Setting Aside Judgment Re Discontinuance - Sas Ansari

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Stover v The Queen, 2016 TCC 235

The Taxpayer filed a motion, pursuant to paragraph 172(2)(a) of the *Tax Court of Canada Rules (General Procedure)* to set aside a "deemed" judgment that dismissed his appeal, seeking to have the appeal reinstated.

NOTE: This motion appears to have been doomed to fail due to the presentation of the error as one of law and not of fact. The evidence seems to suggest that the Taxpayer had made an error of fact, and it is unclear why counsel presented the matter to the court as an error of law.

FACTS

The taxpayer was assessed in 2008, objected in 2013, and obtained an order from the TCC extending the time to file an appeal from a reassessment in 2014, and due to a misunderstanding with his lawyer had that lawyer send a letter to the Registrar indicating that the taxpayer would not proceed with the appeal in Dec 2015. The taxpayer then retained a tax consultant who discovered, after collection action was taken, that the appeal was discontinued.

The appellant and the lawyer who committed the error both filed affidavits to this effect in support of the motion.

ANALYSIS

An appellant's written notice to the TCC of a discontinuance results in a deemed dismissal of the appeal as of the date the Court receives the letter (*Tax Court of Canada Act*, s 16.2(2)).

The taxpayer applied under paragraph 172(2)(a) of the *Rules*, saying that he did not appreciate that he cold have applied under the taxpayer relief provisions while continuing with his appeal (para 22).

The court referred to three cases where section 172 of the Rules was considered:

- In *Bogie v. R.*, [1998] 4 C.T.C. 195, The taxpayer discontinued an appeal on the advice

of his solicitors, this advice being based on errors committed by the taxpayer's accountant. The Court did not set aside the discontinuance and stated that a taxpayer cannot distance himself from erroneous advice of his accountant where the taxpayer could have discovered the true facts by exercising due diligence - "in the absence of fraud, the conduct of the taxpayer embraces the conduct of his professional advisors" (para 24);

- In *Scarola v. Minister of National Revenue*, 2003 FCA 157, also referred to the lack of allegations of fraud in refusing to apply Rule 172 (para 25); and
- In *Rutledge v. R.*, 2004 FCA 88, referred to both a lack of fraud and the error being based on facts that could have been discovered sooner through the exercise of due diligence in restoring a deemed dismissal of a taxpayer's appeal (para 26).

The Court, in this case, referred to the lack of allegations of fraud, the ease with which information about taxpayer relief is available, and no new facts being discovered after the deemed judgment (paras 27-28). Quite correctly, the Court noted that the taxpayer had committed an error of law, resulting from a misunderstanding of the process - *Mujagic v. Kamps*, 2015 ONCA 360 (CanLII).

The Court dismissed the motion, despite the taxpayer's sympathetic circumstances, preferring that the finality of court decisions and efficiency of the administration of justice should prevail (para 30).

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Back To Top OR Home

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