Docket: 2015-2778(IT)G
2015-2874(IT)G
2015-2879(IT)G
2015-2884(IT)G
2015-2890(IT)G
2015-3018(IT)G
2015-3021(IT)G
2015-3028(IT)G

BETWEEN:

BRIGITTE GRATL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on December 4, 2018 by conference call
at Ottawa, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Shauna Hall-Coates

ORDER

UPON Motion made by the Respondent for an Order extending the time allowed for the Respondent to file a Reply to the Appellant's Fresh Amended Notice of Appeal pursuant to Rule 44(1)(b) of the *Tax Court of Canada Rules (General Procedure)*;

AND UPON reading the materials and hearing submissions from the parties;

The Motion of the Respondent is dismissed.

Costs will follow the cause.

Signed at Montreal, Quebec, this 14th day of January 2019.

"Johanne D'Auray"

D'Auray J.

Citation: 2019 TCC 9
Date: 20190114
Docket: 2015-2778(IT)G
2015-2874(IT)G
2015-2879(IT)G
2015-2884(IT)G
2015-2890(IT)G
2015-3018(IT)G
2015-3021(IT)G
2015-3028(IT)G

BETWEEN:

BRIGITTE GRATL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

D'Auray J.

I. Overview

[1] By Motion filed October 10, 2018, the Respondent seeks an Order, pursuant to section 12 and paragraph 44(1)(b) of the *Tax Court of Canada Rules (General Procedure)* (the *"Rules"*), extending the time for filing a Reply to the Appellant's Fresh Amended Notice of Appeal ("Reply").

[2] The time period which the Respondent seeks to extend was fixed by Justice Visser in an Order[1] dated June 12, 2017. Pursuant to the Order, the Respondent had to serve and file the Reply within 60 days of service of the Appellant's Fresh Amended Notice of Appeal. The Appellant filed her Fresh Amended Notice of Appeal on June 25, 2017. This meant that the Reply had to be served and filed on or before August 24, 2017.

[1] The Order of Justice Visser is attached to my Reasons for Order.

[3] On July 5, 2018, the Respondent served her Reply on the Appellant.

II. Facts

[4] On June 9 and June 11, 2015, the Appellant filed Notices of Appeal and Amended Notices of Appeal.

[5] On September 8, 2015, the Respondent sought an Order dismissing the appeals, or in the alternative, striking the Amended Notices of Appeal or portions thereof, or in the further alternative and extending the time for filing a Reply.

[6] On November 3, 2015, the Appellant brought a Motion for an Order dismissing the Respondent's Motion to quash her appeals.

[7] The parties' Motions were adjourned *sine die* to allow for mediated settlement discussions to take place. However, a settlement was not reached.

[8] On May 31, 2017, the Motions were heard by Justice Visser of this Court.

[9] On June 12, 2017, Justice Visser ordered the consolidation of the Notices of the Appeal filed by the Appellant and set a timeline for the serving and filing a Fresh Amended Notice of Appeal and a Reply. The relevant part of the Order reads as follows:

> . . .
>
> c) the Appellant's Appeals dealt with in Appeal docket numbers 2015-2778(IT)G, 2015-2874(IT)G, 2015-2879(IT)G, 2015-2884(IT)G, 2015-2890(IT)G, 2015-3018(IT)G, 2015-3021(IT)G and 2015-3028(IT)G shall be consolidated and the Notices of Appeal filed by the Appellant therein are stricken in their entirety, including any attachments thereto, with leave to amend by filing a Fresh Amended Notice of Appeal consolidating the Appeals, with the only issue dealt with therein being the computation of the amount of interest assessed by the Minister in respect of the taxation years at issue in those Appeals;
>
> d) any such consolidated Fresh Amended Notice of Appeal shall be served and filed by the Appellant by July 17, 2017;
>
> e) if the Appellant serves and files a consolidated Fresh Amended Notice of Appeal by July 17, 2017, the Reply to the consolidated Fresh Amended Notice of

> Appeal shall be served and filed by the Respondent within 60 days of the service of the consolidated Fresh Amended Notice of Appeal by the Appellant; and
>
> . . .

[10] Justice Visser also dismissed the Appellant's application for an extension of time to file Notices of Appeal with respect to her 2003 and 2004 taxation years.

[11] The Appellant appealed this dismissal to the Federal Court of Appeal.

[12] On June 25, 2017, the Appellant filed and served her Fresh Amended Notice of Appeal.

[13] As a result, pursuant to the Order of Justice Visser, the Respondent had until August 24, 2017 to serve and file a Reply.

[14] In response to a query by the Respondent's counsel as to the status of the appeals, a Registry Officer advised him by letter dated February 16, 2018 that the Respondent had to obtain an extension of time to file the Reply.

[15] On April 26, 2018, the Appellant filed a Motion, and on June 1, 2018 an Amended Motion, requesting the Court to hold in abeyance her appeals with respect to the 2001, 2002, 2007, 2008, 2009 2010 and 2013 taxation years, pending the decision of the Federal Court of Appeal on her appeal from Justice Visser's dismissal of her application for an extension of time to file a Notice of Appeal for the 2003 and 2004 taxation years.

[16] On July 5, 2018, the Respondent served a Reply to the Fresh Amended Notice of Appeal on the Appellant.

[17] On September 19, 2018, I heard the Appellant's Motion to hold her appeals in abeyance pending the Federal Court of Appeal's decision on her extension of time for the 2003 and 2004 taxation years. After hearing from both parties, I dismissed the Motion.

[18] On September 19, 2018, I also heard the Respondent's Motion requesting an extension of time for filing a Reply. The Appellant opposed the Motion.

[19] After hearing from the parties, I asked for written submissions on whether the Court has the jurisdiction to extend a time limit prescribed by an Order, as opposed to the *Rules.*

III. Applicable provisions

[20] The applicable provisions of the *Rules* are sections 2(1), 12(1) and 44:

> Section 2 definition - judgment includes an order;
>
> Section 12 – (1) The Court may extend or abridge any time prescribed by these rules or a direction, on such terms as are just.
>
> (2) A motion for a direction extending time may be made before or after the expiration of the time prescribed.
>
> (3) A time prescribed by these rules for filing, serving or delivering a document may be extended or abridged by consent in writing.
>
> Section 44-(1) A reply shall be filed in the Registry within 60 days after service of the notice of appeal unless
>
> > (a) the appellant consents, before or after the expiration of the 60-day period, to the filing of that reply after the 60-day period within a specified time; or
> >
> > (b) the Court allows, on application made before or after the expiration of the 60-day period, the filing of that reply after the 60-day period within a specified time.
>
> (2) If a reply is not filed within an applicable period specified under subsection (1), the allegations of fact contained in the notice of appeal are presumed to be true for purposes of the appeal.
>
> (3) A reply shall be served
>
> > (a) within five days after the 60-day period prescribed under subsection (1);
> >
> > (b) within the time specified in a consent given by the appellant under subsection (1); or

> (c) within the time specified in an extension of time granted by the Court under subsection (1).
>
> (4) Subsection 12(3) has no application to this section and the presumption in subsection (2) is a rebuttable presumption.

[My emphasis.]

IV. Position of the parties

[21] The Respondent argues that this Court has the jurisdiction to extend a time limit fixed in an Order, since under the plain reading of subsections 12(1) and 12(2) of the *Rules*, the word "direction" has to mean an Order.

[22] The Respondent also submits that she satisfies the test for an extension of time as set out by the Federal Court of Appeal in *Hennelly v Canada (Attorney General).*[2]

[23] The Respondent further submits that paragraph 44(1)(b) of the *Rules* allows the Court to extend the time limit for the filing of a Reply beyond the 60-day period prescribed by the *Rules*.

[24] The Appellant submits that the Respondent, having already benefitted from an extension of time to file the Reply under the Order of Justice Visser, cannot now request a second extension under rule 12(1).

[25] The Appellant also argues that, in any event, the Respondent does not satisfy the test set out in *Hennelly v Canada (Attorney General)*[3] for an extension of time.

V. Analysis

[26] In my view, this Court has the jurisdiction to extend a time limit prescribed by an Order. While the word "direction" used in section 12 is not defined under the *Rules*, the wording, structure and logic of section 12 support the conclusion that it means an extension granted by way of Order.

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2 *Hennelly v Canada (Attorney General)*, [1999] FCJ No 846, 244 NR 399 (FCAD).

3 *Supra* note 2.

[27] The word "direction" is used in both section 12(1) and (2). Section 12(1) empowers the Court to "extend or abridge any time prescribed by these rules or a direction". In order to obtain an extension of time, a party must under section 12(2) bring a Motion for a direction: "A Motion for a direction extending the time may be made before or after the expiration of the time prescribed."

[28] In this context, the word "direction" includes an "Order" of the Court that extends time. The Order for extending the time is the result of the Motion for directions for an extension. The Order is the vehicle by which the direction is made. To interpret the word "direction" otherwise would deprive the rule of meaning since the Court with respect to Motion for direction for an extension of time does not issue a direction but an Order.[4] Support for this interpretation is found in the decisions of this Court in *Ward v HMQ*[5] and *Burke v HMQ*.[6]

[29] The Respondent submits that the Court could extend the time to file her Reply by using paragraph 44(1)(b) of the *Rules*. I do not agree. In my view, the applicable section is section 12 of the *Rules.* The latter applies where a party has missed either a time limit imposed by the Court (as was the case here) or one imposed by the *Rules*. By contrast, paragraph 44(1)(b) applies only where a party has missed a time limit imposed by the *Rules*, namely the 60-day time limit for filing a Reply imposed by paragraph 44 (1)(a).[7]

[30] The Appellant argues that the Respondent cannot use subsection 12(1) of the *Rules* to obtain a second extension of time. There is nothing in the *Rules* which explicitly precludes as much. The Appellant, however, points to the decision in

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4 See Rule 8 of the *Federal Courts Rules*, "where on Motion, the Court may extend or abridge a period provided by these *Rules* or by an Order." Under these *Rules*, a direction is different than an Order. Directions, under the *Federal Courts Rules*, are guiding instructions for taking procedural steps. There is no appeal from a direction. This is not the case under the *Tax Court of Canada Rules (General Procedure)* where the word direction is not defined and used indistinctively as Order or directions.

5 *Ward v HMQ*, 2008 TCC 510.

6 *Burke v HMQ*, 2010 TCC 398.

7 Even if I were to be wrong with respect to the application of section 44 of the *Rules*, the outcome of this Order would be the same, since for granting an extension of time, the same test applies under section 12 and 44 of the *Rules.*

Ward[8] and, in particular, to the following comments of Justice Angers at paragraph 21 of the reasons:

> It must be recalled that this motion concerns the extension of time limit set by an order that was made in accordance with the time limit established by the two statutes in questions. As Muldoon J. stated in *Bertold v Canada* (*Minister of Citizenship & Immigration*) [1997] No. 241 (Fed. T.D.) a further order not contemplated by a statute procedural code appears to be impermissible.

[31] I do not agree with the Appellant. The facts in *Ward* differ from those here. In *Ward*, the parties had reached a settlement. Pursuant to this settlement, an Order was issued granting Mr. Ward permission to file his Notices of Appeal with respect to reassessments made by the Minister of National Revenue (the "Minister") under the *Income Tax Act* and the *Excise Tax Act*.

[32] Mr. Ward did not file his Notices of Appeal within the time prescribed by the Order. Mr. Ward filed another Motion for an extension to file the Notices of Appeal. However, by the time he filed his Motion, the Court was without jurisdiction to allow an extension of time. Under the *Income Tax Act* and the *Excise Tax Act*, the Court cannot grant an extension of time to file Notices of Appeal, where more than one year and 90 days has elapsed from the date of the assessment. Therefore, contrary to the argument of the Appellant, Justice Angers did not decide in *Ward* that an Order granting a request for an extension of time can never be the subject of a Motion for a further extension of time, but that section 12 of the *Rules* cannot trump a statutory time limit prescribed in an Act.

[33] In 1985, the Federal Court of Appeal in *Grewal v Canada* (*Minister of Employment & Immigration*)[9] set out a four-prong test to determine whether an extension of time should be granted. This test was reiterated in 1999 by the Federal Court of Appeal in *Hennelly*[10]. The test is as follows:

> The applicant has to demonstrate that he or she has:
>
> 1. a continuing intention to pursue his or her application;

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8 *Supra* at note 5.

9 *Grewal v Canada (Minister of Employment & Immigration*), [1985] 2 FC 263.

10 *Supra* at note 1, at paragraph 4.

2. that the application has some merit;

3. that no prejudice to the respondent [or to the appellant] arises from the delay;

4. that a reasonable explanation for the delay exists.

[34] Recently, on November 1st, 2018, Justice Webb of the Federal Court of Appeal, in *Akanda Innovation Inc. v HMQ*[11] confirmed the continuing applicability of the four-prong test in *Grewal*. Justice Webb also noted that the overriding consideration in deciding whether an extension of time should be granted "is that the interest of justice be served".

[35] Justice Webb also stated in *Akanda Innovation Inc. v HMQ*[12], that an applicant need not satisfy all the factors listed in the decision of *Grewal* to obtain an extension of time. The determination will turn on the facts of each case.

[36] Taking the above principles into account, I will examine whether the Respondent should be granted the extension requested.

1. A continuing intention to pursue his or her application

[37] The Respondent states that she had a continuing intention to pursue her application. In my view, the facts show otherwise. Pursuant to Justice Visser's Order dated June 12, 2017, the Respondent was to serve and file her Reply within 60 days of the service of the consolidated Fresh Amended Notice of Appeal. Accordingly, the Respondent had to file and serve her Reply by August 24, 2017.

[38] Despite being advised by the officer of the Registry of this Court on February 16, 2018, that an extension of time to file the Reply was necessary, the Respondent served the Reply on July 5, 2018, without having obtained the permission of the Court.

[39] The Respondent did not file a Motion for an extension of time to file the Reply until October 10, 2018, namely, nearly fourteen months after the time limit

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11 *Akanda Innovation Inc. v HMQ*, 2018 FCA 200 at paragraph 19.

12 *Supra* at note 11, at paragraph 19.

prescribed in the Order of Justice Visser and almost eight months after being advised by the Registry that a Motion for an extension of time was required.

[40] In my view, the above facts do not demonstrate that the Respondent had a continuing intention to pursue with the proceeding, namely, filing a Motion to extend the time to file a Reply.

2. That the application has some merit

[41] I am of the view that the Respondent's position with respect to the reassessments has merits.

3. That no prejudice to the opposing party arises from the delay

[42] The Respondent argues that the appellant is not prejudiced by the delay in filing a Reply. The Respondent submits that the Fresh Amended Notice of Appeal does not set out how the Minister erred in calculating the interest owed and what the correct calculations are. The filing of the Reply would assist the Court in deciding the issue. Therefore, the interests of justice would be better served.

[43] The Respondent further submits that if she is allowed to file her Reply, the burden of proving that the Minister's calculations of interest are incorrect would be on the Appellant. On the other hand, if the Respondent is no allowed to file her Reply, the burden would be on the Respondent to establish that the Minister's calculation of the interest is correct. That said, the Respondent submits that in cases dealing with the calculation of interest, even if the burden is on the Appellant, practically speaking, the Respondent will have to establish how the Minister computed the amount of interest. Accordingly, the late filing of the Reply does not prejudice the Appellant's ability to maintain the position set out in her Fresh Amended Notice of Appeal.

[44] The Respondent also submits that the Appellant cannot argue that she is prejudiced by the delay, since she seeks to have her appeals held in abeyance pending the decision of the Federal Court of Appeal with respect to her 2003 and 2004 taxation years.

[45] For her part, the Appellant submits that she is prejudiced by the delay. Her position is not the easiest one to understand, so I have decided to reproduce her written submissions on the point to ensure that it is accurately stated:

> "the appellant is certainly prejudiced by the delay; while the appellant herself asked for an extension of time for the perfection of the appeals, on the basis of the necessity of waiting for a decision in her appeal in the Federal Court of Appeal, her motion was dismissed. Had the Respondent filed their Reply some 15 months earlier, this issue would have been decided at much earlier stage, instead the emotional engagement with this case"

[46] If the Reply had been filed within the time limits, the appeals may have moved forward faster. That said, the filing of the Reply may have not prevented the Appellant to file, as she did in June 2018, a Motion to hold the appeals in abeyance before this Court. Instead of filing a Motion to move the appeals forward, for example a Motion under section 63 of the *Rules*, the Appellant chose to file a Motion to hold the appeals in abeyance. This does not excuse the behaviour of the Respondent, but it did not assist in moving forward the appeals.

[47] In my view, the benefit for the Appellant of not having the Minister file a Reply is that the allegations of fact contained in the Notice of Appeal are presumed to be true. In addition, the Respondent will have to establish that the Minister's calculation of the amount of interest for each year under appeal is correct. There is no other prejudice for the Appellant.

4. Reasonable explanations for the Delay

[48] The reason given for the delay is that the counsel handling the case for the Respondent, who was not counsel appearing on this Motion, was waiting for the Court to consolidate the appeals into a single Court docket number. Although no affidavit from counsel was filed, the Respondent stated that this was the counsel's understanding of Justice Visser's Order.

[49] In my view, this explanation does not hold. Justice Visser's Order directed the Appellant to file a "Fresh Amended Notice of Appeal consolidating the Appeals". Once the Respondent was served with the Fresh Amended Notice of Appeal consolidating the appeals with their corresponding docket numbers into a single appeal, the Order provided that the Respondent would have 60 days to file a

Reply. The Order was clear and straight-forward. One would have expected the Reply to be filed in a timely fashion.

[50] Even if there could be said to be confusion flowing from the Order, which I do not accept, that confusion ended in February 2108 when the Registry informed the Respondent that an Order extending the filing time would be required. Despite this, the Respondent did not bring a Motion until October 2018, almost eight months later. The Respondent has not offered an explanation for this eight month period.

[51] As the Federal Court has pointed out in *Lesly v Canada (Min of Employment and Immigration),*[13] the Court expects counsel to request an extension as soon as they discover a missed deadline. Any laxity, in applying as diligently as could reasonably, be expected will militate strongly against the granting of an extension.

[52] Taking into account the factors in *Hennelly,*[14] and the interests of Justice, I am of view, that in light of the facts in this Motion, that the interests of Justice will be better served by not allowing the Respondent to file a Reply. The Respondent showed an indifference to the time limit ordered by Justice Visser and did not move diligently to address the missed deadline.

[53] No valid reason was given for the delay for not respecting Justice Visser's Order. In addition, no reason was given for the delay for filing a Motion for directions to extend the time limit to file a Reply, namely, nearly fourteen months after the time limit prescribed in the Order of Justice Visser. In my view, this is simply unacceptable.

[54] Therefore, the Motion of the Respondent for an extension of time to file a Reply is dismissed.

[55] Costs will follow the cause.

Signed at Montreal, Quebec, this 14th day of January 2019.

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13 *Lesly v Canada (Min of Employment and Immigration),* 2018 FC 272; see also: *Canada v Tran,* 2008 FC 297, at para. 24.

14 *Supra* at note 2.

"Johanne D'Auray"

D'Auray J.

Tax Court of Canada | Cour canadienne de l'impôt

Dockets: 2015-2890(IT)G; 2015-3018(IT)G
2015-2778(IT)G; 2015-3021(IT)G
2015-2874(IT)G; 2015-3022(IT)G
2015-2879(IT)G; 2015-3026(IT)G
2015-2884(IT)G; 2015-3028(IT)G
2015-2880(IT)APP; 2015-2881(IT)APP

BETWEEN:

BRIGITTE GRATL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard and decision delivered orally from the bench
on May 31, 2017, at Hamilton, Ontario

By: The Honourable Justice Henry A. Visser

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	David Besler

ORDER

WHEREAS the Applicant filed Applications for an order extending the time within which a Notice of Appeal from reassessments made under the *Income Tax Act* for the Applicant's 2003 and 2004 taxation years may be filed;

AND WHEREAS on September 8, 2015, the Respondent filed Notices of Motion for an order striking the Notice of Appeal or a portion thereof in each of these cases, or in the alternative for and order striking any attachments to the Notices of Appeal or in the further alternative for an order consolidating the

Appeals and for an order extending the time for filing the Reply to each of the Notices of Appeal;

AND WHEREAS on November 3, 2015, the Appellant filed Notices of Motion seeking to dismiss the Respondent's Motions or alternatively seeking an adjournment of the hearing of the Respondent's Motions;

AND having heard from the parties;

IT IS ORDERED THAT:

a) The Applications for an order extending the time within which a Notice of Appeal from reassessments made under the *Income Tax Act* for the Applicant's 2003 and 2004 taxation years may be filed and dealt with in docket numbers 2015-2881(IT)APP and 2015-2880(IT)APP are dismissed, without costs;

b) the Notices of Appeal filed by the Appellant in Appeal docket numbers 2015-3022(IT)G and 2015-3026(IT)G relating to the Appellant's 2011 and 2012 taxation years are stricken in their entirety without leave to amend;

c) the Appellant's Appeals dealt with in Appeal docket numbers 2015-2778(IT)G, 2015-2874(IT)G, 2015-2879(IT)G, 2015-2884(IT)G, 2015-2890(IT)G, 2015-3018(IT)G, 2015-3021(IT)G, and 2015-3028(IT)G shall be consolidated and the Notices of Appeal filed by the Appellant therein are stricken in their entirety, including any attachments thereto, with leave to amend by filing a Fresh Amended Notice of Appeal consolidating the Appeals, with the only issue dealt with therein being the computation of the amount of interest assessed by the Minister in respect of the taxation years at issue in those Appeals;

d) any such consolidated Fresh Amended Notice of Appeal shall be served and filed by the Appellant by July 17, 2017;

e) if the Appellant serves and files a consolidated Fresh Amended Notice of Appeal by July 17, 2017, the Reply to the consolidated Fresh Amended Notice of Appeal shall be served and filed by the Respondent within 60 days of the service of the consolidated Fresh Amended Notice of Appeal by the Appellant; and

f) the Appellant's Motions are dismissed, without costs; and

g) costs in respect of the Respondent's Motions shall be in any event of the cause.

Signed at Ottawa, Canada, this 12th day of June 2017.

"Henry A. Visser"

Visser J.

CITATION:	2019 TCC 9
COURT FILE NO.:	2015-2778(IT)G, 2015-2874(IT)G 2015-2879(IT)G, 2015-2884(IT)G 2015-2890(IT)G, 2015-3018(IT)G 2015-3021(IT)G, 2015-3028(IT)G
STYLE OF CAUSE:	BRIGITTE GRATL v THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 4, 2018
REASONS FOR ORDER BY:	The Honourable Justice Johanne D'Auray
DATE OF ORDER:	January 14, 2019

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Shauna Hall-Coates

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Nathalie G. Drouin
Deputy Attorney General of Canada
Ottawa, Canada