

Federal Court



Cour fédérale

Date: 20160511

Docket: T-1377-15

Citation: 2016 FC 529

Vancouver, British Columbia, May 11, 2016

PRESENT: The Honourable Mr. Justice Hughes

**IN THE MATTER OF 0741449 B.C. LTD.
AND AN APPLICATION BY
THE MINISTER OF NATIONAL REVENUE
UNDER SECTION 164(1.2) OF THE *INCOME TAX ACT***

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

0741449 B.C. LTD.

Respondent

JUDGMENT AND REASONS

[1] The Minister is seeking jeopardy orders under the provisions of subsection 164(1.2) of the *Income Tax Act*, RSC 1985, c 1, (5th Supp) permitting funds presently in the hands of the Minister to be retained, such funds having been paid by the Respondent in respect of tax owing

until all appeals respecting the tax have been determined. For the reasons that follow, I will issue such an Order.

[2] The Respondent 0741449 B.C. Ltd. is a British Columbia corporation of which Mark Consiglio or his wife Nicola Consiglio is the sole director and shareholder. There are two applications in respect of this Respondent. The evidence and argument is common to both and both were heard together. Since those applications were filed, the Respondent has been amalgamated with another British Columbia corporation is also owned by one of both of the Consiglios. The resulting corporation continues under the name 0722955 B.C. Ltd.

[3] Subsection 164(1.2) of the *Income Tax Act* permits the Minister to apply to the Court to order that funds in the hands of the Minister not be repaid to the taxpayer despite a request for repayment, in circumstances where the judge “*is satisfied that there are reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of the taxpayer would be jeopardized.*” Subsection 164(1.2) provides:

164(1.2) *Notwithstanding subsection 164(1.1), where, on application by the Minister made within 45 days after the receipt by the Minister of a written request by a taxpayer for repayment of an amount or surrender of a security, a judge is satisfied that there are reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of the taxpayer would be jeopardized by the repayment of the amount or the surrender of the security to the*

164(1.2) *Malgré le paragraphe (1.1), le juge saisi peut, sur requête du ministre faite dans les 45 jours suivant la réception de la demande écrite d'un contribuable visant le remboursement d'une somme ou la remise d'une garantie, soit ordonner que tout ou partie de la somme ne soit pas remboursée au contribuable ou que tout ou partie de la garantie ne lui soit pas remise, soit rendre toute ordonnance qu'il estime raisonnable dans les circonstances, s'il est*

<i>taxpayer under that subsection, the judge shall order that the repayment of the amount or a part thereof not be made or that the security or part thereof not be surrendered or make such other order as the judge considers reasonable in the circumstances.</i>	<i>convaincu qu'il existe des motifs raisonnables de croire que le fait de lui rembourser la somme ou de lui remettre la garantie conformément à ce paragraphe compromettrait le recouvrement de tout ou partie du montant d'une cotisation établie à son égard.</i>
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[4] The present Applications deal with three requests for refunds made by the Respondent totalling \$1,157,568.24. The first Application deals with two of these requests, the second deals with the third request which was made after the first Application was initiated. I am advised that the Respondent has taken proceedings in respect of those assessments in the Tax Court but that no date for a hearing has yet been set out.

[5] The Respondent is principally in the real estate development business. The assets of the Respondent, aside from the refunds sought from the Minister, is in the form of real estate in the Kelowna, British Columbia area, much of which is heavily mortgaged. I repeat the description of those assets as set out in Respondent's Counsel's memorandum:

22. The Respondent owns the following real property assets (acquired from Predecessor 0741 on the amalgamation):

a. #15-4215 Westside Road, Kelowna, B.C. ("Lot 15") having a fair market value of \$400,000 and liabilities secured against title as follows:

a. two mortgages registered against title to Lot 15 totalling \$563,808;

b. a CRA judgment in the amount of \$530,531.77; and

c. outstanding strata fees of approximately \$10,000; and

- b. *#20-4215 Westside Road, Kelowna, B.C. ("Lot 20") having a fair market value of \$600,000 and liabilities secured against title as follows:*
 - i. *a registered mortgage having a face value of \$800,000 but with only \$431,697 outstanding; and*
 - ii. *outstanding strata fees of approximately \$10,000.*
23. *The Respondent owns the following additional real property assets (acquired from Predecessor 0722 on the amalgamation):*
- a. *517 Trumpeter Road, Kelowna, B.C. ("517 Trumpeter") having an estimated fair market value of \$410,000 and mortgages registered against title totalling approximately \$400,000;*
 - b. *521 Trumpeter Road, Kelowna, B.C. ("521 Trumpeter") having an estimated fair market value of \$450,000 and mortgages registered against title totalling approximately \$414,000; and*
 - c. *5171 Chute Lake Road, Kelowna, B.C. (the "Chute Lake Road Property") having mortgages totaling \$4,200,000 registered against title.*

[6] The only asset of real value that could potentially be realized, is the Chute Lake property. The Minister's evaluation places a market value of about \$1.5 million on this property, the Respondent's evaluation places a value of about \$4.85 million as undeveloped property and about \$7.15 million as developed property. The evidence is that there is an outstanding foreclosure Order of the British Columbia Court against this property; there is no evidence in the record as to whether that Order has been satisfied or otherwise resolved. The Respondent says that development plans respecting this property are underway but a letter from the Department Manager, Community Planning, City of Kelowna, in the record states that a Preliminary Layout Review (PRL) letter has been issued but that it could be revoked at any time and that, in any

event if Consiglio were still to be involved, he would not approve a subdivision application. There is also a suggestion in the evidence that a sale of the Chute property may be pending.

[7] The evidence also shows that Mr. Consiglio has been involved in a number of business ventures in the past, many of which have failed to pay taxes or gone bankrupt.

[8] There are only two reported decisions dealing with subsection 164(1.2) of the *Income Tax Act*, they are *The Minister of National Revenue v Chabot*, 2010 FC 574, a decision of the late Justice Blanchard of this Court, and *Minister of National Revenue v Clarke*, 2011 FC 838, a decision of Justice Simpson of this Court. Of these, *Chabot* is the more instructive.

[9] Earlier jurisprudence deals with the provisions of section 225.2 of the *Income Tax Act*, which permits the Court to issue a jeopardy order to speed up a pending assessment where the Minister has not yet received funds. The jurisprudence, including *Canada v Golbeck*, [1990] 2 CTC 438, a decision of the Federal Court of Appeal, and *1853-9049 Quebec Inc v Her Majesty the Queen*, [1987] 1 CTC 137, a decision of the late Justice Rouleau of this Court, speak of cases of fraud and cases where the taxpayer may waste, liquidate or otherwise transfer property to escape the tax authorized. I agree with Justice Blanchard where he wrote at paragraph 22 of his decision in *Chabot* that the jurisprudence developed under subsection 225.2(2) has little bearing on applications under subsection 164(1.2).

[10] Justice Blanchard in *Chabot* established that in order for a Judge to be satisfied that there are “reasonable grounds to believe” that the collection of tax would be jeopardized, the Court

must assess the taxpayers net worth and ability to satisfy the tax debt independently of the refund at issue. Factors such as unorthodox behaviour of the taxpayer and evidence regarding potential dissipation of assets by the taxpayer may be considered. He wrote at paragraphs 23 to 26 of

Chabot:

[23] In interpreting subsection 164(1.2) of the Act, I will apply the so-called “modern rule” of statutory interpretation mandated by the Supreme Court of Canada in Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27. The rule provides that:

The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[24] The clear language of subsection 164(1.2) provides that the jeopardy to the collection of the taxpayer’s debt that needs to be established by the Ministers is the jeopardy that would be caused by the “repayment” of the amount of the refund.

[25] Further, by inserting the provision in that part of the Act dealing with refunds, Parliament intended to provide for measures to be available on application by the Minister, where jeopardy is established, to ensure that such refunds be retained and applied as a set-off against amounts that are under objection or appeal.

[26] In my view, factors that require consideration in the circumstances of a subsection 164(1.2) application are the amount of the debt to be collected relative to the amount of the refund, the taxpayer’s ability to pay or otherwise satisfy the debt, the value of the taxpayer’s net assets and whether these are sufficient and available to satisfy the debt independently of the refund. Where it is established that the taxpayer is able to repay the debt or that his assets are of sufficient value to satisfy the debt, then releasing the amount of the refund would not jeopardize the collection of the amount. It is in the context of assessing the taxpayer’s net wealth and the taxpayer’s ability to satisfy the debt independently of the refund that the issue of jeopardy is assessed. This may include considering factors such as unorthodox behaviour of the taxpayer and any evidence regarding dissipation of assets by the taxpayer. Upon consideration of such factors, if there are reasonable grounds to believe, in all of the circumstances, that release of the refund to the taxpayer would result in that amount not being available to the Minister for collection against the debt, then

collection of the debt is jeopardized for the purposes of subsection 164(1.2) and a jeopardy order pursuant to that provision is justified.

[11] In this case, I am satisfied that there are reasonable grounds to believe that the funds now in the hands of the Minister would likely be jeopardized if returned to the Respondent. The only real asset is the Chute Lake property; it is heavily mortgaged and subject to a foreclosure order. There is a suggestion that a sale may be imminent. Approval of a subdivision plan is tentative and may not ever occur. The principal of the Respondent, Consiglio, or the companies with which he is associated, has a history of non-payment of taxes and bankruptcy. All of this makes it reasonable for this Court to conclude that funds in the hands of the Minister may well be in jeopardy if returned to the taxpayer.

[12] Counsel for the Respondent points out that the last few words of subsection 164(1.2) gives the Court a discretion to make “*such other order as the judge considers reasonable in the circumstances.*” Counsel suggests that an Order be made that a portion of the funds in the hands of the Minister be paid to the City of Kelowna to cover subdivision approval fees and that the balance be secured by a mortgage or other charge on the Chute Lake property.

[13] I will decline to make such an Order as it will, in effect, be making the Minister a business partner of the taxpayer in a somewhat risky venture. There are already several mortgages on the property and it is by no means clear as to whether the Respondent still owns the property.

[14] I will award costs to the Minister fixed in the sum of \$5000.00

JUDGMENT

FOR THE REASONS PROVIDED, THE COURT ADJUDGES that:

1. A Jeopardy Order is granted in each of the applications T-1327-15 and T-1377-15 authorizing the Minister to retain and apply a tax refund to the tax debt of the Respondent, including its successor by amalgamation 0722955 B.C. Ltd., until all objections and appeals in respect of such tax debt have been concluded.
2. The Minister is entitled to costs, in both of T-1327-15 and T-1377-15 to be paid by the Respondent and its successor as aforesaid collectively in the sum of \$5000.00

"Roger T. Hughes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1377-15

STYLE OF CAUSE: THE MINISTER OF NATIONAL REVENUE v 0741449
B.C. LTD.

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MAY 10, 2016

JUDGMENT AND REASONS: HUGHES J.

DATED: MAY 11, 2016

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