LEGAL BUSINESS REPORT
ALPERT LAW FIRM
THE TAX LAW PROFESSIONALS
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APPLICATIONS FOR EXTENSIONS OF TIME FOR TAX APPEALS

This issue of the Legal Business Report provides current information to the clients of Alpert Law Firm on the rules governing income tax appeals and administrative changes regarding notices of objection and reassessment periods.

Alpert Law Firm is experienced in providing legal services to its clients in tax dispute resolution and tax litigation, tax and estate planning matters, corporate-commercial transactions and estate administration. Howard Alpert has been certified by the Law Society as a Specialist in Estates and Trusts Law, and also as a Specialist in Corporate and Commercial Law.

I. APPLICATIONS TO THE MINISTER

Under section 166.1 of the Income Tax Act (the "Act"), applications for extensions of the time limits for serving Notices of Objection under section 165 of the Act, or for making requests for GAAR adjustments in accordance with subsection 245(6) of the Act must be made to the Minister. The Tax Court of Canada has jurisdiction to grant such applications where the Minister either refuses or fails to do so.

Under section 167 of the Act, the Tax Court of Canada also hears applications to extend the time for instituting a Notice of Appeal to the Tax Court of Canada pursuant to section 169 of the Act.

Subsection 166.1(2) of the Act states that the application to the Minister must set out the reasons why the Notice of Objection or the request was not served or made within the normal time limits.

Under subsection 166.1(3) of the Act, the application is required to be addressed to the Chief of Appeals in a District Office or a CRA Taxation Centre. Service of the application on the Minister may be affected by delivery or by regular mail. The application for the extension must be accompanied by a copy of the Notice of Objection or the request.

Subsection 166.1(4) of the Act provides that the Minister has discretion to accept an application to extend the time for serving a Notice of Objection or requesting a GAAR adjustment in cases where the application is not made in accordance with subsection 166.1(3) of the Act.

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The Minister is required to consider an application with all due dispatch and to notify the taxpayer of the decision in writing. In the event that the Minister grants the application, the Notice of Objection or the request will be deemed under subsection 166.1(6) of the Act to have been served or made on the day on which the Notice of the Minister's decision is sent to the taxpayer.

Subsection 166.1(7) of the Act provides that no application shall be granted by the Minister unless:

(a) the application is made within one year of the expiration of the normal limitation period for serving the Notice of Objection or filing the request for a GAAR adjustment, and

(b) the taxpayer demonstrates that:

(i) the taxpayer was unable to act or to instruct another to act in the taxpayer's name during the limitation period, or the taxpayer had a *bona fide* intention to object to the assessment or to make the request within that time;

(ii) it would be just and equitable to grant the application; and

(iii) the application was made as soon as circumstances permitted.

II. APPLICATIONS TO THE TAX COURT OF CANADA

1. Extension of Time for Serving Notice of Objection or Requesting GAAR Adjustments

If the Minister refuses to allow the application for extension of time under section 166.1 of the Act or fails to notify the taxpayer within 90 days following the date on which the application is served on the Minister, the taxpayer is permitted under subsection 166.2(1) of the Act to apply to the Tax Court of Canada to have the application granted. An application cannot be made to the Tax Court of Canada after the expiration of 90 days from the day on which notification of the Minister's decision under section 166.1 of the Act was mailed to the taxpayer.

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Subsection 166.2(2) of the Act provides that the application shall be made by filing in the Registry of the Tax Court of Canada three copies of each of the following documents:

(a) the application filed with the Minister under subsection 166.1(1) of the Act;
(b) a Notice of Objection or the request for a GAAR adjustment, as the case may be; and

(c) the Notice of the Minister's decision, if any, issued under subsection 166.1(5) of the Act.

The Tax Court of Canada may impose such terms as it deems just in granting an application made under subsection 166.2(1) of the Act. Subsection 166.2(5) of the Act imposes similar limits on the Tax Court's discretion as those placed upon the Minister under subsection 166.1(7) of the Act. The informal procedure of the Tax Court of Canada applies to the hearing of this application for an extension of time.

2. Extension of Time to Appeal Assessment Confirmation or Reassessment

Subsection 167(1) of the Act provides that a taxpayer may make an application for an extension of the time limit for appealing an assessment confirmation or reassessment to the Tax Court of Canada under subsection 169(1) of the Act. The Tax Court of Canada may impose such terms as it deems just in granting the application.

Subsection 167(2) of the Act requires an application made under subsection 167(1) to state the reasons why the Notice of Appeal to the Tax Court of Canada was not instituted within the applicable time limits. Three copies of the application must be filed in the Registry of the Tax Court of Canada together with three copies of the Notice of Appeal

Subsection 167(5) of the Act states that no application shall be granted unless:

(a) the application is made within one year of the expiration of the normal limitation period for instituting an appeal under section 169 of the Act; and

(b) the taxpayer demonstrates that:

(i) the taxpayer was unable to act or to instruct another to act in the taxpayer's name during the limitation period, or the taxpayer had a *bona fide* intention to appeal within that time;

(ii) 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.

Subparagraph 167(5)(b)(iv) of the Act requires the taxpayer to demonstrate that there are reasonable grounds for the appeal. There is no similar duty on a taxpayer to demonstrate reasonable grounds for objection or making a request in either subsections 166.1(7) or 166.2(5) of the Act.

III. FORMER CASE LAW

1. *Antoniou v. The Minister of National Revenue*, 88 DTC 1415

The taxpayer made an application to the Tax Court of Canada for an extension of time to appeal a Notice of Assessment. In November 1985, the Minister mailed notices of reassessment to the taxpayer at his proper address. The taxpayer alleged that he had 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 notices of objection. The Minister contended that the one year limit imposed by section 167(5) of the Act had expired before the taxpayer's application was made.

The Court held that the application was unnecessary and was dismissed. The words "the day of mailing of the notice of assessment" in section 165(1) of the Act contemplate the receipt by the taxpayer of the notice from the Minister. Section 244(10) of the Act, which deals with proof of mailing of notice, indicates that the mailing of the notice serves as *prima facie* evidence that the notice has been received. However, this merely created a rebuttable presumption of receipt, which may be defeated by evidence that the notice was not in fact received by the taxpayer.

The taxpayer's evidence that he had not received the notice was accepted by the Court, which then held that the limitations imposed by sections 167(1) and (5) of the Act which run from "the day of mailing" had not expired since there was no receipt of notice by the taxpayer and therefore no "day of mailing" as contemplated by section 165(1) of the Act. The consequence of the Court's findings was that there was no basis to apply

for an extension of time to file a Notice of Objection as the manner in which the purported assessments was carried out was insufficient to complete the reassessment process. The taxpayer's application was a nullity since the time period had not expired for objecting to the Notice of Assessment.

2. ***Adler v. The Queen*, 98 DTC 1414**

The taxpayer, who was represented by Alpert Law Firm, brought an application for extension of time to appeal a Notice of Reassessment to the CRA. The CRA alleged that a Notice of Assessment bearing a date of mailing of October 16, 1995 was mailed to the taxpayer. The taxpayer denied ever having received such a Notice of Reassessment from the CRA. The taxpayer stated, in her evidence, that she did not learn of the existence of the Notice of Reassessment until after the time for filing an appeal in the Tax Court of Canada had expired.

The evidence of the CRA was to the effect that the process of mailing the Notice of Assessment was commenced on October 16, 1995 and that pursuant to the provisions of the Act, the date on the Notice of Reassessment is presumed to be the date of mailing. The taxpayer's uncontroverted sworn testimony that she had not received the assessment was accepted by the Court. Based on the decision in **Antoniou v. The Minister of National Revenue**, the Court held that the taxpayer did not receive the reassessment, so that no statutory time limitation period ever begun to run. Hence there was no basis for the taxpayer's application to extend the time for filing a Notice of Appeal. Accordingly, the Court held that the application was unnecessary and was dismissed.

IV. CURRENT CASE LAW

1. ***The Queen v. Schafer*, 2000 DTC 6542**

In this case the taxpayer was vicariously assessed for GST under the transferor-transferee joint liability provisions of section 325 of the Excise Tax Act. The taxpayer appealed to the Tax Court of Canada for an extension of time to file a Notice of Objection. The Tax Court of Canada held that the taxpayer had never received the Notice of Assessment until after her application to the Court was at the discovery stage. Her appeal was therefore dismissed and the Minister's motion to quash her application for an extension of time was granted on the ground that it was unnecessary, since the time limitation had not begun to run until she had actually received the Notice of Assessment.

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The Minister applied to the Federal Court of Appeal for a judicial review of the Tax Court of Canada's decision. The Federal Court of Appeal granted the Minister's application, holding that subsection 301(1.1) of the Excise Tax Act provides that the 90-day limitation period for filing a Notice of Objection commences to run when the assessment is sent, and not when it is received. In interpreting virtually identical sections of the Act, Tax Court Judges had previously held that the 90-day period commences to run when the assessment is received by the taxpayer, but the Federal Court of Appeal has criticized that approach in cases such as **The Queen v. Bowen**, 91 DTC 5594.

As a result, the Tax Court's decision was overruled and the matter was remitted to the Tax Court for reconsideration on the basis that the Minister's motion to quash the taxpayer's application for an extension should have been granted on the ground that, by virtue of paragraph 304(5)(a) of the Act, the Tax Court lacked jurisdiction to extend the time for filing the Notice of Objection since the application for extension of time had been brought beyond the one year limitation period.

Mr. Justice Sharlow, in a concurring opinion, stated that Parliament has chosen to adopt a rule that makes no allowance for the possibility that the taxpayer may miss the deadline for objecting or appealing because of a failure of the postal system. He found this is a choice Parliament is entitled to make.

As a result, the former decisions of the Tax Court of Canada in **Antoniou v. The Minister of National Revenue** and **Adler v. The Queen** were overruled by the Federal Court of Appeal.

2. *Aztec Industries Inc. v. The Queen*, 95 DTC 5235

In this case the corporate taxpayer applied to the Tax Court of Canada for an extension of time to file a Notice of Objection. The taxpayer argued that the 90-day Notice of Objection limitation period had not started running since the Minister's Notice of Assessment was never received by taxpayer. The Minister, on the other hand, argued that he had produced and sent the Notice of Assessment to the taxpayer in 1983, 11 years prior to the Tax Court hearing.

The Tax Court of Canada denied the corporate taxpayer's application to extend the time for filing its Notice of Objection. After reviewing the evidence, the Tax Court found that it appeared that the taxpayer had received the Notice of Assessment in issue in 1983 and had simply failed to file a Notice of Objection within the prescribed limitation

period. As such, the Court dismissed the taxpayer's application as the taxpayer's application for an extension in time had been brought beyond the one year limitation period. The taxpayer appealed the Tax Court's decision.

The Federal Court of Appeal stated that the lower Court judge incorrectly based his findings on whether evidence suggested that the taxpayer *received* the Notice of Assessment, instead of focusing on whether the Minister had proved (i) the existence of the Notice of Assessment and (ii) the date it was *sent*. The Federal Court of Appeal reviewed the evidence presented by the Minister and found that the Minister had failed to prove the existence of a Notice of Assessment entirely, as none of the documents sent to the taxpayer could be considered to be a Notice of Assessment and the Minister did not put forth evidence that indicated that the assessment had been sent. As such, the Court found for the taxpayer, dismissing the taxpayer's appeal on the basis that there was simply nothing for the taxpayer to respond to or deny since no Notice of Assessment had been sent.

Thus, arguing that the Notice of Assessment has not been sent out could be a viable defence against the expiration of the Notice of Objection limitation period. Courts have indicated that when a taxpayer makes an application to extend the time for filing a Notice of Objection, it is up to the Minister to prove that the Notice of Assessment has been mailed. If the Minister is unable to prove that such a notice was mailed, the Court may find in favour of the taxpayer, holding that since Notice of Assessment had not been sent, the limitation period for the Notice of Objection had not begun.

3. ***Tomaszewski v. The Queen*, 2004 DTC 2063**

In this Tax Court of Canada case, the taxpayer decided to appeal the Minister's assessment several years after the Minister had issued his Notice of Assessment. The taxpayer claimed that while he was aware of the assessment, he had never actually received a Notice and as a result he was not beyond the prescribed time limit to file an objection. The Minister moved for an order to quash the taxpayer's appeal on the grounds that the Notice of Assessment was mailed to the taxpayer, and as such, the taxpayer's appeal was too late, being several years beyond the 90 day limitation period for filing an objection. The Minister introduced affidavits of the CRA tax litigation officer to establish that the notice was mailed.

The Court dismissed the Minister's motion, finding in favour of the taxpayer. The Court stated that in order for the Crown to establish that a Notice of Assessment has been mailed, it is not necessary to produce a witness with first hand recollection of the mailing, rather it is generally sufficient to set out in an affidavit, from the last individual in

authority who dealt with the documents before it entered the normal mailing procedures of the office, exactly what those mailing procedures were. In this case, the Court found that the evidence the Minister provided was not sufficient as (i) the affidavit did not conclusively state that the notice was mailed, but stated that the notice was either "mailed *or otherwise communicated* to the taxpayer"; and (ii) the affidavit indicated that the CRA officer simply assumed the notice had been sent out according to mailing procedure, but was not actually sure how the mailing procedures worked.

The Court in **Tomaszewski** followed the decision in **Aztec Industries Inc. v. the Queen**, (1995) DTC 5235, and required that the Minister prove that the Notice of Assessment was actually sent. The Court here also gave general guidelines on the evidence required for proving that the notice was sent.

4. *236130 British Columbia Ltd. v. The Queen*, 2007 DTC 5021

In this Federal Court of Appeal case, the taxpayer filed waivers allowing the Minister to make a reassessment after the normal reassessment period for the 1995 and 1996 taxation years. The taxpayer then filed Notices of Revocation of the waivers on November 2, 2001. As a result, pursuant to subsection 152(4.1) of the *Act,* the limitation period to reassess the 1995 and 1996 taxation years elapsed 6 months after the date of revocation, on May 2, 2002.

Notices of Reassessment to the taxpayer dated April 8, 2002 were mailed to an erroneous address as a result of a mistake by the CRA. They were returned to the CRA and stamped received on April 22, 2002. CRA produced evidence establishing that the reassessments would have been mailed out again by April 29 or 30, 2002. However, they were sent to the taxpayer's "Book and Records" address rather than its mailing address. The reassessments were finally received by the taxpayer on or around May 17, 2002, after the 6-month limitation period has ended. The taxpayer appealed the reassessments on the basis that they were statute barred.

The Federal Court of Appeal decided in favour of the taxpayer and held that the Minister's reassessments were statute barred. The Court found that it was unnecessary to determine whether the reassessments were mailed on time because CRA mailed the reassessments to the wrong address on both occasions. The mailing address provided by the taxpayer on its income tax returns is the only address authorized and adopted for mailing purposes, and the "Book and Records" address is not a proper substitute. Notices of Reassessments sent to the wrong address are deemed to be not issued at all, and therefore the Minister is statute barred from making a reassessment. The Federal Court of Appeal noted that had the reassessments been mailed to the mailing

address rather than the "Book and Records" address, it would have found the reassessments to have been made on time.

5. *Central Springs Limited et al. v. The Queen*, 2006 DTC 3597

The corporate taxpayers applied to the Tax Court of Canada for extensions of time to file notices of objection to notices of assessment for 2001-2003. The evidence showed that the taxpayers did not become aware of the notices of assessment until sometime around the beginning of June, 2005, when the sheriff seized their assets for tax collection purposes. Notices of objection were then sent by the taxpayer's representatives to the CRA on July 24, 2005.

The Tax Court of Canada found that the evidence about the mailing of the notices of assessment given by the Minister's witness was unconvincing. The only statements by the Minister's witness alleging that the notices of assessment were mailed were oblique references contained in an affidavit. It was clear from the witness' evidence on cross-examination that the witness had no actual knowledge of the fact of mailing, nor any knowledge of the process for doing so in the CRA office from which they were mailed.

On the contrary, the taxpayer was clear in his evidence that he did not receive the notices of assessment by mail. The Tax Court found that (i) the unchallenged evidence of the taxpayer outweighed the CRA's flimsy affidavit and (ii) on the balance of probabilities the Notice of Assessments were never mailed.

The Tax Court held that the application was unnecessary and it was dismissed. The law is settled that when Notices of Assessment are not mailed but come to the attention of the taxpayer by personal delivery then the time when they may be objected to starts to run with that personal delivery. Accordingly, the taxpayers did not need the extension of time for which they had applied.

5. *Mpamugo v. The Queen*, 2016 TCC 215

In this Tax Court of Canada case, the taxpayer filed an appeal against reassessments by the CRA in respect to the 1998 to 2002 taxation years. The Minister brought a motion to dismiss the appeal on the grounds that the taxpayer did not file timely Notices of Objection to any of the reassessments of the years in question. The taxpayer argued at Court that the Notices of Reassessment were never sent to him, and there was nothing he could object to in the first place.

The Tax Court of Canada did not find the taxpayer's assertion to be credible. He claimed that he contacted CRA to change his address to the Maplehurst Detention Centre while he was held there in pre-trial detention for criminal charges. The Court found his testimony to be full of inconsistencies and held that it is unlikely that the conversation regarding the address change occurred. In addition, the taxpayer did not even raise the assertion that he had not received the Notices of Reassessment until after the Crown sought to dismiss his appeal.

The Tax Court of Canada clarified the test to be used when a taxpayer alleges that a Notice of Assessment or Reassessment was never mailed.

i) The taxpayer must assert the notice was not mailed.
ii) Once the assertion is made, the Minister must prove on a balance of probabilities that the notice was mailed.
iii) If the Minister is able to prove the notice was mailed, then the mailing is presumed to have occurred on the date set out on the notice by virtue of subsection 244(14) of the Act. This presumption is rebuttable by the taxpayer.
iv) Once the mailing date is established, the assessment is deemed to have been made and received on that date by virtue of subsection 244(15) and subsection 248(7) of the Act. These deeming provisions are not rebuttable.

The Minister is required to prove the notice was mailed on a balance of probabilities if the taxpayer makes an assertion that the notice was not mailed, regardless of the assertion's credibility. The credibility of the taxpayer's assertion only becomes relevant in order to determine whether the Crown has proven mailing on a balance of probabilities. If the Crown believes that the taxpayer's assertion has wasted the Court's time, the Crown may seek a higher award of costs.

After weighing the Crown's evidence against the taxpayer's evidence, the Court held that it was more likely than not that the Notices of Reassessment were mailed. The dates of mailing were not in dispute. Accordingly, the taxpayer missed the relevant deadlines for filing Notices of Objection and his appeal was dismissed.

6. ***Kolmar and 1120733 Ontario Limited v. The Queen*, 2003 DTC 1521**

In this case the Tax Court of Canada clarified the subsection 167(5) requirement for taxpayers to make applications as soon as circumstances permit. Both taxpayers, Mrs. Kolmar and a numbered company, filed Notices of Objection to the Minister's reassessments for the years 1996, 1997, and 1998. Shortly thereafter, on November 30, 2001, the Minister issued Notices of Confirmation. On the last day permitted under

subparagraph 167(5)(a) of the Act, both taxpayers applied to the Tax Court of Canada for extensions of time to file their Notices of Appeal.

The Minister objected to the granting of the applications on the basis that neither of the applicants demonstrated that its application was made as soon as circumstances permitted, in accordance with subparagraph 167(5)(b)(iii) of the Act. The taxpayers argued that their last minute filing was attributed to the illness of their accountant, which caused them to deal with two other accountants, making their task of retrieving documents very difficult and time-consuming. Given these circumstances, the taxpayers claimed that their applications had been made as soon as possible.

The taxpayers' applications were dismissed on the basis that neither of the taxpayers demonstrated that its application was made as soon as circumstances permitted. The court stated that the taxpayer must fulfill all the conditions, as required by subsection 167(5), before an order can be made extending the time to appeal. A taxpayer must demonstrate, among other things, that he or she was unable to act or instruct another to act in their name or had a *bona fide* intention to appeal within the 90 day period but because of serious illness, accident or misfortune or due to one of those inevitable mishaps that occur in life, he or she could not act or instruct another to file the appeal on time. The court found that these requirements were not met despite there being no doubt that having to deal with two new accountants made the task of retrieving documents more difficult for the taxpayers.

7. ***Hickerty v. The Queen*, 2007 DTC 1311**

In this Tax Court of Canada case, the taxpayer mailed copies of her appeal to an assessment by the Minister to the Court and to the CRA. The appeal was mailed in a timely fashion, but the street address was incorrect. The address used by the taxpayer had been supplied to her by a CRA information officer. Once the taxpayer became aware of the fact that the appeal had been incorrectly addressed, she filed an application seeking an extension of time to file a notice of appeal after the one-year deadline.

The Court granted the taxpayer's application, finding that the taxpayer was entitled to proceed with the appeal, as she had acted under the misapprehension that she had validly instituted her appeal during the appropriate time period. The taxpayer satisfied the requisite criteria because (i) she intended to appeal within the normal 90 day period; (ii) she brought the late filing application as soon as circumstances permitted; (ii) there were reasonable grounds for the appeal; and (iii) granting the order was just and equitable in the circumstances.

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The taxpayer did not bring the application for extension of time within one year of the normal 90 day period. However, where a taxpayer mistakenly, but reasonably, believes that an appeal has been validly instituted, the one-year grace period stops running until the taxpayer becomes aware, or ought to have become aware, that the intended appeal was invalid.

8. *Cheam Tours Ltd. v. M.N.R.*, [2008] 4 CTC 2001

In July 2006, the Minister issued a decision that an employee of the corporate taxpayer was engaged in pensionable and insurable employment. In August 2006, the Minister issued a second decision assessing the corporate taxpayer in respect of the aforementioned July 2006 decision.

In August 2006, the corporate taxpayer appealed the decisions in writing and set out in general terms the reasons for the appeal and the relevant facts. The appeal was mistakenly sent to the CRA and not the Tax Court of Canada and so was not properly instituted. The CRA received the appeal and indicated to the accountant of the corporate taxpayer that it would hold the appeal until all of the records were received. The CRA indicated to the corporate taxpayer that the corporate taxpayer would have a chance to appeal the decision once the CRA had finished calculating the final amount owing.

After receiving the detailed calculations in January 2007, the corporate taxpayer faxed a letter to the Tax Court of Canada. This letter did not set out the reasons why the corporate taxpayer had not started an appeal within the allotted time, pursuant to the requirements under subsection 167(2) of the Act, as the corporate taxpayer believed it had already started a valid appeal. The Tax Court requested further particulars, which were provided by the corporate taxpayer and the appeal was correctly filed in April 2007. The Minister filed a motion to dismiss the corporate taxpayer's application for an extension of time because the April 2007 appeal fell outside the prescribed time limit.

The Tax Court of Canada dismissed the Minister's motion and held that the April 2007 filing of the corporate taxpayer's extension application and the Notice of Appeal were both within the time limit for filing an appeal. The Tax Court stated that the corporate taxpayer had been "caught in a procedural web that would be incomprehensible to most Canadians" and that various rules and acts were not meant to be a trap or an obstacle for litigants but were there to resolve disputes. The Tax Court held that the corporate taxpayer had: (i) the good faith intention to appeal; (ii) a

mistaken belief that its appeal had already been validly instituted; and (iii) acted with due diligence in the given circumstances.

9. ***Odebala-Fregene v. The Queen,* 2015 DTC 1087**

In this Tax Court of Canada case, the taxpayer missed the one-year deadline for filing an application for an extension of time to serve a notice of objection as required pursuant to subsection 166.1(7) of the Act. The Taxpayer argued that it was not possible for her to serve a notice of objection within the time limit because she was not aware that she could object until she was contacted by a CRA collections officer. Once she was aware, she immediately proceeded to serve the notice of objection. The Minister refused to consider the taxpayer's application for an extension of time on the basis that it is statute barred by subsection 166.1(7) of the Act. The taxpayer then applied to the Tax Court of Canada to have her application granted.

The Tax Court of Canada held that the taxpayer was not entitled to extra time simply because she was unaware of her right to object to the assessment. The Tax Court of Canada is a statutory Court where equity doctrines do not apply, and therefore the failure of taxpayers to discover their rights to object cannot be used as a defence when they miss deadlines set out by the Income Tax Act. Time will run regardless of whether the taxpayer has fully and clearly appreciated his or her legal rights, and acting diligently to rectify a problem upon learning of it does not change the bright line rule set out by the Parliament for filing an application for an extension of time.

As a result of this decision, it is uncertain whether taxpayers can still assert the defence used in **Hickerty v. The Queen** and ***Cheam Tours Ltd. v. M.N.R.*** that they have a reasonable but mistaken apprehension that an appeal has been validly instituted. This defence may still be available to other taxpayers. In **Hickerty** and **Cheam Tours**, the taxpayers' appeals were mailed in a timely fashion but were invalidated due to technical defects. In contrast, Ms. Odebala-Fregene completely failed to comply with the provisions, and did not object to her reassessments until long after the deadline has passed.

10. ***Jablonski v. The Queen*, 2012 DTC 1066**

In this Tax Court of Canada case, the taxpayer claimed a charitable donation of $30,000 from his participation in the Universal Donation Program ("Universal"). The Minister audited Universal, and disallowed all of the taxpayer's charitable donation credits on the basis that there was no gift within the meaning of the Act. The taxpayer failed to file a Notice of Objection within the one year and 90 day limit pursuant to the

Act. In applying for an order to extend the time within which he may serve a Notice of Objection, the taxpayer claimed that he did not receive the notice of reassessment and that, alternatively, he suffered from age-related dementia.

The Tax Court of Canada dismissed the taxpayer's application, and declined to extend the time for serving a Notice of Objection beyond the one year and 90 days. Firstly, there was no evidence that would allow the Court to conclude that the notice of reassessment was sent to an incorrect address. Secondly, although the taxpayer's doctor had testified that the taxpayer was displaying "the first signs of age-related dementia" in July 2011, there was no proof that the taxpayer had a mental incapacity in 2008 when the notice of reassessment was sent. Furthermore, the time limits in subsections 165, 166.1 and 166.2 are not altered by the mental incapacity of the taxpayer. The Minister was correct in arguing that if receipt of the reassessment is rendered irrelevant by the statute, then the state of mind of the taxpayer would also be an irrelevant consideration in the determination of the end of the limitation period.

11. ***Lambo v. The Queen*, 2011 DTC 1236**

In this Tax Court of Canada case, the Minister reassessed the taxpayer for the 2005 and 2006 taxation years by Notices of Reassessment dated August 24, 2009, which denied the expenses and the charitable donations that were claimed by the taxpayer. The Notices of Reassessment were sent to the former home of the taxpayer, and were not received until the taxpayer met with her accountant on June 9, 2010. Notices of Objection were promptly sent to the CRA on June 9, 2010. The taxpayer then received a letter from the CRA, which acknowledged receipt of the Notices of Objection and advised the taxpayer that she would be contacted. The taxpayer was not contacted by the CRA until December 21, 2010, when she was informed that the Notices of Objection were not filed within 90 days from the mailing date of the Notices of Reassessment and that the time for filing an application for extension of time had expired. The taxpayer applied to the Tax Court of Canada for an order extending the time for filing her Notices of Objection.

The Tax Court of Canada allowed the taxpayer's application and accepted the validity of the Notices of Objection that were filed on June 9, 2010. The Court found that it would be unconscionable for the Minister to refuse to grant the taxpayer an extension of time within which to file the Notices of Objection for the following reasons: (i) the CRA had sent the Notices of Reassessment to the wrong address, which resulted in the taxpayer only being aware of the Notices of Reassessment more than 8 months after they had been sent; (ii) the taxpayer demonstrated an attempt to dispute the Notices of Reassessment by filing Notices of Objection; (iii) the taxpayer was misled by the letter

from the CRA, which had advised that the CRA would be contacting her; and (iv) no contact was made by the CRA until December 21, 2010, when the taxpayer was advised by letter that it was too late to file an application to extend the time for filing her Notices of Objection.

12. ***Gamble v. R*, 2011 DTC 1238**

In this Tax Court of Canada case, the taxpayer was reassessed for the 1993 to 1997 taxation years inclusive. The amount of tax in dispute exceeded $13,000,000. The Minister took approximately ten years after the taxpayer's Notices of Objection to issue a Notice of Confirmation. The taxpayer failed to file Notices of Appeal within the 90 day period provided in the Act, and sought an order to extend the time to file appeals for the relevant taxation years under subsection 167(1) of the Act.

The Tax Court of Canada allowed the taxpayer's application on the basis that the conditions in subsection 167(5)(b) of the Act were met. Firstly, the Court held that the taxpayer had demonstrated a *bona fide* intention to appeal as: (i) a separation from his spouse delayed his awareness of the June 2, 2009 Notice of Confirmation from the CRA until August 20, 2009; (ii) just before the expiration of the 90 day period following the date of the Notice of Confirmation, the taxpayer called and informed an officer of the Tax Court of Canada that he wanted to appeal the Minister's reassessments; and (iii) an officer of the Tax Court of Canada sent him an email advising him that he had an additional 365 days within which to appeal.

Secondly, the taxpayer was also able to demonstrate that he was unable to act or to instruct another to act in his name since: (i) the taxpayer was wholly absorbed with successfully defending a criminal charge for failing an alcohol breathalyzer test in September and October of 2009; (ii) the taxpayer battled serious health problems during the remainder of the period; and (iii) the taxpayer was not able to afford a tax lawyer, and believed that he would regain sufficient health to be capable of making the application on his own with the one year following the end of August 2009 (ie. before the expiration of the period of 90 days plus one year following the date of the Notice of Confirmation)

Furthermore, as the application was filed as soon as circumstances permitted and the reassessment would not be adversely affected by granting the application, it would have been inequitable to not allow the extension of time to file the appeal so that the assessment can be dealt with on its merits.

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V. RELIANCE ON PROFESSIONALS

The Courts will generally grant extensions when taxpayers have relied in good faith on professionals, such as accountants and lawyers, to apply to the Courts for an extension of time to file their Notices of Appeal and these professionals have failed to do so. The failure to file on time may be due to: i) illness; ii) negligence or mishandling of the taxpayer's files; iii) miscommunication or misunderstanding; or iv) retention of a new accountant or new legal counsel. However, more recently, the Courts have held that in certain circumstances they may not grant an extension when the failure to file Notices of Appeal is due to negligence on the part of the professionals.

1. *Euro Software Canada Mondial (ESCM) Inc. et al. v. The Queen*, 2004 DTC 2757

In this Tax Court of Canada case, the corporate taxpayers were assessed by the Minister for the taxation year 1996. The taxpayers, who had relied on their accountant for many years, had specifically asked him to file a Notice of Appeal for the 1996 assessment. However, due to serious health problems, the accountant failed to file the Notice of Appeal within the 90-day statutory limitation period. As such, the taxpayers applied to the Court for an extension of time to file their Notices of Appeal.

The Court granted the taxpayers' application for an extension of time finding it not frivolous. The Court found that due to ill health the accountant was precluded from filing the Notices of Appeal on time. The accountant took full responsibility for this failure. In coming to this conclusion, the Court also considered the fact that the taxpayer had no reason not to rely on their accountant and clearly wished to appeal before the expiration of the limitation period.

2. *Seater v. Canada*, [1996] T.C.J. No. 1363

The taxpayer applied to the Tax Court of Canada for an order extending the time for appealing income tax reassessments. The Tax Court of Canada allowed the application and granted the time extension on the basis that the taxpayer fulfilled all the conditions required by subsection 167(5) of the Act. The taxpayer retained financial consultants, who had previously prepared the tax returns, to file objections to the reassessments. The financial consultants failed to file an appeal of the reassessments within the 90 day time limit.

The Tax Court of Canada held that the financial consultants mishandled the situation and took ineffectual steps to file the appeals. The taxpayer, who was a farmer and salesman with no accounting experience, relied in good faith on the expertise of the financial consultants who held themselves out as income tax experts. The taxpayer fully intended to appeal the reassessments. The consultants did eventually take action on the file. Accordingly, the Tax Court held that it was just and equitable under these circumstances to grant the extension of time. The Tax Court held that generally, it is preferable to have a taxpayer's issues decided on their merits, rather than having them dismissed for having missed time limits in the Act.

3. *Gorenko v. The Queen*, 2002 DTC 2025

The taxpayer applied to the Tax Court of Canada for extensions of time to file notices of appeal from assessments for his 1989 to 1995 taxation years. The question at issue before the Tax Court was whether within the time specified by section 169(1) of the Act for appealing, the taxpayer had a *bona fide* intention to appeal and whether given the circumstances of the case, it would be just and equitable to grant the application.

The Tax Court found that the evidence indicated that the taxpayer had instructed his lawyer, on time, to file the requisite notices of appeal. The lawyer also acted diligently by retaining a colleague to act on his behalf. There may have been a misunderstanding between the lawyer and his colleague that resulted in the exceeding of the time limit but that was not due to negligence on either part. It was important to note: (a) that the lawyer confirmed that the taxpayer had acted on time; (b) that the lawyer himself testified to explain the omission; and (c) that, as soon as the omission was found, the application for an extension of time was filed along with the proposed Notice of Appeal. The Tax Court found that the taxpayer and his lawyer had shown a reasonable degree of diligence in the exercise of their rights and duties. Consequently, the Tax Court of Canada granted the taxpayer's application for an extension of time.

4. *Meer v. The Queen*, 2001 DTC 648

In this Tax Court of Canada case, the taxpayer brought an application for extension of time for appealing from the Minister's tax assessments. The taxpayer had filed timely Notices of Objection but did not receive the notice confirming the reassessments until approximately two months after it was sent, as it was sent to an address where he no longer lived. After receiving the Notice of Confirmation, the taxpayer spoke to his accountant and understood that the accountant would file an appeal. However, several months later, the taxpayer found out that no appeal had been filed.

The application was brought four days before the expiration of the time limit prescribed in paragraph 167(5)(a); however, the Minister objected that the application was not made as soon as circumstances permitted, since approximately eight months had elapsed between the taxpayer learning that an appeal had not been filed and the application for extension of time being brought.

The Tax Court granted the taxpayer's application. It held that the taxpayer, believing his appeal to have been filed, may have had no realistic choice but to rely on his professionals. Initially, on the advice of his lawyer, the taxpayer attempted to pursue a settlement with Revenue Canada, but shortly after realizing that his efforts to settle the reassessments were unsuccessful, he retained counsel to deal with the appeal. The delay that took place after the taxpayer retained lawyers to deal with the filing of the application was further justified: the requirement to file "as soon as circumstances permit" should not prevent legal advisers from taking reasonable advantage of statutorily permitted time frames to assist a client in making a proper assessment of the merits of the application and of the appeal itself, while at the same time assisting the client through such difficult times as those the taxpayer was going through at the time.

5. *Chu et al v. The Queen*, 2009 DTC 1298

The taxpayers made applications for extensions of time to file notices of objection to assessments issued by the CRA. The Tax Court of Canada considered whether the requirements pursuant to subsection 166.2(5) of the Act and subsection 304(5) of the *Excise Tax Act* had been met in order for the Court to grant the extensions of time.

The taxpayers were audited by the CRA and hired a tax company to assist them with the audit. The tax company delegated the work to a chartered accountant. The tax company and the accountant continued to work with the taxpayers after the assessments were sent. The accountant repeatedly assured the taxpayers that he

would file the required notices of objections to the assessments and then lied to the taxpayers that he had indeed filed the objections. He continued to lie to the taxpayers about the status of the assessments.

The Tax Court of Canada dismissed the taxpayers' applications for time extensions on the grounds that: (i) it had no jurisdiction to remedy the situation; ii) the remedy went beyond curing a technical defect; and (iii) that the taxpayers' inaction was an overt failure to comply with the legislation. The Tax Court held that it had no jurisdiction to extend the one-year plus 90-day deadline prescribed by Parliament, even if the taxpayer was diligent and faultless. The Tax Court in this case rejected the argument that the clock should only run when the taxpayer (who reasonably believed a required filing had been made) discovered the failure. The Tax Court held that this was a case where the taxpayer was dealing with a firm that had failed in its professional obligations and the Court would not be an insurer against such malfeasance. Instead, the Tax Court suggested the taxpayers could pursue damages against the professionals as their remedy.

6. *Big Bad Voodoo Daddy v. The Queen*, 2010 DTC 1070

The corporate taxpayer in this Tax Court of Canada case filed applications for an order extending the time in which to file Notices of Appeal in respect of the 2003 and 2004 taxation years.

A tax matter was outstanding for the 2003 and 2004 taxation years. When the corporate taxpayer learned about the tax problems in 2008 for the 2003 and 2004 taxation years, the manager of the corporate taxpayer spoke to the accountant who indicated he would rectify the problem. In 2009, the corporate taxpayer discovered that the accountant had not followed up on the issues with the CRA. The taxpayer's accountant: (i) was negligent in providing information requested by the Appeals Division of the CRA; and (ii) hid from the corporate taxpayer that Notices of Confirmation had been issued. The corporate taxpayer and its legal counsel did not know about the Notices of Confirmation as they were sent to the accountant's office and not to the corporate taxpayer. The corporate taxpayer argued that it wanted to appeal and was misled by the accountant, leaving the application for extension of time as it only recourse.

The Tax Court of Canada allowed the application and granted the corporate taxpayer 90 days to file new Notices of Appeal before the Court. The Court held that the corporate taxpayer: (i) never knew about any outstanding tax issues as it never had any opportunity to look at any of the material; (ii) relied in good faith on the expertise of

the accountant; (iii) should have its case decided on merits rather than being dismissed for missing time limits; and (iv) acted reasonably given the circumstances. The Court also found that the corporate taxpayer and its counsel acted immediately upon learning that the accountant had misled them.

7. *Sapi v. The Queen*, 2016 TCC 239

In this Tax Court of Canada case, four taxpayers made applications for orders extending time to appeal the CRA's reassessments. Each of the four taxpayers participated in a donation program in one or more of the years 2001, 2002 and 2003, and claimed corresponding donation tax credits. The donation program was a tax shelter. The taxpayers purchased various products including books, stationary and medical supplies from the program at low prices and donated them at fair market value in order to claim high donation credits. The Minister reassessed the taxpayers and disallowed the donation credits claimed.

The taxpayers relied on the services of PAC Protection Corporation ("PAC"), who in turn engaged a lawyer to handle their tax appeals. PAC was affiliated with a number of donation programs and offered assistance with appeals to taxpayers facing reassessments of donation tax credits. Each of the four taxpayers only became aware that their Notices of Appeal had not been filed when they received notice from CRA that their tax disputes were no longer under objection and claimed payments of the taxes under dispute. They alerted PAC, and PAC attempted to contact the lawyer but failed to reach him. PAC then filed the applications to the Tax Court of Canada to extend time to appeal on behalf of each of the taxpayers. The four applications were filed 126 days, 94 days, 4 days, and 16 days after the 90 day deadline for filing a Notice of Appeal respectively.

The Tax Court of Canada dismissed each of the taxpayer's applications, holding that reliance on an allegedly qualified and competent person is not in itself an acceptable excuse to justify a failure to act within the prescribed time. The Court found that the taxpayers did not adequately follow up with PAC to ensure their Notices of Appeal were filed on a timely basis after initially forwarding their Notices of Confirmation. The lawyer retained by PAC was not subpoenaed to testify as a witness, and there was no other independent evidence, such as an engagement letter, to confirm that he was in fact retained to act on behalf of the Applicants or PAC, or to provide any explanation as to why he did not act on a timely basis in filing the appeals. The Tax Court of Canada drew an adverse inference from the lawyer's failure to testify and concluded that neither PAC nor the lawyer acted with a reasonable degree of diligence in the exercise of their duties. As a result, the Court held that the taxpayers failed to

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demonstrate that it would be just and equitable for the Court to grant their applications pursuant to subparagraph 167(5)(b)(ii) of the Act. Furthermore, subparagraph 167(5)(b)(iii) of the Act requires the applications to be made as soon as circumstances permit. The Court held that if the parties involved had exercised due diligence, they would not have delayed as long as they did in filing the Applications for Extension of Time.