IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Curves for Women New Glasgow Ltd. v. Nova Scotia (Finance), 2006 NSSC 229

Date: 20060811
Docket: ST 256683
Registry: Truro

Between:

Curves for Women New Glasgow Limited

Appellant

v.

The Minister of Finance

Respondent

Judge: The Honourable Justice Hilroy S. Nathanson

Heard: April 24, 2006, in Truro, Nova Scotia

Counsel: Karen Archibald, self-represented for the appellant
Jacqueline E. Scott, Esq., for the respondent

By the Court:

[1] Curves for Women New Glasgow Limited applied for a Nova Scotia new small business tax deduction certificate. The Minister of Finance ruled that it was ineligible. It appealed the Minister's ruling. Upon the hearing of the appeal, the Minister raised as a preliminary issue that the notice of appeal was out of time and, therefore, this Court did not have jurisdiction to adjudicate the appeal. The appellant then applied for an extension of the time for appeal.

[2] Karen Archibald is the sole director, officer and shareholder of Curves for Women New Glasgow Limited. It was incorporated pursuant to the *Nova Scotia Companies Act* on March 25, 2002. It owns and operates Curves franchises in New Glasgow, Sydney and Antigonish. On March 31, 2004, it applied to the Minister of Finance for a certificate of eligibility for the Nova Scotia corporate tax reduction for

new small businesses as described in s. 42 (4), (7) and (12) of the *Financial Measures (2000) Act*, S.N.S. 2000, c. 4. Archibald was informed orally that the company was ineligible. She immediately wrote to the Department of Finance requesting reconsideration of the question of eligibility.

[3] In a letter dated July 8, 2004, Gordon Jacobson, a revenue officer for the Department of Finance, informed the company that it was ineligible for the tax deduction certificate applied for.

[4] On July 14, Archibald wrote to Bruce Hennebury, Executive Director of the Fiscal and Economic Branch, to request reconsideration of the company's eligibility. In a reply dated August 31, Hennebury stated that he had reviewed the file and pertinent information relating to the application and, after careful consideration, advised that he was in agreement with the original decision reached by the staff of the Department that the company did not meet all the eligibility requirements for the program and, therefore, was ineligible for the tax deduction.

[5] Archibald wrote again to Hennebury on February 21, 2005, stating that she did not fully understand his position and therefore could not present an argument should she decide to appeal. She requested clarification of his position. This letter was responded to on March 2, by Nancy McInnis Leek, Executive Director, Fiscal and Economic Policy, who referred to "sec. 7" and then briefly commented as to how it applied to Archibald's company. I interpret Ms. Leek's reference to "sec. 7" as a reference to s. 42 (7) of the *Financial Measures Act (2000), supra*.

[6] Archibald replied to Leek in a lengthy letter dated April 7, in which she requested that Ms. Leek review the "proposed ineligibility ... under the new business tax holiday prior to a formal appeal." In a letter dated June 16, Leek acknowledged receipt of "the company's appeal" of the Department's decision to deny eligibility, stated that the Department had once more reviewed the application, and stood by the original decision that the company did not meet all the requirements for eligibility.

[7] The company filed a notice of appeal on October 13, 2005:

> TAKE NOTICE that pursuant to sections 42 and section 64, the appellant appeals to the Supreme Court of Nova Scotia from the decision of the Minister of Finance dated the 16th day of June 2005 that the appellant in [sic, is] not eligible for a deduction under the Nova Scotia Corporate Tax Holiday.

[8] Neither party referred the Court to the existence of a prescribed form of notice of appeal. In the circumstances, I accept that the notice of appeal filed on October 13 fulfills the requirements of the provisions of the *Financial Measures Act (2000), supra*, which authorize a particular method of appeal to the Supreme Court of Nova Scotia:

> 2 (1) In this Act,
>
> (d) "Court" means the Supreme Court of Nova Scotia;
>
> 64 (3) An appeal to the Court shall be instituted by serving upon the Minister of Finance a notice of appeal in duplicate in prescribed form and by filing a copy thereof with the registrar of the Court for the county or district in which the taxpayer resides.

[9] The principal issue is whether the notice of appeal was, and is, out of time.

[10] S. 64 of the *Financial Measures Act (2000), supra,* incorporates by reference s. 169 of the *Income Tax Act (Canada).*

[11] S. 169 (1) of the Federal *Act* establishes the time for appeal of an assessment, as follows:

> "... but no appeal under this section 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."

[12] Thus, the 90 day period for appeal established in s. 169 (1) of the Federal *Act* commences on the day notice of confirmation of assessment is mailed to the taxpayer.

[13] I do not accept Archibald being informed orally of the company's ineligibility as a proper notice of assessment. The only mention of it is found in Archibald's application letter of March 31, 2004, wherein she refers to a telephone conversation of the same date with Gordon Jacobson, a revenue officer with the Department of Finance, who recalled that the company was ineligible after an application made the previous year. None of this was confirmed. Moreover, I find it most unlikely that the

Department of Finance would make a ruling of ineligibility in such an informal manner.

[14] Archibald requested reconsideration. I find Gordon Jacabson's letter of July 8, 2004, to be a notice of assessment contemplated by the statutory provisions. This is confirmed by Bruce Hennebury's letter of July 14 in which he confirmed "the original decision". Archibald then requested clarification, and Nancy McInnis Leek responded on March 2, briefly explaining how the statutory provision applied to the company. Archibald requested a review, and Leek apparently treated the request as an appeal, ruling in the letter of June 16 that the Department stood by the original decision. I find that both Leek's letters of March 2 and June 16 can constitute confirmations of assessment. In making this finding, I note that s. 165 of the Federal Act is not incorporated by reference into the *Financial Measures Act (2000)*, *supra*, and that the latter does not include an interpretation of the phrase "confirmation of assessment".

[15] Therefore, I find that the 90 day period for appeal commenced on June 16, 2005, at the latest. In such case, the period terminated on September 14, 2005.

[16] Because the notice of appeal was filed on October 13, it was out of time pursuant to s. 169(1) of the *Federal Act.*

[17] A second issue is whether the Court ought to extend the time for appeal beyond 90 days.

[18] S. 67 of the *Financial Measures Act (2000), supra,* incorporates by reference s. 167 of the *Federal Act* which authorizes the Court to extend the time for appeal set out in s. 169(1) of the *Federal Act*, as follows:

> 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.
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> (2) An application made under subsection 167(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.

[19] Archibald did not make the application for extension of time for appeal on behalf of the company until she did so during the course of oral submissions at the end of the appeal hearing. Thus, the company failed to fulfil the requirements of ss. 167(2), (3) and (4) of the *Federal Act*. In addition, I am not satisfied that the company made the application as soon as circumstances permitted as required by sub-sec. (5)(b)(iii). Although obviously familiar with the statutory requirements, Archibald repeatedly sought reconsiderations, clarification and review, despite the fact that the governing statutory provisions did not authorize such steps. It may be that she thought that, by doing so, the time for appeal set out in s. 169(1) of the Federal *Act*

would thereby be extended. Or it may be that she was simply negligent. We shall never know because she did not give any reason for delaying filing of an appeal. She did testify that she always intended to appeal, but there is no confirmation of this on the record. The only mention of the subject of appeal on the record is found in her letter to Leek of April 7, and that hardly qualifies as confirmation of a continuing intent to appeal. In any event, she wasted the time given for appeal needlessly and uselessly.

[20] In the circumstances, I am unable to conclude that it would be just and equitable to grant the application for an order extending the time for appeal.

[21] This conclusion is consistent with a line of cases which includes the following: **Di Modican**, [2002] 1 C.T.C. 2299; and **106850 Canada Inc.**, [2001] G.S.T.C. 141.

[22] In her submissions to the Court, Archibald also relied upon s. 3(2) of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258. By virtue of s. 3(2)(a), this provision applies to actions as defined in s. 2(1) and does not apply to an appeal of a Minister's decision.

[23] The application for extension of time is refused. The notice of appeal was, and is, out of time. The Court does not have jurisdiction to adjudicate the appeal. If the Minister seeks costs, the Court will hear the parties as to quantum.

J.