Docket: 2005-1851(IT)G

BETWEEN:

MAHVASH LECHCIER-KIMEL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on June 25, 2008, at Toronto, Ontario

By: The Honourable Justice C.H. McArthur

Appearances:

Counsel for the Appellant:	Romeo Finder
Counsel for the Respondent:	Jenny P. Mboutsiadis

ORDER

UPON motion by the Respondent for an Order dismissing the appeal herein, with costs;

AND UPON reading the materials filed, and hearing counsel for the parties;

IT IS ORDERED that:

1. the Respondent's motion is denied;

2. costs in the amount of $5,000 shall be paid by the Appellant to the Respondent by September 30, 2008;

3. the Appellant shall file and serve an Amended Notice of Appeal by September 30, 2008; and

4. the Respondent shall file and serve a Reply to the Amended Notice of Appeal by October 30, 2008.

If the Appellant does not comply with the terms of this Order, the appeal from the reassessment made under subsection 160(1) of the *Income Tax Act* for the 1990 taxation year shall be dismissed.

Signed at Ottawa, Canada, this 8th day of August, 2008.

"C.H. McArthur"

McArthur J.

Citation: 2008 TCC 457
Date: 20080808
Docket: 2005-1851(IT)G

BETWEEN:

MAHVASH LECHCIER-KIMEL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

McArthur J.

[1] This motion by the Respondent is for an Order dismissing this appeal herein, with costs. At the hearing, I granted an Order to the Respondent, abridging the time to file and serve its motion record, despite the objection of counsel for the Appellant. The Appellant was reassessed under subsection 160(1) of the *Income Tax Act* for the 1990 taxation year, in the amount of $172,822 in July 2002.

[2] The facts upon which the Respondent relies are clearly set out in a lengthy affidavit of Donna Dorosh, filed in its motion record. Ms. Mboutsiadis appeared on behalf of the Respondent and Mr. Finder appeared alone as counsel for the Appellant, not having been able to notify his client.

[3] It appears that the Notice of Appeal was filed with the Court on June 6, 2005, the Reply to the Notice of Appeal was filed and served on August 3, 2005, and an Answer to the Reply was filed and served on or around August 22, 2005.

[4] Because the Appellant had not taken certain procedural steps, a status hearing was scheduled for June 8, 2006. Prior to the hearing, Mr. Finder was appointed as

counsel by the Appellant, and the Court ordered dates for completion of certain procedural steps, upon consent of both parties.

[5] The Respondent served a list of documents before the July 14, 2006 deadline, but the Appellant did not. By letters dated August 16, 2006, September 18, 2006 and November 6, 2006, the Respondent reminded counsel for the Appellant that the list of documents had not been filed. Further, on November 15, 2006, the Respondent advised the Appellant that she would move to dismiss the appeal on February 7, 2007, for delay. The Appellant served her list of documents on February 2, 2007, and the motion was withdrawn.

[6] The Court ordered a show cause hearing for March 22, 2007. By letter dated March 20, 2007, the Court agreed to issue an Order confirming a new timetable, upon consent of both parties. The Order reflected:

(i) the Appellant to file and serve a list of documents by March 29, 2007;

(ii) examinations for discovery to be completed by May 29, 2007; and

(iii) undertakings to be satisfied by June 29, 2007.

[7] The Appellant missed the examinations for discovery deadline but filed her answers on written examination, with no Order of the Court to extend the time.

[8] Counsel for the Appellant and the Appellant's husband attended a pre-hearing conference on January 16, 2008, without having filed a pre-hearing brief, although having twice been advised to provide same by letters from the Court's hearing coordinator. The pre-hearing conference proceeded in any event, and by Order dated January 23, 2008, the Appellant was ordered to file and serve an Amended Notice of Appeal within 60 days. Once again, this Order was ignored, resulting in the cancellation of a continuation of the pre-hearing conference scheduled for June 23, 2008, and rather, this motion was heard.

[9] Apparently, counsel for the Appellant was unable to contact his client, and he therefore appeared alone. His request for an adjournment was denied, and as mentioned above, I granted leave to the Respondent to file and serve its motion record having in mind that by way of Order dated April 29, 2008, the parties were informed of the continuation of the pre-hearing conference on June 23, 2008. It would appear that the Appellant had no intention of attending on June 23, 2008

because her lawyer was unable to reach her, although counsel for the Respondent had spoken to Mr. Finder on June 5, 2008, about the motion to dismiss.

[10] I commend Ms. Mboutsiadis for her relentless yet fair persistence in her many attempts to have the Appellant prosecute her appeal within the *Rules* of the Tax Court of Canada.

[11] With respect to dismissal of appeals, Hamlyn J. in *D'Abbondanza v. R.*[1] is often cited for the following:

> 8 It is the responsibility of the appellant to prosecute his appeals without delay and with due dispatch within the prescribed rules. The appellant in these appeals has not been proactive but merely reactive. The appellant has not filed the list of documents in accordance with the rules nor in compliance with a specific Court order. The explanation given, as reviewed, is without merit.
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> 9 The total effect of the appellant's conduct of the appeals is by deliberate intentional action to delay the prosecution of the appeals.
>
> 10 The conclusion is that the appellant has not provided a reasonable excuse for non compliance nor has he made any attempt whatsoever to comply with the rules or the order of this Court, as such this Court is left with no alternative but to dismiss the appeals in relation to the 1986, 1987, 1988 and 1989 taxation years.

[12] In addition, the Respondent's Book of Authorities included eight cases, most of which resulted in dismissal of the appeals for lesser delays and infractions than in the present case. Some of the paragraphs highlighted by the Respondent include the following:

> From *United Color & Chemicals Ltd. v. R.*[2]
>
> 8 To paraphrase a now famous Canadian quote, the record of the Appellants is of "delay, delay, delay". It is one which the Appellants' counsel has aided and abetted.
>
> 9 There is no acceptable valid reason or excuse for an adjournment of these appeals. The request for an adjournment is dismissed in respect of both appeals.

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[1] 93 DTC 1042.

[2] 98 DTC 1385.

> 10 For the foregoing reasons, and on the basis of the failure by both Appellants to prosecute their appeals on January 19, 1998, the appeals are dismissed. The Respondent is awarded a full set of party and party costs against each Appellant.

From *Ho v. R.*[3]

> 9 … In determining whether an appeal should be dismissed, it is necessary to consider whether the taxpayer has made any attempt to comply with the Rules or an Order of the Court or has provided a reasonable excuse for non-compliance. In this particular case, both Appellants were represented at the status hearing, were aware of and understood the directions made by the Court and I am satisfied, in each case received the Order of Bowie J. dated May 17, 1999. Since that time they have chosen to completely ignore the Order and their failure to comply with it constitutes a deliberate and inexcusable delay.

From *Bourque v. R.*[4]

> 41 For a year, the appellant displayed a flagrant breach of his obligations before this Court. Continued tolerance of such actions could cause prejudice to the due administration of justice. It is trite law that an abuse of process can, in appropriate circumstances, lead to the dismissal or the stay of proceedings (see *Yacyshyn v. R.*, [1999] F.C.J. No. 196 (Fed. C.A.) paragraph 18).
>
> …
>
> 43 The appeals are therefore dismissed for failure to prosecute in accordance with section 64 and paragraph 91*(c)* of the *Rules*.

[13] Also, as in *Lichman v. R.,*[5] the Appellant has shown little attempt to comply with the Respondent's repeated requests. The taxpayer has had a cavalier attitude including a disregard for Court Orders and Procedures, while counsel for the Respondent has made serious efforts to accommodate her.

[14] After these conclusions, the next logical step would appear to be to dismiss the appeal with costs to the Respondent, yet I would be remiss in not considering the following troubling matters.

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[3] 2000 DTC 1781.

[4] 2003 DTC 769.

[5] 2004 DTC 2547 (T.C.C.), aff'd 2005 FCA 226.

[15] I commence with the premise that it is in the best interest of justice that the appeal be heard on its merits. The Appellant's counsel stated he was unable to reach the Appellant and she was unaware of this motion.

[16] Further, the history of this appeal has two sides and the Respondent's actions should also be scrutinized. Briefly, the Respondent's position is the following. The Appellant's husband purchased a matrimonial home in March 1989 for $3,713,000. In May 1990, he transferred it to the Appellant (his wife) for $2 at a time when the Respondent states it had an equity of $1,110,000 and, he, the transferor, was liable to pay tax of $172,822. The Appellant states that the home had no equity in May 1990, and that the transferor had no tax obligations. For unknown reasons, the Appellant was not assessed under subsection 160(1) of the *Act* until July 2002, an unexplained delay of over 12 years. The delay makes it very difficult for the Appellant to challenge the original assessment as permitted in *Gaucher v. Her Majesty the Queen*,[6] or to establish the market value of her home as of May 1990. Further, the Reply to the Notice of Appeal was inadequately drafted in the first instance, and an application to amend had to be made.

[17] The unacceptable conduct of the Appellant and her representatives is partially balanced by the Respondent's delays. I believe that the seriousness of her intentions to pursue her appeal, and the Respondent's time wasted can be best dealt with by an award of costs. Justice is better served by a hearing on the merits than a dismissal on procedural grounds.

[18] In conclusion, the Respondent's motion for an Order dismissing the appeal is denied. Costs are fixed at $5,000 payable by the Appellant to the Respondent, by September 30, 2008, and as requested by counsel for the Appellant, an Amended Notice of Appeal shall also be filed by September 30, 2008, and the Respondent may file a Reply to the Amended Notice of Appeal by October 30, 2008.

[19] If the Appellant does not comply with the terms of the Order in the matter by September 30, 2008, the appeal from the reassessment made under subsection 160(1) of the *Income Tax Act* for the 1990 taxation year shall be dismissed.

Signed at Ottawa, Canada, this 8th day of August 2008.

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[6] 2000 CanLII 16513 (F.C.A.).

"C.H. McArthur"

McArthur J.

CITATION:	2008 TCC 457
COURT FILE NO.:	2005-1851(IT)G
STYLE OF CAUSE:	MAHVASH LECHCIER-KIMEL AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 25, 2008
REASONS FOR ORDER BY:	The Honourable Justice C.H. McArthur
DATE OF ORDER:	August 8, 2008

APPEARANCES:

Counsel for the Appellant:	Romeo Finder
Counsel for the Respondent:	Jenny P. Mboutsiadis

COUNSEL OF RECORD:

For the Appellant:

Name:	Romeo Finder
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For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada