

Docket: 2009-32(IT)G

BETWEEN:

ABDUL GHAFFAR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on February 5, 2015, at Toronto, Ontario.

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant: Leigh Somerville Taylor

Counsel for the Respondent: Rita Araujo

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**ORDER**

The Appellant's Application to have the Judgment dated October 6, 2010, dismissing the Appellant's Appeal of his 2003 and 2004 taxation years set aside pursuant to subsection 140(2) of the *Tax Court of Canada Rules (General Procedure)* is denied as is the Appellant's Motion for an extension of time to bring that Application. Costs of \$3,000 payable within 60 days are awarded to the Respondent.

Signed at Ottawa, Canada, this 23<sup>rd</sup> day of February 2015.

“David E. Graham”

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Graham J.

Citation: 2015 TCC 46

Date: 20150223

Docket: 2009-32(IT)G

BETWEEN:

ABDUL GHAFFAR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR ORDER**

Graham J.

[1] Abdul Ghaffar filed Notices of Appeal in respect of reassessments of his 2003 and 2004 taxation years. During the course of the litigation, the Court ordered Mr. Ghaffar to attend a show cause hearing. Neither Mr. Ghaffar nor his former counsel attended that hearing. Accordingly, the Court dismissed Mr. Ghaffar's appeal. The Judgment dismissing Mr. Ghaffar's appeal was issued on October 6, 2010 (the "Default Judgment"). Mr. Ghaffar applied to have that dismissal set aside pursuant to subsection 140(2) of the *Tax Court of Canada Rules (General Procedure)*. Subsection 140(2) permits the Court to set aside such a judgment if the taxpayer brings an application to have it set aside within 30 days. Mr. Ghaffar did not apply to have the Default Judgment set aside until September 27, 2011 (the "Application"), well after the 30 day period had expired. The Respondent opposed the Application on the basis that the time for bringing an application had expired. By letter dated October 7, 2011, the Tax Court Registry advised Mr. Ghaffar that his request to set the Default Judgment aside had been denied. Mr. Ghaffar brought a motion dated February 11, 2013 (the "Motion"), effectively seeking an extension of time to apply to have the Default Judgment set aside.

#### **Preliminary Issue**

[2] The Respondent raises a preliminary question as to whether I am *functus officio*. The Respondent argues the letter dated October 7, 2011 was a final order of the Court and thus that Mr. Ghaffar does not have the ability to re-argue

the issue before me. I disagree. A letter from the Registry signed by a registry officer is not an order of this Court. Subsection 167(1) of the *Rules* states that applications shall be disposed of by issuing an order and subsection 167(2) (when read in conjunction with the definition of “judgment” in section 2) requires such orders to be signed. While the subsection does not say so explicitly, I cannot imagine that subsection 167(2) could contemplate an order being signed by anyone other than a judge or, in very limited circumstances not applicable here<sup>1</sup>, the Judicial Administrator.

[3] Since no order was ever signed, in essence, the Application remains outstanding and the Motion merely fleshes out the Application and requests an extension of time. On the basis of the foregoing, I do not find myself to be *functus officio*<sup>2</sup>. I will treat the Motion as being supplemental to the Application and these reasons shall deal with them both. I will deal first with the request for an extension of time.

### **Extension of Time**

[4] Section 12 of the *Rules* permits the Court to extend a deadline. The Federal Court of Appeal has set out the four tests that must be satisfied for the Court to grant an extension of time under section 12<sup>3</sup>. Those tests are:

- (a) a continuing intention to pursue the appeal;
- (b) that the appeal has some merit;
- (c) that no prejudice to the Respondent arises from the delay; and
- (d) that a reasonable explanation is given for the delay.

### **Continuing Intention to Pursue the Appeal**

[5] Prior to the Spring of 2010, Mr. Ghaffar’s appeal was proceeding in the normal course. Lists of documents had been filed and examinations for discovery had been conducted. The next step in the Appeal was for Mr. Ghaffar to provide answers to the undertakings that he had given on discovery. The court ordered deadline for providing those undertakings was March 1, 2010. Mr. Ghaffar did not

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<sup>1</sup> See subsection 23(2) of the *Tax Court of Canada Act*

<sup>2</sup> The Respondent made a number of alternative submissions on this issue. In light of my conclusions below, I do not feel that it is necessary to address them.

<sup>3</sup> *Tomas v. The Queen*, 2007 FCA 86 at paragraph 11.

satisfy his undertakings by that date nor did he apply to the Court for an extension of time to do so. The deadline for reporting to the Court was April 15, 2010. Mr. Ghaffar did not report to the Court by that deadline nor did he apply for an extension of the deadline. The Respondent did report to the Court by that deadline and asked the Court to extend the deadline for reporting to the Court on the basis that Mr. Ghaffar had not yet satisfied his undertakings. The Court extended the deadline for reporting to May 15, 2010. Mr. Ghaffar neither satisfied his undertakings nor reported to the Court by that date. As a result, the Court ordered that a show cause hearing be held on September 29, 2010. Mr. Ghaffar neither satisfied his undertakings prior to that show cause hearing nor attended the show cause hearing itself. As a result, his appeal was dismissed, thus giving rise to these proceedings.

[6] Mr. Ghaffar was represented by counsel throughout the foregoing period. I note that it was different counsel than the firm which now represents him. A great deal of evidence was introduced regarding the physical and mental health challenges faced by Mr. Ghaffar's former counsel during the period in question. The specific details of those challenges are not material to my decision.

[7] Evidence was also provided regarding Mr. Ghaffar's relationship with his former counsel. The quality of the evidence is not ideal.

[8] The former counsel was examined by both parties. He readily acknowledged that, due to his health challenges, he has significant issues with his memory regarding the period in question. He simply does not recall some events from that period<sup>4</sup>. While he believes he recalls other events from the period, he is not certain that his recollection is accurate<sup>5</sup>.

[9] On the other hand, I struggle with Mr. Ghaffar's credibility. Mr. Ghaffar testified that his former counsel never phoned him or his accountant, Mr. Ahmed, but later described receiving two phone calls from former counsel within a couple of days<sup>6</sup>. It was as if Mr. Ghaffar knew that it was important that he testify that he had not had adequate communication from his former counsel but was unsure exactly when that lack of communication was supposed to have occurred. He

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<sup>4</sup> Examination of Mr. Ghaffar's former counsel; Respondent's Motion Record; Tab 2; questions 105 to 106, 110, 121, and 124 to 127.

<sup>5</sup> Examination of Mr. Ghaffar's former counsel; Respondent's Motion Record; Tab 2; questions 153 to 154.

<sup>6</sup> Cross-Examination of Mr. Ghaffar; Respondent's Motion Record; Tab 4; questions 74 to 80 and 108 to 116.

denied communication even when it was implausible (i.e. in the case of counsel not phoning to tell him when to attend discoveries). He then admitted it when it seemed beneficial (i.e. in the case of two phone calls arranging and then cancelling a meeting). He then backtracked when he seemed to have admitted too much (i.e. to deny that he knew the meeting was about undertakings or that undertakings were discussed on the phone call since his position was that he did not know what undertakings were required). Similarly, Mr. Ghaffar testified that he had received the October 7, 2011 letter from the Registry denying the Application and had immediately given it to Mr. Ahmed to translate for him but then stated that Mr. Ahmed had not told him that the Application had been denied<sup>7</sup>. It was as if he wanted to appear to have been acting with speed and diligence while, at the same time, being unaware what was happening. Taken together, these implausible denials have caused me to question whether Mr. Ghaffar's otherwise seemingly plausible denials are credible.

[10] Mr. Ghaffar did not produce an affidavit from Mr. Ahmed despite the fact that it appears that Mr. Ahmed had more communication with Mr. Ghaffar's former counsel than Mr. Ghaffar did. I draw an adverse inference from his failure to do so.

[11] In addition, Mr. Ghaffar has brought a complaint against his former counsel with the Law Society of Upper Canada. He may thus have a financial incentive outside of his appeal to blame his former counsel for his problems and his former counsel or his former counsel's insurer may have a similar financial incentive to blame Mr. Ghaffar for his own problems.

[12] Thus I am left with the unenviable task of determining what occurred based on the testimony of two witnesses, one lacking in reliability, the other lacking in credibility, both potentially adverse in interest outside of these proceedings, without the benefit of the evidence of the accountant who was acting as their go-between / translator.

[13] Based on the evidence available to me, I make the following findings of fact. Generally, where Mr. Ghaffar's former counsel has a good recollection of events, I have preferred his version over that of Mr. Ghaffar and where his recollection is poor or there is no evidence, I have preferred Mr. Ghaffar's version:

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<sup>7</sup> Cross-Examination of Mr. Ghaffar; Respondent's Motion Record; Tab 4; questions 168 to 173.

- The relationship between Mr. Ghaffar and his former counsel became strained in the Spring of 2010. The source of this strain was Mr. Ghaffar's failure to provide counsel with the documents and information that were needed to satisfy the undertakings, a difference of opinion over what counsel had agreed to do for the amount of the retainer that Mr. Ghaffar had provided to him and the health challenges faced by counsel.
- Mr. Ghaffar was unaware of the health challenges faced by his former counsel and was thus unaware that his former counsel may not have been attending to matters that he should have.
- Despite his health challenges and his strained relationship with Mr. Ghaffar, Mr. Ghaffar's former counsel did not remove himself from the record. He remained listed as counsel of record until he was replaced by Mr. Ghaffar's current counsel.
- Mr. Ghaffar's former counsel advised him what undertakings were required of him<sup>8</sup>.
- Mr. Ghaffar never provided the information and documents required to satisfy the undertakings to his former counsel<sup>9</sup>.
- Mr. Ghaffar's former counsel did not comply with the deadlines for reporting to the Court and neither sought an extension of those deadlines nor sought an extension of the deadline for satisfying undertakings.
- Mr. Ghaffar was aware that the deadline for satisfying undertakings had been missed<sup>10</sup> but was unaware that the deadlines for reporting to the Court had also been missed.
- Sometime after June 8, 2010, Mr. Ghaffar's former counsel decided to stop representing Mr. Ghaffar but did not communicate that fact

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<sup>8</sup> Examination of Mr. Ghaffar's former counsel; Respondent's Motion Record; Tab 2; questions 81 to 85.

<sup>9</sup> Examination of Mr. Ghaffar's former counsel; Respondent's Motion Record; Tab 2; questions 99 to 100.

<sup>10</sup> Examination of Mr. Ghaffar's former counsel; Respondent's Motion Record; Tab 2; question 87.

clearly to Mr. Ghaffar. Mr. Ghaffar remained under the impression that counsel continued to represent him.

- Mr. Ghaffar's former counsel did not inform Mr. Ghaffar of the show cause hearing.
- Mr. Ghaffar's former counsel did not inform Mr. Ghaffar that his appeal had been dismissed.
- Mr. Ghaffar's former counsel's physical and mental challenges caused him to effectively cease representing Mr. Ghaffar entirely by September 2010 without notice to Mr. Ghaffar, counsel for the Respondent or the Court.
- Mr. Ghaffar had no knowledge of either the show cause hearing or the dismissal of his appeal prior to August 2011.
- Mr. Ghaffar and his former counsel had no contact from September 2010 to August 2011 and no contact thereafter. The contact in August 2011 was limited to Mr. Ghaffar's son trying to phone Mr. Ghaffar's former counsel and counsel indicating he would call him back.
- Mr. Ghaffar's former counsel was suspended administratively by the Law Society of Upper Canada in July 2011.

[14] Based on the foregoing, I find that Mr. Ghaffar's failure to attend the show cause hearing was not an indication of a lack of intention to pursue his appeal. He was simply unaware that he had been ordered to do so.

[15] However, I find that Mr. Ghaffar's failure to satisfy his undertakings was an indication that he lacked an intention to pursue his appeal. In reaching that conclusion I am not just considering the fact that he failed to satisfy the undertakings by the deadline, but, more importantly, that he continued to fail to satisfy them for more than a year and a half thereafter. I understand that part of counsel's role when dealing with some types clients is to pressure them to satisfy their undertakings. Clearly Mr. Ghaffar was one of these types of clients. I also understand that, without that pressure, those types of clients might not take any action on their own. I would be prepared to accept that Mr. Ghaffar may have continued to do nothing towards satisfying his undertakings for some period of time after his former counsel ceased contact with him because he was relying on

counsel to tell him what to do and when to do it. However, at a certain point, given the poor relationship that had developed between Mr. Ghaffar and his former counsel and given the amount of time that had passed, Mr. Ghaffar should have taken the step of either contacting his former counsel, retaining new counsel or contacting the Court. He did none of these things. In fact, there is no evidence that he did anything in relation to his appeal from July 2010 to August 2011.

[16] Based on all of the foregoing, I conclude that Mr. Ghaffar has failed to demonstrate that he had an intention to pursue his appeal. I note that, in reaching this conclusion, I have not given any consideration to Mr. Ghaffar's actions after he found out that his appeal had been dismissed. I have no doubt that he maintained a desire to continue his appeal during this period and it seems unreasonable to me to expect a taxpayer to continue actively pursuing an appeal that no longer exists.

### Merit of the Appeal

[17] One of the issues on appeal is the application of gross negligence penalties. Since the Respondent bears the onus of proving gross negligence penalties, I cannot see how I could reach any conclusion other than that the Appeal has merit.

[18] Counsel for Mr. Ghaffar went further than simply arguing that Mr. Ghaffar's appeal had merit. She submitted, in reliance on *Bens v. The Queen*<sup>11</sup>, that the presence of gross negligence penalties meant that Mr. Ghaffar's appeal should not have been dismissed in the first place. *Bens* dealt with the question of whether an appeal where the appellant had failed to complete undertakings and had failed to appear at a show cause hearing should be dismissed for want of prosecution. The Court concluded that the matter should proceed to trial. However, the question in *Bens* was whether the appeal should be dismissed. Before I can consider that question, I have to first consider whether an extension of time should be granted. The Federal Court of Appeal has clearly laid out the test for granting an extension of time. Whether penalties have been assessed or not is not part of that test. I have already factored the presence of penalties into my analysis in concluding that the Appeal has merit. I am not required to give it additional consideration.

### Prejudice

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<sup>11</sup> 2011 TCC 240.

[19] The Respondent will be prejudiced in a way that cannot be compensated by costs if the extension of time is granted. While the Respondent still has copies of the documents from the Respondent's list of documents, the Respondent no longer has copies of the rest of Mr. Ghaffar's file relating to the taxation years in issue. Not only does this prevent the Respondent from referring to the file, it also prevents the Respondent from filing a supplemental list of documents if the need arises, introducing documents to impeach a witness on cross-examination or verifying that any documents produced by Mr. Ghaffar in a supplemental list of documents have not previously been produced to the CRA for some other purpose.

#### Reasonable Explanation for the Delay

[20] In order to determine whether Mr. Ghaffar has a reasonable explanation for the delay, I must first decide whether he is required to provide a reasonable explanation for the delay in bringing the Application or a reasonable explanation for the delay in bringing the Motion. The Application was an application under Subsection 140(2). There was no indication in the Application that Mr. Ghaffar was seeking an extension of time. The test set out by the Federal Court of Appeal in *Tomas* relates to extensions of time. Therefore, I conclude that the period that I must consider is the period between the time that it became necessary to request an extension of time (November 5, 2010<sup>12</sup>) and the date that the extension of time was requested (February 11, 2013). This 27 month period can be broken down into three sub-periods.

- (a) The first sub-period is the time between the date that it became necessary to request an extension (November 5, 2010) and the date that Mr. Ghaffar brought the Application (September 27, 2011). Mr. Ghaffar was unaware that the Default Judgment had been issued until he was contacted by CRA Collections in August 2011 and then spoke to the Registry and determined what had happened. I struggle with the idea of holding Mr. Ghaffar at fault for failing to apply for an extension of time during a period in which he was unaware that he needed such an extension. I acknowledge the Respondent's position that had Mr. Ghaffar taken a more active interest or role in his appeal he may have discovered the need to apply for an extension earlier but I have already considered Mr. Ghaffar's inaction when examining whether he had a continuing intention to appeal so I do not think it is appropriate to fault him for the same error in this portion of the analysis.

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<sup>12</sup> Being 30 days after the Default Judgment was issued (October 6, 2010).

- (b) The second sub-period is the time between the date that Mr. Ghaffar received the letter from the Registry (October 7, 2011) and the date that he retained counsel in this matter. I have no evidence as to when Mr. Ghaffar retained counsel. His counsel objected to his answering that question when he was being cross-examined on his affidavit<sup>13</sup>. The Respondent provided evidence that Mr. Ghaffar's counsel's firm had been in contact with the Registry as early as July 25, 2012<sup>14</sup>. Although Mr. Ghaffar's counsel did not want me to draw the inference that her firm must have been retained by Mr. Ghaffar on or before that date, I think it is reasonable to at least conclude that Mr. Ghaffar had sought legal advice by that time. In any event, regardless of the length of this second sub-period, I have no evidence of why Mr. Ghaffar did not apply for an extension of time during this second sub-period. The onus is on Mr. Ghaffar to provide evidence showing why the Motion should succeed. Without that evidence I cannot conclude that his delay was reasonable.
- (c) The third sub-period is the period between the date that Mr. Ghaffar retained counsel and the date that he brought the Motion (February 11, 2013). Again, I have no evidence of when Mr. Ghaffar retained counsel or why it took Mr. Ghaffar at least six months after he retained counsel to file the Motion. I draw a negative inference from counsel's reluctance to have Mr. Ghaffar admit when he retained her firm. This refusal suggests to me that counsel does not want me to know how long the third sub-period actually was.

[21] Based on the foregoing, I conclude that Mr. Ghaffar has failed to provide a reasonable explanation for his delay in applying for an extension of time during either the second sub-period or the third sub-period.

### **Conclusion**

[22] On the basis of the foregoing, I find it is not appropriate to allow Mr. Ghaffar an extension of time to bring the Application. His lack of intention to pursue the appeal, the prejudice to the Respondent and the lack of an explanation for the delay in requesting an extension of time are all strong indications that the Motion should be denied. The mere fact that there is merit to the underlying appeal

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<sup>13</sup> Transcript of the Cross-Examination of Abdul Ghaffar; Respondent's Motion Record; Tab 4; questions 130 to 132.

<sup>14</sup> Affidavit of Jena McCaustlin; Respondent's Motion Record; Tab 6; Exhibit "B".

is not enough in itself for me to grant the extension. Since the Application was therefore brought out of time, it too is denied.

**Costs**

[23] The Respondent requested costs of \$3,000 payable within 60 days regardless of the outcome of this proceeding. Counsel for Mr. Ghaffar was not able to provide me with any convincing reason why such costs would not be appropriate. This proceeding has been sufficiently complex that it has had to be case managed. An examination of Mr. Ghaffar's former counsel was held along with three cross-examinations of the parties' affiants. In the circumstances, I find that the figure put forward by the Respondent is entirely appropriate. While I am reluctant to pile more misfortune upon Mr. Ghaffar, the simple fact is that the problems that Mr. Ghaffar had with his former counsel should not be visited upon the Respondent. If Mr. Ghaffar feels that he has been put to additional financial expense as a result of his former counsel's actions, there are other avenues for him to pursue.

Signed at Ottawa, Canada, this 23<sup>rd</sup> day of February 2015.

“David E. Graham”

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Graham J.

CITATION: 2015 TCC 46

COURT FILE NO.: 2009-32(IT)G

STYLE OF CAUSE: ABDUL GHAFAR V. HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 5, 2015

REASONS FOR ORDER BY: The Honourable Justice David E. Graham

DATE OF ORDER: February 23, 2015

APPEARANCES:

    Counsel for the Appellant: Leigh Somerville Taylor

    Counsel for the Respondent: Rita Araujo

COUNSEL OF RECORD:

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