

Docket: 2022-1529(IT)I

BETWEEN:

VU KIEU,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeals in respect of the
2014, 2015 and 2016 taxation years heard on November 9, 2023, at
Ottawa, Canada

Before: The Honourable Justice Jean Marc Gagnon

Appearances:

Agent for the Appellant: Martinraj Manadan

Counsel for the Respondent: Gabriel Caron

JUDGMENT

AFTER having heard the Respondent's preliminary objection that the Appellant's appeals in respect of his 2014, 2015 and 2016 taxation years have not been validly instituted before the Court;

AND AFTER having heard the submissions of the Appellant;

IN ACCORDANCE with the attached Reasons for Judgment, the Respondent's preliminary objection is sustained and the Appellant's appeals with respect to the 2014, 2015 and 2016 taxation years are hereby quashed. No costs are awarded.

Signed at Vancouver, British Columbia, this 20th day of November 2023.

“J.M. Gagnon”

Gagnon J.

Citation: TCC 2023 160

Date: 20231120

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BETWEEN:

VU KIEU,

Appellant,

and

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REASONS FOR JUDGMENT

Gagnon J.

I. Introduction

[1] The Appellant, Mr. Vu Kieu, has instituted on June 6, 2022, appeals under the informal procedure in respect of reassessments made under the *Income Tax Act* (**ITA**) for the 2014, 2015 and 2016 taxation years and confirmed by notices of reassessment dated July 16, 2019. The issue under appeal concerns the results of a net worth audit completed by the Canada Revenue Agency (**CRA**) for 2013, 2014, 2015 and 2016. This Court understands that the 2013 taxation year is not under appeal here as a valid notice of objection for that year is still pending with the CRA.

[2] The Respondent brought before this Court a preliminary objection, which ultimately comes to a motion to quash the Appellant's appeals for his 2014, 2015 and 2016 taxation years.

[3] The grounds for the Respondent's motion are that the Appellant has not served on the Minister of National Revenue (**Minister**), pursuant to subsection 165(1) ITA, a valid notice of objection against the reassessments under appeal, as required by subsection 169(1) ITA.

[4] Subsection 169(1) ITA states:

169(1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

(a) the Minister has confirmed the assessment or reassessed, or

(b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.

[5] In support of its position, the Respondent's Reply includes the following statements of facts:

1. By concurrent Notices of Reassessment dated July 16, 2019, the Minister reassessed the Appellant to include unreported income in the amounts of \$198,259, \$177,557 [R-1], \$39,409 [R-2] and \$119,327 [R-3], based on a net worth assessment, in his income for the 2013, 2014, 2015 and 2016 taxation years, respectively.
2. On January 22, 2020, the Appellant attempted to object to the reassessment of his tax liability for the 2013 taxation year only [R-4].
3. By letter dated February 4, 2020 [R-5], the Minister notified the Appellant that his objection cannot be accepted as it was not filed within 90 days from the date of the Notice of Reassessment dated July 16, 2019, but that the Appellant can apply for an extension of time to file an objection.
4. On December 7, 2020, the Minister received the Appellant's electronic application to extend the time to file an objection for the 2013 taxation year. By letter issued dated December 9, 2020 [R-6], the Minister granted the Appellant's application and considered the Notice of Objection for the 2013 taxation year as having been filed on the date of said letter.
5. At the filing of this Notice of Appeal on June 6, 2022, the Minister has not confirmed, vacated nor varied the reassessment of the Appellant's 2013 taxation year.
6. On October 14, 2021, the Appellant applied to the Minister for an extension of time to serve Notices of Objection with respect to the reassessments of his tax liability for the 2014, 2015 and 2016 taxation years.
7. On November 8, 2021 [R-8], the Minister denied the Appellant's application pursuant to paragraph 166.1(7)(a) of the Act as the application was not made within one year of the due date of filing the Notices of

Objection. The date otherwise limited by the Act for filing the Notices of Objection was October 15, 2019.

8. On February 14, 2022, the Appellant again applied to the Minister for an extension of time to serve Notices of Objection with respect to the reassessments of his tax liability for the 2014, 2015 and 2016 taxation years.
9. On March 31, 2022 [R-9], the Minister again denied the Appellant's application in accordance with paragraph 166.1(7)(a) of the Act.
10. The Appellant has not filed in this Court an Application for extension of time to file a Notice of Objection in respect of the 2014, 2015 and/or 2016 taxation years.
11. The Appellant has not been granted an Order extending the time within which to file a Notice of Objection for the 2014, 2015 and 2016 taxation years.

[6] The Appellant did not deny at the hearing that the events and dates described, *inter alia*, in subparagraphs 1 and 6 to 11 of paragraph 5 above are correct. The Appellant added that he may have made an additional request to the CRA on December 1, 2021, to reconsider their position to deny the right to obtain an extension of time to file a notice of objection for the 2014, 2015 and 2016 taxation years.

[7] The Appellant also confirmed having received, *inter alia*, the notices of reassessment referred to in subparagraph 5(1) above, and the Minister's decisions in subparagraphs 5(7) and (9) above. He also acknowledged not having been able to file, as of this date, a valid notice of objection with the CRA with respect to the three taxation years under appeal.

II. Discussion

[8] I have reviewed the possibilities to assist the Appellant. Unfortunately, I must admit that I was not able to find a scenario involving the Court and that would be favourable to the Appellant.

[9] It is clear that an appeal may not be instituted under subsection 169(1) ITA unless a valid notice of objection has been served by the taxpayer with the Minister¹.

[10] The Appellant's representative was honest and transparent in exposing his position. He admitted that the Appellant has not been able to serve a valid notice of

¹ See, e.g., *Bormann v The Queen*, 2006 FCA 83.

objection with the Minister with respect to the years under appeal. In particular, no notice of objection with respect to the 2014, 2015 and 2016 taxation years was ever filed within the 90-day period following the issuance of the notices of reassessment for such years.

[11] In addition, the first time the Appellant made an application to the Minister under section 166.1 ITA for an extension of time to serve a notice of objection was October 14, 2021. The Minister denied the application by letter dated November 8, 2021. The Minister's reason was that the Appellant's application was made more than one year after the regular 90-day period normally allowed to file a notice of objection expired, such date being October 15, 2020. And if we add the additional time allowed under *An Act respecting additional COVID-19 measures*, that ultimate expired date was December 31, 2020. The first application filed by the Appellant with the Minister was then late by approximately 10 months. I am convinced that if he had known at the time, the Appellant would have complied with the applicable rules of the ITA and served a valid notice of objection. But unfortunately, he did not and ignorance of the law is of no assistance in this case ².

[12] The Appellant's subsequent attempts to obtain an extension of time to file a notice of objection from the Minister did not change or affect the Minister's decision.

[13] The Appellant did not file an application for an extension of time to file a notice of objection before this Court under section 166.2 ITA. And even if it is assumed for a moment that the first document filed by the Appellant with the Court for these appeals, being the notice of appeal filed on June 6, 2022, could be considered as a valid application for purposes of section 166.2, the Court could not grant the Appellant the right to file a notice of objection because the condition in paragraph 166.2(5)(a) would not be met. For the Court to grant an application to serve a notice of objection, paragraph 166.2(5)(a) provides that the application filed with the Minister must have been filed with the Minister within one year after the expiration of the time otherwise limited by the ITA for serving a notice of objection. As discussed above, that ultimate date for filing the application with the Minister was December 31, 2020. Therefore, at least one essential condition, being paragraph 166.2(5)(a), would not be satisfied as the Appellant's earliest application with the Minister was made October 14, 2021.

² See, e.g., *Corporation de l'École Polytechnique v Canada*, 2004 FCA 127 and *John Robertson v Her Majesty the Queen*, 2015 TCC 246.

[14] The Appellant referred the Court to the Kershaw decision³. The Appellant mentioned that this decision confirmed that where an applicant and any tax advisers to that applicant had a consistent and genuine intention to act throughout the period of delay, the application ought to be allowed.

[15] The Kershaw decision was an application made under section 28 of the *Federal Court Act*, as it was relevant then, to review and set aside the decision of Tax Court Judge D. W. Beaubier wherein he dismissed the application of Mr. Kershaw, which was made on May 28, 1991, pursuant to subsection 167(1) ITA, for an extension of time within which a notice of objection could be served in respect of the reassessment by the Minister of Mr. Kershaw's income for the 1985, 1986, 1987 and 1988 taxation years. This application to review did not deal with the provisions of sections 166.1 and 166.2 ITA as are now applicable.

[16] Section 167 ITA that was under review by the Federal Court of Appeal in Kershaw applied to applications filed before January 17, 1992, and formerly read:

167(1).

Application to Tax Court of Canada for time extension --

Where no objection to an assessment under section 165, appeal to the Tax Court of Canada under section 169 or request under subsection 245(6) has been made or instituted within the time limited by that provision for doing so, an application may be made to the Tax Court of Canada for an order extending the time within which a notice of objection may be served, an appeal instituted or a request made, and the Court may, if in its opinion the circumstances of the case are such that it would be just and equitable to do so, make an order extending the time of objecting, appealing or making a request and may impose such terms as it deems just.

(2)

Idem –

The application referred to in subsection (1) shall set out the reasons why it was not possible to serve the notice of objection, institute the appeal to the Court or make the request under subsection 245(6), as the case may be, within the time otherwise limited by this Act for so doing.

³ *Kershaw v The Queen*, 92 DTC 6241 (FCA) [Kershaw].

[17] The applicable provisions before the Federal Court of Appeal in *Kershaw* are different from the applicable provisions in these appeals. Current paragraph 166.2(5)(a) ITA makes it clear that even if we assume that the Appellant in this case had made an application under subsection 166.2(1) on a timely basis, the Court is prevented from granting the requested extension. Again, in order to avoid the limitation in that paragraph in the present case, the Appellant should have made his application with the Minister under subsection 166.1(1) ITA no later than December 31, 2020, which he did not do.

[18] The Federal Court of Appeal in *Carlson*⁴ confirms that this Court is precluded from extending the time in which to file a notice of objection unless paragraph 166.2(5)(a) ITA is satisfied:

However, both the Minister and the TCC are precluded under paragraphs 166.1(7)(a) and 166.2(5)(a) of the Act from extending the time in which to file a notice of objection unless the application is made within one year after the expiry of the time in which a notice of objection could have been made.

[19] The Appellant's representative also argued that it would not be fair for him to be unable to object against the reassessments as the exercise conducted by the CRA did not reflect reality and the Appellant is able to present reasons for all the years reassessed. A valid notice of objection was filed for the 2013 taxation year, the first year of four years reassessed in total, and the three other years should be subject to the same treatment.

[20] Unfortunately, as mentioned in the *Pietrovito*⁵ decision below, the Court does not have authority when it comes to equity and fairness:

[86] Finally, here are my last comments: no consideration of fairness or equity can be of assistance to the Appellant as this Court is a statutory court. As explained in *Odebala-Fregene, supra* [2015 TCC 44]:

22 Factoring in the nature of the specialized statutory scheme of the Act and that this Court is a statutory Court, considerations of fairness do not apply. In his submission, respondent counsel referred to the Federal Court of Appeal in *Chaya v Canada*, 2004 FCA 327, 2004 DTC 6676 (FCA), which noted that such grounds are not within the power of this Court. In paragraph 4 of the decision, Rothstein JA, as he then was stated:

⁴ *Canada v Carlson*, 2002 FCA 145 [Carlson].

⁵ *Pietrovito v The Queen*, 2017 TCC 119 [Pietrovito].

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

[21] The position argued by the Appellant and the position exposed by the Respondent leave no doubt on the absence of a valid notice of objection being served with respect to the reassessments before this Court. A condition precedent to instituting an appeal before the Court has not been met. This is fatal. The appeals have not been validly instituted before the Court, and therefore this Court has no jurisdiction to hear the appeals.

III. Decision

[22] Considering the foregoing, I conclude that the appeals with respect to the 2014, 2015 and 2016 taxation years before this Court shall be quashed. Each party shall bear their own costs.

Signed at Vancouver, British Columbia, this 20th day of November 2023.

“J.M. Gagnon”

Gagnon J.

CITATION: TCC 2023 160

COURT FILE NO.: 2022-1529(IT)I

STYLE OF CAUSE: VU KIEU AND HIS MAJESTY THE KING

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: November 9, 2023

REASONS FOR JUDGMENT BY: The Honourable Justice Jean Marc Gagnon

DATE OF JUDGMENT: November 20, 2023

APPEARANCES:

Agent for the Appellant: Martinraj Manadan
Counsel for the Respondent: Gabriel Caron

COUNSEL OF RECORD:

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