

Federal Court of Appeal



Cour d'appel fédérale

Date: 20201201

Docket: A-217-19

Citation: 2020 FCA 206

**CORAM: WEBB J.A.
NEAR J.A.
LASKIN J.A.**

BETWEEN:

**SHER-E PUNJAB RADIO BROADCASTING
INC.**

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard by online video conference hosted by the registry on October 6, 2020.

Judgment delivered at Ottawa, Ontario, on December 1, 2020.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**NEAR J.A.
LASKIN J.A.**

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This appeal arises as a result of the Order of the Tax Court of Canada (Tax Court Docket: 2015-447(IT)G) dismissing the appeal of Sher-E Punjab Radio Broadcasting Inc. (Sher-E-Punjab Radio) for delay pursuant to Rule 64 of the *Tax Court of Canada Rules (General Procedure)* SOR/90-688a. The Order was issued as a result of a Motion brought by the Crown.

[2] For the reasons that follow, I would dismiss this appeal.

I. Background

[3] Sher-E-Punjab Radio failed to file its corporate tax returns for its 2005 to 2012 taxation years. As a result, on December 13, 2013, the Minister of National Revenue (Minister) issued assessments for each of these taxation years pursuant to subsection 152(7) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act).

[4] On March 12, 2014, Sher-E-Punjab Radio filed notices of objection to the assessments. The Minister confirmed the assessments on November 3, 2014. On January 30, 2015, Sher-E-Punjab Radio filed a notice of appeal to the Tax Court.

[5] The history of the appeal before the Tax Court is summarized by the Tax Court Judge in his oral reasons:

- the first timetable order was issued on November 20, 2015;
- Sher-E-Punjab Radio filed an amended notice of appeal sometime in December 2015 and the reply was filed by the Crown on January 5, 2016;
- by request of the parties, the appeal was held in abeyance until July 13, 2016 to allow Sher-E-Punjab Radio time to provide documentation that supported the new tax returns that it had filed for its 2005 to 2012 taxation years on January 31, 2016;
- Sher-E-Punjab Radio did not provide the documentation during the abeyance period;
- the Tax Court issued a second timetable order dated August 8, 2016 which included a deadline of September 15, 2016 for the parties to file and serve lists of documents;

- while the Crown filed and served its list of documents on September 14, 2016, Sher-E-Punjab Radio did not comply with the Tax Court's second timetable order;
- a show cause hearing was held on March 28, 2017. By the Order dated April 7, 2017 new timelines were set, including an obligation to report to the Tax Court by September 29, 2017;
- pursuant to an Order dated October 30, 2017, the Tax Court amended the April 7, 2017 Order to require the parties to report to the Tax Court by January 5, 2018;
- pursuant to an Order of the Tax Court dated January 31, 2018, a new timetable was set and, in accordance with this Order, the Crown conducted an examination for discovery of Sher-E-Punjab Radio's nominee on February 5, 2018;
- pursuant to the January 31, 2018 Order, undertakings given by Sher-E-Punjab Radio were to be satisfied by May 31, 2018;
- Sher-E-Punjab Radio did not provide the undertakings by May 31, 2018, and did not request an extension of that deadline on a timely basis, or file a motion to request such an extension even though it had been advised by both the Crown and the Tax Court that it was required to do so;
- as a result, a second show cause hearing was held on November 21, 2018, at which time Justice Campbell considered whether Sher-E-Punjab Radio's appeal should be dismissed for delay as argued by the Crown, or whether a further extension should be granted to Sher-E-Punjab Radio;
- as set out in the Order dated December 5, 2018, Justice Campbell granted Sher-E-Punjab Radio an extension. In that respect, she amended the January 31, 2018 Order to require Sher-E-Punjab Radio to provide answers to undertakings on or before February 28, 2019 and for the parties to report to the hearings coordinator by March 31, 2019. She also required Sher-E-Punjab Radio to pay costs of \$500 in any event of the cause.

[6] The Order dated December 5, 2018 also included a notation that if the parties failed “to advise the Court of the status of the matter with respect to the audit that is to be performed” (which could include detailed reasons for any further extensions) by March 31, 2019, the Crown could bring a motion for dismissal forthwith. The reference to the “audit to be performed” was presumably to the review of the documents and the preparation of the reconciliations that were to be completed by Sher-E-Punjab Radio. Sher-E-Punjab Radio failed to advise the Court as required by this Order. It also failed to provide the undertakings as ordered on or before February 28, 2019 and it did not request an extension of time by March 31, 2019. As a result, the Crown brought the motion for dismissal of Sher-E-Punjab Radio’s appeal. This motion was granted and Sher-E-Punjab Radio’s appeal was dismissed, which resulted in this appeal.

II. Decision of the Tax Court

[7] In his oral reasons allowing the Crown’s motion and dismissing the appeal, the Tax Court Judge first set out the history of this matter, as noted above. He then summarized the testimony of the two witnesses who were called by Sher-E-Punjab Radio at the hearing of the motion. The two witnesses were directors of Sher-E-Punjab Radio.

[8] Jasbir Singh Badh is an officer and director of Sher-E-Punjab Radio. He also carries on a public accounting practice, which includes preparing tax returns for his clients. He was the officer and director of Sher-E-Punjab Radio who would have been responsible for filing its corporate tax returns for its taxation years from 2005 to 2012. The other witness was Gurdial

Singh Badh, who is a brother of Jasbir Singh Badh. Gurdial Singh Badh is a real estate agent and he let his brother deal with all of the tax matters for Sher-E-Punjab Radio.

[9] After summarizing the testimony of the two directors, the Tax Court Judge noted:

[o]verall, it is my view that both Mr. Jasbir Singh Badh and Mr. Gurdial Singh Badh gave vague testimony about the reasons for the extensive delays to date in [Sher-E-Punjab Radio's] prosecution of its appeal, and also gave vague promises of how they would cause [Sher-E-Punjab Radio] to comply with any new timelines given [to] it. It is my view that they have not demonstrated any resolve to advance this appeal and failed to comply with all aspects of the December 5, 2018 order of this Court, even after being warned they may receive no further extensions. They did not even take the simple step of causing [Sher-E-Punjab Radio] to pay the five hundred dollars of costs set out in the December 5, 2018 Order on a timely basis.

[10] After referring to the decision of this Court in *Djelebian v. The Queen*, 2016 FCA 26, the decision of the Ontario Court of Appeal in *1196158 Ontario Inc. v. 6274013 Canada Limited et al*, 2012 ONCA 544 and the decision of the Tax Court in *D'Abbondanza v. The Queen*, 93 D.T.C. 1042, [1993] 2 C.T.C. 2956, the Tax Court Judge concluded:

In my view, [Sher-E-Punjab Radio] in this case has also only been reactive at each and every stage in this appeal, and has not been proactive since the commencement of this appeal, which has had the effect of inordinately delaying the prosecution of its appeal.

In my view, [Sher-E-Punjab Radio's] behaviour in this case “smacks of a cavalier attitude that includes a complete disregard for this Court's procedure”, which was also the conclusion Justice Campbell made in *Lichman v. R.*, 2000-3216(IT)G, at page 11 of her reasons for judgment.

Considering all of the evidence, it is my view that [Sher-E-Punjab Radio] in this case has failed to prosecute its appeal with due dispatch notwithstanding the many opportunities given to it by this Court. There has been one delay after another since the commencement of its appeal. More recently, it has failed to provide answers to undertakings given on February 5, 2018, notwithstanding being given a number of

extensions, and failed to comply with any aspects of the December 5, 2018 order of this court following the second show cause hearing in this appeal. [Sher-E-Punjab Radio] now wishes to receive another extension, but only provides a vague promise as to how it will complete the outstanding pretrial steps. In my view, [Sher-E-Punjab Radio] should not be given another extension. It has been given every opportunity to comply with the Rules, but has squandered them. Accordingly, it is my view that its appeal should be dismissed for delay pursuant to Rule 64.

III. Issue and standards of review

[11] The issue in this appeal is whether the Tax Court Judge erred in granting the Crown's motion and dismissing the appeal for delay. To the extent that this appeal raises any questions of law, the standard of review is correctness. To the extent that this appeal raises any questions of fact or questions of mixed fact and law (for which there is no extricable question of law), the standard of review is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33).

IV. Analysis

A. *Resolve to Advance the Appeal*

[12] Sher-E-Punjab Radio's main argument in this appeal is that the Tax Court Judge made a palpable and overriding error in his finding that Sher-E-Punjab Radio had not demonstrated any resolve to advance the appeal.

[13] Palpable and overriding error is a high standard for an appellant to satisfy. The Supreme Court of Canada adopted the following descriptions of a palpable and overriding error in *Benhaim v. St-Germain*, 2016 SCC 48:

38 It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:

Palpable and overriding error is a highly deferential standard of review "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

39 Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

[14] As support for its position that Sher-E-Punjab Radio did have the resolve to advance its appeal in a timely manner, Sher-E-Punjab Radio focused mainly on the letter that was dated November 21, 2018 from Timothy Clarke, who was then acting as its counsel. In this letter, Sher-E-Punjab Radio provided its response to the status of the undertakings. The date of this letter (November 21, 2018) is the same date on which the show cause hearing was held before Justice Campbell.

[15] While the letter does indicate that some of the undertakings have been completed, there were a number of undertakings which were not completed as of that date. The letter lists 28 different undertakings and the response of Sher-E-Punjab Radio to each of these undertakings. The response for at least 14 of these undertakings includes a statement that Sher-E-Punjab Radio is still looking for documents or working on a reconciliation or some other indication that the undertaking has not been completed. Of particular note is the response to the undertaking identified as number 8:

8. Please reconcile the expenses on the financial statements to the trial balances.

The expenses were pooled from the trial balances to reduce the number of items on the financial statements. Mr. Badh has attempted to reconcile them but has been unable to do so do [*sic*] date. [Sher-E-Punjab Radio] is hiring an outside clerk to search for more records and an outside accountant to work on this and the other reconciliations requested at the discoveries.

[16] The reference to the assistance that will be provided by the new accountant or new clerk is also included in several of the other responses provided in the letter dated November 21, 2018.

[17] The last part of the response to undertaking number 8 is particularly noteworthy. Sher-E-Punjab Radio stated, on November 21, 2018, that it “is hiring an outside clerk to search for more records and an outside accountant to work on this and the other reconciliations requested at the discoveries”. At the hearing of the motion in this matter on May 13, 2019, the following exchange took place between counsel for Sher-E-Punjab Radio and Gurdial Singh Badh:

Q And when will you hire the accountant and the file clerk?

A As I’ll discuss with you yesterday, I will, you know, get at it right away and put an ad then and start searching for the both of individuals right away.

[as transcribed]

[18] It is evident that even though Sher-E-Punjab Radio had indicated in its letter of November 21, 2018 that it was hiring an outside clerk and an outside accountant, no steps had been taken to accomplish this during the almost six month period from the date of that letter to the date of the hearing on May 13, 2019.

[19] As a result of not hiring the outside clerk and accountant, the reconciliations were not completed by May 13, 2019. The Tax Court Judge summarized the testimony of Mr. Jasbir Singh Badh at the hearing of the motion on May 13, 2019, with respect to his failure to complete the undertakings:

He testified that he has attempted to obtain or prepare the necessary documentation or reconciliations to satisfy the outstanding answers to undertakings, but that he has largely been unsuccessful in doing so because of his busy accounting practice and because it is difficult to locate the files which have been misplaced following a personal and business move, as a result of which many of the corporate records are now located in two storage facilities.

[20] The difficulty that Mr. Badh was having in locating the necessary documents to complete the undertakings raises questions concerning what documentation was used to prepare the tax returns for 2005 to 2012. The Tax Court Judge noted that Sher-E-Punjab Radio filed its tax returns for these taxation years on January 31, 2016. The discovery examinations that gave rise to the undertakings were held on February 5, 2018.

[21] Presumably, Sher-E-Punjab Radio had the necessary documentation and information to complete its tax returns for its 2005 to 2012 taxation years when it prepared those tax returns, which were filed on January 31, 2016. It would be expected that a person who carries on a public accounting practice, which includes preparing tax returns for his clients, would appreciate the importance of maintaining and having access to the documents related to the preparation of tax returns. This is particularly so when those tax returns are filed after the notices of appeal to the Tax Court related to assessments issued for the same taxation years have been filed.

[22] It should also be noted that, although the date of the personal and business move is not entirely clear from the record, Jasbir Singh Badh testified that the move took place before they stopped broadcasting and Gurdial Singh Badh appears to state that they stopped broadcasting around the end of 2014. As a result, it would appear that the move took place before the tax returns were prepared and filed.

[23] With respect to the completion of the undertakings, the following exchange took place between counsel for Sher-E-Punjab Radio and Jasbir Singh Badh at the hearing of the motion:

Q So what you meant was, you have completed 60 percent of the answers to the undertakings. Is that right?

A Yes.

[...]

Q When do you expect to get the other 40 percent, sir?

A So it's a tough question to answer right now. But it's just that the -- from the timeframe it took us I would appreciate it anywhere. I know we've already gone through this, but anywhere because the way it's gone through and the way the storage and the way the filing information search is going through, I would expect it can be 60 to 90 days. But if not, then we will try to compliant to apply with whatever, however quickly we can get them done.

[as transcribed]

[24] Not only is this response to the question of when the remaining undertakings will be completed evasive, it also lacks a firm commitment to complete the undertakings within the stated 60 to 90 days.

[25] The Tax Court Judge did not make any error in finding that Sher-E-Punjab Radio had not demonstrated any resolve to advance the appeal, let alone a palpable and overriding error.

B. *Failure to Pay Previous Costs Award*

[26] Sher-E-Punjab Radio also submitted, in paragraph 56 of its memorandum, that “[t]he Judge appeared to place great weight on the fact [Sher-E-Punjab Radio] had not yet paid the \$500 in costs (the “Costs”) awarded in the December Order”. The award of costs in the Order of Justice Campbell dated December 5, 2018 was stated as:

Costs to the Respondent of \$500 in any event of the cause.

[27] Costs that are payable in any event of the cause, without any reference to being payable forthwith, are not payable until the matter has been finally resolved. In *Teale v. United Church of Canada at Woodlawn, Nova Scotia*, [1979] N.S.J. No. 23, 34 N.S.R. (2d) 313 (NSCA), the Nova Scotia Court of Appeal noted:

4 Counsel for the respondent did not await this appeal but immediately taxed his costs and collected costs from the appellant. He should not have done so. The costs were ordered payable in any event of the cause; this means that the plaintiff would get the costs of the application no matter who won the case - but could not tax and collect them until the end of the case. Costs are payable before the end of a case only if specifically ordered to be paid "forthwith" - *Orkin on Costs*, p. 62.

[28] The Alberta Court of Appeal reached a similar conclusion in *566320 Alberta Ltd. (c.o.b. Import Auto Sales) v. Lethbridge (City)*, 2005 ABCA 244:

27 Costs of an interlocutory application that are ordered payable to a party "in any event of the cause" or "in any event", without more, are not payable forthwith but only at the conclusion of the litigation when the issue of overall costs is determined.

[29] As a result, the costs of \$500, which were payable in any event of the cause with no indication that they were payable forthwith, were only payable when the matter before the Tax Court was concluded.

[30] Nevertheless, a fair reading of the transcript of the oral reasons does not support the position of Sher-E-Punjab Radio that the Tax Court Judge placed great weight or significant weight (as submitted in paragraph 59 of its memorandum) on the failure of Sher-E-Punjab Radio to pay this costs amount. The Tax Court Judge did mention it. A fair reading of these reasons, however, confirms that it was the overall failure of Sher-E-Punjab Radio to pursue this appeal in a timely manner and, in particular, the failure to respond to the undertakings that resulted in the dismissal of the appeal for delay. The failure to pay the costs that were awarded in the order of December 5, 2018 was not a significant factor in dismissing Sher-E-Punjab's appeal.

[31] Given the lengthy history of delay and, in particular, the failure of Sher-E-Punjab Radio to satisfy the undertakings provided on February 5, 2018 by May 13, 2019, there was a sufficient basis for the Tax Court Judge to conclude that the appeal should be dismissed for delay, without considering the status of the payment of the costs awarded on December 5, 2018.

[32] The failure by Sher-E-Punjab Radio to take any action with respect to hiring the clerk and outside accountant during the almost 6 month period from November 21, 2018 (when it stated in

the letter that it was hiring these persons) to the hearing on May 13, 2019 and its renewed promise on May 13, 2019 to then take action to hire these individuals, also confirms that Sher-E-Punjab Radio was reactive and not proactive in pursuing its appeal.

[33] It cannot be said that the failure to pay the costs amount of \$500 was a significant factor in the decision to dismiss the appeal.

C. Role of Previous Counsel

[34] The final matter raised by Sher-E-Punjab Radio was an allegation that the Tax Court Judge did not consider the role that its former counsel had played in its failure to adhere to the orders of the Court and also the former counsel's role in the litigation. The particular concerns raised by Sher-E-Punjab Radio in its memorandum relate to the failure to bring a motion for an extension of time to comply with the undertakings, certain questions related to the reconciliations that were posed by counsel at the hearing of the motion, and the awarding of costs against Sher-E-Punjab Radio in the Order of December 5, 2018.

[35] With respect to the failure to request an extension of time, this does not address the failure of Sher-E-Punjab Radio to comply with the undertakings on a timely basis or any of the previous delays and missed deadlines. The concern in this case is focused on the failure to comply with the undertakings in light of all of the other delays, rather than the failure to request a further extension of time to complete the undertakings.

[36] With respect to the questions that were posed by the former counsel for Sher-E-Punjab Radio to Jasbir Singh Badh at the hearing of the motion on May 13, 2019, the concern identified in paragraph 64 of Sher-E-Punjab Radio's memorandum is stated as follows:

[i]n addition, Mr. Clark's [*sic*] redirect of Jasbir was conducted as a cross examination for the surprising purpose of establishing that [Sher-E-Punjab Radio] did not provide accounting reconciliations by February 28th, a fact that was known to Mr. Clarke and was not helpful to [Sher-E-Punjab Radio's] case.

[37] However, the Crown would certainly have been aware, before the hearing of this motion, that Sher-E-Punjab Radio had failed to provide these accounting reconciliations by February 28, 2019. These questions did not disclose any information that would not have been known by the Crown. There is no merit to the argument that somehow the posing of these questions should warrant our intervention in this appeal.

[38] The final concern relates to the costs and is set out in paragraph 65 of Sher-E-Punjab Radio's memorandum:

[f]inally, in the context of the Costs, [Sher-E-Punjab Radio's] directors were not present in the Courtroom at the November hearing. Accordingly, the only way the directors of [Sher-E-Punjab Radio] would know that Costs were awarded would be if Mr. Clarke had advised them as to the same and requested payment of the amount from [Sher-E-Punjab Radio]. It is entirely possible Mr. Clarke failed to do either.

[39] This paragraph is not based on any factual finding or even any evidence. It is based solely on speculation as to whether Mr. Clarke failed to notify the directors of Sher-E-Punjab Radio that costs had been awarded against it. Mere speculation of what might possibly have occurred

does not provide any basis on which to interfere with the Order of the Tax Court Judge in this appeal.

[40] In any event, as noted above, on a fair reading of the Tax Court Judge's reasons, the fact that Sher-E-Punjab Radio had not paid the costs that were awarded in the Order dated December 5, 2018 by May 13, 2019, was not a significant factor in dismissing the appeal. There is simply no merit in the argument that any role that Mr. Clarke may have possibly had in Sher-E-Punjab Radio not paying these costs on or before May 13, 2019 (which as noted above, were not payable at that time in any event) should have been taken into account by the Tax Court Judge.

V. Conclusion

[41] As a result, I would dismiss the appeal with costs fixed in the amount of \$2,000.

“Wyman W. Webb”

J.A.

“I agree
D. G. Near J.A.”

“I agree
J.B. Laskin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

**APPEAL FROM AN ORDER OF THE TAX COURT OF CANADA
RENDERED ORALLY ON MAY 13, 2019 AND SIGNED ON MAY 14, 2019,
DOCKET NO. 2015-447(IT)G**

DOCKET: A-217-19

STYLE OF CAUSE: SHER-E PUNJAB RADIO
BROADCASTING INC. v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: HEARD BY ONLINE VIDEO
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LASKIN J.A.

DATED: DECEMBER 1, 2020

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