

Federal Court dismisses judicial review application for delay

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Introduction

Facts

Decision

Comment

Introduction

Under Section 18.1 of the Federal Courts Act, a party may bring an application for review of a discretionary decision of a government board, commission or other tribunal. Generally, the application must be made within 30 days of the decision.

In *R & S Industries* (2016 FC 275), the Federal Court recently dismissed a taxpayer's application for judicial review of a discretionary decision of the Canada Revenue Agency (CRA), holding that the taxpayer had missed the 30-day deadline and no extension should be granted.

Facts

In *R & S* the taxpayer made some errors in a T2059 form in connection with a Section 97(2) rollover of property to a partnership. The CRA reassessed and the taxpayer objected.

The CRA appeals officer told the taxpayer that an amended T2059 had to be filed in order for the reassessment to be dealt with properly. Accordingly, the taxpayer filed an amended T2059 pursuant to Section 96(5.1) of the Income Tax Act, which allows a Section 97(2) rollover election to be amended where "in the opinion of the Minister, the circumstances of a case are such that it would be just and equitable" to permit the taxpayer to amend an election.

A CRA officer (other than the appeals officer) denied the application under Section 96(5.1) and various letters were sent to the taxpayer to that effect. The appeals officer then confirmed the reassessment on the basis that the taxpayer's request under Section 96(5.1) had been denied.

When the taxpayer appealed the reassessment to the Tax Court, the crown alleged that the Tax Court had no jurisdiction to review the CRA's decision to reject the taxpayer's application to amend the T2059 under Section 96(5.1) because it was a discretionary decision of the minister of national revenue and not subject to appeal to the Tax Court.

The taxpayer then commenced a judicial review application in the Federal Court on the basis that the decision under Section 96(5.1) was procedurally unfair and unreasonable. The crown rejected both arguments and further argued that the application was out of time and no extension should be granted.

Decision

In dismissing the taxpayer's application, the Federal Court stated that it was clear the taxpayer had missed the 30-day deadline because there had been a lengthy delay from the date of the decision (January 31 2014) to the filing of the application for judicial review (May 19 2015).

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The Federal Court refused to consider the subsequent correspondence between the taxpayer and the CRA as having created a later date on which the decision was communicated.

The court did not accept the taxpayer's argument that the character of the decision as an exercise of ministerial discretion was not conveyed to the taxpayer until after January 2014. Further, the Federal Court noted that the taxpayer had counsel throughout the process and that the counsel was knowledgeable about the CRA's decision-making process. The court held that the CRA was not obliged to inform the taxpayer of the availability of judicial review of the discretionary decision.

In respect of an extension of time to file the application, the Federal Court held that the taxpayer had failed to establish that:

- it had a continuing intention to pursue the judicial review application;
- no prejudice arose to the minister of national revenue;
- a reasonable explanation for the delay existed; and
- there was merit to the application (see *Exeter v Canada*, 2011 FCA 253).

Despite having found that the taxpayer was out of time to pursue judicial review, the Federal Court considered the taxpayer's arguments regarding the merit of the application and held that the CRA's decision was neither unfair nor unreasonable.

The appeal in the Tax Court continues. Whether the Tax Court has jurisdiction to consider the taxpayer's arguments regarding Section 96(5.1) in the context of an appeal of the reassessment remains an open question.

Comment

This case is an important reminder to tax professionals that if the CRA communicates a discretionary decision to a taxpayer, the appropriate relief is sometimes in Federal Court rather than Tax Court. Identifying and quickly responding to those discretionary decisions is key to preserving the client's right to pursue a remedy.

For further information on this topic please contact [Margaret MacDonald](#) at Dentons Canada LLP by telephone (+1 604 687 4460) or email (margaret.macdonald@dentons.com). The Dentons website can be accessed at www.dentons.com.

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