

Citation: 2008TCC18
Date: **20080121**
Docket: 2007-1615(EI)APP
2007-1616(CPP)APP

BETWEEN:

CHEAM TOURS LTD. OP AIRPORT LINK SHUTTLE,
Applicant,
and
THE MINISTER OF NATIONAL REVENUE,
Respondent.

Counsel for the Applicant: Donald Smetherman & Andrea Donohoe
Counsel for the Respondent: Selena Sit

AMENDED REASONS FOR ORDER

**(Delivered orally from the Bench on
November 8, 2007, at Vancouver, British Columbia)**

McArthur J.

[1] This motion by the Respondent is for an Order that the Applicant's requests to extend time to file Notices of Appeal be dismissed on the grounds that they were not filed in time, pursuant to subsection 103(1) of the *Employment Insurance Act* and subsection 28(1) of the *Canada Pension Plan*. This is an instance where an Applicant, acting on his own behalf as he is entitled to do, found himself in deep procedural trouble requiring the able assistance of counsel to guide him through a maze of rules and regulations.

[2] Two decisions, dated July 26, 2006 and August 7, 2006, respectively, were sent by the Minister of National Revenue to the Applicant. The first confirmed the ruling that Stephen Eric Freeric Simpson was engaged in pensionable and insurable

employment, and the second concerned assessments of EI and CPP contributions. Both decisions concluded with the following paragraph:

If you disagree with this decision, you can appeal to the Tax Court of Canada within 90 days of the date of this letter. You can find details on how to file an appeal in the enclosed information sheet called *How to Appeal to the Tax Court of Canada*. (addresses for the Tax Court of Canada were included)

[3] On August 16, 2006, Mr. Narinder S. Johal, the president, director and shareholder of the Applicant, wrote asking to appeal the decisions. This “appeal” was in writing and it set out, in general terms, the reasons for the appeal and the relevant facts. Unfortunately it was sent to Canada Revenue Agency instead of the Tax Court of Canada, Mr. Johal not appreciating the difference between the two. Had it been forwarded to the Tax Court Registry, there would be no need for this motion. Subsection 5(4) of the *Tax Court of Canada Rules of Procedure respecting the Employment Insurance Act*¹ requires that the appeal be instituted by filing the original document in the Registry. Because this “appeal” was sent to the wrong address and not forwarded to this Court, this was not possible.

[4] CRA records (provided pursuant to an access to information request) indicate that a CRA Trust Examiner received this “appeal” on August 22, 2006 and advised the Applicant’s accountant, Zahoor Shariff, that he would hold on to it until all of the records had been received.

[5] The Applicant was verbally advised by a CRA official that there would be an opportunity to appeal the decision once CRA had calculated the final amount owing. CRA records also confirm that the Trust Examiner knew the Applicant was under the impression there would be another appeal.

[6] After receiving the Trust Examiner’s detailed calculations on January 24, 2007, the Applicant faxed a letter to the Tax Court on January 31, 2007. Unfortunately, this letter failed to set out the reason why the Applicant had not instituted an appeal within the allotted time. Obviously, he believed, albeit mistakenly, that he had instituted a valid appeal. The Tax Court requested further particulars in a letter dated February 15, 2007. The Applicant provided the particulars on March 27, 2007 and the appeal was filed on April 2, 2007. Because

¹ Reference to EI includes CPP for all purposes. The legislation and *Rules* are the same for both.

April 2, 2007 fell more than 180 days after August 7, 2006, the Minister filed a motion to dismiss the Applicant's application for an extension of time.

[7] Subsection 103(1) of the *Employment Insurance Act*² (the "Act") stipulates that an application for extension can only be made up of 180 days (90 days + 90 days) after the decision is communicated. And the *Interpretation Act* states:

Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating that number of days the day on which the first event happens is excluded and the day on which the second event happens is included.

[8] The relevant dates are:

- (i) Ninety days after August 7, 2006 which would have been Sunday, November 5, 2007 (not including August 7th but including November 5th). Since November 5th fell on a weekend, however, the deadline would have fallen on Monday, November 6, 2006.
- (ii) One-hundred and eighty days after August 7, 2006 which would have been Saturday, February 3, 2007. Since this also fell on a weekend, the deadline would similarly have been moved to Monday, February 5, 2007.

[9] The issues are whether the fax sent by the Applicant to the Tax Court on January 31, 2007 is a valid application for extension of time and if not, was the April 2, 2007 application for extension of time filed in time?

[10] The main sections of the legislation relied on are as follows:

Employment Insurance Act

- 103(1) The Commission or a person affected by a decision on an appeal to the Minister under section 91 or 92 may appeal from the decision to the Tax Court of Canada in accordance with the *Tax Court of Canada Act* and the applicable rules of court made thereunder within 90 days after the decision is communicated to the Commission or the person, or within such longer time as the Court allows on application made to it within 90 days after the expiration of those 90 days.

² R.S.C. 1985, c.I-21.

- 103(1.1) Section 167, except paragraph 167(5)(a), of the *Income Tax Act* applies, with such modifications as the circumstances require, in respect of applications made under subsection (1).

Income Tax Act

- 167(1) 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.

- 167(2) An application made under subsection 167(1) shall set out the reasons why the appeal was not instituted within the time limited by section 169 for doing so.

- 167(3) An application made under subsection (1) shall be made by filing in the Registry of the Tax Court of Canada, in accordance with the provisions of the *Tax Court of Canada Act*, three copies of the application accompanied by three copies of the notice of appeal.

- 167(4) The Tax Court of Canada shall send a copy of each application made under this section to the office of the Deputy Attorney General of Canada.

- 167(5) No order shall be made under this section unless

(a) ...

(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.

[11] The *Tax Court of Canada Rules of Procedure Respecting the Employment Insurance Act* provides at Rule 3 and 27(3):

- 3. These rules shall be liberally construed to secure the just, least expensive and most expeditious determination of every appeal on its merits.
- 27(3). The Court may, where and as necessary in the interests of justice, dispense with compliance with any rule at any time.

Analysis

[12] While rule 27 of the *Tax Court Rules for Unemployment Insurance* appeals, made under the authority of the *Tax Court Act*, permits the Court to dispense with compliance with any rule, this clearly does not authorize the Court to alter the statutory conditions for appeal in subsection 70(1) of the *Unemployment Insurance Act* [today subsection 103(1) of the *EIA*].³ Obviously, I am not free to dispense with the statutory conditions in section 103 of the *Employment Insurance Act* or in section 167 of *Income Tax Act* (except for paragraph 167(5)(a)).

[13] Subsection 167(2) of the *Income Tax Act*, however, presents a stumbling block. It stipulates that an application for extension shall set out the reasons why the appeal was not instituted within the time limit. I cannot overlook the fact that, since the fax of January 31, 2007 failed to do this, it cannot constitute a valid application to extend the time within which to institute an appeal.

[14] The final question is whether the April 2, 2007 application for extension of time was filed in time? On several occasions, this Court has permitted an Applicant to cure a technical defect where due diligence was exercised in good faith. The following comments of Chief Justice Bowman in *Spensieri v. The Queen*⁴ come to mind:

³ *Pervais v. M.N.R.* [1996] F.C.J. No. 77 at para. 2 (F.C.A.).

⁴ 2001 DTC 787.

I do not mean to be either dismissive or disrespectful of the Crown's submission, but I cannot help thinking that the respondent is being rather technical in mounting a major campaign to keep the Applicant from having her day in court because of a rather minor slip-up. **It is not surprising, if a person has to manoeuvre through two acts (the *Income Tax Act* and the *Tax Court of Canada Act*) and two sets of rules, informal and general, that he or she might make a mistake. The rules are not intended to be a trap for the unwary or to create a minefield of obstacles for litigants. Rather they are supposed to facilitate the resolution of substantive disputes.**

(Emphasis added)

[15] In *Hickerty v. Canada*,⁵ where as in the present instance, the taxpayer had also mailed her appeal to CRA rather than mailing it to the Tax Court. Justice Boyle held that:

In the circumstances, I am of the view that the period during which the taxpayer is under a reasonable but mistaken belief that she has validly instituted an appeal is not included in the further one year grace period provided for in paragraph 167(5)(a). ...An interpretation favourable to the taxpayer is consistent with this Court's expressed preference to have taxpayers' tax disputes heard and resolved on their merits, especially in the absence of any prejudice to the Crown. To interpret and apply this differently would deprive a taxpayer of the right to have an appeal that she reasonably believed for a period of just less than five months to have [been] properly instituted, heard on its merits, where there was nothing else she could reasonably have been expected to do during that period. In most cases, the one year period will be a calendar year plain and simple. However, if a taxpayer mistakenly but reasonably believes that she has validly instituted an appeal and the other requirements of subsection 167(5) are met, the one year grace period stops running until the taxpayer becomes aware, or should have become aware if she is acting and thinking reasonably, that the intended appeal was invalid.

[16] By analogy to *Hickerty*, the conditions in subsection 167(5) of the *Income Tax Act* must be met. After a review, I am satisfied that the Applicant had a good faith intention to appeal and it would be just and equitable to grant the application for extension in the circumstances. In addition, there are reasonable grounds for the Applicant to appeal the decisions of the Minister and it had a mistaken belief that the appeal had been validly instituted.

[17] Nevertheless, several hurdles must be overcome. First, since the Tax Court requested further particulars in a letter dated February 15, 2007, but the Applicant

⁵ [2007] T.C.J. No. 312 (T.C.C.).

did not respond until March 27, 2007, it could be argued that the application was not made as soon as circumstances permitted. However, I am satisfied that this allegation can be overcome by looking to the overall circumstances of the case. The Applicant sent the initial “appeal” (albeit mistakenly) to CRA shortly after receiving the CRA decisions. In addition, the Applicant faxed a letter to the Tax Court (albeit lacking the necessary particulars) shortly after receiving the Trust Examiner’s detailed calculations. This indicates a general level of diligence which I believe inures to the benefit of the Applicant.

[18] Perhaps more serious is the question, “was there something else the Applicant ought reasonably to have done during the period in question?” Assuming without deciding that the Applicant ought reasonably to have done some unspecified action during the period in question of when this unspecified action ought to have taken place. And, since two month of stopped-time would be enough to bring the April 2, 2007 filing within the allotted 180-day timeframe, I am satisfied the application for extension of time was validly instituted. The bottom line is that the Applicant was caught in a procedural web that would be incomprehensible to most Canadians. As Chief Justice Bowman stated in *Spensieri*, “it is in the interest of justice that he be extricated from it so that he can get on with having his case heard on its merits.”

[19] Further, the Tax Court has inherent jurisdiction over its own process. The Applicant has acted reasonably and in good faith throughout and I accept the alternative argument of counsel for the Applicant’s counsel as follows:

On the basis of the Boyle J.’s decision in *Hickerty*, that the date which the Minister contends as the filing date of the Applicant’s extension application and notice of appeal in the Tax Court of April 2, 2007 is within the 90 day time

limit set out in the *CPP* and *EI Act* for the filing an appeal to the Minister's August 7, 2006 Decision.

These Reasons for Order are issued in substitution for the Reasons for Order issued January 9, 2008.

Signed at Ottawa, Canada, this **21st** day of January, 2008.

“C.H. McArthur”

McArthur J.

CITATION: 2008TCC18

COURT FILE NO.: 2007-1616(CPP)APP and
2007-1615(EI)APP

STYLE OF CAUSE: CHEAM TOURS LTD. OP AIRPORT LINK
SHUTTLE AND M.N.R.

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AMENDED
REASONS FOR ORDER BY: The Honourable Justice C.H. McArthur

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