

Docket: 2006-2691(EI)

BETWEEN:

64728 MANITOBA LTD. O/A BETTER-BUY FOOD SUPPLY,
Appellant,

and

THE MINISTER OF NATIONAL REVENUE,
Respondent.

Motion heard on January 15, 2008 at Winnipeg, Manitoba.

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant: William Musey
Counsel for the Respondent: Melissa Danish

ORDER

The Application by the Appellant under subsection 18.21(2) of the *Tax Court of Canada Act* (“*Act*”) to set aside the judgment of this Court dated August 3, 2007 dismissing the Appellant's appeal, is dismissed without costs.

Signed at Winnipeg, Manitoba, this 16th day of January 2008.

“Wyman W. Webb”

Webb J.

Docket: 2006-2692(CPP)

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Signed at Winnipeg, Manitoba, this 16th day of January 2008.

“Wyman W. Webb”

Webb J.

Citation: 2008TCC35

Date: 20080116

Dockets: 2006-2691(EI), 2006-2692(CPP)

BETWEEN:

64728 MANITOBA LTD. O/A BETTER-BUY FOOD SUPPLY,
Appellant,
and
THE MINISTER OF NATIONAL REVENUE,
Respondent.

REASONS FOR ORDER

Webb J.

[1] This is an application by the Appellant under subsection 18.21(2) of the *Tax Court of Canada Act* (“*Act*”) to set aside the judgment of this Court dated August 3, 2007 dismissing the Appellant's appeal. This judgment was rendered following the failure of the Appellant to appear at the hearing scheduled for August 3, 2007.

[2] The notice of the hearing scheduled for August 3, 2007 was sent to the Appellant on June 26, 2007. The Appellant confirms that he received the notice of the hearing, but stated that he had simply misfiled the notice with other documents related to the month of October. The Appellant also confirmed that, subsequent to receiving the notice of the hearing, he had received a letter dated July 18, 2007 from the counsel for the Respondent identifying the individual who was assigned to act as counsel on behalf of the Minister of National Revenue. That letter did not refer to the date of the court hearing.

[3] Counsel for the Respondent had contacted the Appellant prior to the hearing of this motion to ask the Appellant for his explanation of why he had failed to appear at his hearing on August 3, 2007. The Appellant refused to provide any reasons for his failure to appear at the August hearing to the counsel for the Respondent.

[4] Subsections 18.21(2) and (3) of the *Act* provide as follows:

(2) An appellant whose appeal has been dismissed pursuant to subsection (1) may apply to have the order of dismissal set aside and the appeal set down for hearing.

(3) The Court may set aside an order of dismissal made under subsection (1) where

(a) it would have been unreasonable in all the circumstances for the appellant to have attended the hearing; and

(b) the appellant applied to have the order of dismissal set aside as soon as circumstances permitted the application to be brought but, in any event, not later than one hundred and eighty days after the day on which the order was mailed to the appellant.

[5] The issue in this case relates to the requirement as set out in paragraph 18.21(3)(a) above. The only excuse provided by the Appellant for failing to appear at the hearing was that he had misfiled the notice of the hearing. He did not provide any evidence to suggest that he was unable to attend at the hearing on August 3, 2007. He simply forgot because he had misfiled the notice of the hearing. He would have received the notice of the hearing only about 30 days before the hearing date. It would be expected that a reasonable person would have taken better care of the notice of hearing for a hearing scheduled in 30 days time.

[6] In *Dayan v. Her Majesty the Queen*, [2003] T.C.J. No. 511, the taxpayers failed to appear at their hearing and a judgment was issued dismissing their appeal. The taxpayers in that case subsequently made an application under subsection 18.21(2) of the *Act* to set aside the judgment dismissing their appeal. Mogan J. made the following comments with respect to the explanations provided by the two taxpayers for their failure to appear:

17 In one sense, I could look at the appeal of James and say it would have been unreasonable in all the circumstances for the Appellant to attend at the hearing because he was out of the country on a compassionate journey having to do with the recent death of his brother. If I were to take that into account, I could look at his failure to notify counsel for the Respondent that he would not attend as an act of discourtesy. Similarly, his failure to give notice to the Court that he either would not attend or needed an adjournment might be regarded as a discourtesy. While failure to give notice might reflect a lack of courtesy, it may not take away from the fact that it was reasonable for James not to be in Toronto on February 10.

18 Similarly with Albert, he had a serious mouth illness the evening before the hearing and made a call to his brother-in-law on the basis that the brother-in-law would go to an accounting firm and ask them to send somebody to seek an adjournment or say that he could not come. He said that he had asked for the day

off.

...

22 In these two appeals, the fact which influences me most and causes me not to set aside the judgments is this. The Respondent was in Court on February 10, 2003 with two witnesses. One of those witnesses was not an employee of Revenue Canada but was the person who had been through the painful experience of being charged with and convicted of an offence related directly to the transactions in issue in these appeals. To bring that person to this Court to testify as a witness for the Crown was a very serious matter. There may have been considerable inconvenience in getting that witness to come to Court on that day.

23 The two Appellants failed to take this matter seriously. Their failure to attend on February 10, 2003 was, at first blush, a grave discourtesy both to the opposing counsel, who went to the trouble of bringing two witnesses to Court and coming herself, and to the Court itself. This court is centred in Ottawa and judges are sent from Ottawa to hear cases. A case like this would be regarded as significant, probably consuming the whole day. A judge came from Ottawa to sit on February 10 expecting to adjudicate on this matter. The Appellants did not show up.

In that case the application was dismissed. This was confirmed on appeal to the Federal Court of Appeal (2004 FCA 75). In this case the hearing scheduled for August 3, 2007 was to be held in Brandon, Manitoba and the Respondent was also in Court in Brandon on that day with a witness to whom the Respondent has paid the witness fee and travel costs.

[7] In this case the Appellant has not provided any evidence to establish why it would have been unreasonable, in all of the circumstances, for him to have attended the hearing on August 3, 2007. He simply misfiled the notice of the hearing and forgot the court date. Since it would be reasonable to expect an appellant to properly file the notice of their hearing and to remember their court date, it would be reasonable to expect the Appellant to have attended the hearing in this case. Misfiling the notice of the court hearing that is only received approximately 30 days before the hearing date and forgetting the court date are not sufficient grounds to grant an application under subsection 18.21(2) of the *Act*. As a result, the Appellant's application under subsection 18.21(2) of the *Act* is dismissed, without costs.

Signed at Winnipeg, Manitoba, this 16th day of January 2008.

“Wyman W. Webb”

Webb J.

CITATION: 2008TCC35

COURT FILE NOS.: 2006-2691(EI), 2006-2692(CPP)

STYLE OF CAUSE: 64728 MANITOBA LTD. O/A BETTER-BUY FOOD SUPPLY AND M.N.R.

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: January 15, 2008

REASONS FOR JUDGEMENT BY: The Honourable Justice Wyman W. Webb

DATE OF JUDGMENT: January 16, 2008

APPEARANCES:

Agent for the Appellant: William Musey
Counsel for the Respondent: Melissa Danish

COUNSEL OF RECORD:

For the Appellant:

Name:
Firm:

For the Respondent:

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Deputy Attorney General of Canada
Ottawa, Canada