Docket: 2018-1827(IT)G

BETWEEN:

BEATA KOWALCZYK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Counsel for the Appellant: Mieszko Chuchla
Counsel for the Respondent: John Bodurtha

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**ORDER**

WHEREAS the Respondent has brought a motion pursuant to section 69 of the *Tax Court of Canada Rules (General Procedure)* in which he seeks an Order to strike the Notice of Appeal filed with the Court on May 18, 2018, and allowing the Appellant to file a Fresh Notice of Appeal in accordance with the applicable rules of procedure and allowing the Respondent to file and serve a Reply 60 days after the date of service of the Fresh Notice of Appeal; and,

WHEREAS counsel for the Appellant has opposed the motion;

UPON CONSIDERATION of the written submissions made by the parties,

IT IS ORDERED that

1) the Notice of Appeal is struck,

2) the Appellant may file and serve a new Fresh Notice of Appeal that complies with the Rules no later than the 20th day of November 2018,

3) the Respondent shall file and serve a Reply to Notice of Appeal no later than 60 days after service upon it of the Fresh Notice of Appeal, and

4) there will be no order as to costs.

Signed at Ottawa, Canada, this 13th day of September 2018.

"Gaston Jorré

Jorré D.J.

Citation: 2018TCC190
Date: 20180913
Docket: 2018-1827(IT)G

BETWEEN:

BEATA KOWALCZYK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR ORDER

Jorré D.J.

[1] The Respondent has filed a Notice of Motion in writing seeking to strike out the Notice of Appeal in this matter but allowing the Appellant to file a fresh Notice of Appeal as well as allowing the Respondent to file a Reply 60 days after the date of service of the Fresh Notice of Appeal. In the alternative, the Respondent seeks 60 days from the date of the order to serve and file its Reply.

[2] By way of background I note the following. First, the Appeal was originally filed under the informal procedure. Subsequently, when the Appellant became aware that the amount in dispute was in excess of the jurisdiction of the informal procedure, she asked that the matter be moved to the general procedure.

[3] Secondly, while the Appellant, in preparing her Notice of Appeal, appears to have had the assistance of another individual who co-signed the Notice, she did not retain counsel until a later date.

[4] Broadly, the Respondent submits that the Notice of Appeal is not in conformity with the Rules because it is not in accordance with form 21(1)(a) of the *Tax Court of Canada Rules (General Procedure)*, it consists primarily of argument, contains accusations not relevant to the proceedings and discloses no reasonable grounds of appeal.

[5] Counsel for the Appellant has filed submissions in writing, dated August 16, 2018, opposing the substance of the motion. Although the document is headed "Affidavit in Opposition to Motion" it is clearly written representations and not an affidavit.

[6] Nothing in the submissions directly requests a hearing of the motion and nothing in the submissions gives reasons why the matter cannot be dealt with in writing although the reference at the bottom of the second page to documents or other evidence that may be used at the hearing of the motion implies that counsel for the Appellant expects there to be a hearing.

[7] Assuming that counsel for the Appellant intended to request a hearing, I would note that rule 69 reads as follows:

> 69(1) A party filing a notice of motion may, at the same time, or subsequently, file a written request that the motion be disposed of upon consideration of written representations and without appearance by the parties.
>
> (2) A copy of the request and of the written representations shall be served on all parties served with the notice of motion.
>
> (3) A party served with a request shall within twenty days,
>
> (a) file and serve written representations in opposition to the motion, or
>
> (b) file and serve a written request for a hearing.
>
> (4) When all parties served with the request have replied to it or the time for doing so has expired, the Court may,
>
> (a) grant judgment without a hearing,
>
> (b) direct a hearing, or
>
> (c) direct that written representations be filed.

[8] It is clear that once the step in paragraph (3) of the Rule has been completed the Court may exercise the powers contained in paragraph (4). There is no automatic requirement to have a hearing even if a party served with a request under paragraph (2) asks for one.

[9] The written representations of the Appellant clearly set out its reasons for opposing the motion. Given that and given that the key evidence for the motion is the Notice of Appeal itself, I am satisfied that this motion can properly be disposed of without a hearing of the motion and the additional time and cost of a hearing. My order and reasons for order are set out below.

[10] In essence, the Appellant raises four objections. First, that no one advised the Appellant that a new Notice of Appeal would be necessary or that they objected to the notice of appeal in its current form; in addition it notes that the Court has the power to dispense with the Rules. Second, that the motion is contrary to the Court's mandate to "… secure the just, most expeditious and least expensive determination of every proceeding on its merits" because the motion route would result in an unjustified delay to the proceedings and it would result in additional and unwarranted costs in the form of the second Court filing fee. Third, that the main objective of the motion is to obtain additional time to file and serve the Reply and, fourth, that the grounds invoked by the Respondent in support of the motion are unfounded and unsubstantiated.

[11] With respect to the first and second point raised by the Appellant I would note that the there is no order by the Court dispensing with the rules of pleadings and that at this stage the motion would not cause great delay. Further I would note that if the Motion was granted and the Appellant were allowed to file a Fresh Notice of Appeal the Appellant would not be obliged to pay a second set of filing fees.

[12] Reproduced below are some of the Court Rules relating to the form of pleadings and, in particular, Notices of Appeal:

> 21(1) Every proceeding to which the general procedure in the Act applies shall be instituted by filing an originating document in the Registry
>
> (a) in Form 21(1)(a) in the case of an appeal from an assessment under the *Income Tax Act* …
>
> …
>
> 47(1) Pleadings shall be divided into paragraphs, numbered consecutively, and each allegation shall, so far as is practical, be contained in a separate paragraph.

> (2) Where it is convenient to do so, particulars may be set out in a separate document attached as a schedule to the pleading.
>
> 48. Every notice of appeal shall be in Form 21(1)(a), (d), (e) or (f).

[13] Also relevant is the Rule below relating to the striking of pleadings:

> 53(1) The Court may, on its own initiative or on application by a party, strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document
>
> (a) may prejudice or delay the fair hearing of the appeal;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) is an abuse of the process of the Court; or
>
> (d) discloses no reasonable grounds for appeal or opposing the appeal.
>
> (2) No evidence is admissible on an application under paragraph (1)(d).
>
> (3) …

[14] I will now turn to the merits of the motion.

[15] The Notice of Appeal in question is about 12 ½ pages in length and also has a number of documents attached. It is not in the format set out in form 21(1)(a). It also does not conform to Rule 47(1). Rule 47(1) is important because it is designed to enable, as much as possible, the opposite party to admit, deny or not admit individual allegations of fact in a straightforward way.

[16] Much of the Notice of Appeal consists of argument mixed together with allegations of facts. The Notice does not clearly set out factual allegations and the issues; it is often quite confusing.

[17] The Appeal also raises a great many allegations relating to the conduct of the CRA. These do not belong in the Appeal for the following reasons.

[18] Ultimately, the question for the Court to determine is the correctness of the assessment, i.e. was the amount of tax assessed correctly determined or should a different amount of tax have been assessed. The Court's role is not to judge the

behaviour of the parties during the audit; this is because the behaviour of the parties during the audit does not affect the correct amount of tax to be assessed.[1]

[19] In order to get the answer to the question "is the amount of tax correctly determined?" what matters are the underlying facts and the applicable law. For example, suppose that in computing a gain on the disposition of property there is a dispute as to the cost of the property and the Minister proceeded on the basis that the cost is $100 and an Appellant says that the cost is higher, $200. The conduct of the parties will not change the cost.

[20] While I do not agree with all aspects of the Respondent's submissions, the Notice of Appeal is quite problematic and, in its current form, is not substantially in conformity with the rules of pleading.

[21] I am satisfied that in its current form the Notice of Appeal is often confusing and that this confusion together with the irrelevant allegations relating to conduct and the failure to clearly articulate allegations of fact may prejudice or delay the fair hearing of the appeal.

[22] I am also satisfied that the Appellant should be able to remedy the deficiencies.

[23] Given the way the Notice of Appeal is set out, I cannot see a way of remedying the problem other than by following the Respondent's suggestion that the appeal in its current form be struck and that the Appellant be ordered to file a completely new Fresh Notice of Appeal.

[24] Given that the Appellant now has counsel that should be relatively straightforward.

[25] This Order should not delay the hearing unduly and I again note that no additional filing fee is payable upon the filing of the Fresh Notice of Appeal.

[1] Nothing in the submissions or in the pleadings filed would even begin to suggest that somehow, for exceptional reasons, conduct would effect the correct amount of tax to be assessed in this case.

[26] Accordingly, the Court orders that:

the Notice of Appeal is struck,

the Appellant may file and serve a new Fresh Notice of Appeal conforming to the Rules no later than the 20th day of November 2018 and

the Respondent shall file and serve a Reply to Notice of Appeal no later than 60 days after service upon it of the Fresh Notice of Appeal.

[27] In the circumstances, there will be no order as to costs.[2]

Signed at Ottawa, Canada, this 13th day of September 2018.

"Gaston Jorré"

Jorré D.J.

[2] The parties may also wish to read the recent judgment of Associate Chief Justice Lamarre in the matter of *Olukayode Adebogun v the Queen*, 2018TCC181.

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| COURT FILE NO.: | 2018-1827(IT)G |
| STYLE OF CAUSE: | BEATA KOWALCZYK AND THE QUEEN |
| SUBMISSIONS: | |
| Motion Record including written submissions filed: | July 27, 2018 |
| Written submissions filed by the Respondent: | August 16, 2018 |
| File referred to the Judge: | August 27, 2018 |
| REASONS FOR ORDER BY: | The Honourable Justice Gaston Jorré |
| DATE OF ORDER: | September 13, 2018 |
| APPEARANCES: | |
| Counsel for the Appellant: | Mieszko Chuchla |
| Counsel for the Respondent: | John Bodurtha |
| COUNSEL OF RECORD: | |
| For the Appellant: | |
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