Tax Court of Canada Cour canadienne de l'impôt

Français

Date: 19980122

Docket: APP-344-97-IT

BETWEEN:

ELEANOR ADLER,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appearances

Counsel for the Applicant: Howard J.Alpert

Counsel for the Respondent: Christine Mohr

Reasons for Order

(Delivered from the Bench in Toronto, Ontario, on January 5, 1998.)

Hamlyn, J.T.C.C.

[1] This is in the matter of Eleanor Adler and Her Majesty The Queen. It is an application for extension of time within which an appeal may be instituted.

[2] Revenue Canada alleges that a Notice of Assessment bearing a date of mailing of October 16, 1995 was mailed to the Applicant. The Applicant denies ever having received such a Notice of Assessment from Revenue Canada. The Applicant states, in her evidence, that she did not learn of the existence of the Notice of Assessment until after the time for filing an appeal in the Tax Court had expired. The Applicant discovered the existence of the Notice of Assessment only on July 28, 1997.

[3] From her evidence, and from her Affidavit filed, that was part of the evidence, Eleanor Adler stated - it is paragraph 11 of the Affidavit:

11. In May, 1997 I became concerned about an apparent delay in Revenue Canada's processing of an income tax refund which I expected for my 1996 taxation year. On or about May 26, 1997 I telephoned Revenue Canada and was advised that my refund was frozen on the basis that a letter had been allegedly mailed to me in October, 1995 stating that I owed Revenue Canada the sum of $192,000.00. At all material times, I deny ever having received

such a letter from Revenue Canada, and I verily believe that such a letter was never in fact mailed or otherwise delivered to me by Revenue Canada in any manner whatsoever.

[4] At paragraph 17 of that same Affidavit, she goes on to state:

17. On July 24, 1997, I am advised that my solicitors, by telephone, contacted Takahashi. As a result of a request made by my solicitors to Takahashi during this telephone conversation, on or about July 28, 1997, Takahashi, delivered by facsimile to my solicitors a copy of my Notice of Assessment in respect of my 1992 taxation year, bearing a purported "date of mailing" of October 16, 1995. The copy of the Notice of Assessment states that I was assessed the sum of $175,000.00 in respect of a transfer of 61 Willowbrook Rd. from my Husband to me.

[5] And she goes on to state:

Attached hereto as Exhibit "F" to this my Affidavit is a copy of the fax letter and the Notice of Assessment ...

[6] At paragraph 18 she says:

18. At no material time did I have any prior knowledge of the Notice of Assessment, and I deny ever having received such a Notice of Assessment, and in fact I verily believe that such a Notice of Assessment was never in fact mailed or delivered to me by the Respondent in any manner whatsoever.

[7] The Minister of National Revenue (the "Minister") has taken the position in the matter that the mailing was, as indicated, on the 16th of October 1995, and the evidence of the Minister is to that effect, that the mailing of the assessment was commenced in the Minister's department at that time and that was sufficient mailing to meet the test of the *Income Tax Act* (the "*Act*") under section 160(2) of the *Act*.

[8] The Applicant, according to the Minister, did not serve on the Minister a Notice of Objection to that assessment, and that the extension of time within which to institute an appeal to this Court was filed on September 9, 1997, and that this application should be dismissed because the Applicant did not serve on the Minister a Notice of Objection to the assessment dated October 16, 1995 as required by section 169 of the *Act*, and an Order granting the application therefore should not be made.

[9] In terms of the analysis, I find that the Minister's evidence is that the Minister commenced the mailing processes to the Applicant of the Notice of Assessment at the address of the Applicant on the 16th of October, 1995. The Applicant stated she never received the assessment and did not know of the assessment until July of 1997.

[10] The Applicant has applied for an Order at this time within which to extend the time to appeal to that assessment by Revenue Canada. I accept the Applicant's evidence that the Applicant did not have any prior knowledge of the Notice of Assessment and that she never did receive such an assessment from Revenue Canada.

[11] The evidence of Revenue Canada was to the effect that the processes of mailing was commenced on October 16, 1995 and that with the reading of the *Act* this notice shall be presumed to be the date of that mailing, that is, the date on the Notice of Assessment shall be presumed to be the date of that mailing. Now, that presumption that is in the *Act* is a rebuttable presumption.

[12] I find that the Applicant had full control over her mailbox at the time in question and she was the only one who picked-up the mail and her uncontroverted sworn testimony was that she did not receive the assessment. To me, that is very important.

[13] And I refer now to the *Antoniou v. M.N.R.* case, 88 DTC 1415 (T.C.C.), which was cited to me by the Applicant. In that case, in November 1985, the Minister mailed Notices of Reassessment to the taxpayer at his proper address. The taxpayer alleged that he never received the notices and that he did not know about the reassessments until March 1987 when he was advised about them indirectly. The taxpayer wished to object to the reassessments and he applied to the Tax Court of Canada for an Order extending the time for service of the Notices of Objection. The Minister contended that the one-year limit imposed by section 167(5) had expired before the taxpayer's application was made.

[14] Judge Brulé in *Antoniou* said at page 1418:

In light of the evidence adduced, the Court is satisfied that the Notice of Reassessment was sent by mail addressed to the appellant at his proper address on November 4, 1985. The Court also finds the appellant has established on a balance of probabilities he never received the Notice of Reassessment that had been mailed to him.

The date of mailing of a Notice of Assessment is presumed to be the date indicated in the Notice [subsection 244(14)]. This of course is in the absence of the evidence to the contrary. No evidence was introduced as to the mailing except by a Revenue Canada record officer's affidavit. After receipt of the reassessment was denied by the applicant herein and his testimony not disturbed under cross-examination and no rebuttal evidence offered, the Court concludes that there was no receipt of the Notice.

[15] Judge Brulé goes on to say:

In the present case, although there probably were valid reassessments, no valid receipt of the mailing of the Notice having been established, after evidence indicated it had not been received, the time limited by subsections 165(1) and 167(1) of the Act for objecting to the reassessment has not expired. There is no basis to apply for an extension of time to file a Notice of Objection as the manner in which the purported reassessments for 1982 and 1983 was carried out was insufficient to complete the reassessment process. The present application is therefore a nullity.

[16] From that, I conclude for this case, because there was no receipt of the assessment by the Applicant, the limitations imposed on the *Act*, which run from the day of the mailing, have not expired. Since there was no receipt of the notice by the Applicant, therefore, there was no date of mailing. Therefore, the application for an Order extending the time within which an appeal may be instituted to this Court is a nullity.

Signed at Ottawa, Canada, this 23rd day of January 1998.

"D. Hamlyn"

J.T.C.C.