

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160128

Docket: A-121-15

Citation: 2016 FCA 33

**CORAM: TRUDEL J.A.
STRATAS J.A.
RYER J.A.**

BETWEEN:

ABDUL GHAFAR

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on January 28, 2016.
Judgment delivered from the Bench at Toronto, Ontario, on January 28, 2016.

REASONS FOR JUDGMENT OF THE COURT BY:

TRUDEL J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on January 28, 2016).

TRUDEL J.A.

[1] In a decision cited as 2015 TCC 46, the Tax Court of Canada (Graham J.) dismissed Mr. Ghaffar's application under subsection 140(2) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, (Rules), to set aside a previous judgment of the Tax Court dismissing his appeal for failure to appear at a status hearing. Mr. Ghaffar's lawyer, at the time of that status

hearing, neither informed him of the hearing nor appeared on his behalf, and Mr. Ghaffar did not know about it until he was alerted to the judgment dismissing his appeal.

[2] Graham J. dismissed the application on the basis that it was not submitted within thirty days of the judgment, as provided in subsection 140(2) of the Rules, and in his view, Mr. Ghaffar did not satisfy the test to allow an extension of time. It would have been necessary to determine that an extension of time is warranted before proceeding to consider the application on its merits.

[3] Whether to extend time is a discretionary decision to be made in accordance with a four-factor test, enunciated by the Tax Court at paragraph 4:

- a) a continuing intention to pursue the appeal;
- b) that the appeal has some merit;
- c) that no prejudice to the Respondent arises from the delay; and
- d) that a reasonable explanation is given for the delay.

[4] The Tax Court found that while Mr. Ghaffar's tax appeal has merit, and although he had a reasonable explanation for failing to attend the status hearing, he nonetheless failed to satisfy each of the other elements. In particular, Mr. Ghaffar demonstrated a lack of intention to pursue his appeal by failing to meet his undertakings, the respondent would suffer irreparable prejudice, and Mr. Ghaffar was unable to provide a reasonable explanation for the delay in bringing the application to set aside the judgment dismissing his appeal, at least 16 months after the deadline for such an application (Tax Court reasons at paragraphs 15 and 20).

[5] We do not accept Mr. Ghaffar's submissions that Graham J. applied the incorrect legal test or that his approach was unjustifiably rigid. The test he applied is consistent with the authorities on which Mr. Ghaffar relies (*Izumi v. The Queen*, 2014 TCC 108; *GMC Distribution Ltd. v. The Queen*, 2009 TCC 287), setting out the same four factors.

[6] In any event, Graham J. followed the binding authority of this Court (*Tomas v. Canada*, 2007 FCA 86, [2007] 3 C.T.C. 75), and his reasons demonstrate careful consideration of the relevant factors and the evidence underlying his decision. Even if we were to accept Mr. Ghaffar's argument that Graham J. erred in his assessment of prejudice to the appellant relative to that of the respondent, this would not outweigh the other considerations or justify our interference with his overall conclusion.

[7] The appeal will therefore be dismissed with costs.

"Johanne Trudel"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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MAJESTY THE QUEEN
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STRATAS J.A.
RYER J.A.
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