

Docket: 2002-4120(IT)APP

BETWEEN:

DR. ROBERT J. WILSON,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on May 1, 2003 at Windsor, Ontario

Before: The Honourable Justice L.M. Little

Appearances:

Counsel for the Applicant: David M. McNevin

Counsel for the Respondent: Roger Leclaire

ORDER

Upon application for an Order extending the time within which a Notice of Objection to the assessment of income tax for the 1989, 1990 and 1991 taxation years may be served;

And upon hearing what was alleged by the parties;

The application is dismissed in accordance with the attached Reasons for Order.

Signed at Vancouver, British Columbia, this 8th day of July 2003.

"L.M. Little"

J.T.C.C.

Citation: 2003TCC459
Date: 20030708
Docket: 2002-4120(IT)APP

BETWEEN:

DR. ROBERT J. WILSON,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Little, J.

A. FACTS

[1] The Applicant is a licensed medical doctor carrying on the practice of medicine in the City of Windsor with a speciality in internal medicine.

[2] In December 1989, on the advice of a friend and financial advisor, the Applicant invested the sum of \$36,900.00 in a partnership known as Mainstream Productions 89-25 (hereinafter referred to as the "Partnership").

[3] The Partnership was engaged in the business of marketing and producing popular music. Units in the Partnership were sold and marketed by an entity known as Advanced Business Opportunities (hereinafter referred to as "Advanced").

[4] In determining his income tax liability for the 1989, 1990 and 1991 taxation years the Applicant claimed deductions related to the purchase of units in the Partnership.

[5] On July 14, 1993 the Minister of National Revenue (the "Minister") issued Notices of Reassessment for the Applicant's 1989, 1990 and 1991 taxation years.

In the said Reassessments the Minister disallowed the amounts claimed by the Applicant in connection with his investment in the Partnership.

[6] The Applicant filed Notices of Objection to the Reassessments. The Notices of Objection were held in abeyance pending the outcome of a test case *William King v. Canada*, [1995] T.C.J. No. 92 (the "*William King* case") before the Tax Court of Canada.

[7] On July 25, 1995 the Tax Court of Canada dismissed the *William King* appeal.

[8] The decision of the Tax Court was appealed to the Federal Court of Appeal. By Judgment dated January 17, 2001, the Federal Court of Appeal dismissed the *William King* appeal.

[9] By letter dated August 22, 2001 the Minister advised the Applicant that because of the decision of the Federal Court of Appeal in *William King* his Notices of Reassessment would be confirmed.

[10] On October 3, 2001 the Minister issued a Notification of Confirmation for the Applicant's 1989, 1990 and 1991 taxation years.

[11] Following receipt of the Notification of Confirmation the Applicant retained the services of David McNevin, Barrister and Solicitor. The Applicant asked Mr. McNevin to advise him with respect to his tax position for the 1989, 1990 and 1991 taxation years in light of the decision of the Federal Court of Appeal in *William King*.

[12] In an Affidavit dated October 28, 2002 Mr. McNevin stated that in early November 2001, he advised the Applicant that an appeal to the Tax Court was not likely to be successful because of the Court decision in the *William King* case.

[13] The Applicant accepted the advice that he received from Mr. McNevin and did not file a Notice of Appeal to the Tax Court within the time limits specified in the *Income Tax Act* (the "*Act*").

[14] Mr. McNevin advised the Applicant that since a positive result was unlikely if an appeal were filed with the Tax Court the Applicant might achieve a reduction of his tax liability if he filed an application under the *Fairness Legislation* in the *Act*.

[15] The Applicant accepted the advice of Mr. McNevin and on or about March 15, 2002, Mr. McNevin delivered an application under the *Fairness Legislation* to officials of the Canada Customs and Revenue Agency (the "CCRA") in Windsor.

[16] Sometime in June 2002, Mr. McNevin became aware of the decision of the Supreme Court of Canada in *Brian J. Stewart v. The Queen*, 2002 DTC 6969.

[17] Mr. McNevin sought a legal opinion from a tax lawyer on the tax position of the Applicant as a result of the conclusions contained in *Stewart*. In September 2002, Mr. McNevin was advised by a tax lawyer that by virtue of the Supreme Court's decision in *Stewart* the likelihood of success by the Applicant in connection with his tax liability had greatly improved.

[18] Mr. McNevin represented the Applicant before the Tax Court in Windsor, Ontario on May 1, 2003. Mr. McNevin maintained that under the circumstances as outlined above the Applicant should be entitled to an extension of time within which to file Notices of Appeal to the Tax Court.

B. ISSUE

[19] Should the Court grant the Applicant an extension of time pursuant to subsection 167(1) of the *Act*?

C. ANALYSIS

[20] Subsection 167(1) of the *Act* reads as follow:

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.

[21] Subsection 167(5) of the *Act* reads as follow:

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.

[22] It will be noted that subsection 167(5) provides that no extension order shall be made under paragraph 167(5)(b) unless the taxpayer demonstrates that within the time limited by section 169 he had a *bona fide* intention to appeal.

[23] In this situation the time within which the Applicant should have filed a Notice of Appeal to the Tax Court was 90 days from October 3, 2001, i.e. sometime prior to January 2, 2002.

[24] During the period from October 3, 2001 to January 2, 2002 the Applicant obtained advice from Mr. McNevin that a positive result on an appeal to the Tax Court was unlikely and that his best course of action to reduce his tax liability was to apply under the *Fairness Legislation Provisions* of the Act. The Applicant accepted this advice and instructed his lawyer, Mr. McNevin, to file an application under the *Fairness Legislation Provisions* of the Act. The application was made by Mr. McNevin for the Applicant on March 15, 2002.

[25] Based on the evidence that was presented in the Affidavit of Mr. McNevin and filed with the Court, I have concluded that the Applicant had abandoned his right to file an appeal to the Tax Court. In other words, the Applicant did not have

a *bona fide* intention to appeal within the time limit specified in the *Act* (October 3, 2001 to January 2, 2002).

[26] Since the Applicant had abandoned his intention to file an appeal to the Tax Court he does not qualify for an extension of time to file an appeal under subsection 167(5) of the *Act*.

[27] During the hearing before me it was noted that officials of the CCRA "lost" the Applicant's file or related files for approximately two years. Under these circumstances it would appear that the interest that has been imposed against the Applicant on his tax liability should be waived by the Minister for the two years when the file was lost pursuant to the *Fairness Legislation Provisions* contained in the *Act*.

[28] The application is dismissed.

Signed at Vancouver, British Columbia, this 8th day of July 2003.

"L.M. Little"

J.T.C.C.

CITATION: 2003TCC459

COURT FILE NO.: 2002-4120(IT)APP

STYLE OF CAUSE: Dr. Robert J. Wilson and
Her Majesty the Queen

PLACE OF HEARING: Windsor, Ontario

DATE OF HEARING: May 1, 2003

REASONS FOR JUDGMENT BY: The Honourable Justice L.M. Little

DATE OF JUDGMENT: July 8, 2003

APPEARANCES:

 Counsel for the Appellant: David M. McNevin

 Counsel for the Respondent: Roger Leclaire

COUNSEL OF RECORD:

 For the Appellant:

 Name: David M. McNevin

 Firm: Ducharme Fox
 Windsor, Ontario

 For the Respondent: Morris Rosenberg
 Deputy Attorney General of Canada
 Ottawa, Canada