

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190524

**Dockets: A-420-17
A-125-18**

Citation: 2019 FCA 160

**CORAM: NADON J.A.
WEBB J.A.
WOODS J.A.**

BETWEEN:

YEGHIA KIBALIAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on May 1, 2019.

Judgment delivered at Ottawa, Ontario, on May 24, 2019.

REASONS FOR JUDGMENT BY:

WOODS J.A.

CONCURRED IN BY:

**NADON J.A.
WEBB J.A.**

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REASONS FOR JUDGMENT

WOODS J.A.

[1] The appellant has instituted income tax appeals in the Tax Court of Canada with respect to reassessments for the 2006 - 2010 taxation years, inclusive. In this Court, the appellant appeals from two orders issued by the Tax Court during the pre-trial process.

[2] The first order (the December Order), issued on December 13, 2017, required the appellant to pay an outstanding costs award in the amount of \$7,500. Further, the last paragraph of the order provided:

Should the appellant not comply with this Order, the appeal will be automatically dismissed without further notice or formality and with additional costs.

[3] The December Order was not requested by the respondent and it does not appear as though the parties were provided an opportunity to make submissions with respect to its terms prior to its issuance.

[4] By way of background, the matter of outstanding costs was brought to the attention of the Tax Court by the respondent who was replying to the Court's standard request to advise whether the appeal should be set down for hearing. In its status report, the respondent informed the Court that discoveries were not complete and that the appellant had not paid an outstanding costs award. The respondent submitted that "the appeals should not be set down for trial until a period of at least 15 days after [the discoveries are complete]" (appeal book, p. 257).

[5] The second order (the April Order) was issued on April 13, 2018 pursuant to a motion brought by the appellant for a stay of the Tax Court proceedings pending an appeal of the December Order. The Tax Court dismissed the motion on the ground that there was nothing to stay since the appeals were automatically dismissed when the appellant failed to pay the amount owing by the deadline of January 8, 2018.

[6] For the reasons below, I am of the view that there is no reason to interfere with the April Order, but that the last paragraph of the December Order should be set aside.

[7] With respect to the December Order, the only reason provided by the Court for issuing an order with a conditional dismissal of the appeal was the following recital:

WHEREAS counsel for the respondent has reported to the Court that the appellant did not comply with this Court's Amended Order of May 1, 2017, awarding costs to the respondent in the sum of \$7,500.00, payable forthwith;

[8] In my view, this order raises two issues in this appeal:

- Were there sufficient grounds for the Court to order a dismissal of the appeal if the costs were not paid by January 8, 2018?
- Was the appellant provided with a sufficient opportunity to be heard?

[9] The December Order was a drastic step for the Court to take because it ultimately resulted in a dismissal of the appellant's appeal in the Tax Court without the appeal being heard on the merits. However, the jurisprudence from this Court has recognized that the Tax Court has "the implied jurisdiction to ensure that its Orders are obeyed and to prevent the abuse of its process," and that "[i]n an appropriate case, non-compliance with Court Orders may warrant the severe remedy of dismissing an appeal" (*Roper v. The Queen*, 2013 FCA 245, 2013 D.T.C. 5169, at para. 7).

[10] Even on a highly deferential standard of review, I have some doubt as to whether this drastic step was warranted in these particular circumstances. It is not necessary to decide this

question, however, as there is another reason why the automatic dismissal provision should be set aside.

[11] As mentioned earlier, the December Order was issued on the Tax Court's own initiative. The respondent did not seek this relief and no opportunity was provided for submissions regarding its terms. This was a breach of the principle of natural justice, which includes the right to be heard. The breach warrants the intervention of this Court and the last paragraph of the December Order should be set aside for this reason (*The Queen v. Nunn*, 2006 FCA 403, 2007 D.T.C. 5111, at para. 26).

[12] As for the April Order, there is no reason for this Court to intervene. The Tax Court was correct to conclude that there were no proceedings to stay because the appeals had been automatically dismissed by the time the April Order was issued and the Tax Court could not overturn the December Order.

[13] Finally, I would briefly comment that many of the appellant's submissions in this Court were not with respect to the two orders under appeal but related to the original costs award.

[14] The Tax Court had ordered costs to be paid by the appellant following the appellant's request to conduct late discoveries, and for a consequent adjournment of the hearing. The request was not opposed by the respondent. The Court granted the adjournment with very high costs in the amount of \$7,500, notwithstanding that the adjournment had not been opposed and no costs were sought. Further, there was no invitation for the parties to make submissions on costs.

[15] Based on the appellant's submissions in these appeals, it seems clear that the root of the appellant's concern is the \$7,500 costs award. However, the appellant did not appeal the original costs order and it is not before this Court.

[16] Nevertheless, I would make a brief comment on the practice of awarding costs and would refer to an excerpt from this Court's decision in *Exeter v. Canada (Attorney General)*, 2013 FCA 134, 445 N.R. 356 which considers the awarding of costs that have not been requested:

[12] The general principle is that a court may not award costs when costs were not requested: see, for example, *Balogun v. Canada*, 2005 FCA 350. To award costs in these circumstances would be a breach of the duty of fairness because it would subject the party against whom they are awarded to a liability when the party had had no notice or an opportunity to respond: see, for example, *Nova Scotia (Minister of Community Services) v. Elliott (Guardian ad litem of)* (1995), 141 N.S.R. (2d) 346 (N.S.S.C.) at para. 5.

[17] I would also say that a judge, when granting costs of a punitive nature, which at first glance certainly appears to be the case here, is duty bound to provide a reasonable explanation as to why such costs are being granted. Failure to provide such an explanation may well not pass muster should an appeal be taken thereof.

[18] For the reasons above, I would allow the appeal of the December Order and set aside the last paragraph of the order. I would dismiss the appeal of the April Order.

[19] As for costs, although the appellant was successful for the most part in these appeals, I would not order costs as the appellant did not seek them.

“Judith Woods”

J.A.

“I agree.
M. Nadon J.A.”

“I agree.
Wyman W. Webb J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-420-17 and A-125-18

STYLE OF CAUSE: YEGHIA KIBALIAN v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 1, 2019

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: NADON J.A.
WEBB J.A.

DATED: MAY 24, 2019

APPEARANCES:

Yeghia Kibalian ON HIS OWN BEHALF

Isida Ranxi FOR THE RESPONDENT
H. Annette Evans

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