Docket: 2008-3719(GST)G

BETWEEN:

ANTHONY M. SPECIALE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on June 20, 2012 at Toronto, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Samantha Hurst

ORDER

Upon motion by the appellant for an order setting aside the judgment of the Court dated January 31, 2012;

And after reviewing the written submissions from both the appellant and the respondent;

And upon hearing what was alleged by the parties *viva voce* in Court;

The application is allowed.

The respondent is entitled to costs of this motion and of the motion to dismiss brought on January 25, 2012 in any event of the cause, the said costs being fixed at $1,000 and payable within 60 days from the date of this order.

The appeal is scheduled for hearing at the Tax Court of Canada, Federal Judicial Centre, 180 Queen Street West, Toronto, Ontario, for a duration of two days, on December 5 and 6, 2012.

Signed at Montreal, Quebec, this 5th day of July 2012.

"Lucie Lamarre"

Lamarre J.

Citation: 2012 TCC 236
Date: 20120705
Docket: 2008-3719(GST)G

BETWEEN:

ANTHONY M. SPECIALE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Lamarre J.

[1] The appellant's motion is for an order setting aside my judgment dated January 31, 2012, dismissing for delay and want of prosecution, with costs of $2,534.57, the appeal from the assessment for an amount of $68,900 or thereabouts made under the *Excise Tax Act* (**ETA**) for the period from January 1, 2004 to April 30, 2006, the notice of which was dated March 15, 2007.

[2] That judgment was rendered following a motion to dismiss the appeal brought by the respondent at the show cause hearing held before me in Toronto on January 25, 2012, at which the appellant, although duly notified of the time and place of the hearing, was not present and no one appeared on his behalf.

[3] The grounds for the appellant's motion are set out in his notice of motion filed with this Court on March 19, 2012.

[4] Those grounds are mainly that his appeal has merit, that he has always shown his intention to pursue his appeal, that, historically (but for January 25, 2012), he has always appeared before this Court when requested, that the notice from this Court regarding a show cause hearing to be held on January 25, 2012 did not come to his attention because of an honest mistake and/or inadvertence, that he expressed his

intention to seek to have the judgment set aside on the same date he first became aware of that judgment, that is, February 1, 2012, by calling a registry officer of this Court, that he immediately sought in writing, unsuccessfully, the respondent's consent to have the judgment set aside, that he brought this motion immediately upon being advised that the respondent was not prepared to consent to an order to set aside the judgment, that there is no prejudice to the respondent in the judgment being set aside which an order on costs could not compensate, that the respondent has taken against the appellant enforcement measures securing more than four times the monetary amount involved in the appeal, that the outcome of the appeal will affect how other amounts in dispute between the appellant and the Canada Revenue Agency (**CRA**) will be dealt with, that the appellant's failure to attend on January 25, 2012 is an irregularity, and that not setting aside the judgment would result in a manifest injustice to the appellant. The appellant also states that this Court has the inherent jurisdiction to set aside the judgment.

[5] In support of his motion the appellant filed an affidavit sworn by him in which he sought leave of this Court to rely upon his own affidavit, which I granted pursuant to rule 4.02 of the *Rules of Professional Conduct* of the Law Society of Upper Canada in order to expedite the matter.

[6] In essence, the appeal arises from the disallowance by the CRA of input tax credits (**ITC**) in respect of goods and services received during a specific period. The CRA has taken the position that all the ITCs in question must be disallowed on the basis that insufficient documentary evidence was provided to substantiate the credits claimed. It is the appellant's position that the CRA misconstrued the facts and was wrong in law in arriving at its decision. The appellant is of the view that there is a reasonable probability of this Court's making a finding in the appeal that the information provided by him is sufficient to support his claim for ITCs.

[7] Further, the appellant states in his affidavit that there was a misfiling of, and failure to diarize, the notice for a show cause hearing to be held on January 25, 2012 and that these errors were caused by a clerk in his office. Apparently, the notice from the Court had been misfiled as part of seven "banker boxes" of documents relating to a long-outstanding appeal matter going back to the 1989 taxation year.

[8] The respondent opposes the appellant's motion. She states that the appellant has been less than forthright with this Court and the respondent throughout the appeal process and that he has a manifest history of disregarding court orders.

[9] First of all, the appellant failed to comply with an order issued by Hogan J. of this Court on July 14, 2009 requiring the parties to deliver their lists of documents by September 30, 2009.

[10] Second, the appellant did not fulfil his undertakings by August 30, 2010, the date that had been set for doing so in a second order of this Court dated May 13, 2010.

[11] Third, the appellant again failed to fulfil his undertakings, this time not meeting the February 25, 2011 deadline specified in a third order of this Court, dated February 3, 2011, issued following a show cause hearing held before V. Miller J. of this Court on January 25, 2011.

[12] The appellant finally fulfilled his undertakings on April 6, 2011. However, the Court advised the appellant on April 13, 2011 that he needed to bring a motion for an extension of time to satisfy his undertakings. Although duly advised by the Court, the appellant did not bring such a motion as required by Practice Note No.14 of this Court.

[13] Fourth, on November 18, 2011, the Court ordered the appellant to appear at a show cause hearing on January 25, 2012. Although duly notified by the Court and by the respondent, who had sent him a copy of a letter written to the Court asking for dates for the hearing of a motion to dismiss for delay, the appellant did not answer the respondent's letter and failed to attend the show cause hearing on January 25, 2012. That failure resulted in the judgment dismissing his appeal for delay and want of prosecution, with costs of $2,534.57, that was issued on January 31, 2012 and is now the subject of the present motion to set aside.

[14] Subsection 140(2) of the *Tax Court of Canada (General Procedure) Rules* (**TCC Rules**) provides that this Court may set aside a judgment dismissing an appeal for failure to appear if the moving party applies for such relief within 30 days of the pronouncement of the judgment. Subsection 140(2) reads as follows:

> *Failure to Appear*
>
> 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.

[15] The case law has established that the application should be made as soon as possible after the judgment comes to the knowledge of the appellant, but mere delay is not a bar unless it prejudices the other party or is wilful.

[16] The respondent is of the view that the appellant did not present his motion in a timely way. Although the judgment was pronounced on January 31, 2012, the appellant did not file his affidavit until March 19, 2012. He did not write to the Court until February 28, 2012, for which he gave a host of excuses, including medical reasons, pressing client matters and deadlines in other matters. The respondent argues that the appellant's delay in bringing this application was, in fact, wilful.

[17] The respondent also submits that the reasons given by the appellant for the failure to attend the show cause hearing on January 25, 2012 (i.e., the misfiling by the clerk and her failure to diarize the date of the hearing) could not be verified, and are not believable. Indeed, the respondent mentioned that the appellant's diary entries did not show the show cause hearing held a year ago, on January 25, 2011, and did not record the appellant's attendance at that time. The respondent infers that the existence or non-existence of a diary entry is therefore irrelevant.

[18] Further, although the clerk's performance apparently declined in the fall of 2011, the appellant did not feel it necessary to check his personal tax files to determine if deadlines had been missed. Had he done so after the clerk's departure on December 12, 2011, he would have found the allegedly misfiled notice of hearing long before the actual hearing date of January 25, 2012, since he subsequently found it mixed in with other tax files. The respondent concludes that the appellant did not attend on January 25, 2012 because he had lacked diligence in the prosecution of his appeal.

[19] Finally, the respondent suggests that the appellant has no case on the merits. Indeed, the appellant was denied ITCs for the period at issue and he does not have documents substantiating his ITC claim. In his list of documents, he only included documents for a period prior to the period under appeal. Further, the appellant never provided the required documentation, and so, even if that documentation exists, he will be barred from introducing it as evidence by section 89 of TCC Rules. Therefore, he has no reasonable prospect of success in his appeal.

[20] The respondent concludes by saying that the appellant did not have the intention to bring a motion for an extension of time to satisfy his undertakings as requested by the Court (cross-examination of the appellant on his affidavit, at pages 107-109). The appellant's conduct leads to the conclusion that there was a deliberate

violation of the TCC Rules, a repetitive and intentional violation, and that this justifies the dismissal of his motion (*MacIver v. Canada*, 2009 FCA 89).

My decision

[21] Although I recognize that the appellant has been negligent and disorganized, overwhelmed by his personal tax matters, I do not find that this is a situation comparable to the ones that prevailed in *MacIver*, *supra*, *Fafard v. Canada*, [1999] F.C.J. No. 1856 (QL), or *Amethyst Greenhouses Ltd. v. Canada*, 2006 TCC 575, referred to by the respondent.

[22] In *MacIver*, the taxpayer's behaviour was deliberately obstructive; his answers at discovery were abusive and scandalous; he engaged in defiant misconduct; and he had been convicted in the past for perjury and obstruction of justice. In *Fafard*, the taxpayer's misconduct included abuse, insults, intimidation, obscenities, and verbal and physical aggression. In *Amethyst Greenhouses Ltd.*, the taxpayer did not have the benefit of legal representation; his notice of appeal was incoherent, making it difficult, if not impossible, to discern on what basis he was challenging the minister's assessments. All this, combined with the fact that the taxpayer simply forgot — no other explanation was provided — to attend the hearing, was considered by Sheridan J. in dismissing the motion to set aside the default judgment.

[23] In *Jamieson v. the Queen*, 2012 TCC 144, a decision signed on May 2, 2012, and referred to by the respondent, Campbell J. of this Court dismissed the motion to set aside the default judgment mainly because she came to the conclusion that the taxpayer's inaction in his appeals and his approach of delaying the matter to infinity tended to show that he had no desire ultimately to have his appeals adjudicated by this Court.

[24] In the present case, I am prepared to give the appellant a last chance to get organized and to go ahead with the necessary steps to have this case scheduled for hearing. My reasons are set out hereunder.

[25] Although subsection 140(2) of the TCC Rules provides that there is a 30-day time limit for making an application to set aside a default judgment, it is clear that the time limit may be extended (see *Tomas v. The Queen*, 2007 FCA 86).

[26] The Court has inherent jurisdiction to set aside a default judgment. The principles which should be taken into account in considering whether a judgment

should be set aside were considered by Bowman A.C.J. in *Farrow v. Canada*, 2003 TCC 885.

[27] Thus, the application has to be made as soon as possible after the judgment comes to the knowledge of the party against whom it was rendered, but mere delay will not be a bar to the application unless an irreparable injury will be done to the other party or the delay has been wilful. The affidavit supporting the application should explain the delay in making the application. Finally, the application must disclose that the applicant has a case on the merits.

[28] It is also worth noting that the Court should not apply a set of factors in a rigid manner (see *GMC Distribution Ltd. v. The Queen*, 2009 TCC 287).

[29] In the present case, I am fully aware that the appellant, being a barrister and solicitor, should be more careful with regard to procedural matters.

[30] It is somewhat difficult to understand the appellant's not filing his motion as soon as he learnt about the default judgment, on the basis that he was awaiting counsel for the respondent's consent to having the judgment set aside. The appellant should have known that, whatever the position of the respondent might be, he had to present a motion before this Court in order to obtain an order setting aside the default judgment.

[31] Nonetheless, although the appellant must bear responsibility for the situation that has arisen, I find that he gave a sufficient explanation for not attending the show cause hearing on January 25, 2012 and that, even though he only filed his motion with the Court on March 19, 2012, he advised the Court of his intent right after receiving the default judgment.

[32] Further, the delay in bringing the motion, while unfortunate, has not occasioned prejudice to the respondent.

[33] Counsel for the respondent argued that the appellant has not demonstrated that he has an arguable appeal. As Bowman A.C.J. stated in *Farrow*, the threshold in that regard is a relatively low one.

[34] 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, and, the respondent argues under section 89 of the TCC Rules, it is now too late to provide other documentation, if any exists.

[35] I do not agree that the appellant is precluded from doing so. There is still the possibility of amending his list of documents. In any event, I am reluctant to deprive the appellant of his rights, especially taking into account that the amount of money involved, $68,900, is not insignificant. It is my view that there is a justiciable issue here that should be decided on the merits.

Conclusion

[36] I have concluded that it is appropriate to set aside the judgment dated January 31, 2012, dismissing the appeal.

[37] The application is allowed. The appellant will be exempted from filing a motion for an extension of time to fulfil the undertakings that were fulfilled on April 6, 2011. The appeal shall be scheduled for hearing for a duration of two days, in Toronto, on December 5 and 6, 2012.

[38] As for costs, relying on *Farrow*, and in light of the fact that the problem was caused by the appellant, I am awarding the respondent costs of this motion and the motion to dismiss in any event of the cause, the said costs being fixed at $1,000 and payable within 60 days from the date of this order.

Signed at Montreal, Quebec, this 5th day of July 2012.

"Lucie Lamarre"

Lamarre J.

CITATION:	2012 TCC 236
COURT FILE NO.:	2008-3719(GST)G
STYLE OF CAUSE:	ANTHONY M. SPECIALE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 20, 2012
REASONS FOR ORDER BY:	The Honourable Justice Lucie Lamarre
DATE OF ORDER:	July 5, 2012

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Samantha Hurst

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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