[ENGLISH TRANSLATION]

Docket: 2010-122(IT)G

BETWEEN:

RITA MADERE,

Applicant,

and

HER MAJESTY THE QUEEN

Respondent.

Motion heard at Ottawa, Ontario, on July 3, 2012.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Applicant:	Claude-Alain Burdet
Counsel for the Respondent:	Natasha Wallace

ORDER

Upon motion by the applicant to have set aside a judgment;

Upon reading the affidavit of Janet Struss filed in support of this motion;

And upon hearing each party's allegations;

The Court ALLOWS the present motion;

ORDERS that the judgment of Bédard J. dated December 16, 2011, be set aside, dismissing appeal 2010-122(IT)G, and RESTORES appeal 2010-122(IT)G;

EXTENDS the deadline to provide the respondent with the responses to undertakings to May 11, 2011, the date on which the respondent was provided with the responses to undertakings;

EXTENDS the deadline to provide the applicant with the responses to undertakings to September 7, 2011, the date on which the responses to undertakings were delivered to the applicant;

JOINS appeals 2010-122(IT)G and 2010-1737(GST)I to have them heard on common evidence;

ORDERS a settlement conference;

Without costs.

Signed at Ottawa, Canada, this 27th day of August 2012.

"Johanne D'Auray"

D'Auray J.

Translation certified true
on this 25th day of August 2023.
François Brunet, Revisor

Citation: 2012 TCC 297
Date: 20120827
Docket: 2010-122(IT)G

BETWEEN:

RITA MADERE,

Applicant,

and

HER MAJESTY THE QUEEN

Respondent.

REASONS FOR ORDER

D'Auray J.

[1] The applicant, Rita Madère, is seeking an order to set aside a judgment by this Court dismissing the applicant's appeal of an appraisal made under section 160 of the *Income Tax Act* (ITA), thereby:

a) allowing this motion;

b) setting aside a decision by this Court on December 16, 2011, which dismisses the appeal by reason of delay due the applicant's failure to appear;

c) and restoring the appeal;

[2] The applicant is also asking me to amend the order issued by Paris J. on March 11, 2011, to extend the date to give notice of the undertakings to the respondent.

[3] Though the applicant has already objected to the income tax appeal, namely appeal 2010-122(IT)G, and the GST appeal, 2010-1737(GST)I, being heard on common evidence, she now asks that the appeals be joined and heard on common evidence.

The facts are as follows

[4] The applicant received notices of assessment pursuant to section 160 of the ITA and section 325 of the *Excise Tax Act* (ETA). The applicant duly objected to it.

[5] After receiving the notices of objection, the Canada Revenue Agency (CRA) issued more notices of reassessment on September 15, 2009. In light of these notices of reassessment, the fair market value of the property went from $445,000 to $390,000.

[6] The applicant filed two notices of appeal, namely a notice of appeal pursuant to the General Procedure with respect to the income tax and a notice of appeal under the informal procedure with respect to GST. Some technical difficulties related to filing these appeals were experienced; however, since these difficulties are not relevant to this motion, I did not deem it necessary to dwell on them at length.

[7] The respondent duly filed responses to the notices of appeal in the files related to income tax and GST.

[8] Pursuant to the order issued by Paris J. on March 11, 2011, the applicant had to provide the respondent with responses to the undertakings on September 2, 2011, at the latest, which she did not do.

[9] On September 29, 2011, in a letter, the respondent asked this Court to schedule an appeal hearing. She mentioned that the applicant had failed to comply with her obligation to respond to the undertakings.

[10] After receiving this letter from the respondent, this Court issued an order on September 30, 2011, to have the applicant explain why the appeal should not be dismissed for delay and, toward this end, a hearing was scheduled for December 13, 2011.

[11] Due to an administrative oversight, the manager of the law firm representing the applicant wrote that the hearing date was December 23, 2011, instead of December 13, 2011, in its hearing agenda management system. As a result, on December 13, 2011, counsel for the applicant failed to appear. After 30 minutes had elapsed, the respondent moved to dismiss the appeal, and the Court allowed this motion. The judgment to that effect was signed by Bédard J. on December 16, 2011.

[12] On December 13, 2011, at 2:40 p.m., the respondent received an email from counsel for the applicant concerning some irritants. The email also referred to the hearing on December 23, 2011.

[13] That same afternoon, on December 13, 2011, namely at 4:01 p.m., the respondent informed counsel for the applicant by email that a judgment dismissing the appeal had been made *instanter*. The respondent also asked counsel for the applicant what her client's intentions were following the default judgment.

[14] Following this email by the respondent, the applicant's counsel sent an email response on December 13, 2011, at 7:29 p.m., which I will now quote:

> [TRANSLATION]
>
> [...] It goes without saying that I must correct the situation and ask the Court to set aside this morning's summary dismissal.

He also added:

> The question is now as follows: Can we address these defects through a consent motion or are you opting to contest?

[15] On December 15, 2011, the respondent sent emails and faxes to make it known that she would not take a position as long as she did not have the opportunity to read the sworn affidavit supporting the motion to set aside Bédard J.'s judgment.

[16] I have noted that on these dates, Bédard J.'s judgment dismissing the applicant's appeal had not yet been signed. The judgment dismissing the appeal was signed on December 16, 2011, by Bédard J.

[17] Counsel for the applicant sent another email to the respondent on February 3, 2012, setting out the following:

> [TRANSLATION]
>
> Ms. Wallace,
>
> I am contacting you once again about this case.
>
> My client conducted a significant amount of research and made a considerable effort over the past months to get a hold of the documents—that she knew existed—

concerning the appraisal of her house at the time of the transfer in 2004. She has been able to contact the bank's appraiser, who refinanced the residence shortly before the transfer, and we now have the corresponding appraisal of the property.

In fact, this amount was already in the bank's documents that you were provided with in 2007 and that you produced under tab 13 of your book of documents, more specifically on pages 30 and 33, under the heading "VALUATION." They are not open to dispute, notwithstanding your tab 16.

My client was also able to locate and recently get back in touch with Mr. Romain, who confirmed his appraisal. This is how--using the original as a starting point--the value provided by the creditor was located in your documents.

Given the mortgage value of $259,552 mentioned on page 35, tab 13 of your documents, the value transferred by Richard Madère was at most half of $94,448, namely $46,224 instead of $65,223.81 as indicated at tab 15, page 42.

Ms. Madère's position is that she will not pursue her appeal to the extent that the CRA will reassess it based on this property value of $325,000 in September 2003 by the appraiser, Mr. Romain, which you will find on pages 30 and 33 of your disclosed documents.

I have noted that the amount proposed by my client is higher than the total amount of taxes claimed by the CRA pursuant to sections 160 and 325, as can be seen at tabs 1 and 2, pages 2 and 4 of your documents.

It therefore seems to be a reasonable solution for both parties, which would avoid reopening of the case.

I thank you for agreeing to reconsider Ms. Madère's position with your customer agency.

Respectfully,

(s) Claude-Alain Burdet
Claude-Alain Burdet
Counsel for the applicant

[18] Essentially, the applicant's counsel was trying to find a way to prevent her client from having to incur additional costs. According to her, the CRA had to agree to reappraise the fair market value of the transferred property at $352,000. According to counsel for the applicant, the appraisal by Mr. Romain, the appraiser from the bank who refinanced the mortgage in October 2003, is relevant because it was a snapshot assessment. As for the assessment made by the CRA's appraiser, the

applicant completely dismisses it, arguing that it is not relevant because it is a "retrospective assessment" made in 2009.

[19] Counsel for the applicant argued that her client would be ready to settle if the CRA agreed to assign a fair market value of $352,000 to the property. As a result, he proposed to the respondent to advise her client to carry out a reassessment reflecting the fair market value of $352,000.

[20] As for the respondent, she argued that there was a judgment dismissing the appeal because the applicant did not file an application to have the judgment set aside. Consequently, the case was closed.

[21] Evidence reveals that the parties communicated with each other until April 12, 2012.

[22] During that period, the applicant did not forward the responses to the undertakings to the respondent.

[23] After some discussions on the motion to set aside with counsel for the respondent, a motion was filed by the applicant on June 21, 2012, to set aside Bédard J.'s judgment dismissing the appeal.

[24] Counsel for the applicant submits that it meets the criteria to have the judgment set aside. They did not appear on December 13, 2011, due to an administrative oversight concerning the date of the hearing. The correspondence on record proves that the applicant never intended to waive her right to pursue her appeal. It should also be noted that the respondent did not suffer any prejudice due the 5-month delay. He acted in good faith for the applicant when he attempted to settle the dispute by means of an alternative to judicial recourse to help his client save money. Therefore, the applicant did not act intentionally. Furthermore, the appeal concerning the fair market value of the property is arguable.

[25] The respondent argues that the applicant did not file her motion within a reasonable time after having become aware of the judgment issued by the Honourable Mr. Justice Bédard. According to her, the 5-month time limit was intentional.

Analysis

[26] The provision that is relevant to the motion to set aside a judgment is subsection 140(2) of the *Tax Court of Canada Rules*:

> **140.** (1) If at a hearing, either party fails to appear, the Court may allow the appeal, dismiss the appeal or give such other direction as is just.
>
> (2) The Court may set aside or vary, on such terms as are just, a judgment or order obtained against a party who failed to attend a hearing, a status hearing or a pre-hearing conference on the application of the party if the application is made within thirty days after the pronouncement of the judgment or order.

[27] Pursuant to *Tomas v. The Queen*, 2007 FCA 86, there is no doubt that the 30-day deadline at subsection 140(2) can be extended.

[28] Under the case law, the tests to be considered to determine whether a default judgment should be set aside are the following:

a) the ongoing intention to pursue the appeal;

b) the appeal must be well-founded, that is to say that the appeal must be arguable. To this end, Bowman J., while he was still the Associate Chief Justice of this Court, indicated that the threshold is relatively low when we determine whether a case is arguable. He wrote the following at paragraph 15 of *Farrow v. The Queen*, 2003 TCC 885:

> [15] […] I agree that the court must be satisfied that a litigant who seeks to have a default judgment set aside has an arguable case, but the threshold is a relatively low one. I do not think a litigant needs to testify or call evidence to show that there is a prima facie case. […]

c) the other party must not suffer prejudice due to the delay;

d) the application to set aside should be filed as soon as the respondent has become aware of the judgment. Furthermore, a reasonable explanation should justify the delay. In Farrow, Associate Chief Justice Bowman approvingly quotes Chief Justice Culliton from Saskatchewan at paragraph 17 of his judgment:

> [17] […] The circumstances under which a Court will exercise its discretion to set aside a judgment regularly signed are pretty well settled. The application should be made as soon as possible after the judgment comes to the knowledge of the defendant, but mere delay will not bar the

> application, unless an irreparable injury will be done to the plaintiff or the delay has been wilful. *Tomlinson v. Kiddo* (1914) 1914 CanLII 139 (SK CA), 7 WWR 93, 29 WLR 325, 7 Sask LR 132; *Mills v. Harris & Craske* (1915) 1915 CanLII 161 (SK CA), 8 WWR 428, 8 Sask LR 114. The application should be supported by an affidavit setting out the circumstances under which the default arose and disclosing a defence on the merits. *Chitty's Forms*, 13th ed., p. 83.
>
> It is not sufficient to merely state that the defendant has a good defence upon the merits. The affidavits must show the nature of the defence and set forth facts which will enable the Court or Judge to decide whether or not there was matter which would afford a defence to the action. *Stewart v. McMahon* (1908) 1908 CanLII 96 (SK QB), 7 WLR 643, 1 Sask LR 209.
>
> If the application is not made immediately after the defendant has become aware that judgment has been signed against him, the affidavits should also explain the delay in making the application; and, if that delay be of long standing, the defence on the merits must be clearly established. *Sandhoff v. Metzer* (1906) 4 WLR 18 (N.W.T.)."

[29] With respect to these tests, I believe that the motion to set aside the judgment must be allowed.

[30] Based on the evidence, including the correspondence exchanged between the parties, the applicant had an ongoing intention to pursue her appeal.

[31] Moreover, the affidavit and the written claims filed by counsel for the applicant show that the appeal is arguable. There are two appraisals concerning the property that was subject to a transfer under section 160 of the ITA and 325 of the ETA. It will be up to the judge who hears the appeal on the merits to determine the value that should be assigned to the property.

[32] Furthermore, the respondent acknowledged that she is not suffering any prejudice due to the applicant's delay in filing the motion to set aside a judgment. The respondent also acknowledged that she is not casting doubt over the explanation provided by counsel for the applicant concerning the reason why the applicant and her counsel did not appear before this Court on December 13, 2011.

[33] As for the 5-month time limit to submit the application to set aside a judgment, during this period of time, counsel for the applicant tried to convince the respondent to settle the case by means of a reassessment. Despite the respondent's repeated refusals to pursue this option, counsel for the applicant persisted until he understood

that the proposed method would never be accepted by the respondent. At that point, he filed an application to set aside the judgment. I do not believe, as the respondent alleges, that the 5-month delay was intentional.

[34] It may be difficult to understand why counsel filed the motion to set aside the judgment 5 months after becoming aware of the judgment dismissing the applicant's appeal. This being said, he was under the impression that the respondent would have agreed to reach a settlement given Mr. Romain's appraisal, which he had just discovered in the documents forwarded by counsel for Ms. Madère's spouse. The evidence shows that he acted in good faith. To him, it was a way to decrease the costs involved in this case.

[35] As for the responses to the undertakings, the documentary evidence shows that on May 15, 2012, the respondent realized that the applicant had not been provided with the responses to the undertakings before September 7, 2011, despite the fact that she had entrusted a mail service with delivering them on September 2, 2011.

[36] Consequently, both parties breached Paris J.'s order because the deadline for the undertakings was September 2, 2011.

[37] I cannot help but notice that had both parties communicated more and displayed greater flexibility, it is quite possible that they would not have reached the point they are at in this case.

[38] After the end of the hearing, on December 13, 2011, counsel for the respondent became aware of the email sent by counsel for the applicant. In this email, she noticed that counsel for the applicant referred to a hearing scheduled for December 23 instead of December 13, 2011.

[39] After being informed of the default judgment by counsel for the respondent, counsel for the applicant asked her—through an email sent during the evening of December 13, 2011—whether she intended to contest the motion to set aside the judgment or consent to it. Counsel for the respondent responded to counsel for the applicant that she would not make a decision as long as she did not see the affidavit explaining the reason why she failed to appear at the hearing though she knew why counsel for the applicant failed to appear. Furthermore, the respondent never cast doubt over this version of the facts presented by the applicant.

[40] As for counsel for the applicant, instead of preparing a motion to set aside the judgment, he urged the respondent to carry out a reassessment pursuant to the fair

market value that he suggested, despite the respondent's repeated refusals to proceed this way and in light of the judgment dismissing the appeal.

[41] In my opinion, had the parties shown more flexibility, everything could have been settled before Bédard J. signed his judgment.

[42] Therefore, this Court:

ALLOWS this motion;

ORDERS that the judgment of Bédard J. dated December 16, 2011, be set aside, dismissing appeal 2010-122(IT)G, and RESTORES appeal 2010-122(IT)G;

EXTENDS the deadline to provide the respondent with the responses to undertakings to May 11, 2011, the date on which the respondent was provided with the responses to the undertakings;

EXTENDS the deadline to provide the respondent with the responses to the undertakings to September 7, 2011, the date on which the responses to undertakings were delivered to the respondent;

JOINS appeals 2010-122(IT)G and 2010-1737(GST)I to have them heard on common evidence;

ORDERS that a settlement conference be held;

Without costs.

Signed at Ottawa, Canada, this 27th day of August 2012.

"Johanne D'Auray"

D'Auray J.

Translation certified true
on this 25th day of August 2023.
François Brunet, Revisor

CITATION:	2012 TCC 297
COURT FILE NO.:	2010-122(IT)G
STYLE OF CAUSE:	RITA MADERE v. THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	July 3, 2012
REASONS FOR ORDER BY:	The Honourable Justice Johanne D'Auray
DATED:	August 27, 2012

APPEARANCES:

Counsel for the Applicant:	Claude-Alain Burdet
Counsel for the Respondent:	Natasha Wallace

SOLICITORS OF RECORD:

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