

Docket: 2012-1749(IT)G

BETWEEN:

GREGORY E. PYLATUKE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motions heard on September 3, 2013, at Saskatoon, Saskatchewan.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant: Grant Carson

Counsel for the Respondent: John Krowina

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**ORDER**

The Respondent's motion to quash the appellant's 2006 income tax appeal is dismissed and the Appellant's motion for an extension of time to file an appeal for the 2006 taxation year is allowed and the notice of appeal filed on April 30, 2012 is deemed to be a valid notice of appeal instituted on the date of this Order. Each party shall bear its own costs.

Signed at Ottawa, Canada, this 21st day of November 2013.

« Réal Favreau »

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Favreau J.

Citation: 2013 TCC 364  
Date: 20131121  
Docket: 2012-1749(IT)G

BETWEEN:

GREGORY E. PYLATUKE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR ORDER**

Favreau J.

[1] The Respondent has brought a motion to quash the appellant's 2006 income tax appeal as having been instituted by filing his notice of appeal with the Court after the expiry of the time allowed for filing an appeal pursuant to subsection 169(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the “*Act*”).

[2] The Respondent alleged that:

- (a) no request for extending the time for filing an appeal was made pursuant to subsection 167(1) of the *Act*;
- (b) the time within which an application to extend the time for filing an appeal in this proceeding has expired; and
- (c) a condition precedent to instituting a valid appeal has not been met.

[3] The Appellant has brought a motion for an extension of time within which the Appellant's appeal may be instituted up to and including the date of filing of the notice of appeal, pursuant to subsection 167(1) of the *Act*.

[4] The Appellant alleged that:

- (a) the Minister of National Revenue (the "Minister") did not notify the Appellant of a reassessment or a decision on an objection in a timely fashion or at all;
- (b) the Respondent filed a reply in this proceeding which raised no issue of time or a requirement for an extension of time for instituting an appeal;
- (c) the Respondent in its reply confirmed its response to a disclaimer of knowledge;
- (d) the time for commencement of the appeal should run no earlier than February 27, 2012;
- (e) the time to apply for an extension should not commence, in these circumstances, until June 11, 2013; and
- (f) the Appellant did not receive the notice of confirmation of the reassessment and did appeal in a timely fashion.

### **Chronology of events**

[5] Based on the supplementary Respondent's submissions, the chronology of events in this matter is as follows:

- (a) the Appellant was reassessed in respect of his 2006 taxation year on June 11, 2009;
- (b) the Appellant filed an objection which was dated September 9, 2009 and received by the Minister on September 17, 2009;
- (c) the objection was filed late but deemed by the Minister to have been received on February 4, 2010;
- (d) the Appellant was subsequently reassessed a second time by notice of reassessment dated January 19, 2012;
- (e) a letter explaining the decision giving rise to the notice of reassessment of January 19, 2012 (the "Reassessment") was sent to the Appellant personally and carbon-copied to the Appellant's lawyer, on January 19, 2012;
- (f) the notice of appeal was filed on April 30, 2012;
- (g) 90 days from January 19, 2012 is April 18, 2012;
- (h) one year from April 18, 2012 is April 18, 2013;
- (i) no application to extend the time to file the notice of appeal was made prior to April 18, 2013;
- (j) the reply was filed on September 28, 2012.

## **Issues**

[6] The issues are as follows:

- (a) did the applicable time limit for filing the notice of appeal expire prior to the date on which it was filed?
- (b) if yes, can the filing of the notice of appeal substitute for the making of an application under section 167 of the *Act*?
- (c) what is the significance, if any, of the reply having been filed by the Respondent before the time the motion was brought?

## **The Law**

[7] Subsection 169(1) of the *Act* provides for a time limit of 90 days from the day the notice is sent to the taxpayer where the Minister has reassessed under section 165.

[8] Section 169(1) reads as follows:

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,

...

[9] No appeal under subsection 169(1) may be instituted after the expiration of 90 days from the day notice has been mailed to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed. The time period within which an appeal may be made to this Court is 90 days from the date the notice of confirmation of the reassessment was mailed to the Appellant. Since the notice of confirmation was mailed to the Appellant on January 19, 2012, this 90-day period expired long before the notice of appeal was filed on April 30, 2012.

[10] A taxpayer may make an application to extend the time within which an appeal may be made to this Court. Section 167 of the *Act* governs such applications. This section provides that:

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.

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

(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.

(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.

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

(a) the application is made within one year after the expiration of the time limited by section 169 for appealing; and

(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] On the facts of this case, the main issue is whether the Minister mailed the reassessment to the Appellant on January 19, 2012? The Appellant maintains that neither him nor his lawyer received the said reassessment.

[12] Both the Appellant and the Respondent filed sworn affidavits on this issue.

[13] The Respondent filed an affidavit of Mr. Young-Hamel, an appeals officer with the Canada Revenue Agency, sworn on August 29, 2013. In his affidavit, Mr. Young-Hamel namely stated that:

4. On January 19, 2012, the Appellant was sent a Notice of Reassessment. A copy of this Notice of Reassessment is attached as Exhibit "D" to the Affidavit of Shelley Eichorn, sworn January 29, 2013.
5. A T7W-C form dated January 19, 2012, was attached to the Notice of Reassessment of January 19, 2012. A copy of this T7W-C is attached hereto and marked as Exhibit "A".
6. A letter explaining the variation to the Appellant's assessment was sent to the Appellant by registered mail on January 19, 2012. A copy of this letter is attached hereto and marked as Exhibit "B".
7. The letter was carbon-copied to the lawyer for the Appellant, Mr. Carson. The Appellant had authorized the Agency to communicate with Mr. Carson on his behalf by written authorization dated August 3, 2011.
8. The Agency's address on file for Mr. Carson is Carson & Company Law Offices, 803 Main St., Melfort, SK, SOE 1A0.
9. The copy of the letter of January 19, 2012, would have been sent to Mr. Carson by regular mail.
10. My normal practice is to place a letter in an envelope and then to place the envelope in the "out" box for pick-up by our mail clerk.
11. The mail clerk picks up once in the morning and once in the afternoon. My understanding is that items usually leave our office the following day.
12. At no time did the Appellant or Mr. Carson communicate with the Agency to say that the Reassessment of January 19, 2012, or the explanatory letter of the same date, was not received.

[14] The Appellant filed two affidavits, one from Mrs. Cindy Nelson, legal assistant with the law firm Carson & Co., sworn on August 30, 2013 and one from the Appellant, sworn on August 21, 2013. In her affidavit, Mrs. Nelson affirmed that:

3. I have searched our file 24,226 which pertains to Tax Court of Canada file 2012-179(IT)G to determine whether or not Exhibits "A" and "B" to the Affidavit of Jonathon Young-Hamel sworn August 29, 2013, was ever received. I can state positively that the said Exhibit "A" and "B" have never been received at our

offices through regular mail or by any other means. I am entirely familiar with the delivery and receipt of registered domestic mail within Canada Post. I have reviewed the Affidavit of Jonathon Young-Hamel sworn August 29, 2013, in which he alleges in paragraph 6 that Exhibit "B" was sent by registered mail to the Appellant on January 19, 2012.

4. Annexed hereto as Exhibit "A" to this my Affidavit is a true copy of the front and back of a registered mail receipt.
5. If, as Mr. Jonathon Young-Hamel swears, registered mail had been sent to Gregory Pylatuke his file would contain the 11 digit tracking number as well as an accepting location stamp on the back confirming that the mail had reached the post office in Saskatoon.
6. After registered mail reaches the accepting location it is then possible through the Canada Post website to track the delivery through the 11 digit number. A search result can be obtained if the mail actually reaches its destination in Quill Lake, Saskatchewan.
7. The failure of Jonathon Young-Hamel to provide the 11 digit tracking code for the registered mail or any website result from the mail destination suggests to me that the mail never reached the post office in Saskatoon.

[15] In his affidavit, Mr. Pylatuke affirmed, among other things, that:

4. That I have never received a similar letter or Notice of Reassessment calculation of any kind respecting my personal appeal. The first notification of the results of my assessment came in the form of a Statement of Account which indicated that I owed \$ 210,743.03. A copy of that Statement of Account annexed hereto as Exhibit "B". On August 21, 2013, prior to signing this Affidavit I was shown Exhibit "D" to the Affidavit of Shelley Eichorn which purports to be the decision on my Objection. That document was never received by me and this is the first time that I have seen it.
5. Upon receipt of that Statement of Account in Exhibit "B" I forwarded the document to my solicitor with the fax cover sheet dated March 2, 2012, annexed hereto as Exhibit "C". At this point in time a Notice of Appeal had already been filed with the Tax Court of Canada (on March 2, 2012).
6. I have been informed by my solicitor, Grant Carson and do verily believe that the Carson & Co., Law Office, has not received Notices of Reassessment for my personal Appeal.
7. In early April 2012, I received the invoice with processing date March 30, 2012, annexed hereto as Exhibit "D". On April 10, 2012, I forwarded that invoice to

my solicitor with instructions to file an Appeal based upon the same grounds (or a minor image of grounds) contained in the corporate Appeal filed March 2, 2012.

8. The Respondent in this case did not raise any objection to time limits in filing its reply to our Notice of Appeal and this matter was raised for the first time on or about June 11, 2013.

[16] From the evidence before me, I am satisfied that the 2006 reassessment was issued on January 19, 2012. However, the record does not satisfy me that it was mailed to the Appellant and to the Appellant's lawyer. The Respondent would have to bring more specific evidence of having mailed the said reassessment, particularly when it was sent by registered mail.

[17] The fact that the Appellant became aware of the 2006 reassessment when he received on March 2, 2012, a statement of account dated February 27, 2012, showing that a 2006 reassessment was issued on February 19, 2012 and that he did not take any steps to obtain a copy of the said reassessment, does not have the effect of validating the reassessment.

[18] In the circumstances, I will dismiss the Respondent's motion and will allow the Appellant's motion for an extension of time to file an appeal for the 2006 taxation year. The notice of appeal filed on April 30, 2012 is deemed to be a valid notice of appeal instituted on the date of this Order. The matters raised in the 2006 reassessment shall then be heard on their merits. Considering my decision on the first issue of the Respondent's motion, it is not necessary for me to deal with the other issues therein. Each party shall bear its own costs.

Signed at Ottawa, Canada, this 21st day of November 2013.

« Réal Favreau »

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Favreau J.



CITATION: 2013 TCC 364  
COURT FILE NO.: 2012-1749(IT)G  
STYLE OF CAUSE: Gregory E. Pylatuke and Her Majesty the Queen  
PLACE OF HEARING: Saskatoon, Saskatchewan  
DATE OF HEARING: September 3, 2013  
REASONS FOR JUDGMENT BY: The Honourable Justice R  al Favreau  
DATE OF JUDGMENT: November 21, 2013  
APPEARANCES:

Counsel for the Appellant: Grant Carson  
Counsel for the Respondent: John Krowina

COUNSEL OF RECORD:

For the Appellant:

Name: Grant Carson  
Firm: Carson & Co.  
Melfort, Saskatchewan

For the Respondent:

William F. Pentney  
Deputy Attorney General of Canada  
Ottawa, Canada