made under subsection 303(1) as soon as circumstances permitted it to be made.

[3] The Applicant submitted fairly substantial evidence that was clearly intended to show the ambiguity and confusion that surrounded the notices of assessment pertaining to the tax debt or debts.

[4] Although the evidence of the confusion was of some interest, I do not believe that such confusion was a relevant consideration. Indeed, the true date of the notice of assessment was not in issue; the focus was on the amounts actually due, as opposed to the legal grounds of the assessments.

[5] Thus, the principal intent of the Applicant's evidence was to show that the Minister acted in a dubious and perhaps even frivolous manner when it changed the amount of the tax debt several times.

[6] The trustee explained that for financial reasons, it was generally very rare for him to pay immediate attention to proofs of claim under a notice of assessment; he also said that a quick examination would prejudice the administration of the bankrupt's property in that it could entail significant professional fees.

[7] This was why the trustee did not act on the proofs of claim received in June 2004. In keeping with this practice, it was only in February 2005 that he took measures to obtain explanations about the assessment. This is shown very clearly at pages 48 and 49 of the transcript of the cross-examination of Mr. Breton.

[TRANSLATION]

Q. O.K. So what did you do after receiving that document in September 2003?

R. Not much. I filed it.

Q. All right. You did receive it, then. Can you give me the address of your office?

R. 1 Place Ville-Marie.

Q. Was that the office address on September 25, 2003?

R. Yes.

Q. 1 Place Ville-Marie, Suite 2400, Montréal, H3B 3M9. Is that correct?

R. H3B 3M9.

Q. All right. It was received on or about September 25, 2003, to your knowledge?

R. I presume so.

Q. All right. I would like to go to tab...

R. According to the good offices of Canada Post.

Q. Canada Post. All right. If I go to tab 2, the proof of claim dated January 5, 2004, I will once again refer to the table on page 3, where a distinction is made from the other proof of claim; I am not mistaken, it says that the "assessed claim" is \$62,524.48 and that the "estimated claim" is zero insofar as the *Excise Tax Act* is concerned.

R. Yes.

Q. You did not notice ... Well, the difference did not bother you, that it was estimated back in September 2003. And then, in May ... I mean in January 2004, the claim is assessed?

R. As I explained earlier and will repeat, the trustee does little work on proofs of claim until there is reason to believe that there will be a dividend. To do otherwise would result in needless expenses being borne by the creditors as a whole.

[8] The first condition in subparagraph 304(5)(b)(i) reads as follows:

- (i) the person was unable to act or to give a mandate to act in the person's name; or

[9] The question whether someone was unable to act may be open to interpretation; I do not believe that it is possible to identify objective criteria that lead to a completely objective answer.

[10] Several factors must be taken into account, including the context, the taxpayer's knowledge and experience, his level of education, his health, and any of the numerous kinds of issues or constraints that exist.

[11] Can the trustee's explanation — namely that in order to prevent significant costs from being charged against the assets to be distributed eventually among the different creditors, there is a certain amount of time between the date that a proof of claim is filed and the date that its merits are assessed — serve to justify or explain the failure to comply with the time limit set out in the Act?

[12] In other words, based on the explanations that he gave, can the trustee claim that he was unable to act or mandate someone to act on his behalf?

[13] Section 135 of the *Bankruptcy Act* stipulates as follows:

ADMISSION AND DISALLOWANCE OF PROOFS OF CLAIM AND PROOFS OF SECURITY

Trustee shall examine proof

135. (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

- (2) The trustee may disallow, in whole or in part,
 - (a) any claim,
 - (b) any right to a priority under the applicable order of priority set out in this Act; or
 - (c) any security.

Notice of determination or disallowance

- (3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

- (4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Expunge or reduce a proof

- (5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

[14] A trustee cannot disregard the time limits contained in the Act on the pretext that an examination of a claim could result in significant costs being charged against the assets that would ultimately be divided among the various creditors of varying priority.

[15] In a sense, the trustee assumed that the amounts claimed in the notice of reassessment were arbitrary if not groundless. In addition, it is very clear that he drew inferences from the fact that the amount of the assessment had been changed

several times. According to the trustee, this was a somewhat haphazard approach, and it justified his inaction.

[16] There is no dispute as to whether there was notice of the reassessment. This was simply not a case in which the trustee was unaware of an assessment that was discarded or lost in the commotion of the period preceding the transfer of the seizin of the bankrupt's property to the trustee.

[17] In the case at bar, the trustee essentially acted out of habit or reflex when he declined to examine the quality of the tax debt because he was unable to draw any conclusions about the costs and benefits. While this conduct might be generally reasonable, it is certainly not sufficient to conclude that the trustee was unable to act or mandate someone to act in his name as soon as the circumstances permitted.

[18] An in-depth examination of the merits of the reassessment or an exhaustive analysis of the amounts paid versus the amounts payable would not have been necessary in order to constitute action.

[19] Basically, in order to have taken action, the trustee would have had to produce a summarily substantiated notice of his intent to question the merits of the assessment.

[20] Essentially, this would have required that he show a modicum of respect for the time limit established by the Act.

[21] In the case at bar, the Applicant has not met the conditions precedent to the issuance of an order extending the time in which to file a notice of objection.

[22] For these reasons, the application is dismissed.

Signed at Ottawa, Canada, this 24th day of November 2006.

"Alain Tardif"

Tardif J.

Translation certified true
on this 28th day of February 2008.

Brian McCordick, Translator

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PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: July 10, 2006

REASONS FOR ORDER BY: The Honourable Justice Alain Tardif

DATE OF ORDER: November 24, 2006

APPEARANCES:

 Counsel for the Applicant: Yves Ouellette

 Counsel for the Respondent: Mario Laprise

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