

Date: 20030214

Docket: A-158-01

Neutral citation: 2003 FCA 82

CORAM: RICHARD C.J.

**DESJARDINS J.A.**

**ROTHSTEIN J.A.**

BETWEEN:

JAMES KENNETH KERR

pellant

Ap

and

HER MAJESTY THE QUEEN

ondent

Resp

Heard at Ottawa, Ontario, on February 12, 2003.

Judgment delivered at Ottawa, Ontario, on February 14, 2003.

REASONS FOR JUDGMENT

BY:

RICHARD C.J.

CONCURRED IN

BY:

DESJARDINS J.A.

ROTHSTE

IN J.A.

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REASONS FOR JUDGMENT

**RICHARD C.J.**

[1] On this appeal, the Court is called upon to determine whether there are any grounds to interfere with the decision of the Tax Court of Canada to dismiss the appellant's appeal of his assessment for the 1995 taxation year.

[2] The appellant commenced the proceeding in this Court by way of judicial review. Since he is appealing a final judgment of the Tax Court of Canada under its general procedure, the appropriate way to proceed is by way of an appeal. We have treated this proceeding as an appeal; however, the result is not affected by the form of the proceeding.

[3] The appellant was called to the Bar of the Province of Ontario in 1952 and represented himself both before the Tax Court of Canada and this Court.

[4] The following is the sequence of events leading to the dismissal of his appeal for want of prosecution:

1) In 1999, the appellant sought to appeal the assessments of his 1995 and 1996 taxation years to the Tax Court of Canada;

- 2) By Order of the Tax Court dated December 2, 1999, the Tax Court extended the time within which a notice of appeal from the assessment made under the *Income Tax Act* for the 1995 taxation year could be instituted;
- 3) On February 25, 2000, the respondent filed a reply to the applicant's notice of appeal before the Tax Court;
- 4) No further steps were taken by the appellant in the prosecution of his appeal;
- 5) On October 3, 2000, the Tax Court ordered that a status hearing be held by conference call on December 4, 2000 to inquire into the status of his appeal;
- 6) The appellant failed to attend the status hearing, and provided no reason for not attending. The Tax Court rescheduled the status hearing to February 5, 2001 and ordered that the parties appear in person before the Tax Court;
- 7) The appellant again failed to attend at the status hearing on February 5, 2001 and the respondent moved before the Tax Court to have the appeal dismissed for want of prosecution.

[5] The Tax Court dismissed the appellant's appeal from the assessment made under the *Income Tax Act* for the 1995 taxation year pursuant to subsection 125(7) of the Tax Court of Canada Rules (General Procedure);

[6] The Tax Court Judge noted that the appellant was not present when the hearing to inquire into the status of his appeal was called, although duly notified of the time and place of the hearing and that it was the second time that the appellant had failed to attend a status hearing;

[7] The appellant did not apply to the Tax Court for a reconsideration of the judgment dismissing his appeal.

[8] The relevant portions of section 125 of the Tax Court of Canada Rules (General Procedure) read as follows:

Status Hearing

Audience sur l'état de l'instance

125. (1) Where an appeal has not been set down for hearing or terminated by any means within six months after filing the reply or after the last day for filing the reply, whichever is later, subject to any direction by the Chief Judge, the Registrar or a person designated by the Registrar, may serve on the Deputy Attorney

125. (1) Si un appel n'a pas été inscrit au rôle pour audition ou n'a pas pris fin de quelque manière que ce soit dans les six mois suivant le dépôt de la réponse ou après l'expiration du délai prévu pour le dépôt de la réponse, selon le dernier de ces événements à survenir, sous réserve d'une directive du juge en chef, le

General of Canada and on the counsel of record greffier ou la personne qu'il désigne peut signifier for the appellant or, where the appellant acts in au person, on the appellant, a notice of status hearing at least 30 days before the date fixed for that hearing, and the hearing shall be held before a judge

(2) A counsel who receives a notice of status hearing shall forthwith give a copy of the notice to that counsel's client.

(3) Unless the appeal has been set down for hearing or terminated by any means before the date fixed for the status hearing, the counsel of record shall attend the status hearing and the parties may attend the hearing.

(4) Where a party represented by counsel does not attend the hearing, that counsel shall file proof that a copy of the notice was given to the party.

(5) At the status hearing,

(a) if a reply has been filed the appellant shall show cause why the appeal should not be dismissed for delay, and the judge may

(i) if satisfied that the appeal should proceed, set time periods for the completion of any remaining steps to set down the appeal for hearing and either fix the time and place of hearing or direct the Registrar to do so within a specified time and the judge may make a direction regarding the filing of the hearing record containing the documents described in subsection 124(1),

(ii) if not satisfied that the appeal should proceed, dismiss it for delay, or

(iii) give such other direction as is just;

[...]

(7) Where a party fails to comply with an order or direction made under subsection (5), the Court may, on application or of its own motion, allow the appeal, dismiss the appeal or make

sous-procureur général du Canada et à l'avocat inscrit au dossier de l'appellant, ou à l'appellant lui-même lorsqu'il agit en son propre nom, un avis d'audience sur l'état de l'instance au moins 30 jours avant la date prévue pour cette audience. Celle-ci est tenue devant un juge.

(2) L'avocat qui reçoit un avis d'audience sur l'état de l'instance en donne immédiatement une copie à son client.

(3) À moins que l'appel n'ait été inscrit au rôle pour audition ou n'ait pris fin de quelque manière que ce soit avant la date fixée pour l'audience sur l'état de l'instance, les avocats inscrits au dossier doivent, et les parties peuvent, se présenter à l'audience.

(4) Si une partie représentée par un avocat ne se présente pas à l'audience, celui-ci dépose la preuve qu'une copie de l'avis a été donnée à la partie.

(5) Lors de l'audience sur l'état de l'instance :

a) si une réponse a été déposée, l'appellant expose les raisons pour lesquelles l'appel ne devrait pas être rejeté pour cause de retard et le juge peut,

(i) s'il est convaincu qu'il est opportun de procéder à l'appel, fixer les délais dans lesquels doivent être prises les autres mesures nécessaires à l'inscription de l'appel au rôle pour audition et soit fixer la date, l'heure et le lieu de l'audition, soit ordonner au greffier de le faire dans un délai déterminé, et il peut donner une directive à l'égard de la production du dossier de l'audience contenant les documents visés au paragraphe 124(1),

(ii) s'il n'est pas convaincu qu'il est opportun de procéder à l'appel, le rejeter pour cause de retard,

(iii) donner toute autre directive appropriée;

[...]

(7) Si une partie omet de se conformer à l'ordonnance rendue en vertu du paragraphe (5) ou à la directive donnée en vertu de ce paragraphe, la Cour peut, sur demande ou de

such other order as is just.

son propre chef, accueillir l'appel, rejeter l'appel  
ou rendre toute autre ordonnance appropriée.

[9] Clearly, the Tax Court has a wide discretion to deal with cases of non-compliance at a status hearing.

[10] The record shows that the appellant did nothing to prosecute his appeal from the time he filed a late notice of appeal by leave of the Tax Court.

[11] The record shows that the appellant failed to attend or participate in two status hearings ordered by the Tax Court.

[12] The record also shows that the appellant gave no reasons to the Tax Court to explain his failure to attend.

[13] In these circumstances, there are no grounds for this Court to interfere with the Tax Court judge's exercise of discretion.

[14] Accordingly, the appeal will be dismissed without costs.

Richard" \_\_\_\_\_

\_\_\_\_\_ "J.

f Justice

Chie

"I concur

Alice Desjardins J.A."

"I concur

Marshall Rothstein J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-158-01

**STYLE OF CAUSE:** James Kenneth Kerr v. Her Majesty  
The Queen

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** February 12, 2003

**REASONS FOR JUDGMENT BY:**

**CONCURRED IN BY:**

**APPEARANCES:**

Mr. James Kenneth Kerr APPLICANT ON HIS OWN BEHALF

Mr. Michael Ezri FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Mr. Morris Rosenberg FOR THE RESPONDENT

Deputy Attorney General of Canada