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Notices of Assessment, Impossibility, and the Perils of Mail Service

There are countless unbreakable commandments in Canadian tax theology. The most fundamental rule is: "Thou shalt pay tax." Another? "Canada's tax system is self-reporting", with all the associated responsibilities to be borne by the taxpayer. A third, but by no means final, rule is: "An extension of time to file an objection to or appeal from an assessment cannot be granted if more than one year and 90 days have elapsed since the assessment was issued." Charles Lam found himself on the wrong side of that last commandment. [1]

According to the *Excise Tax Act* ("ETA"),[2] a taxpayer who objects to an assessment has 90 days after the notice has been sent to file an objection.[3] Where an objection has not been filed within those 90 days, the taxpayer can apply to the Minister for an extension of time to submit an objection.[4] If the Minister refuses to allow an extension, or more than 90 days have passed since service of the application and the Minister has not notified the taxpayer of the decision, the taxpayer can make an application for an extension of time to the Tax Court of Canada.[5] This application must be filed within one year of the expiration of the original 90 days to object to the assessment. In addition, the taxpayer must demonstrate to the Court that:

- within the time limit for objecting,
  - the taxpayer was **unable** to act or to give instructions to act, or
  - the person had a ***bona fide* intention** to object to the assessment (or give instructions to make the objection),
- it would be **just and equitable** to grant the application, and
- the application was made **as soon as circumstances permitted**.[6]

Perhaps most importantly for Mr. Lam, according to the ETA, any-

[1] *Lam v. The King*, 2025 TCC 15. While *Lam* is a GST/HST case, the facts and law discussed therein apply as much to income tax procedure as they do to GST/HST.

[2] Similar rules in the *Income Tax Act* (Canada) can be found at sections 165, 166.1, 166.2, and 248(7).

[3] ETA s. 301(1.1).

[4] ETA s. 303(1).

[5] ETA s. 304(1).

[6] ETA s. 304(5).

thing sent by first class mail or its equivalent is **deemed to have been received** by the person to whom it was sent **on the day it was mailed**.[7]

Several years ago, Mr. Lam purchased a property in Canada ("Rebate Property") and submitted an application for the GST/HST new housing rebate, which he received in the amount of $22,296.77. However, the CRA later issued a Notice of Assessment ("NOA") dated February 26, 2016, disallowing the rebate and charging $1,040.10 of interest (resulting in a total of $23,336.37 owed to the CRA).

When the NOA was sent to him at the Rebate Property, Mr. Lam was living abroad. He did have a tenant who lived at the Rebate Property, and Mr. Lam delegated the responsibility to his tenant of collecting and forwarding his mail. Unfortunately, the tenant neglected to forward the NOA, and it was left amongst the junk mail.

Mr. Lam returned to Canada in 2017. According to him, one day at the Rebate Property he was accosted by a man who said he owed taxes. Like the responsible taxpayer he is, Mr. Lam contacted the CRA by telephone to inquire about this, but the agents could not locate any record of outstanding taxes relating to his social insurance number. In 2018, Mr. Lam was assured by the CRA that no action would be taken against him to collect any tax debts.

Finally, in 2024, Mr. Lam discovered the NOA in a pile of his old mail. While the time to submit a Notice of Objection ("NOO") to the CRA had long passed (almost seven years), Mr. Lam filed one anyway on March 20, 2024. This was duly rejected by the CRA. Mr. Lam persisted in his objection and applied to the Tax Court of Canada to extend the time to file a NOO ("Application").

In support of his Application, Mr. Lam made the following arguments:

- He did not discover the NOA until March 2024;
- The encounter in 2017 frightened Mr. Lam and stopped him from seeking further information or taking action;
- The CRA agents made an error, confusing Mr. Lam's social insurance number and business registration number, which hid the outstanding assessment;
- He was not present in Canada when the NOA was sent;
- His tenant was negligent in not forwarding the NOA to him or bringing it to his attention; and
- The years' long gap between Mr. Lam's contact with the CRA regarding tax liabilities and any action by the CRA caused Mr. Lam to believe there was no issue of outstanding tax.

Despite his sympathetic circumstances, Mr. Lam's Application was dismissed. As the Tax Court observed in his case, "Once the Minister proves, on balance, the NoA has been sent, no obligation or requirement exists that the taxpayer actually receive it…"[8] Mr. Lam had until May 23, 2016, to file his NOO with the CRA. When he missed that date, his Application deadline was May 23, 2017. When that date passed without Mr. Lam filing his Application, the Court's discretion or ability to grant any relief irrevocably and unequivocally "dies".

While Mr. Lam's actions and explanation appear reasonable, there is no excuse or exception for "reasonableness" in these matters. Unlike director's liability for a corporation's outstanding taxes, there is no due diligence defence.[9] The legislation and jurisprudence cited in *Lam* appears conclu-

[7] ETA s. 334(1).

[8] *Lam*, para. 6.

[9] ETA s. 323(3); *Income Tax Act* (Canada), s. 227.1(3).

sive, but could common law and equity provide a resolution favourable to taxpayers who find themselves in situations similar to the one confronting Mr. Lam?

In *Canada v. Louisbourg SBC*,[10] the taxpayer argued it had not received the two GST/HST assessments in question and, consequently, no objections were filed within the time prescribed. The Federal Court of Appeal overturned the Tax Court's decision allowing an extension of time, but provided a sliver of hope: "The respondent could clearly attempt to establish that it had been **impossible to act**, but it also had to demonstrate that the error was not the result of its own negligence."[11]

If Mr. Lam presented the Tax Court with a situation where an assessment was mislaid by an agent of the Crown—perhaps mistakenly delivered by Canada Post to a neighbour—would that be a case of impossibility to act and provide grounds for an extension of time?

According to the Supreme Court of Canada in *Cité de Pont Viau v. Gauthier Mfg. Ltd.*, a taxpayer in these situations does not have to prove the action was "absolutely impossible", only that it was "relatively impossible": "It is impossible to specify in advance every situation that might constitute a relative impossibility. Each case must be decided according to its own particular circumstances, since the **impossibility in question is really one of fact**."[12]

The Supreme Court concluded, "In the case at bar foreclosure is due solely to the error of appellant's counsel. The party itself acted with diligence and I do not see what more it could have done in order to 'act sooner'."[13] Furthermore, "… a real impossibility, 'in fact', cannot be denied because of a fiction whereby the possibility to act of the agent would be held to be that of the principal."[14]

Returning to Mr. Lam's case, assuming the Tax Court would accept that the defence of impossibility to act applies to a failure to file an application for extension, how impossible was it for Mr. Lam to discover and act upon the NOA? The mail was properly delivered to his residence and, due to an oversight by the tenant (his agent), Mr. Lam did not personally receive the NOA until years later. Whether the tenant left a pile of junk mail and assorted letters moldering somewhere in the Rebate Property for years or delivered it directly to Mr. Lam upon his return is unclear from the limited facts provided in the judgment. Nor is it clear whether Mr. Lam returned to Canada before or after the expiry of the limitation period.

Should Mr. Lam have arranged with Canada Post to forward his mail to his address overseas? Regardless, it was reasonable for Mr. Lam to have missed the NOA, but was it *impossible* (or nearly impossible) for him to discover the NOA and pursue timely action?

Impossibility to act may provide a path to justice in some circumstances, but it is not a silver bullet. Time is not on Mr. Lam's side. With so many years having passed, the question as to whether it would be "just and equitable"[15] to grant the extension presents a seemingly insurmountable barrier and Mr. Lam (who has not appealed the Tax Court's decision) might be out of luck.

[10] 2014 FCA 78.
[11] *Louisbourg SBC*, para. 14. Emphasis added.
[12] *Cité de Pont Viau*, p. 526. Emphasis added.
[13] *Cité de Pont Viau*, p. 527.
[14] *Cité de Pont Viau*, p. 527.
[15] ETA s. 304(5)(*b*)(ii).