

Docket: 2013-3389(IT)APP

BETWEEN:

SHANE YARMOLOY,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on December 12, 2013 at Calgary, Alberta.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Agent for the Applicant: Steven Richmond
Counsel for the Respondent: Paige MacPherson

ORDER

The application for an Order extending the time within which an appeal from the assessment made under the *Income Tax Act* for the 2007 taxation year may be instituted is dismissed.

Signed at Ottawa, Canada, this 24th day of January 2014.

"Gerald J. Rip"

Rip C.J.

Citation: 2014 TCC 27
Date: 20140124
Docket: 2013-3389(IT)APP

BETWEEN:

SHANE YARMOLOY,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Rip C.J.

[1] Shane Yarmoloy has applied for an extension of time within which to file a Notice of Appeal for his 2007 taxation year: section 167 of the *Income Tax Act* ("Act").

[2] Mr. Steven Richmond, Mr. Yarmoloy's accountant, testified in support of the application. Mr. Richmond stated that the reassessment for 2007, notice of which is dated September 23, 2010, was objected to by notice dated January 5, 2011 and confirmed by notice dated February 7, 2012. The notice of confirmation was purportedly delivered by Canada Post on February 16, 2012. Mr. Richmond declared he never received the notice of confirmation and that the scanned signature on a copy of a Canada Post document sent to Mr. Yarmoloy by the Canada Revenue Agency ("CRA") on or about June 29, 2012 confirming delivery by registered mail is unrecognisable. Mr. Yarmoloy, who also said he did not receive the notice of confirmation, also could not recognize the scanned signature on the Canada Post document. The delivery date of the notice of confirmation on the Canada Post document is February 9, 2012. The scanned signature on the Canada Post document does not appear to be similar to Mr. Yarmoloy's signature on a copy of a form entitled "Election on Disposition of Property by a Taxpayer to a Taxable Canadian Corporation" (Form T2057). A copy of a second document from Canada Post with a

different scanned signature was sent by the CRA to either Mr. Richmond or Mr. Yarmoloy. They denied recognition of this signature as well. This second document indicated delivery of a registered letter on February 16, 2012.

[3] Mr. Richmond stated that the practice is that mail addressed to Mr. Yarmoloy from the CRA is sent to the latter's office and that CRA mail is "opened immediately". Mr. Richmond is present at the office six days a week and "scans CRA mail immediately".

[4] Mr. Yarmoloy carries on business as a developer and also earns rental income. He carries his business from the address in Canmore Alberta to which the CRA sends him his general mail. The civic address in Canmore is shared by several tenants, although Mr. Yarmoloy's office is in a fixed unit. He stated that his ordinary practice is to sign for any registered mail and then give the mail to the Chief Financial Officer, Mr. Richmond.

[5] Mr. Yarmoloy resides in Sicamous, British Columbia but he usually is present in Sicamous the last part of a month.

[6] Mr. Yarmoloy testified that he has been in an automobile accident and received a brain injury and has memory difficulty. In an affidavit of Daljeet Dev, an Appeals Officer in the Appeals Division of the Calgary office of the CRA, filed on behalf of the respondent, Mr. Dev stated that:

- (e) The Applicant filed a T1 Adjustment Request for the 2007 taxation year on March 1, 2012 requesting his allowable charitable donations be increased from \$500 to \$100,500. ...
- (f) The Minister reassessed the Applicant's 2007 taxation year by way of a Notice of Reassessment dated July 3, 2012 to increase the Applicant's allowable charitable donations from \$500 to \$100,500. ...

[7] On a question put to him by respondent's counsel, Mr. Yarmoloy could not recall receiving a notice of reassessment for 2007 dated July 3, 2012; Mr. Richmond also had no knowledge of the reassessment.

[8] Mr. Dev states in his affidavit that he has charge of appropriate records and has knowledge of CRA's practices, that he has undertaken a careful examination and search of CRA's records relating to Mr. Yarmoloy's application for an extension of time to appeal his income tax assessment for 2007. He says, amongst, other things:

- (a) The Minister reassessed the Applicant for the 2007 taxation year by way of a Notice of Reassessment (the "Reassessment") dated October 7, 2010 to, among other things; assess late filing penalties and arrears interest on unremitted tax instalment payments. ...
 - (b) The Applicant filed a Notice of Objection to the Reassessment on January 5, 2011. ...
 - (c) The Minister confirmed the Reassessment on the Applicant's 2007 taxation year by Notice of Confirmation (the "Confirmation") dated and mailed to the Applicant on February 7, 2012 by registered mail. ...
 - (d) Canada Post records show that the Confirmation was successfully delivered and signed for by the Applicant on February 16, 2012. ...
4. On September 11, 2013 the Applicant filed an application for an extension of time to file a Notice of Appeal for the 2007 taxation year in this Court pursuant to section 167 of the *Income Tax Act*.

[9] Attached to Mr. Yarmaloy's application for extension of time to file a Notice of Appeal for 2007, is a Notice of Appeal from an assessment dated "03/07/2012". There is no evidence that a notice of objection to the July 3, 2012 assessment was filed with the CRA by Mr. Yarmaloy. Indeed, as mentioned earlier, neither he nor Mr. Richmond recall receiving the notice of assessment. Their evidence as to the Canada Post documents attesting to delivery dates of a notice of confirmation relate to an assessment dated September 23, 2010.

[10] In *Abrahams v. The Queen*¹, Jockett P., as he then was, explained:

Assuming that the second reassessment is valid, it follows, in my view, that the first reassessment is displaced and becomes a nullity. The taxpayer cannot be liable on an original assessment as well as on a re-assessment. It would be different if one assessment for a year were followed by an 'additional' assessment for that year. Where, however, the 're-assessment' purports to fix the taxpayer's total tax for the year, and not merely an amount of tax in addition to that which has already been assessed, the previous assessment must automatically become null.

I am therefore, of opinion that, since the second reassessment was made, there is no relief that the Court could grant on the appeal from the first reassessment because the assessment appealed from had ceased to exist. There is no assessment, therefore, that the Court could vacate, vary or refer back to the Minister. When the second reassessment was made, this appeal should have been discontinued² or an application should have been made to have it quashed³.

¹ 66 DTC 5451, per Jockett, at paras. 9 and 10.

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- ² The appellant could have asked the respondent to agree to pay his costs as a condition to his discontinuing. If the respondent had refused, he could have applied for leave to discontinue on terms that the respondent be ordered to pay his costs of the appeal that had been made abortive by the second reassessment.
- ³ An alternative view is that the appeal should be allowed and the assessment appealed from declared null. I am of the view that the correct view of the statute is that there is no basis for an appeal from an assessment that has become null by virtue of a reassessment. Certainly such an appeal is unnecessary and it would be an unnecessary expense and expenditure of time and energy if the practice of taking such appeals developed.

[11] The assessment for 2007 issued on July 3, 2012 therefore nullified the earlier assessment of September 23, 2010. The September 23, 2010 assessment no longer existed. Only the reassessment of July 3, 2012 was before me. The bulk of the evidence I heard from Mr. Yarmoloy and Mr. Richmond concerned facts relating to the non receipt of the notice of confirmation of the September 23, 2010 assessment.

[12] At the end of the hearing of this application I informed the parties that Mr. Yarmoloy would have until January 15, 2014 to provide me with any case law to support their position. I did receive copies of three reported cases, none of which I find to be on point². Mr. Richmond notified me in the covering letter dated January 14, 2014 that "Mr. Yarmoloy has never consented in any way of the original appeal being disposed of, in fact was in discussions about the appeal after the second reassessment was done ..." Neither Mr. Richmond nor Mr. Yarmoloy provided information as to when Mr. Yarmoloy was aware of the second reassessment; as a matter of fact he denied knowledge at the hearing of the second assessment.

[13] I have heard no evidence why it was not possible to file a notice of objection to the assessment for 2007, notice of which is dated July 3, 2012.

² *Leblanc c. Canada*, 2010 FC 688; *TransCanada Pipelines Limited v. R.*, 2001 FCA 314; and *Poehlke v. The Queen*, 2010 TCC 604,

[14] The application is dismissed.

Signed at Ottawa, Canada, this 24th day of January 2014.

"Gerald J. Rip"

Rip C.J.

CITATION: 2014 TCC 27
COURT FILE NO.: 2013-3389(IT)APP
STYLE OF CAUSE: SHANE YARMOLOY v. THE QUEEN
PLACE OF HEARING: Calgary, Alberta
DATE OF HEARING: December 12, 2013
REASONS FOR ORDER BY: The Honourable Gerald J. Rip, Chief Justice
DATE OF ORDER: January 24, 2014

APPEARANCES:

Agent for the Applicant: Steven Richmond
Counsel for the Respondent: Paige MacPherson

COUNSEL OF RECORD:

For the Applicant:

Name:

Firm:

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