



What to do when deadlines pass

Big Bad Voodoo Daddy



Marc Weisman

Many readers have asked me to discuss matters that arise in the ordinary

course of tax practice, both legal and accounting. Sometimes professional advisors discover mistakes made by their predecessors and must seek a remedy on their clients' behalf. This topic arose from a file referred to me by an accountant, Steven B., who was reviewing the file of a new corporate client.

In his review, Steven B. discovered that the Canada Revenue Agency (the "CRA") had sent a Notice of Confirmation (the final notification before a case is handed off to Tax Court) to the client's former accountant. The former accountant had not notified the client about the Notice of Confirmation and appeared to have misguided the client into thinking the issue under objection had been fully addressed. The 90-day deadline to file a Notice of Appeal had expired. Steven's question to me was whether the client could request an

extension on the deadline for filing a Notice of Appeal.

Section 167 of the *Income Tax Act* (Canada) allows the Minister to grant a taxpayer an extension to file a Notice of Appeal if:

1. the application is made within one year after the deadline for appealing,
2. the taxpayer demonstrates that the taxpayer:
 - a) was unable to act or instruct another to act in the taxpayer's name, or
 - b) the taxpayer had a bona fide intention to appeal,
3. given the reasons set out in the application and the circumstances of the case, it would be 'just and equitable' to grant the application,
4. the application was made as soon as circumstances permitted, and
5. there are reasonable grounds for the appeal.

The Tax Court of Canada recently considered a similar situation and the application of the 'just and equitable'

principle in *Big Bad Voodoo Daddy v. The Queen* ("Voodoo Daddy") 2010 TCC 12.

The US jazz band, Big Bad Voodoo Daddy, had retained an accountant

to handle their Canadian tax matters. The accountant failed to notify the band that the CRA had



sent Notices of Confirmation for assessments in respect of the 2003 and 2004 taxation years, failed to follow up with the CRA about them, and misled the client into thinking that all outstanding matters in respect of the issues under objection had been fully addressed. Upon later discovering that this was not the case, the taxpayer retained tax counsel and immediately filed an application for an extension of time to file Notices of Appeal with the Tax Court of Canada.

Their application for an extension of time to file Notices of Appeal was granted for the following reasons:

- They had relied on the advice of a firm that held itself out as an expert in tax matters;

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- It is preferable to have a taxpayer's issues decided on their merits rather than have them dismissed for having missed a deadline;
- The circumstances could not have allowed the taxpayer to know much more than it did as all correspondence regarding the reassessments and Notice of Confirmation were between the taxpayer's accountant and the CRA; and
- The taxpayer retained legal counsel almost immediately upon learning that no action had been taken by the accountant after deliberately misleading them, and filed an application for an extension of time to file Notices of Appeal.

All of these factors have been considered in previous tax jurisprudence, and the judge held that they applied in this case, commenting that the taxpayer should not be penalized because their accountant "fell asleep on the file." The taxpayer was given 90 days to file Notices of Appeal.

This case holds two messages for professional advisors:

- Act quickly on discovering a mistake or negligence by a predecessor advisor.
- It is possible to get deadlines extended if taxpayers can demonstrate that circumstances prevented them from acting sooner.

Do you have a question about a tax matter, or a topic that you would like to see discussed here? Contact Marc Weisman at 416 777 5455.

Torkin Manes' Tax Group has significant experience in tax planning and dispute resolution matters. Marc Weisman's practice focuses on corporate and personal income tax and commodity tax planning, and dealing with the Canada Revenue Agency and provincial tax authorities. Marc works with more than 500 accountants, financial advisors and lawyers on a variety of tax and trusts matters on behalf of their clients. Marc can be reached at (416) 777-5455 or mweisman@torkinmanes.com.

Please contact members of our Tax, Business, Trusts and Estates, and Financial Services & Corporate Recovery Groups for more information.

Risa Awerbuck, Trusts and Estates Law
416 777 5425 | rawerbuck@torkinmanes.com

Allan S. Bronstein, Business Law
416 777 5369 | abronstein@torkinmanes.com

Howard Burshtein, Business Law
416 777 5456 | hburshtein@torkinmanes.com

Barry A. Cohen,
Financial Services and Corporate Recovery
416 777 5456 | hburshtein@torkinmanes.com

Jeffrey I. Cohen, Business Law
416 777 5422 | jcohen@torkinmanes.com

Matthew Tevlin, Business Law
416 777 5401 | mtevlin@torkinmanes.com

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