Docket: 2014-2851(IT)G

BETWEEN:

MARTIN STOVER,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion to set aside the dismissal of the applicant's appeal after the filing of a notice of discontinuance, heard on October 11, 2016, at Belleville, Ontario.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Applicant:	Robert F. Goddard
Counsel for the Respondent:	Alexander Nguyen

ORDER

The motion is dismissed with costs in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 21st day of October 2016.

"Réal Favreau"

Favreau J.

Citation: 2016 TCC 235
Date: 20161021
Docket: 2014-2851(IT)G

BETWEEN:

MARTIN STOVER,

Applicant,

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Respondent.

REASONS FOR ORDER

Favreau J.

[1] Mr. Martin Stover filed a motion to the Court for an order pursuant to paragraph 172(2)(*a*) of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") to set aside the "deemed" judgment dismissing his appeal and to reinstate his appeal.

[2] By notices of reassessment dated November 24, 2008, the Minister of National Revenue (the "Minister") adjusted Mr. Stover's tax liability and disallowed commission expenses in the amounts of $72,392 and $82,143 for the 2005 and 2006 taxation years respectively.

[3] By notice of objection dated February 26, 2013, Mr. Stover objected to the reassessments and the Minister confirmed the reassessments by notice of confirmation dated March 27, 2014.

[4] On December 9, 2014, Mr. Stover obtained an order from the Court extending the time within which an appeal from the reassessments made under the *Income Tax Act* for the 2005 and 2006 taxation years may be instituted.

[5] Although Mr. Stover has been representing himself in his appeal, he sought the assistance of his long-time legal counsel, Mr. J. David Crowe.

[6] For instance, Mr. Crowe attempted to have the lien filed with the sheriff's office on the applicant's house based on the reassessments, lifted because the reassessments were under appeal in the Tax Court of Canada. Mr. Crowe was also consulted by Mr. Stover when he was served with the respondent's notice of motion and amended notice of motion to strike out certain portions of his notice of appeal, which motion was returnable by January 21, 2015.

[7] Mr. Stover also brought to Mr. Crowe's attention, a letter dated October 28, 2015, informing of a pending status hearing before the Tax Court of Canada.

[8] Mr. Stover consulted his accountant and Mr. Crowe concerning the advantages of making an application to the Fairness Committee, now known as the Taxpayer Relief Committee, as an alternate process to resolve his tax dispute. Mr. Stover's conversations with his accountant and Mr. Crowe did not make him aware that discontinuing his appeal would amount to a full acceptance of his tax liability.

[9] During the month of November 2015, Mr. Stover informed Mr. Crowe that he was going to ask for relief by way of the Taxpayer Relief provisions. Based on his understanding of Mr. Stover's intent, Mr. Crowe forwarded a letter dated December 1, 2015 to the registrar of the Tax Court of Canada, informing that the appellant would not proceed with his appeal.

[10] At the beginning of December 2015, Mr. Stover's accountant referred him to Mr. Wayne Warner of Warner Tax Consultants with regards to his tax issues and Mr. Stover retained Mr. Warner in early January 2016.

[11] On March 16, 2016, Mr. Stover received a letter dated March 8, 2016 from the Canada Revenue Agency (the "CRA") Collection Division demanding payment of the disputed amount within 30 days. Mr. Stover then became aware that the request for payment resulted from the discontinuance of his appeal and that there was a judgment against him that rendered him liable for the amounts claimed by way of the reassessments.

[12] On March 29, 2016, Mr. Warner forwarded a letter to the CRA informing it that to his knowledge, the applicant's file was under appeal and that CRA's letter did not make sense considering that he was retained in early January 2016 by Mr. Stover to represent him in the audit and collection process relating to his tax appeal.

[13] Mr. Stover and Mr. Crowe each signed a separate affidavit which were filed as evidence at this hearing and they both testified as well.

[14] Mr. Stover stated that he has never indicated to Mr. Crowe that he accepted the CRA's assessments. It has always been his intention to oppose the reassessments and that he would not have knowingly taken any action that would amount to his acceptance of the tax reassessments. The fact that he has retained the services of Mr. Warner in January 2016 clearly demonstrates that he wanted to proceed with his appeal.

[15] Mr. Crowe stated that he did not realize that by discontinuing Mr. Stover's appeal, Mr. Stover was considered to have accepted full liability of the reassessments. He also confirmed that Mr. Stover never acknowledged that the reassessments were proper and correct.

[16] Mr. Crowe confirmed his understanding that at no time did Mr. Stover decide to accept the tax liability in issue and that Mr. Stover was not aware of the withdrawal letter which was done in error by him.

[17] In his testimony, Mr. Crowe affirmed that he acted on his own initiative when he sent the discontinuance letter and that Mr. Stover never gave him the mandate to withdraw his appeal.

[18] However, the discontinuance letter dated December 1, 2015 seems to contradict both Mr. Stover's and Mr. Crowe's testimonies. The said letter reads as follows: "I have been instructed by my client, Martin Stover not to proceed with his notice of appeal. He will be applying to the Fairness Committee for hopefully resolution of his issues."

[19] As Mr. Stover and Mr. George Boyd Aitken of the Department of Justice in Ottawa were copied on the discontinuance letter, it is probable that Mr. Stover became aware of it before March 2016 when he received the CRA's letter.

Analysis

[20] Pursuant to subsection 16.2(2) of the *Tax Court of Canada Act*, R.S.C. 1985, C.T-2, as amended, the discontinuance of a proceeding by a written notice from the party who instituted it, is deemed to be dismissed as of the day on which the Court receives the written notice.

[21] Section 172 of the *Rules* reads as follows:

> **Setting Aside, Varying or Amending Accidental Errors in Judgments — General**
>
> (1) A judgment that,
>
> (a) contains an error arising from an accidental slip or omission, or
> (b) requires amendment in any matter on which the Court did not adjudicate
>
> may be amended by the Court on application or of its own motion.
>
> (2) A party who seeks to,
>
> (a) have a judgment set aside or varied on the ground of fraud or of facts arising or discovered after it was made,
> (b) suspend the operation of a judgment, or
> (c) obtain other relief than that originally directed,
>
> may make a motion for the relief claimed.

[22] The applicant specifically referred to paragraph 172(2)(a) of the *Rules* and invoked the fact that he did not appreciate that he could have applied under the taxpayer relief provisions while continuing with his appeal.

[23] The Federal Court of Appeal considered the application of section 172 in at least three cases.

[24] In *Bogie v. R.*, [1998] 4 C.T.C. 195, the Court did not apply section 172 of the *Rules*. In that case, the taxpayer's solicitors advised the taxpayer to discontinue his appeal from the Minister's notice of assessment on the basis of information received from the taxpayer's accountant. A notice of discontinuance was then duly filed with the Tax Court of Canada. Subsequently, the taxpayer was advised by his accountant that the earlier advice was given in error. The error pertained to a

question of fact, namely whether a capital cost allowance had been claimed by the taxpayer in a previous taxation year. The Court concluded as follows at page 196:

> 1. Assuming, without deciding, that the Tax Court of Canada possesses the inherent jurisdiction to set aside a notice of discontinuance or that the requisite jurisdiction arises under section 172 of the Tax Court of Canada Rules, we are all of the view that his appeal cannot succeed on its merits.
>
> . . .
>
> 3. Against this factual background, it is obvious to us that the taxpayer cannot distance himself from the erroneous advice given by his accountant. In the circumstances, there is no merit in the argument that the taxpayer could not have discovered the true state of affairs through the exercise of due diligence. In the absence of fraud, the conduct of the taxpayer embraces the conduct of his professional advisors. . . .

[25] In *Scarola v. Minister of National Revenue*, 2003 FCA 157, the Court made the following comments concerning paragraph 172(2)(a) of the *Rules*:

> 26 In practice, it is Rule 172(2)(*a*) which is more likely to be invoked where the deemed dismissal has been obtained by fraud or where facts have arisen or have been discovered after the dismissal took effect. I hasten to add that, in the present case, there is no allegation of fraud and, although invited by us to do so, counsel for the respondent has been unable to point to facts discovered or that have arisen after the dismissal which would warrant the application of Rule 172.

[26] In *Rutledge v. R.*, 2004 FCA 88, Justice Létourneau restored the deemed dismissal of the respondent's appeal and stated that:

> 19. No allegation of fraud was made by the respondent in the present case. She still lives with her husband. The respondent alleges her own mistake with respect to her husband's tax liability as the fact which led to the dismissal of her appeal. That was obviously not a fact arising after the judgment. Furthermore, it was not, in my view, a fact that could not have been discovered sooner with reasonable or due diligence: . . .

[27] In this instance, there is no allegation of fraud and the applicant was represented by an experienced lawyer. Literature concerning the terms and conditions of the Taxpayer Relief provisions can easily be obtained, had the applicant decided to learn more about it before taking the decision to apply for this relief.

[28] More importantly, no new fact arose or was discovered after the "deemed" judgment. What we have here is an error in law resulting from a misunderstanding of the process of application for relief from a tax liability to the Fairness Committee or a designated officer of the CRA.

[29] Justice Doherty of the Court of Appeal for Ontario considered in *Mujagic v. Kamps*, 2015 ONCA 360 (CanLII), a rule similar to section 172 of the *Rules*. In paragraph 9 of his decision, he wrote:

> . . . The distinction between fact and law is well-established. Facts come from evidence, including new testimony and exhibits. Law comes from statute books and case law. The law is applied to the facts to produce a result. Rule 59.06(2)(a), by its plain meaning, speaks to "facts arising or discovered" and not to jurisprudential changes. New facts, like all facts, are found in evidence, not in the statute books or case law.

[30] In my view, the finality of Court decisions and the efficiency of the administration of justice should prevail over the sympathetic circumstances from the applicant's perspective.

[31] For these reasons, the motion is dismissed with costs.

Signed at Ottawa, Canada, this 21st day of October 2016.

"Réal Favreau"

Favreau J.

CITATION:	2016 TCC 235
COURT FILE NO.:	2014-2851(IT)G
STYLE OF CAUSE:	Martin Stover and Her Majesty the Queen
PLACE OF HEARING:	Belleville, Ontario
DATE OF HEARING:	October 11, 2016
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	October 21, 2016

APPEARANCES:

Counsel for the Appellant:	Robert F. Goddard
Counsel for the Respondent:	Alexander Nguyen

COUNSEL OF RECORD:

For the Appellant:

Name:	Robert F. Goddard
Firm:	

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada