Docket: 2016-3028(GST)I

BETWEEN:

JENNIFER HEATH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Written Motion filed on April 12, 2018 at Ottawa, Canada

Before: The Honourable Justice Guy R. Smith

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Arnav Patel

ORDER

HAVING READ the parties' documentation;

THE COURT ORDERS that the motion to set aside the notice of discontinuance is hereby dismissed, without costs.

Signed at Ottawa, Canada, this 27th day of June 2018.

"Guy Smith"

Smith J.

Citation: 2018 TCC 119
Date: 20180627
Docket: 2016-3028(GST)I

BETWEEN:

JENNIFER HEATH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Smith J.

[1] The Appellant filed a notice of discontinuance of her appeal prior to the scheduled date of hearing and now moves to have it set aside. The Minister of National Revenue (the "Minister") opposes the request.

[2] The material facts are not in dispute. The hearing date was scheduled for March 28, 2018. The Appellant was not represented by legal counsel. Counsel for the Respondent (Mr. Arnav Patel — "Mr. Patel") wrote to the Appellant to discuss the appeal and an exchange of documents and emails followed.

[3] In an email dated March 15, 2018, Mr. Patel expressed the view that the appeal was unlikely to be successful, adding that he represented the interests of the Minister only, that his views did not constitute legal advice and finally, that the Appellant was encouraged to seek independent legal advice.

[4] The Appellant responded with an email dated March 17, 2018, attaching additional evidence, and indicating that she would be seeking legal counsel to assist in this matter. Mr. Patel indicated that he looked forward to hearing from her counsel.

[5] On March 21, 2018, Mr. Patel sent an email and later telephoned the Appellant to indicate that he had a proposal to resolve her case favourably. At that

point, the Appellant informed him that a notice of discontinuance had been filed the previous day, on March 20, 2018.

[6] The parties nonetheless signed a consent to judgment allowing the appeal and referring the matter back to the Minister on the basis that the Appellant "was entitled to the New Housing Rebate in the amount of $6,831.65". However, the Registrar of the Court refused to accept the consent on the basis that a notice of discontinuance had already been filed.

[7] In a letter from the Court dated March 22, 2018, the parties were informed of the need to file a motion to set aside the notice of discontinuance, and more specifically were referred to the decision of *Canada (Attorney General) v. Scarola*, 2003 FCA 157 ("*Scarola*").

[8] *Scarola* involved an appeal from a decision of the Tax Court of Canada where the Court, "relying upon the well-established principle that every court has the authority required to govern its own proceedings (…) claimed an inherent jurisdiction to set aside the notice of discontinuance and concluded that the facts (…) warranted to exercise of the jurisdiction" (para.8).

[9] The Federal Court of Appeal (the "FCA") did not agree. It referred to section 16.2 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, which provides as follows:

> Discontinuance
>
> 16.2 (1) A party who instituted a proceeding in the Court may, at any time, discontinue that proceeding by written notice.
>
> Effect of discontinuance
>
> (2) Where a proceeding is discontinued under subsection (1), it is deemed to be dismissed as of the day on which the Court receives the written notice.

[10] Having reviewed the relevant case law, the FCA concluded that "Parliament has chosen to legislatively determine the legal consequences of a notice of discontinuance", rather than leaving it to judicial discretion (para. 18). It added that "An appeal discontinued is, pursuant to subsection 16.2(2), an appeal dismissed. An appeal dismissed is an appeal disposed of, and an appeal which has been

disposed of no longer exists" (para. 21). The FCA went on to find that a discontinuance under subsection 16.2(2) "produces the same effect as a judgment of dismissal by the Court" (para. 21).

[11] The FCA also considered section 172 of the *Tax Court of Canada Rules (General Procedure)*, often referred to as the "slip" rule, that allows the Court to set aside, vary or amend judgments when the conditions provided therein are met. It provides as follows:

> Setting Aside, Varying or Amending Accidental Errors in Judgments — General
>
> 172 (1) A judgment that,
>
> (a) contains an error arising from an accidental slip or omission, or
>
> (b) requires amendment in any matter on which the Court did not adjudicate,
>
> may be amended by the Court on application or of its own motion.
>
> (2) A party who seeks to,
>
> (a) have a judgment set aside or varied on the ground of fraud or of facts arising or discovered after it was made,
>
> (b) suspend the operation of a judgment, or
>
> (c) obtain other relief than that originally directed,
>
> may make a motion for the relief claimed.

[12] In particular, the FCA referred to paragraph 172(2)(a), noting that it allows the Court to set aside a judgment "on the ground of fraud or of facts arising or discovered after it was made". The FCA then noted:

> [27] The respondent submitted that the Court possessed and could exercise an inherent jurisdiction to allow the withdrawal of a notice of discontinuance. I cannot accept that submission in view of subsection 16.2(2). As properly stated by I.H. Jacob in an article entitled "The Inherent Jurisdiction of the Court", Current Legal Problems 1970, pages 23 and 24:

> ... the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision.
>
> (emphasis added)

> I believe section 16.2 by its plain meaning took away any inherent or residual jurisdiction in the Court to allow for withdrawals of notices of discontinuance. Both law and logic suggest that there is no more scope or authority for doing so than there is for re-opening a matter after the Court has rendered its judgment.
>
> [My emphasis.]

[13] In this instance, as in *Scarola*, there is no allegation of fraud or of facts discovered or that have arisen after the dismissal of the appeal. It may be that the Appellant's decision was hasty, but the suggestion that she was not represented by legal counsel or that she may not have been properly served by the Canada Revenue Agency throughout the audit stage, are not matters than can be considered by this Court in a motion to set aside or vary a judgment, in a proceeding that was "deemed to be dismissed" (Rule 16.2(2)), when the Court received the notice of discontinuance.

[14] This analysis effectively disposes of the motion as far as this Court is concerned. The result is unfortunate and likely a hard pill to swallow for the Appellant since the Minister had in fact agreed to grant the appeal as evidenced by the consent to judgment noted above. I leave it to the Minister to consider the appropriateness of a reassessment to implement the terms of the consent, possibly pursuant to subsection 298(2) of the *Excise Tax Act*, R.S.C. 1985, c. E-15.

[15] The motion is dismissed, without costs.

Signed at Ottawa, Canada, this 27th day of June 2018.

"Guy Smith"

Smith J.

CITATION:	2018 TCC 119
COURT FILE NO.:	2016-3028(GST)I
STYLE OF CAUSE:	JENNIFER HEATH AND THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
WRITTEN MOTION FILED ON:	April 12, 2018
REASONS FOR ORDER BY:	The Honourable Justice Guy R. Smith
DATE OF ORDER:	June 27, 2018

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Arnav Patel

COUNSEL OF RECORD:

For the Appellant:

Name:	N/A
Firm:	

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada