

TAX COURT OF CANADA

BETWEEN:

IRFAN S. QADIR

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

JUDGMENT RENDERED BY HONOURABLE MR. JUSTICE PARIS
at Courts Administration Service, Room 6B,
180 Queen Street West, 6th Floor,
Toronto, Ontario
on Friday, April 13, 2007 at 2:00 p.m.

APPEARANCES

Mr. Thomas McRae

for the Appellant

Ms Marie-Therese Boris
Ms Jenna Clark

for the Respondent

Also Present:

Ms Roberta Colombo
Ms Shirley Sereney

Court Registrar
Court Reporter

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2 --- Upon resuming on Friday, April 13, 2007

3 at 2:03 p.m.

4 THE REGISTRAR: The Court is now
5 resumed.

6 JUSTICE PARIS: The Appellant has
7 brought a motion pursuant to rule 140(2) of the
8 General Procedure Rules for an order setting aside
9 the judgments issued by Chief Justice Bowman on
10 March 13, 2007 dismissing these appeals.

11 The appeals were dismissed because
12 no one appeared on behalf of the Appellant at a
13 show cause hearing held on March 7, 2007 and
14 because the Appellant had failed to communicate
15 with the Court by February 1, 2007 to advise of the
16 status of the appeals, as required by a previous
17 Order of the Court dated October 26, 2006.

18 Upon learning of the dismissals,
19 counsel for the Appellant brought this motion and
20 filed affidavits of the Appellant and of Mr. Martin
21 O'Brien, who represented the Appellant up until
22 March 7, 2007.

23 Mr. O'Brien's affidavit sets out
24 the circumstances which led to his failure to
25 appear at the show cause hearing, and the affidavit

1 of Mr. Qadir indicates Mr. Qadir's intention at all
2 times to proceed with his appeals.

3
4 Apparently counsel did not contact
5 the Court by February 1, 2007 as required by the
6 Order dated October 26, 2006 because he was aware
7 that the Respondent's counsel had sent a letter to
8 the Court on that date regarding the status of the
9 appeals, and he believed that this was sufficient
10 to meet the requirement in the Order that the
11 parties contact the Court.

12 Mr. O'Brien states in his
13 affidavit that he had no recollection of seeing the
14 Order of the Court requiring the Appellant's
15 attendance at the March 7, 2007 show cause hearing.
16 He also states that he had advised Respondent's
17 counsel in February 2007 that the Appellant wished
18 to proceed with his appeals and that answers to the
19 undertakings arising from the examination for
20 discovery of the Appellant were delivered to the
21 Respondent's counsel on March 2, 2007 prior to the
22 show cause hearing.

23 The contents of the affidavit of
24 Mr. O'Brien were not contradicted by the affidavit
25 material filed by on behalf of the Respondent.

1 Counsel for the Appellant contends
2 that the affidavit evidence shows that Mr.
3 O'Brien's failure to contact the Court by February
4 1, 2007 and to attend at the show cause hearing was
5 due to Mr. O'Brien's error and was not due to any
6 fault of the Appellant himself and could not be
7 taken as proof of an intention not to proceed.

8 Counsel for the Respondent opposed
9 the application to set aside the judgment on the
10 basis that, in addition to counsel's failure to
11 comply with the said Order and to attend the show
12 cause hearing, the Appellant also failed to comply
13 with the Order requiring him to provide answers to
14 undertakings by December 22, 2006. Counsel for the
15 Respondent takes the position that none of these
16 failures to comply with Court Orders is explained
17 in a satisfactory manner in the affidavit evidence
18 presented by the Appellant on the motion.

19 Firstly, I do not accept that I
20 ought to take into account in deciding this matter
21 the Appellant's failure to meet the deadline for
22 providing answers to undertakings. Since the
23 undertakings had been answered by the time of the
24 show cause hearing, this ground was not relied upon
25 by Chief Justice Bowman in dismissing the appeals.

1 This is not to condone the Appellant's failure,
2 however, and I recognize the frustration of
3 Respondent's counsel in having to deal with the
4 delay.

5 Secondly, while I agree with
6 counsel for the Respondent that the explanations of
7 counsel for the failure to contact the Court and to
8 appear at the show cause hearing are short on
9 detail, they were not contradicted and they show
10 that the failures were the result of counsel error.
11 What is material here is that the Appellant himself
12 was not responsible for those failures.

13 I accept that the Appellant should
14 not be deprived of his right to proceed with his
15 appeals because of an error or errors of his
16 counsel.

17 The principles upon which the
18 Court will set aside a default judgment are set out
19 by Chief Justice Bowman in *Farrow v. The Queen*,
20 2003 TCC 885:

21 *The circumstances under which a*
22 *court can exercise its discretion to set aside a*
23 *judgment regularly signed are pretty well settled.*
24 *The application should be made as soon as possible*
25 *after the judgment comes to the knowledge of the*

1 *defendant, but mere delays will not bar the*
2 *application unless an irreparable injury would be*
3 *done to the plaintiff or the delay had been wilful*
4 *... The application should be supported by an*
5 *affidavit setting out the circumstances under which*
6 *the default arose and disclosing a defence on the*
7 *merits. (citing Klein v. Shill, [1921] 2*
8 *W.W.R. 78)*

9 Here the application has been
10 brought without delay, and no allegation of
11 prejudice has been made by the Respondent.
12 Furthermore, the Respondent does not dispute the
13 Appellant's claim that he has an arguable case in
14 each of these appeals.

15 Finally, the affidavits set out
16 the circumstances in which the defaults referred to
17 in the judgment arose, and I accept that
18 explanation although I would add that the
19 explanation does not reflect well on counsel who
20 was acting at the time for the Appellant.

21 The application is therefore
22 allowed, and the judgments dismissing the appeals
23 are set aside.

24 Costs in the motion, fixed in the
25 amount of \$1,000, are awarded to the Respondent

1 payable in any event of the cause.
2 --- Whereupon the transcript of oral reasons
3 concludes.

I HEREBY CERTIFY THAT I have, to the best
of my skill and ability, accurately recorded
by Shorthand and transcribed therefrom, the
foregoing proceeding.



Shirley Serency, Shorthand Reporter

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