

CITATION: 2010 TCC 441

2010-702(IT)APP
2010-1479(GST)APP

BETWEEN:

GEORGE FRANCIS ELLENTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

**TRANSCRIPT OF
REASONS FOR JUDGMENT**

Let the attached revised transcript of the Reasons for Judgment delivered orally from the Bench at Vancouver, British Columbia, on July 8, 2010, be filed. This certified transcript was modified for clarity and accuracy.

"F.J. Pizzitelli"

Pizzitelli J.

Signed at Ottawa, Canada, on August 27, 2010.

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IN THE TAX COURT OF CANADA

2010-702 (IT) APP;
2010-1479 (GST) APP

BETWEEN:

GEORGE FRANCIS ELLENTON,

Appellant;

- and -

-

HER MAJESTY THE QUEEN,

Respondent.

Oral Reasons of Mr. Justice Pizzitelli held at the Courts
Administration Service, Courtroom No. 603, 6th Floor,
701 West Georgia Street, Vancouver, B.C., on Thursday, July
8, 2010

APPEARANCES:

Mr. G. Ellenton,
Ms. H. Popenia,

Appearing On His Own Behalf;
Appearing for the Respondent.

THE REGISTRAR: F. Richard

Allwest Reporting Ltd.
12th Floor - 1125 Howe Street
Vancouver, B.C.
V6Z 2K8
Per: K. Bemister

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PROCEEDINGS

(PROCEEDINGS RESUMED AT 12:36 P.M.)

JUSTICE: This is my oral judgment in the above two matters, both the IT and GST matters, which were heard at the same time.

Both these applications deal with an application for extension of time to file a notice of objection under sections 166.2 and 304 respectively of the *Income Tax Act* and *Excise Tax Act*.

The taxpayer was reassessed for the taxation years 2005 and 2006 under the *Income Tax Act* on September 3, 2008. On December 7, 2009, CRA received a letter from the Appellant dated November 28, 2009, and postmarked December 4, 2009, objecting to the reassessment which the Minister of National Revenue, pursuant to its letter of March 3, 2010 addressed to the Appellant, treated as an application to extend time to file a notice of objection before the Minister pursuant to section 166.1 of the *Income Tax Act*. On February 8, 2010, the Minister notified the Appellant that his application for an extension of time was not granted as having been filed outside the time limits of the *Act* and the Appellant applied to this Court for such extension pursuant to section 166.2 of the *Income Tax Act*.

1 With respect to the GST appeal for the
2 period September 1, 2004 to August 31, 2006, the Minister
3 assessed the Appellant by notice of assessment dated
4 July 22, 2008. On January 14, 2010, the Minister received
5 a letter dated January 12, 2010 advising the Minister that
6 he was having trouble obtaining his records from his
7 accountant and asking for the Minister's patience, which
8 the Minister treated as an application for an extension of
9 time to file a notice of objection under subsection 303(1)
10 of the *Excise Tax Act*. On April 7, 2010, the Minister
11 advised the Appellant that it could not grant the
12 application and on May 3, 2010, the Appellant applied to
13 the Tax Court for an extension of time to file the notice
14 of objection pursuant to section 304 of the *Excise Tax*
15 *Act*.

16 The law applicable to these applications is
17 similar in wording and in effect. Both section 165 of the
18 *Income Tax Act* and subsection 301(1.1) of the *Excise Tax*
19 *Act* effectively grant the taxpayer 90 days to file a
20 notice of objection from the date of receiving the
21 reassessment notice. There is no dispute that the
22 Appellant therefore had until December 2, 2008 and until
23 October 20, 2008 to file notices of objection under the
24 *Income Tax Act* and *Excise Tax Act* respectively. No such
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1 notices were filed within such 90 days.

2 Under section 166.1 of the *Income Tax Act*
3 and section 303 of the *Excise Tax Act*, a taxpayer who has
4 not filed a notice of objection within the 90-day time
5 limits referred to above may file an application to the
6 Minister to extend the time for filing such notices of
7 objection. In the case here, as above mentioned, the
8 Appellant was treated as having made those requests by his
9 letter received by CRA on December 7, 2009 under the
10 *Income Tax Act* and by his letter received by CRA on
11 January 14, 2010 under the *Excise Tax Act*. As stated
12 above, the Minister declined to grant an extension for
13 filing a notice of objection for both on the grounds the
14 Appellant was out of time.

15 Under paragraph 166.1(7) (a) of the
16 *Income Tax Act*, no application can be granted by the
17 Minister where the application is made more than one year
18 following the 90-day period the Appellant originally had
19 to file the notice of objection, which in this case would
20 have been December 2, 2009. The Appellant's letter of
21 November 28, 2009 which was postmarked December 4, 2009,
22 and stamped "Received" by CRA on December 7, 2009, is
23 outside that limit -- granted, by only a few days.

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1 Under paragraph 303(7) (a) of the *Excise Tax*
2 *Act*, a similar provision to the *Income Tax Act* paragraph
3 166.1(7) (a) above, no application could be granted by the
4 Minister when the application is made more than one year
5 following the 90-day period the Appellant originally had
6 to file the notice of objection, which in this case would
7 have been September 20, 2009. The Appellant's letter of
8 January 12, 2010 received by the CRA on January 14, 2010,
9 was clearly well beyond that limit.

10 Likewise, the similar provisions of
11 paragraph 166.2(5) (a) of the *Income Tax Act* and paragraph
12 304(7) (a) of the *Excise Tax Act* provide that the Court
13 shall not grant an application where the application to
14 the Minister was not made within the same time
15 requirements, *i.e.*, by December 2, 2009 in the case of the
16 *Income Tax Act* and September 20, 2009 in the case of the
17 *Excise Tax Act*.

18 The Appellant admitted during the trial
19 that he did not meet the technical time limits of the
20 Acts, but argues he hired an accountant, one Debra Webb,
21 to make his filings and prepare the objections and relied
22 on her to do so. There was ample evidence he submitted a
23 large volume of documentation to her under the mistaken
24 impression she had done so, having confirmed this to him
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1 orally throughout the process. Regrettably, there is no
2 evidence she filed notices of objection within the 90-day
3 periods above referred to and confirmed by the affidavits
4 of a CRA officer. The only evidence is that such
5 accountant may have filed notices of objection by the
6 accountant's letter of June 22, 2009 addressed to the
7 Chief of Appeals, which CRA had no record of receiving and
8 the Appellant provided no proof it was sent, other than
9 testifying he was told it was and believes CRA erred in
10 its affidavit that it was not received. In any event, even
11 if the accountant's letter was received, it was still
12 outside the 90-day limit for filing the notices of
13 objection and contains no application for an extension of
14 time or makes any reference to reasons for late filing at
15 all, and hence, could not be considered an application for
16 extension to the Minister in any event.

17 The Appellant was a very credible witness
18 and the evidence is that he in fact did retain his
19 accountant to represent him, but such accountant ceased to
20 practice on or about July 31, 2009, which he only
21 discovered after complaining to the Institute of Certified
22 General Accountants of British Columbia, having received
23 no notice from her directly. After several efforts to
24 contact her and obtain the return of his files, he was
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1 only finally successful in recovering his nine boxes of
2 files in early January of 2010. The evidence is that he
3 kept CRA aware of his difficulties in contacting his
4 accountant in writing and that it was CRA itself who
5 notified him it discovered she was no longer practicing.
6 The taxpayer was, as he described it, a victim of
7 circumstances beyond his control and the evidence clearly
8 supports his position. As I said, he admits he may have
9 been technically outside the time limits for filing the
10 application, but under the circumstances which I agree
11 were clearly beyond his control asks the Court for
12 fairness and to not penalize him for the actions of his
13 accountant but give him the opportunity to further his
14 appeal.

15 Regrettably for the Appellant, this Court
16 has no power to grant an application for an extension of
17 time to file a notice of objection when such application
18 is made beyond one year following the 90-day period
19 normally allowed to file a notice of objection under
20 paragraph 166.2(5) (a) of the *Income Tax Act* and paragraph
21 304(7) (a) of the *Excise Tax Act*, as those time limits are
22 mandatory. That is confirmed numerous times with the
23 Federal Court of Appeal, including in *Aztec Industries*
24 *Inc. v. Canada*, 95 DTC 5235 (F.C.A.), *Pereira v. Canada*,

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1 2008 DTC 6709 (F.C.A.), and *Canada v. Carlson*, 2002 DTC
2 6893 (F.C.A.), where Nadon, J.A., succinctly put the law
3 in paragraph 13:

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5 13 ... As this Court has held on numerous
6 occasions, when a taxpayer is unable to meet
7 the deadline prescribed by the *Act*, even by
8 reason of a failure of the postal system,
9 neither the Minister nor the Tax Court of
10 Canada can come to his help. ...

11
12 As for his plea for fairness, I would
13 certainly agree that if there was ever a situation where the
14 Minister and Court should show understanding and allow the
15 taxpayer to proceed to have his objection filed and day in
16 court if necessary, this would be one. However, I am tied by
17 the law, which denies me the right to assist the taxpayer in
18 this situation. As the Respondent pointed out, the Federal
19 Court of Appeal confirmed in *Chia v. Canada*, 2004 DTC 6676
20 (F.C.A.), that such grounds are not within the power of this
21 Court.

22 In paragraph 4 of the decision, Rothstein, J.A., as he then
23 was, stated:

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1 4 ... It is not open to the Court to make
2 exceptions to statutory provisions on the
3 ground of fairness or equity. If the applicant
4 considers the law unfair, his remedy is with
5 Parliament, not with the Court. ...

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7 Aside from seeking remedy against his former advisor or an
8 attempt for redress from the Fairness Commission of the CRA,
9 the Appellant would appear to have no redress from this
10 Court. Accordingly, the application is denied.

11 Sir, it is with deep regret that I deny
12 your application. I must say that, had I had the power
13 and the equitable jurisdiction to grant it, I would have.
14 Thank you.

15 (PROCEEDINGS ADJOURNED AT 12:45 P.M.)
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