

# Neglect or Carelessness by Representative no Reason to Extend Time - Sas Ansari

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## Neglect or Carelessness by Representative no Reason to Extend Time

*Sapi v The Queen*, [2016 TCC 239](#)

This was an application to extend the time within which a Notice of Appeal may be filed with the TCC by persons who took part in a donation tax scheme by .

### FACTS

The parties all forwarded CRA correspondence to PAC who then took no action. The Applicants argued for an extension of time on the basis that their agent believed that the Agent's legal representative had filed an appeal, but this was not correct (para 5).

The parties agreed that the application was made within the one year period and that there are reasonable grounds for the underlying appeal of the donation agreement.

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### ANALYSIS

The TCC is guided by section 167 of the [Income Tax Act](#) when an applicant requests an extension of the time to file a Notice of Appeal.

The Court referred to the decision in *Mehta v. R.*, [2011 TCC 38](#), where Justice Miller granted an application of the basis of the harm of disallowing the application being greater to the applicant than the respondent. However, this Court considered that balance to be a relevant but not a determinative factor as the balance almost always favours the applicant (para 23).

The Court also referred to *Gorenko v. R.*, [2002 D.T.C. 2025](#), where two lawyers failed to file a NOA due to a miscommunication and remedied the problem within 2 days of discovering it. The Court held that in *Gorenko* both lawyers testified and were found to have acted with a reasonable degree of diligence, while no such evidence existed in this case (para 25). The Court drew an adverse inference from the APplicant's failure to call or subpoena the lawyer involved.

The Court agreed that the applications should be dismissed because:

- The Applicant bears the onus of establishing each criterion in section 167;
- Failure to meet any one of the conditions is fatal to the application - *Dewey v. Canada*, [2004 FCA 82](#); *Kolmar v. R.*, [2003 TCC 829](#)
- A bona fide intention to appeal within 90 days is not satisfied where the taxpayer merely forward correspondence to an agent without following up or taking steps to ensure an appeal was filed - *Sampson v. R.*, [2012 TCC 156](#)
- The failure of an Applicant to appear and testify as their inability to act or instruct another to act is fatal to an application (para 23) - *Hamilton v. R.*, [2013 TCC 192](#)

The Court held that in this case, the failure of the agent or lawyer to file a NOA is not a just and equitable reason to grant the extension of time. There was insufficient evidence to establish that the agent or lawyer acted with reasonable diligence (para 37). There was also no evidence of the Applicants actively monitoring the status of their case, or that there was evidence of an insufficient number of counsel in their jurisdiction to take on the matter (para 37).

The failure of an agent to file a NOA is not in itself sufficient to grant an extension of time - *Carrier v. Canada*, [2005 TCC 182](#). The Court concluded at para 44:

[44] Overall, it is my view that each of the Applicants provided their respective Notice of Confirmation to PAC on a timely basis, and then simply trusted PAC to attend to their appeals without adequately following up with PAC to ensure their appeal was so filed. Unfortunately, their trust in PAC was misplaced, as PAC did not ensure their appeals were filed on a timely basis or take adequate steps in doing so. While PAC has attempted to deflect blame to Mr. De Bartolo, who did not testify, it is my view that any neglect or carelessness by either PAC or any counsel it engaged to file the appeals in question is not a just and equitable reason to grant these four Applications.

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