

# Relevant Factors in Setting Aside TCC Judgment

## Relevant Factors in Setting Aside TCC Judgment Dismissing Appeal for Failure to Appear at Status Hearing

*Izumi v The Queen*, [2014 TCC 108](#)

The court was asked to exercise its discretion under the [Tax Court of Canada Rules \(General Procedure\)](#) Section 12 and Subsection 140(2), to extend the time to apply for an order under 140(2) and to grant an order under 140(2) setting aside the judgment.

### FACTS

The taxpayer was reassessed and filed a Notice of Appeal through his then counsel. He then moved and notified the CRA of his new address, but did not notify the Tax Court of the change in address. The TCC issued a Notice of Status Hearing and sent the notice to the Taxpayer's former address. At this hearing the TCC dismissed the Appellant's appeal for failing to appear at the status hearing.

After this, the Appellant contacted his accountant to ask about the status of the appeal and was referred to a law firm to assist with the legal issues. The Appellant then filed a motion to set aside the TCC judgment dismissing the appeal.

### ANALYSIS

Rule 140(2) grants the TCC discretion to set aside or vary a Judgment or Order against a party who failed to attend a hearing where an application is made within 30 days of the pronouncement of the Judgment or Order. In this case, the application was brought 18 months after the Judgment, and the court was asked to extend the time provided under 140(2) by exercising its discretion under section 12 of the *Rules*.

The factors generally considered in applications for extension of time were set out in [Tomas v The Queen, 2007 FCA 86](#), to include:

- A continuing intention to pursue the appeal
- the appeal having some merit
- there being no prejudice to the respondent arising from the delay
- a reasonable explanation is given for the delay

The principles to be considered in setting aside a Judgment were discussed in [Farrow v The Queen, 2003 TCC 885](#), as:

- the application should be made as soon as possible after the judgment comes to the applicant's knowledge
- the supporting affidavit should explain the delay

- the affidavit must disclose an arguable appeal - a low contextual threshold not requiring testimony or evidence demonstrating a *prima facie* case - [GMC Distribution v. The Queen, 2009 TCC 287](#)

The taxpayer stated he believed that his appeal was being held in abeyance pending the outcome of related tax case. This was a reasonable belief in the context. The Court also accepted the mistaken belief of having provided the new address to the TCC.

When considering the prejudice question, the "overriding consideration" should be the relative effect on the persons that will be affected. Here, the Responded did not appear to be prejudiced.

The court, in granting the motions, concluded:

[18] [...] The Appellant had done everything expected of him in relation to keeping the Court advised with respect to his address, and was not intentionally avoiding any notice of matters with respect to his tax appeal. The Appellant when he noticed that he had received correspondence from the Respondent with respect to his bill of costs acted quickly and paid the bill of costs forthwith. The prejudice to the Appellant if the appeal does not proceed is significant.

[19] [...] I am satisfied that the Appellant took the appropriate steps in the process, although he could have done it in a little more timely fashion. His conduct was certainly not egregious behaviour and I believe to deprive him of the ability to have his case decided on the merits would most certainly be unduly harsh. [...]

- **Sas Ansari, JD LLM PhD (exp)**

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