

BETWEEN:

JEAN BELVAL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion heard on December 2, 2013, at Montréal, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant: Bogdan Draghia

Counsel for the respondent: Danny Galarneau

JUDGMENT

In accordance with the attached Reasons for Judgment, the motion is allowed and the appeal from the assessment made under the *Excise Tax Act* for the April 1 to June 30, 2003, period is dismissed with costs of \$700 payable to the respondent no later than January 9, 2015.¹

1. It is entirely appropriate in the circumstances of this case to award costs under subsection 9(2) of the *Tax Court of Canada Rules of Procedure Respecting the Excise Tax Act (Informal Procedure)*. The amount of \$700 is calculated in consideration of the maximum payable, given that there were two motion hearings and that it is not necessary to tax the costs, and of the amount of the costs awarded in the order dated April 4, 2013. This results in \$710, which I rounded down to \$700.

Signed at Ottawa, Ontario, this 21st day of November 2014.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 13th day of January 2015
Johanna Kratz, Translator

Citation: 2014 TCC 349
Date: 20141121
Docket: 2009-2311(GST)I

BETWEEN:

JEAN BELVAL,

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and

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REASONS FOR JUDGMENT

Jorré J.

Introduction

[1] The respondent filed a motion for the dismissal of the appeal. In support of this motion, the respondent submitted that the appellant failed to act with due dispatch or with the good faith required in dealing with his appeal.

The facts²

[2] The appellant is appealing from a GST assessment for the amount of \$10,500 in taxes plus interest and penalties. His Notice of Appeal was filed on July 14, 2009, by Mr. Draghia. The appellant has chosen the informal procedure.

[3] According to the respondent, the appellant should have collected GST on \$150,000 in business income. According to the appellant, this amount was an

2. The pagination of the printed version of the electronic version of the transcript is not always the same as that of the paper version. The page references here are to the paper version.

unexpected windfall for which the appellant had not provided a service in exchange.

[4] The Reply to the Notice of Appeal was filed on September 16, 2009.

[5] In November 2009, the appeal hearing was set for July 7, 2010. This hearing was postponed on June 11, 2010, following the respondent's request.

[6] On July 7, 2010, the parties filed a joint application to fix a time and place for the hearing. One of the proposed dates was January 19, 2011, and, in an order dated July 9, 2010, the Court scheduled a one-day hearing for January 19, 2011.

[7] On January 11, 2011, the appellant requested that the appeal be adjourned for medical reasons; this adjournment was granted on January 12, 2011.

[8] In a letter dated February 18, 2011, Mr. Draghia informed the Court that the appellant's medical condition remained unchanged.

[9] On December 21, 2011, the Registry wrote to Mr. Draghia, asking him to submit a written report on the appellant's health no later than January 6, 2012.

[10] Having received no response from Mr. Draghia, the Registry wrote to Mr. Draghia again on May 1, 2012, to inform him that if the Court did not receive a written indication of the appellant's intentions by May 4, 2012, the hearing would be scheduled during the next session available in Montréal.

[11] In a letter dated May 4, 2012, Mr. Draghia informed the Court that, in response to the letters dated December 21, 2011, and May 1, 2012, which he had forwarded to the appellant, he was still waiting to hear from the appellant. Mr. Draghia also wrote that he understood that [TRANSLATION] "[the appellant] still wishe[d] to maintain his position in the case and [that he would] ask him to confirm this [to the Registry] as soon as possible". The appellant did not inform the Court of his intentions.

[12] In an order dated August 8, 2012, the hearing of the appeal was fixed for October 4, 2012.

[13] The exact date is unclear but at some point between May 4, 2012, and October 4, 2012, Mr. Draghia withdrew from the case; subsequently, on June 6, 2013, he wrote to the Court to again represent the appellant in this case.³

[14] According to the transcript of the October 4, 2012, hearing, the appellant represented himself and filed a signed Notice of Discontinuance, without costs. Counsel for the respondent stated that he agreed with the discontinuance without costs.

[15] Two copies of the Notice of Discontinuance are on file. Both copies were signed by the appellant on October 3, 2012; one copy was signed on October 4, 2012, by Mr. Galarneau, counsel for the respondent, but the other copy was not signed by the respondent.

[16] On October 10, 2012, Mr. Galarneau wrote to the Court to report that, after a meeting he had just had with the appellant, he became aware that the appellant and the respondent do not have the same understanding of the discussion that preceded the filing of the discontinuance: he therefore asked the Court to withdraw the discontinuance and to give the parties the same status they had before October 4, 2012. He also asked that a hearing date be fixed quickly.

[17] On October 17, 2012, the Registry wrote to the appellant to ask him to submit his observations on the respondent's letter dated October 10, 2012, by October 31, 2012.

[18] According to a written note from the Registry dated October 29, 2012, on the record, Mr. Draghia telephoned the Court to explain that he had received a telephone call from the appellant's son, informing him that his father had just had a heart attack. The Court subsequently received a medical certificate.

[19] In a letter dated November 7, 2012, the Registry informed the parties that the Chief Justice had ordered that the discontinuance be withdrawn from the record and that a hearing be fixed during the first available session.

3. I was unable to find anything in writing stating that Mr. Draghia had removed himself from the case. However, I note, first, that there are two written notes from the Registry on file regarding telephone calls on May 7, 2012, and July 20, 2012, during which Mr. Draghia said that he could not confirm whether he was still representing the appellant, and, second, that there is a written note from the Registry on file dated October 17, 2012, concerning a telephone conversation with Mr. Draghia, where the latter confirms that he was no longer representing the appellant in this case.

[20] I note that before the March 27, 2013, hearing, the Court never received any observations in reply to the letter dated October 17, 2012.

[21] A hearing was held on March 27, 2013. At the hearing, the appellant stated that he did not understand why he was there; as far as he was concerned, the appeal had been settled.

[22] In an order dated April 4, 2013, I ordered that the appeal be adjourned *sine die*, that the appellant pay costs of \$625 to the respondent and that he inform the respondent and the Court by May 6, 2013, whether he was discontinuing or not.⁴

[23] In May 2013, the respondent filed the present motion together with an affidavit and written submissions. The respondent asked that his motion, dated May 7, 2013, be dealt with on the basis of written submissions.

[24] The motion gives as a reason that the appellant did not comply with the order dated April 4, 2013, because he did not pay the respondent's costs by May 6, 2013, or inform the respondent and the Court whether he was discontinuing or not by May 6, 2013.

[25] The appellant sent a cheque in the amount of the costs to the Court instead of the respondent. This cheque was received on May 6, 2013, and was then sent to the respondent.⁵

[26] The cheque was made out to the Tax Court of Canada.

[27] Regarding the appellant's obligation to inform the Court and the respondent of his intentions, the appellant testified that he had told someone at the Registry, during a telephone call on May 6, 2013, that he still intended to pursue his appeal.⁶ According to the appellant, it was the Court Registry that had telephoned him about the cheque.⁷

4. Because the appellant said at the hearing that he believed that a settlement had been reached and because he was not represented by counsel at that point, I asked the Registry to refer the parties to three decisions regarding confirmation, which the Registry did in a letter dated April 16, 2013.

5. According to a note on the record written by the Registry on May 10, 2013, the Registry had the cheque on May 7, 2013; Exhibit A-1 indicates that the cheque was delivered by mail in Ottawa on May 6, 2013.

6. Transcript, pages 19 to 22, 42 and 43.

7. Transcript, pages 19 to 21.

[28] However, the appellant does not claim to have notified the respondent. He testified that this part of the order had not caught his attention and that he believed that the respondent was represented by someone other than Mr. Galarneau.

[29] The order dated April 4, 2013, is not complicated, and I am certain that the appellant was able to understand [TRANSLATION] "the appellant shall inform the respondent and the Court by May 6, 2013, whether he is discontinuing or not". He clearly made no effort to notify the respondent.

[30] Regarding the appellant's testimony according to which he verbally informed the Court on May 6, 2013, counsel for the appellant wanted to add to the evidence after the hearing by sending a letter dated December 17, 2013, to which he appended what he claims to be a copy of a page from a cellular telephone bill showing what appears to be a call made on May 13, 2013, to a number of this Court, and apparently, another call made on May 15, 2013, to the same number.

[31] In a letter dated December 18, 2013, counsel for the respondent opposed this way of proceeding, adding that if a call was made, this did not prove its content.

[32] The respondent could also have added that even with proof of the calls on May 13 and 15, 2013, this did not corroborate the appellant's testimony that he verbally announced his intention on the May 6, 2013, deadline.

[33] I agree with the respondent's objection. Counsel for the appellant cannot simply send additional evidence. Even though this matter is being appealed under the informal procedure, which offers some flexibility, the usual procedure—especially as the respondent is represented by counsel—is to at least begin with an application for leave to submit additional evidence.

[34] I will not consider the page appended to the letter dated December 17, 2013.

[35] In procedural matters, a court may consult the court record to see what took place. I said at the hearing that I would examine the Court record to see whether there was a trace of a conversation between the appellant and the Registry in May 2013.⁸

8. See pages 40, 41 and 46 of the transcript. A court may review the record not only with respect to procedural issues but also for certain other purposes. In general, a court should inform the parties of this. See, for example, *R. v. Tysowski*, 2008 SKCA 88 (CanLII), at paragraphs 18 and 19; *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367, at paragraphs 30 to 45, and particularly paragraphs 38, 39 and 42; *R. v. Truong*, 2008 BCSC 1151, at

[36] I examined both the paper and the electronic record and was unable to find any note from the Registry that would corroborate the appellant's testimony regarding the conversation he alleges to have taken place on May 6, 2013, in which he indicated his intention to pursue the appeal.⁹

[37] I also noted that there was a note on the record, written by a Registry officer on May 10, 2013, according to which the Registry officer had left a telephone message with the appellant on May 7, 2013, regarding the cheque for the costs that the appellant had sent to the Court.

[38] I do not accept the appellant's testimony that, on May 6, 2013, during a telephone call initiated by the Registry to tell him that he had sent the cheque to the wrong address, he informed the Registry that he still intended to pursue his appeal. This is unlikely, given that the letter accompanying the cheque was delivered by mail that same day, that the letter had to have been transferred from the mail room to a Registry officer and that the Registry left the appellant a telephone message regarding the cheque on May 7, 2013.

[39] There are other events that must also be considered.

[40] On May 30, 2013, the Registry wrote to the appellant regarding the respondent's May 7, 2013, motion. The Registry asked the appellant to make written submissions by June 6, 2013.

[41] On June 6, 2013, Mr. Draghia returned to the case and wrote a letter to the Court to inform it that he was again representing the appellant. Mr. Draghia wrote that he had just received the respondent's motion and asked for a seven-day extension to reply to the letter dated May 30, 2013.

[42] On June 14, 2013, the appellant filed a notice of objection to the respondent's motion together with a supporting affidavit. Among other things, the appellant stated that he and the respondent had reached a settlement and that his discontinuance was conditional on the respondent's recognition and respect of this settlement. The appellant also stated that a motion to certify this settlement would be filed [TRANSLATION] "as soon as possible".

paragraphs 36 to 62; *R. c. Perron*, 2011 QCCQ 8186, particularly Note 3; *J.N. c. Company A*, 2012 QCCA 1044, at paragraph 2; *Droit de la famille — 08168*, 2008 QCCA 199, at paragraph 20, last sentence.

9. As a precaution, I did the same for the appellant's income tax appeal before this Court in the event there was a note in the income tax record.

[43] The appellant also requested a hearing.

[44] On August 15, 2013, the Court ordered a hearing of the respondent's motion on December 2, 2013, on condition that the appellant serve the respondent his motion for approval and the affidavit and written submissions supporting his motion, and file these with the Court by September 20, 2013. The Court ordered that the respondent's motion and the motion to certify be heard on the same day.

[45] The appellant did not comply with the order dated August 15, 2013, nor did he file his motion to certify by September 20, 2013. In an order dated November 4, 2013, the Court amended its order dated August 15, 2013, and ordered that only the respondent's motion be heard on December 2, 2013.

[46] On November 21, 2013, the appellant filed with the Court two notices of motion with a supporting affidavit.

[47] The first motion was for the certification of a settlement. I have one comment to make about this first motion. The motion and the affidavit are very short: the affidavit is half a page long. It is hard to understand why the motion could not have been filed before September 20, 2013.¹⁰

[48] The second motion filed by the appellant is for a confidentiality order so that all the testimony and documents provided by the appellant be declared confidential. The affidavit supporting this motion contains only two sentences and a total of 43 words.¹¹

[49] Considering that the Notice of Appeal was filed in July 2009 and that Mr. Draghia signed the joint application to fix a time and place for the hearing on July 7, 2010, a hearing that should have taken place on January 19, 2011, and that was only adjourned on January 12, 2011, following a request made on January 11, 2011, that is, eight days before the hearing, it is hard to understand why the issue of confidentiality was not raised earlier.

10. The content of the affidavit is quite surprising. The appellant states that it was his understanding that if he discontinued his appeal, the respondent would close [TRANSLATION] "this case" in return for which the appellant expected that [TRANSLATION] "the respondent remit him the tax debt alleged in this matter". Given that legally discontinuance would preserve the assessment and, consequently, the tax debt, closing the case would have the opposite effect of the appellant's expectation.

11. The motion is surprising when one considers the fact that, according to the notice of appeal, the amount of \$150,000 was received *ex gratia* and was an unexpected windfall for which the appellant had not asked and in exchange for which he did not provide any services. See the appellant's notice of appeal, which, in fact, consists of the submissions made by the appellant at the objection stage.

Analysis

[50] I have set out all of these facts because in listing them the reply to the question whether the appellant acted with due dispatch becomes clear.

[51] Here is a summary of the essential facts:

- (a) When the Registry sent the letter dated December 21, 2011, requesting a written report on the appellant's health by January 6, 2012, there was no reply.
- (b) When the Registry wrote to the appellant again on May 1, 2012, to ask him to clarify his intentions by May 4, 2012, Mr. Draghia replied that he was still waiting to hear from the appellant; the appellant gave no news between this date and the October 4, 2012, hearing.
- (c) When the Registry wrote to the appellant on October 17, 2012, to ask him to submit his observations regarding the respondent's letter dated October 10, 2012, by October 31, 2012, there was no reply from the appellant between this date and the March 27, 2013, hearing.
- (d) When the Court ordered the appellant, in an order dated April 4, 2013, to inform the respondent and the Court whether he was discontinuing or not, the appellant did not disclose his intentions to the respondent or the Court before the deadline set by the Court, namely, May 6, 2013. There was a reply only on June 14, 2013. There was no application for an extension of this deadline.
- (e) After the appellant stated in his notice of objection that a motion to certify would be filed [TRANSLATION] "as soon as possible" and the Court ordered the holding of a hearing for the respondent's motion for dismissal, as requested by the appellant, on condition that the motion to certify be filed by September 20, 2013, the appellant filed a motion to certify only on November 21, 2013, without requesting an extension of the September 20, 2013, deadline.

[52] I recognize that in late October 2012, the appellant had a heart attack that may have made him unable to respond to the letter dated October 17, 2012, by October 31, 2012; however, this does not explain the lack of a reply before March 27, 2013.

[53] There is no evidence that would explain why the motion to certify was filed late.¹²

[54] At one point in his pleadings, Mr. Draghia suggested that the delay was the result of difficulties related to his motion for confidentiality. I fail to understand this argument, as there is no link between the motion to certify and the motion for confidentiality. Moreover, as I have said previously, when one reads the notice of motion to certify and the supporting affidavit, it is hard to fathom why the motion could not have been filed on time.

Conclusion

[55] When one considers the events I have just described, it is clear that the appellant did not act with due dispatch. Not only did he fail to comply with two orders, but, generally speaking, his behaviour was not to respond or to respond late.¹³

[56] On the contrary, when looking at the events described as a whole, I cannot but conclude that the appellant sought to delay the proceeding. In the circumstances, the appeal should be dismissed.¹⁴

[57] The appeal is dismissed.

Signed at Ottawa, Ontario, this 21st day of November 2014.

"Gaston Jorré"

Jorré J.

12. After the arguments where I raised the question of this lateness, the evidence was reopened, and the appellant was recalled.

13. In the case of the second order issued following the motion for dismissal on the ground that the appellant did not act with due dispatch, a motion that had not yet been heard, the appellant did not comply with the deadline established in this order.

14. See, for example, *Bourque v. The Queen*, 2002 CanLII 809 (TCC), particularly at paragraphs 39 to 42. Even though it is a consideration in such motion, prejudice is not required for a case to be dismissed. In a different context, see, for example, the decision of the Court of Appeal for Ontario in *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, particularly at paragraphs 19 to 33.

Translation certified true
on this 13th day of January 2015
Johanna Kratz, Translator

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PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: December 2, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice Gaston Jorré

DATE OF JUDGMENT: November 21, 2014

APPEARANCES:

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 Counsel for the respondent: Danny Galarneau

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