

Docket: 2009-2452(IT)G

BETWEEN:

3735851 CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on December 4, 2009 at Ottawa, Canada

By: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellant: Ellen de Casmaker

Counsel for the Respondent: Gatien Fournier

JUDGMENT

Upon motion by the respondent, it is ordered that the notice of appeal is struck out and the appeal is dismissed. Each party shall bear their own costs.

Signed at Toronto, Ontario this 13th day of January 2010.

“J. M. Woods”

Woods J.

Citation: 2010 TCC 24
Date: 20100113
Docket: 2009-2452(IT)G

BETWEEN:

3735851 CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] On June 11, 2009, an appeal was instituted in this Court in respect of an assessment made under the *Income Tax Act* for the 2001 taxation year.

[2] This matter relates to a motion brought by the respondent in respect of this appeal. The motion is for an order:

1. dismissing the appeal on the ground that a condition precedent to instituting a valid appeal has not been met pursuant to paragraph 58(3)(b) of the *Tax Court of Canada Rules (General Procedure)* (the “Rules”);
2. in the alternative, striking the appeal under paragraph 58(1)(b) of the *Rules*;
3. in the further alternative, quashing the appeal under paragraph 53(c) of the *Rules*;
4. compelling the Appellant to be represented by counsel pursuant to paragraph 30(2) of the *Rules*;
5. compelling the Appellant to file a Amended Notice of Appeal in accordance with section 48 and Form 21(1)(a) of the *Rules*;

6. granting an extension of time for filing a Reply to the Amended Notice of Appeal pursuant to section 12 of the *Rules* to 30 days from the date upon which the Respondent is served with the Appellant's Amended Notice of Appeal;
7. granting such further and other relief as this Honourable Court deems just; and
8. granting the Respondent the costs of this motion.

[3] At the commencement of the hearing, leave was granted for the appellant to be represented at the hearing by Ellen de Casmaker, a director of the appellant.

[4] Unfortunately for the appellant, it is clear that the appeal has no chance of success in this Court because the Tax Court of Canada does not have jurisdiction over the subject matter. As a result, the notice of appeal should be struck out and the appeal should be dismissed.

[5] Generally, the jurisdiction of the Tax Court of Canada is to consider the correctness of an assessment or reassessment. The jurisdiction is derived from subsections 169(1) and 171(1) of the *Income Tax Act*.

[6] In this case, the appellant does not dispute the correctness of the assessment. In fact, the appellant was successful at the objection stage.

[7] The reason for the appeal is that the respondent has refused to process a refund or credit resulting from the successful objection because the tax return was not filed within the three year period described in s. 164(1). The amount of the refund is \$25,664.29.

[8] The Tax Court of Canada has no jurisdiction over refund issues such as this. Accordingly, I agree with the respondent that there is no reasonable ground of appeal and the notice of appeal should be struck out on that basis.

[9] In light of this conclusion, I agree with the respondent that the appeal should be dismissed.

[10] The respondent has sought costs.

[11] I do not think that it would be appropriate to award costs in this matter. The Minister of National Revenue himself advised the appellant by letter dated June 3, 2009 that the appropriate avenue of relief is the Tax Court of Canada. Based on

correspondence that Mrs. de Casmaker had with the Canada Revenue Agency, it was relatively clear that what the appellant was seeking was beyond the jurisdiction of this Court. Each party shall bear their own costs.

Signed at Toronto, Ontario this 13th day of January 2010.

“J. M. Woods”

Woods J.

CITATION: 2010 TCC 24

COURT FILE NO.: 2009-2452(IT)G

STYLE OF CAUSE: 3735851 CANADA INC. and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Ottawa, Canada

DATE OF HEARING: December 4, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice J. M. Woods

DATE OF JUDGMENT: January 13, 2010

APPEARANCES:

Agent for the Appellant: Ellen de Casmaker

Counsel for the Respondent: Gatien Fournier

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada