Docket: 2004-3115(GST)G

BETWEEN:

GMC DISTRIBUTION LTD.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 27, 2009 at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Applicant:	Donald R. Fiske Sandev S. Purewal
Counsel for the Respondent:	Brandon Siegal

ORDER

Upon application to set aside a judgment, the application is allowed and it is ordered that the judgment of C. Miller, J. signed on April 12, 2006, which dismissed an appeal in respect of an assessment made under the *Excise Tax Act* for the period from April 1, 1998 to September 30, 2000, be set aside.

The respondent is entitled to costs of the motion, which shall be paid by the applicant forthwith.

Signed at Toronto, Ontario this 27th day of May 2009.

"J. Woods"

Woods J.

Citation: 2009 TCC 287
Date: 20090527
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BETWEEN:

GMC DISTRIBUTION LTD.,

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Respondent.

REASONS FOR ORDER

Woods J.

[1] The applicant, GMC Distribution Ltd. ("GMC"), seeks to set aside a judgment of this Court which dismissed its appeal from an assessment under the *Excise Tax Act* (the "*ETA*").

[2] The salient facts are set out below.

[3] By notice dated September 23, 2002, GMC was assessed under the *ETA* for net tax of $3,540,574, interest of $369,022 and a penalty in the amount of $519,178. The period at issue was from April 1, 1998 to September 30, 2000.

[4] An appeal in respect of the assessment was filed in this Court on behalf of GMC by Brian Cherniak, who was its principal shareholder. The notice of appeal, which was filed on July 26, 2004, elected that the appeal be heard under the informal procedure, as is permitted for appeals under the *ETA*. As far as I know, no counsel was retained in connection with the litigation.

[5] Upon motion by the respondent, the procedure was subsequently changed to the Court's general procedure. Counsel for GMC was still not retained,

notwithstanding that this is a requirement of the general procedure unless leave of the Court is granted.

[6] It appears that nothing much happened in respect of the litigation until the Court ordered the parties to attend a status hearing on March 7, 2006.

[7] No one appeared for GMC at that hearing. According to the transcript of the proceeding, counsel for the respondent requested that GMC be given a short period of time to either retain counsel or seek leave for other representation.

[8] The judge, C. Miller J., agreed with the proposal and provided the applicant with a period of 30 days in which to take further action. No further steps were taken and the appeal was dismissed by judgment signed on April 12, 2006. It is this judgment that is the subject of this application.

[9] Shortly after the judgment was issued, the Minister took steps to collect the amount owing from Mr. Cherniak. A directors' liability assessment was issued to him by notice dated August 3, 2006.

[10] The directors' assessment should not have been a surprise. The Canada Revenue Agency (CRA) had given notice of the possibility of such an assessment by letter dated January 7, 2003, and a response was provided by Mr. Cherniak's lawyer at the time.

[11] On January 18, 2008, an appeal was instituted by Mr. Cherniak in respect of the directors' assessment.

[12] The hearing of Mr. Cherniak's appeal was first scheduled for August 28, 2008. Shortly before this date, Mr. Cherniak retained counsel and the hearing was accordingly adjourned to give counsel time to prepare. The appeal was re-scheduled on a peremptory basis for April 27, 2009.

[13] A few weeks prior to the new hearing date, counsel for Mr. Cherniak filed a notice of motion on behalf of GMC. It sought to set aside the judgment which dismissed GMC's appeal.

[14] The motion was scheduled to be heard on the same day as Mr. Cherniak's appeal and both matters came before me on April 27, 2009. At that time, I heard GMC's motion, and I adjourned Mr. Cherniak's appeal until the motion was dealt with.

Position of parties

[15] In support for the motion, GMC's counsel relies on paragraph 171(1)(*b*) of the Tax Court of Canada Rules (General Procedure). It provides that the Court may set aside a judgment where a person fails to appear on a motion due to accident, mistake or insufficient notice.

[16] Subsection 171(3) of the Rules provides that this type of motion cannot be brought without leave of the Court if it is not made within a reasonable time of the applicant becoming aware of the judgment. I am not aware that such leave was sought, notwithstanding that the applicant had known of the judgment.

[17] GMC submits that the judgment should be set aside because Mr. Cherniak was not able to properly attend to the litigation until August 2008 due to health difficulties.

[18] Counsel for the respondent submits that paragraph 171(1)(*b*) has no application here because it only applies to interlocutory matters. He suggests that the relevant rule is s. 140(2). It provides a 30 day period in which a party may apply to the Court to set aside a judgment issued following a failure to appear. Counsel acknowledges that the 30 day period can be extended but he submits that an extension is not warranted in the circumstances.

Applicable principles

[19] The two rules that were relied on by the parties, s. 171(1)(*b*) and s. 140(2), provide:

> **171**(1) A person who,
>
> […]
>
> (*b*) fails to appear on a motion through accident, mistake or insufficient notice,
>
> may move to set aside or vary the judgment by a notice of motion.
>
> **140**(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.

[20] Usually when an application is made to set aside a default judgment, the applicant relies on s. 140(2). It is clear that the 30 day limit imposed by the section can be extended: *Tomas v. The Queen*, 2007 FCA 86, 2007 DTC 5178.

[21] It would seem unnecessary to look to s. 171(1)(*b*) in the case of a default judgment because that provision seems to have a more narrow scope.

[22] Aside from the rules, though, the Court also has an inherent jurisdiction to set aside a default judgment: *Farrow v. The Queen*, 2003 TCC 885, 2004 DTC 2055. (Different considerations may have applied if the appeal had continued under the informal procedure because certain statutory requirements have to be satisfied in that case: *Webster v. The Queen*, 2007 FCA 203, 2007 DTC 5399; *Dayan v. The Queen*, 2004 FCA 75, 2004 DTC 6155.)

[23] The decision in *Farrow* is also helpful for setting out principles which should be taken into account in considering whether a judgment should be set aside. At para. 17, former Chief Justice Bowman made the following comment:

> The principles upon which the court will set aside a default judgment are discussed further in *Hamel*, (*supra*). At pages 117-118 Culliton, C.J.S. said:
>
> > The principles upon which a court in its discretion will act to set aside a judgment legally entered were set forth by Lamont, J.A. in *Klein v. Schile* [1921] 2 WWR 78, 14 Sask LR 220, when he said at p.79:
> >
> > > 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) 7 WWR 93, 29 WLR 325, 7 Sask LR 132; *Mills v. Harris & Craske* (1915) 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) 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.).

[24] I have also found assistance from a more recent decision of the Ontario Court of Appeal: *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695.

[25] In discussing the principles to be applied in an application to revive an action that had been dismissed for delay, the appellate court commented that it was important not to apply a set of factors in a rigid manner. Like the modern approach to procedural matters generally, a contextual approach should be taken to determine the most appropriate course of action in the particular circumstances (para. 20).

Discussion

[26] In my view, the overriding consideration in the circumstances of this case is the relative effect on the persons that will be affected by the decision.

[27] Although GMC brought the application, it likely will not be affected. There is a substantial amount at stake for Mr. Cherniak however.

[28] As for the impact on the respondent, counsel informed the Court that the respondent would not be significantly prejudiced if the matter were revived.

[29] An argument could be made that the more appropriate forum in which to decide the substantive issue is at the hearing of Mr. Cherniak's appeal. However, for reasons that are not entirely clear to me, counsel agreed that the merits of the GMC assessment would not be challenged at Mr. Cherniak's appeal. In light of this agreement, it appears that this decision could have a significant impact on Mr. Cherniak.

[30] I am very reluctant to make a decision in this motion that would have the effect of depriving Mr. Cherniak of the ability to challenge the correctness of the GMC assessment.

[31] The evidence before me does not fully explain, to my satisfaction at least, why GMC did not prosecute its appeal. The evidence presented regarding Mr. Cherniak's medical difficulties did not convince me that this was the sole reason. It may well have been a contributing factor, however. I would also note that Mr. Cherniak had advised the respondent at the time that he did not have the financial resources to hire a lawyer. This may also have been a contributing factor.

[32] In any event, the decision that Mr. Cherniak took back in 2006 was to forego the prosecution of GMC's appeal.

[33] It is significant in my view that Mr. Cherniak did not have the benefit of counsel in 2006 when this decision was made. It is not clear to me whether he fully appreciated the consequences to him personally.

[34] For this reason, I conclude that the most appropriate course of action is to grant this motion and set aside the default judgment.

[35] In reaching this conclusion, I have also taken into account whether there are merits to GMC's appeal.

[36] Counsel for the respondent submits that there are no good grounds for GMC's appeal. The issue, according to the respondent, concerns the right to input tax credits in circumstances where the documentation requirements of the *ETA* have not been satisfied. The judicial authorities are clear, it is submitted, and the appeal cannot possibly succeed.

[37] Counsel for the applicant did not address the merits of GMC's appeal in any detail at the hearing.

[38] Notwithstanding that the applicant has failed to properly address this issue, I am not satisfied based on the information before me that GMC's appeal could not possibly succeed.

[39] GMC's appeal was instituted in the informal procedure. The notice of appeal was not prepared by a lawyer and the grounds for appeal are not clearly stated.

[40] In the reply to the notice of appeal, the Minister assumed that the only issue was the availability of input tax credits.

[41] It is not clear to me from the pleadings that this is the only issue to be decided. For example, the Minister assumed that GMC did not report or remit the appropriate amount of GST on its sales (Reply, para. 7(x)). In the notice of appeal, GMC appears to take issue with this.

[42] In all the circumstances of this case, including the large amount at issue and the agreement of the parties not to contest GMC's assessment at Mr. Cherniak's appeal, I have concluded that it is appropriate to set aside the judgment dismissing the appeal.

[43] The application will be allowed.

[44] As for costs, the applicant has agreed to bear the costs of this motion. This is appropriate. Such costs are to be paid forthwith.

Signed at Toronto, Ontario this 27th day of May 2009.

"J. Woods"

Woods J.

CITATION:	2009 TCC 287
COURT FILE NO.:	2004-3115(GST)G
STYLE OF CAUSE:	GMC DISTRIBUTION LTD. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 27, 2009
REASONS FOR ORDER BY:	The Honourable Justice J. Woods
DATE OF ORDER:	May 27, 2009

APPEARANCES:

Counsel for the Applicant:	Donald R. Fiske Sandev S. Purewal
Counsel for the Respondent:	Brandon Siegal

COUNSEL OF RECORD:

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