Federal Court Cour fédérale

Date: 20230718

Docket: T-457-22

Citation: 2023 FC 977

Toronto, Ontario, July 18, 2023

PRESENT: Mr. Justice Diner

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

ARI BEN-MENASHE

Respondent

JUDGMENT AND REASONS

[1] This Motion is brought by the Respondent [Mr. Ben-Menashe] for reconsideration of a jeopardy order granted by this Court on March 8, 2022 [Order], in response to an *ex parte* application brought by the Minister of National Revenue [Minister]. The Minister brought a request for the Order pursuant to subsection 225.2(2) of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [ITA].

[2] The Order authorizes the Minister to take collection actions pursuant to paragraphs 225.1(1)(a) to (g) of the ITA with respect to the income tax debt of Mr. Ben-Menashe, a sum of $7,663,570.71 for the tax years 2012, 2014, 2015, 2017, 2018 and 2019, including accrued interests.

[3] After reconsidering the issuance of the Order in light of the evidence and arguments presented by each of the two Parties, I agree with Mr. Ben-Menashe that the Order should be set aside, for the reasons that follow.

[4] First, a brief background of the law around jeopardy orders and key legal considerations will assist in providing the context for my conclusion and judgment in this matter.

I. Jeopardy Orders

[5] An *ex parte* jeopardy order is issued pursuant to subsection 225.2(2) of the ITA, the relevant provisions of which have been reproduced at Annex A to these Reasons. For a jeopardy order to be issued, the judge hearing the application must be satisfied that there are reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of a taxpayer would be jeopardized by a delay in its collection.

[6] The Minister must meet this onus on a balance of probability. Put another way, the Minister is not required to show beyond all reasonable doubt that the time allowed to the taxpayer would jeopardize the Minister's debt (*Services M.L. Marengère Inc. (Re)*, 1999 CanLII 9004 (FC) at para 63 [*Marengère*]).

[7] Given the extraordinary, *ex parte* nature of an application for a jeopardy order, the Minister has an obligation to exercise utmost good faith and ensure full and frank disclosure that is reasonable in the circumstances (*Canada (National Revenue) v Grenon*, 2015 FC 1050 at para 5 [*Grenon*] citing *Marengère* at para 63; see also *Canada (National Revenue) v Zhao*, 2022 FC 1108 at para 16 [*Zhao*]).

[8] In *Canada (National Revenue) v Imbeault*, 2009 FC 499, this Court identified factors, one or more of which can justify the issuance of a jeopardy order:

a) there are reasonable grounds to believe that the taxpayer has acted fraudulently;

b) the taxpayer has proceeded to liquidate or transfer his or her assets;

c) the taxpayer is evading his or her tax liabilities;

d) the taxpayer has assets that could potentially lessen in value over time, deteriorate or perish;

e) the amount of the debt in relation to income and expenses.

(See also, more recently, *Zhao* at para 17-18 for the legal principles applicable to jeopardy orders).

[9] Justice Pentney, based on the evidence put before him by the Minister, found that “the Court is satisfied that there are reasonable grounds to believe that allowing the Respondent a delay for the payment of the amount which he was assessed for would jeopardize its collection in all or in part” in his succinct Order of March 8, 2022.

[10] Once a jeopardy order is granted, the taxpayer may apply to a judge of this Court for a reconsideration of its issuance pursuant to subsection 225.2(8) of the ITA. That is what Mr. Ben-Menashe has done and the merits of which I must now decide. To do so, I must apply a two-part test:

1. Mr. Ben-Menashe has the initial burden of mustering evidence that there are reasonable grounds to doubt that the test required by subsection 225.2(2) of the ITA has been met. He must demonstrate through affidavits or cross-examination of the Minister's witnesses, that the evidence originally submitted by the Minister in the *ex parte* application, did not meet the s. 225 test.

2. If Mr. Ben-Menashe succeeds in the first step, the burden shifts to the Minister, who has the ultimate burden of showing that the *ex parte* issuance of the Order was justified. (*Canada v Proulx*, 2011 FC 1231 at para 18 [*Proulx*]; see also *Canada (National Revenue) v Moise*, at para 14-15 [*Moise*])

II. Background

A. *Factual background*

[11] Mr. Ben-Menashe describes his work as "carrying on business in the area of international consulting and lobbying" and "offering services to underdeveloped countries or to countries undergoing conflicts, or to political organizations seeking to govern such countries". The services he offers include "conflict resolution and the creation of economic or political ties with world powers such as the United States, Great Britain and Russia."

[12] Mr. Ben-Menashe's activities are regulated and monitored in the United States by the National Security Division of the United States Department of Justice, pursuant to the *Foreign Agents Registration Act*, 22 USC § 611 *et seq*. [FARA]. Mr. Ben-Menashe is a shareholder and director (president and secretary) of Dickens & Madson Canada Inc. [Dickens], which is the registrant company with FARA.

[13] Beyond his work as a consultant, Mr. Ben-Menashe is also involved in a number of entities, holding various titles such as non-executive officer, president, director, secretary and treasurer. He is also identified as either the settlor, one of the trustees, or one of the beneficiaries in a number of trusts.

[14] Mr. Ben-Menashe has been married to Karina Oganesjane since 2014. He has two daughters from previous marriages.

B. *History of the proceeding*

[15] On March 2, 2022, the Minister filed a successful *ex parte* application that resulted in the issuance of the Order. The Order was issued to permit collection and secure payment of the amount in respect of which Mr. Ben-Menashe was assessed, for the taxation years 2012, 2014, 2015, 2017, 2018 and 2019, namely the sum of $7,663,570.71.

[16] On April 14, 2022, Mr. Ben-Menashe challenged the Order through this Motion for reconsideration.

[17] On May 31, 2022, Mr. Ben-Menashe served the Minister with a further motion within these proceedings, requesting that the Court strike the affidavit of Ms. Navi You [You Affidavit]. Ms. You is a collections officer working for the Canada Revenue Agency [CRA]. The Minister originally filed the You Affidavit in support of the *ex parte* application.

[18] On September 21, 2022, I issued an order to merge the two motions such that they be heard simultaneously.

[19] Between that date and the hearing of the matter on June 13-14, 2023, the Parties conducted cross-examinations, and filed their responding records. Mr. Ben-Menashe filed his Reply Record on May 15, 2023. It included a supplementary affidavit sworn by him [Supplementary Affidavit], and five exhibits, Exhibits ABM-22 to 26, which were not previously part of Mr. Ben-Menashe's Motion Record. Accordingly, he filed a third Notice of Motion, this time asking the Court for leave to file the Supplementary Affidavit and its Exhibits. After a further case management conference, this third motion was also added to the hearing of the main matter, to be argued and decided at the outset [Preliminary Issue].

[20] Now that the procedural background has been summarized, I will address the issues raised in this proceeding, beginning with the Preliminary Issue.

III. Parties' Positions on the Preliminary Issue

[21] Mr. Ben-Menashe seeks the Court's permission to admit the Supplementary Affidavit into the record, which appends five items of new evidence [Exhibits]:

- Exhibit ABM-22: Notice of Appeal to the Tax Court of Canada [TCC] filed by Mr. Ben-Menashe on February 21, 2023 with respect to the Minister's assessments for the taxation years 2012, 2014, 2015, 2017, 2018 and 2019;

- Exhibit ABM-23: April 17, 2023 Revenu Québec Notices of Assessments of Mr. Ben-Menashe for the taxation years 2013-2019;

- Exhibit ABM-24: April 27, 2023 Notice of Objection of the Revenu Québec assessments for the taxation years 2014, 2017, 2018 and 2019;

- Exhibit ABM-25: April 26, 2023 end of audit (for the taxation years 2015, 2016 and 2017) letter issued by Revenu Québec to Mr. Ben-Menashe's spouse, Ms. Oganesjane; and

- Exhibit ABM-26: April 27, 2023 end of audit (for the taxation years 2014 to 2019) letter issued by Revenu Québec to Dickens.

[22] Mr. Ben-Menashe argues that the Supplementary Affidavit and its Exhibits should be admitted into the record, because they are relevant to the reconsideration of the Order. First, he submits the TCC Notice of Appeal (Exhibit ABM-22) supports his argument that the Minister's assessments are filled with substantial errors that the Court should consider when determining whether the Order can stand, relying on paragraphs 67-68 of *Robarts*.

[23] Mr. Ben-Menashe further argues that the TCC Notice of Appeal supports his argument that the delay, which the Minister alleges is jeopardizing the debt, was the result of the Minister's own lack of diligence in the audit and assessment process. Mr. Ben-Menashe submits that he was able to file the TCC Notice of Appeal in February 2023 pursuant to subsection 169(1) of the

ITA, because 90 days had elapsed after he served the Minister his Notice of Objection in April 2022, without any response from the Minister.

[24] With respect to the Revenu Québec documents (Exhibit ABM-23 to ABM-26), Mr. Ben-Menashe argues that they are relevant because they confirm the complexity motive he has invoked to justify the delay for filing his current tax returns, as he, his spouse and Dickens were being simultaneously audited by both Revenu Québec and the CRA.

[25] In particular, he argues that these new Exhibits demonstrate that (i) the CRA was not diligent in their audit of his finances having failed to communicate for some nine months prior to suddenly taking action in bringing its *ex parte* application to the Court despite ongoing efforts by Mr. Ben-Menashe to cooperate and respond to audit concerns, whereas Revenu Québec responded in a timely manner to the Notice of Objection he filed, and issued re-assessments in due course; and (ii) Revenu Québec recognized the nominee relationship between Mr. Ben-Menashe and Dickens, which is relevant to the correctness of the CRA assessments.

[26] The Minister argues that the Supplementary Affidavit and its Exhibits should not be admitted because reply evidence is generally not permitted as it amounts to splitting Mr. Ben-Menashe's case, relying on *Amgen Canada Inc. v Apotex Inc.*, 2016 FCA 121 at para 12 [*Amgen*]. The Minister submits the only purpose of the Supplementary Affidavit and its Exhibits is either to bolster arguments already made in chief, which Mr. Ben-Menashe should not be allowed to do on reply (*Merck Sharpe & Dohme Corp. v Pharmascience Inc.*, 2021 FC 1456 at

para 4). The Minister submits moreover that the five Exhibits in question are all irrelevant to the reconsideration of the Order.

[27] The Minister contends that Mr. Ben-Menashe already had the opportunity to submit evidence to support his argument that the complexity of his finances and the ongoing audits of him, his spouse, and Dickens resulted in a delay in filing his tax returns. The Minister maintains Mr. Ben-Menashe has not demonstrated that the TCC Notice of Appeal or the Revenu Québec documents are relevant to the issues raised in the reconsideration of the Order. The Minister argues Mr. Ben-Menashe strictly relies on these documents to dispute the correctness of the CRA assessments, which is not an issue before this Court.

IV. Analysis: Preliminary Issue

[28] As requested by the Parties, I provided a decision on the Preliminary Issue from the bench – to admit the Supplementary Affidavit – with reasons to follow. These are the reasons.

[29] In deciding to admit the materials, I considered (i) whether the evidence would assist the Court because of its relevance and its probative value; (ii) whether admitting the evidence would cause substantial or serious prejudice to the other side; and (iii) whether the evidence was available when Mr. Ben-Menashe filed his original affidavit, or whether it could have been discovered with the exercise of due diligence (*Amgen* at para 13).

[30] In this case, I found that the Supplementary Affidavit and its Exhibits would assist the Court, because contrary to the Minister's assertion, they are relevant to the reconsideration of the Order.

[31] First, they show that Mr. Ben-Menashe seriously challenges the evidence used by the Minister to justify the Order.

[32] Second, it is clear that these documents were not available and could not have been discovered at the time Mr. Ben-Menashe filed his amended Motion Record in October 2022. This is because the TCC Notice of Appeal was filed in February 2023, and could not have been filed earlier pursuant to subsection 169(1) of the ITA. Likewise, the Revenu Québec reassessments and letters confirming the conclusion of its audits were only issued in April 2023.

[33] Third, the Minister has neither argued nor demonstrated that admitting the Supplementary Affidavit and its Exhibits would result in substantial and serious prejudice to the Minister.

[34] Regarding the Minister's argument that Mr. Ben-Menashe is simply trying to attack the correctness of the assessment through the admission of this evidence, which is a matter that solely falls to the competence of the TCC and not this Court on a reconsideration of a jeopardy order, that observation in and of itself is an entirely accurate one.

[35] However, I cannot agree that the new documents are sought to be introduced to attack the correctness of the assessment. Rather, Mr. Ben-Menashe is solely requesting they be admitted to

support his arguments challenging the evidence that was put forward by the Minister on an *ex parte* basis as part of its affidavit evidence. That is a valid purpose for the admission of the five Exhibits. As was held by this Court at paragraph 68 of *Robarts*:

> If the record shows that a good portion of the evidence used by the Minister to justify the jeopardy order is seriously challenged by the taxpayer, the Court cannot simply ignore these submissions when determining whether the jeopardy order should stand. The Minister's assertions must necessarily be called into question (see *Minister of National Revenue v. Douville*, 2009 FC 986, 357 F.T.R. 316 at paras 16 and 20).

[36] Finally, I note that at the hearing, Counsel for Mr. Ben-Menashe undertook to rely on the TCC Notice of Appeal only to illustrate the Minister's lack of diligence in the audit and assessment process, and not to rely on the written submissions within the TCC Notice of Appeal to bolster Mr. Ben-Menashe's arguments on the substantial errors he asserts have been made by the CRA in their assessments. This limitation was a reasonable compromise, which I endorsed, given the concerns raised by the Minister.

[37] In conclusion on the Preliminary Issue, the Supplementary Affidavit and its Exhibits are admitted into the record, whereby any consideration of the TCC Notice of Appeal will be restricted to Mr. Ben-Menashe's argument on the Minister's lack of diligence.

V. Issues and Applicable Test on the Reconsideration of the Order

[38] Mr. Ben-Menashe raises two issues regarding the merits of the Order: first, that its issuance should be reconsidered and set aside; and second, that the You Affidavit – the primary supporting piece of evidence upon which the Order was granted – should be struck.

[39] Mr. Ben-Menashe asserts that three elements render the Order unwarranted and unjustified, namely that (i) the Minister has not met the obligation of full and frank disclosure; (ii) there are substantive errors with the CRA's assessment of his tax liability; and (iii) the Minister had an alternative recourse under section 160 of the ITA.

[40] On the second evidentiary issue, Mr. Ben-Menashe argues that the You Affidavit should be struck from the record pursuant to subsection 58(1) of the *Federal Courts Rules*, SOR/98-106, because it contains multiple irregularities, including opinion evidence, and causes him prejudice.

[41] The Minister responds in the first place that Mr. Ben-Menashe has not met his initial burden to demonstrate reasonable grounds to doubt that a delay in time would jeopardize the Minister's recovery of the debt. Second, The Minister submits that the issue of whether the You Affidavit should be filed into the record can only be considered by the Court in the event that Mr. Ben-Menashe meets his initial burden. In the event the Court concludes that Mr. Ben-Menashe's initial burden is met, the Minister submits that the You Affidavit should not be struck, because it does cause prejudice to Mr. Ben-Menashe, the motion was not made as soon as practicable, and that ultimately, subsection 225.2(8) of the ITA permits opinion.

[42] As described above at paragraph 10, the reconsideration of a jeopardy order first requires the taxpayer to demonstrate that there are reasonable grounds to doubt that the test required by subsection 225.2(2) of the ITA has been met. The burden then switches to the Minister to justify the Order (*Moise* (at para 14, citing *Proulx*)).

[43] As recognized by the Court in *Canada (National Revenue) v Reddy*, 2008 FC 208 at paragraph 6 [*Reddy*], the first part of the two-part test is similar to an appeal. Consequently, it is necessary for the Court to review the record submitted to Justice Pentney in the *ex parte* application in its entirety in deciding whether or not Mr. Ben-Menashe has met his initial onus. When the Court concludes this onus has been met, the Court will conduct a *de novo* reconsideration of the matter, in the second part of the two-part test, to decide whether the jeopardy order was justified (*Reddy* at para 6).

[44] Thus, I agree with the Minister that the Court need not consider the issue of whether to strike the You Affidavit until it is determined that Mr. Ben-Menashe has met his initial onus, and the Court is conducting the *de novo* hearing of the matter in the second part of the two-part test.

VI. Analysis: Reconsideration of the Order

[45] The central issue in this case is whether the Minister has fulfilled the initial obligation for full and frank disclosure. As held by Justice Gleason, as she was then, in *Tassone v Canada (National Revenue)*, 2013 FC 1100 at paragraph 10 [*Tassone*]:

> The case law recognises that the Minister must make full and frank disclosure in an *ex parte* application for a jeopardy order and that failure to do so will result in the order's being set aside in a review application made under subsection 225.2(8) of the ITA even if the evidence before the Court demonstrates that there was a valid case for the order being issued. Thus, lack of full and frank disclosure is a stand-alone basis for review of an ex parte jeopardy order (*Canada (National Revenue) v Papa*, 2009 FC 49 at para 21).
>
> [Emphasis added]

[46] Full and frank disclosure is thus the key issue in this reconsideration. The ultimate question is what constitutes “full and frank disclosure”, and whether that requirement was satisfied by the Minister in the application to the Court for the March 2022 Order.

[47] As pointed out at the outset of these Reasons, the disclosure must be “reasonable in the circumstances.” This carries a measure of discretion on the part of the Minister in terms of what evidence is required in its application for a jeopardy order. The full and frank disclosure requirement includes “an obligation on the Crown […] to draw to the attention of the Court all facts in issue, even those which it considers unhelpful or inconvenient; and to disclose reasonably foreseeable weaknesses in its case” (*Grenon* at para 5, citing various authorities including *Marengère* at para 63 and *Robarts* at para 35).

[48] Mr. Ben-Menashe argues that the Minister failed to make a full and frank disclosure in the *ex parte* application, omitting information that was relevant to whether or not the Order should have been issued. Mr. Ben-Menashe contends the Minister failed to disclose information in connection with three central grounds that were relied on to obtain the Order, namely, (i) the large disbursements from Mr. Ben-Menashe’s spouse’s bank accounts since May 2021; (ii) Mr. Ben-Menashe’s tax behaviour, which according to the Minister, showed carelessness and negligence in his tax affairs; and (iii) his lifestyle, which the Minister deemed to be incompatible with his declared income.

[49] The Minister counters that the duty to make full and frank disclosure is limited to the specific burden of proof that must be met, which is to establish that there are reasonable grounds

to believe that giving the taxpayer time to pay their tax debt would jeopardize the collection. The Minister submits that she only needs to disclose in the *ex parte* application all information that is relevant to determine whether a delay in time would jeopardize the collection of his tax debt. The Minister further argues that the omissions raised by Mr. Ben-Menashe only relate to the amount of his tax liability, which is not at issue in this proceeding before this Court.

[50] The Minister argues that the omissions therefore do not amount to a breach of her duty to make full and frank disclosure, and that in any event, "[d]isclosure does not need to be perfect must [*sic*] be adequate or reasonable in the circumstances" (*Canada (National Revenue) v Accredited Home Lenders Canada Inc.*, 2012 FC 461 at para 9, citing *Marengère* at para 63).

[51] Despite the Minister's arguments, I find she did not fulfill the duty to make full and frank disclosure, in that she omitted relevant information relating to three aspects of the March 2022 *ex parte* application. The fact that Justice Pentney's decision to grant the Order might have been the same if full and frank disclosure had been made is of no consequence: it is not the role of this Court on reconsideration to speculate on that possibility (*Canada (National Revenue) v 159890 Canada Inc.*, 1997 CanLII 6138 at page 6 [*159890 Canada Inc.*]).

[52] I will proceed to review each of the three key areas in which the Minister omitted to provide information, beginning with the claims made about his spouse's account – arguably the most crucial of the gaps in the evidence presented.

A. *Bank accounts of Mr. Ben-Menashe's spouse*

[53] Mr. Ben-Menashe argues that the Minister did not disclose all the relevant information regarding the flow of money into and out of his spouse's bank accounts since May 2021.

[54] In the *ex parte* application, the Minister indicated that Ms. You, a complex case officer at the CRA and the Minister's primary affiant, identified several significant disbursements in Ms. Oganesjane's bank accounts since May 2021, which amount to $459,847.75 USD and $1,325,842.62 CAD. The Minister explained that these disbursements led them to believe that Mr. Ben-Menashe – who was using Ms. Oganesjane's bank accounts – was taking active steps to place his liquid assets out of the reach of his creditors, including the Crown.

[55] Mr. Ben-Menashe submits that the Minister's argument fails to take into consideration the deposits made into Ms. Oganesjane's bank accounts. According to the bank statements, between May 25, 2021 and March 2, 2022 (the date of the Minister's *ex parte* application), a total of $352,567.50 USD was deposited back into Ms. Oganesjane's bank accounts, in addition to the disbursements in the sum of $459,847.75 USD and $1,325,842.62 CAD. Those deposits were neither disclosed nor otherwise mentioned in the *ex-parte* application materials.

[56] Mr. Ben-Menashe argues that the deposits and withdrawals clearly demonstrate that he uses his spouse's bank accounts to receive payments for his services, as well as to pay for his business expenses. He argues that the Minister's characterization of the disbursements as an attempt to place his liquid assets out of the reach of His Majesty is misleading because it does

not take into account the deposits. Indeed, he asserts that if he was truly emptying his accounts or otherwise shielding his assets from the CRA, he would not have deposited funds into his account shortly before the Minister brought her application based on the converse.

[57] I agree. By failing to disclose the deposits in the *ex parte* application, the Minister omitted information that was relevant for this Court's determination to grant the Order. The Court did not have the full picture of the bank account activity given the lack of any information about deposits into the account.

[58] The Minister's primary affiant, Ms. You, later testified in cross-examination (done in the context of these reconsideration proceedings) that she "did not put into account [*sic*] the deposits amount because a point of this paragraph is to show the disbursements, the high volume of disbursement and the high amount of disbursement [*sic*]."

[59] I do not accept this explanation of the limitation on the disclosure, as being adequate or reasonable in the circumstances. Although the total amount of deposits (described as payments from contracts) was far less than the total amount of disbursements (described as business expenses) between May 2021 and March 2022, there could have been any number of explanations for that differential, including the turning of significant profits from those contracts.

[60] Whatever the explanation – and again it is not for this Court to speculate on the outcome that would have ensued had all the relevant information been placed in the application record – it was unreasonable for the Minister not to mention any deposits at all. This is particularly so when

the Court was only presented with one side of the ledger – namely the disbursements which were described as a “high volume” and “high amount”.

[61] It is clear that the application judge needs to see both sides of the ledger, in order for the Court to have made a balanced assessment by weighing the various factors outlined in the test and its underlying legal principles (see paragraph 8 of these Reasons, with reference to paragraphs 17-18 of *Zhao*). This is particularly so when allegations or inferences are made regarding unorthodox banking activity, that form a key component of the application for the jeopardy order.

[62] Here, a central plank of the Minister’s case was that the taxpayer would waste, liquidate or otherwise transfer property and/or the proceeds therefrom, such that the collection would more likely than not be jeopardized by the delay. Indeed, the test and its relevant legal principles also make it clear that mere suspicion or concern is insufficient to establish reasonable grounds.

[63] Turning back to the evidence presented by the Minister in this case, in characterizing the disbursements as an attempt to place liquid assets out of the reach of His Majesty, Ms. You, in addition to omitting any mention of the deposits, failed to mention that these disbursements could be business expenses. However, in cross-examination, Ms. You testified she was aware that Mr. Ben-Menashe used Ms. Oganesjane’s bank accounts to carry out his business, which includes paying business expenses.

[64] Specifically, Ms. You explained under oath that she did not mention the matter of the deposits in her affidavit, because (i) they were mentioned in the affidavit of Ms. Petit, which Ms. You referenced in her affidavit; and (ii) Ms. You could not verify exactly which disbursements were for business expenses since Ms. Oganesjane also used her bank for her personal finances and Ms. You did not have time to request further bank statements.

[65] Given that subjects of jeopardy orders are not given the opportunity to advocate for, or defend themselves in the context of *ex parte* motions, the Minister's obligation for full and frank disclosure remains paramount: as it is with any one-sided, *ex parte* application in an adversarial judicial system, there will necessarily be a deficit in the picture provided.

[66] While acknowledging that the Minister's disclosure does not need to be "perfect", I find that they nonetheless have an obligation to be vigilant about presenting a complete portrait of the good and the bad of the case. This permits the Court to form a full and more accurate – rather than a partial – picture of the situation, in order to adjudicate whether there are reasonable grounds to believe the Crown's debt is in jeopardy.

[67] Once a jeopardy order issues, in a subsequent motion for reconsideration, the Court's role is not to redetermine the decision that should have been made in the first place (*159890 Canada Inc.* at page 6). Otherwise stated in this particular case, it is not the Court's role to determine whether the Order should have been issued had the bank account disbursements been disclosed by the Minister in the *ex parte* application.

[68] Moreover, a motion for reconsideration of a jeopardy order is not the appropriate forum to assess the correctness of an assessment (*Robarts* at para 67). Regardless of whether the Minister could confirm that the disbursements were indeed business expenses, there was a duty to disclose the full picture in the *ex parte* application, including any facts that ran at odds with the narrative recounted to the Court and what might reasonably be regarded as weaknesses in the Minister's case for a jeopardy order (*159890 Canada Inc.* at page 5).

[69] Indeed, there were not only the large disbursements that the Minister described, but there were also large deposits made during the key period in question – from May 2021 to March 2022. The Minister should have also pointed out in the *ex parte* materials that Mr. Ben-Menashe's position was that he had used his spouse's bank accounts, from which the withdrawals were made, to pay for his business expenses.

B. *Mr. Ben-Menashe's "Unorthodox Tax Behaviour" and Business Expenses*

[70] The Minister further contends that the taxpayer's unorthodox behaviour, both prior to and during the CRA audit, is unequivocal. On this second allegation regarding his tax behaviour, Mr. Ben-Menashe contends that the Minister failed to disclose a central document setting out the business expenses incurred by Dickens (produced by him in Exhibit ABM-14 in support of this reconsideration Motion).

[71] Exhibit ABM-14 contains a preliminary analysis of Mr. Ben-Menashe's finances for 2015-2017, prepared by his counsel in the context of the Revenu Québec audit. It was shared in October 2019 with Mr. Potvin, Ms. Petit's audit predecessor at CRA. The document includes a

detailed analysis of Mr. Ben-Menashe's business expenses and documentary evidence with regard to these business expenses.

[72] However, neither Exhibit ABM-14 nor its analysis of Mr. Ben-Menashe's business expenses were provided in the Minister's *ex parte* application to this Court. The Minister contends that Exhibit ABM-14 was not considered by Ms. Petit or provided in support of her affidavit, because, as explained by Ms. Petit in her cross-examination, Exhibit ABM-14 is a draft and therefore, not a final version. As a draft, she contends, it is inherently incomplete and unreliable, and only refers to alleged business expenses.

[73] In short, Ms. Petit explained that the CRA audit of Dickens was not complete but was rather still ongoing at the date of the application, and thus these alleged business expenses had not been verified or confirmed. The Minister submits that the omission, if any, to provide the Court with a document that even Mr. Ben-Menashe considers not to be final, did not constitute a failure to make full and frank disclosure.

[74] Once again, I disagree. The Minister appears to be conflating reliability with relevance. Obviously, given the fact that Mr. Ben-Menashe was in the midst of an audit when the Minister applied for the Order, would mean that any documentation provided for him would not have been a final, or accepted position. The fact that the CRA would deem the document not to be reliable may well be its analysis of the document. However, that does equate to a lack of relevance in respect of record supporting its application: the duty of the Minister was rather to

provide all central facts at issue – even those which it found unhelpful or inconvenient to its position vis-à-vis the taxpayer.

[75] In short, I find that the Minister's omission to disclose Exhibit ABM-14 constituted a material omission and a failure to meet her obligation of full and frank disclosure. Although the dispute over the correctness of the assessments – including whether Mr. Ben-Menashe's claimed business expenses are accurate – is to be settled in a different forum than this Court, that does not mean the assessments were irrelevant to this Court to determine whether a delay in time would jeopardize the Minister's debt. And again, while the impact of Exhibit ABM-14 may have been inconsequential on this Court's Order, that possibility does not absolve the Minister from having to produce it as representing Mr. Ben-Menashe's version of his tax position.

[76] In fact, the Minister relied on Ms. Petit's assessments of Mr. Ben-Menashe's income between 2012-2019, which was much higher than the income Mr. Ben-Menashe himself reported (for the years he did file his tax returns), to argue that his tax behaviour of underreporting his income constituted a reasonable ground to grant the Order.

[77] Again, the Minister did not disclose that Ms. Petit's assessments did not account for any business expenses at all, which would inevitably make her assessments much higher than Mr. Ben-Menashe's income reported in his tax returns, in which he did take into account his alleged business expenses.

[78] Ms. Petit testified in her cross-examination that she did not take into account any business expenses, as reported by Mr. Ben-Menashe in Exhibit ABM-14, because the audit of Dickens had not been completed. In fact, Ms. Petit's assessments from March 2022 indicated a total of $19,428,072 of income and $0 of business expenses, while Mr. Potvin's previous assessments from June 2021 indicated the exact same total of $19,428,072 of income and $1,432,087 of business expenses. Not only did Ms. Petit not mention Exhibit ABM-14 in her affidavit, she did not disclose that her predecessor on the audit, Mr. Potvin, had assessed Mr. Ben-Menashe's business expenses to be $1,432,087, based on the information provided in Exhibit ABM-14.

[79] Nor did Ms. Petit explain how she arrived at a substantially different assessment than Mr. Potvin with regard to expenses, when they both had access to the same information, namely Exhibit ABM-14, and whereas both assessed Mr. Ben-Menashe's income to be exactly the same amount.

[80] On this point, the Minister relies on paragraph 15 of *Tassone*, to argue that she does not have an obligation to disclose the auditor's "working papers" as part of the *ex parte* application materials, and thus there was no need for Ms. Petit to point out, or explain, that she had arrived at a different assessment with regard to expenses than her predecessor, Mr. Potvin.

[81] I disagree. Since the Minister relied on Ms. Petit's assessments to argue that Mr. Ben-Menashe was underreporting his income as a ground to obtain the Order in this case, the

Minister had a duty to be more transparent about how Ms. Petit arrived at her assessments, including the fact that they did not account for any business expenses whatsoever.

C. *Lifestyle of Mr. Ben-Menashe*

[82] Lastly, Mr. Ben-Menashe argues that the Minister failed to disclose relevant information regarding his lifestyle, which the Minister deemed to be incompatible with his declared income.

[83] Specifically, the Minister argued in the *ex parte* application that Mr. Ben-Menashe's lifestyle was incompatible with the modest income he reported, because he was booking hotels and first-class airfare amounting to several million dollars through his Amex Centurion card (Mr. Ben-Menashe was an Amex Centurion cardholder up to 2018). Mr. Ben-Menashe submits that the Minister did not mention in the *ex parte* application that he was often travelling for business, thus misleading the Court by categorizing all of his travel as personal travel and a part of his "lifestyle."

[84] Mr. Ben-Menashe contends, on the other hand, that Ms. You testified in cross-examination that she was aware that he travelled extensively for his business. However, she exclusively discussed his travels in the "lifestyle" section of her affidavit, because she felt that she could not differentiate between his personal and business travel.

[85] Once again, I find that instead of disclosing two sides of the coin – that Mr. Ben-Menashe claimed that he was spending significant amounts on both personal and business travel – and informing the Court that it was difficult to differentiate between the travel based on the evidence,

Ms. You rather decided to lump all his travel under the “lifestyle” section of her affidavit, and put an emphasis on Mr. Ben-Menashe’s “high spending” on personal travel.

[86] With regard to his lifestyle, Mr. Ben-Menashe submits that he informed the CRA through the CRA Audit Questionnaire that he had financed his lifestyle and real estate acquisitions with a substantial inheritance from his parent’s successful business that was located abroad – noting that he immigrated to Canada later in life. Mr. Ben-Menashe stated that he was having difficulty obtaining bank documents confirming these transfers, due to the closure of the Russian bank from which the funds originated. Yet, once again, this information was not disclosed in the *ex parte* application.

[87] Ms. You testified in her cross-examination that she was aware that Mr. Ben-Menashe claimed to have had access to a family fortune through a Russian bank account, but that she could not confirm that information, and therefore did not disclose it in the “lifestyle” section of her affidavit.

[88] Furthermore, the record shows that in internal communications with colleagues at the CRA, Ms. Petit indicated she was awaiting a response from Russian authorities about inquiries made in December 2021 regarding Russian bank accounts held in the name of Mr. Ben-Menashe. Thus, the CRA was aware that Mr. Ben-Menashe had possibly inherited money through a Russian bank account, and had taken specific steps to verify this claim.

[89] Once again, I find that the Minister failed to disclose any details of this inheritance, and the difficulties associated with it, in the *ex parte* application. It should have been included to provide greater context about Mr. Ben-Menashe's personal financial position, particularly given that the Minister alleged that Mr. Ben-Menashe's lifestyle was incompatible with his self-reported financial position, and relied on this ground in her *ex parte* application to seek the Order.

[90] In sum, I agree with Mr. Ben-Menashe that regarding the three major omissions that he raises above, the Minister's affiants – Ms. You and Ms. Petit – omitted crucial evidence that would have gone some way to levelling the playing field in the extraordinary context of the jeopardy order application.

[91] The cross-examinations of Ms. You and Ms. Petit show that both of these two affiants, upon whom the CRA's position rested, omitted to draw the attention of the Court to significant facts in their affidavits. Those facts were material to the Court's determination of whether to grant the Jeopardy Order, which resulted in the Minister presenting facts lacking in the full and frank disclosure required for the *ex parte* application.

[92] This Court's jurisprudence is clear that a lack of full and frank disclosure is a stand-alone basis to set aside the Jeopardy Order (*Tassone* at para 10, citing *Canada (National Revenue) v Papa*, 2009 FC 49 at para 21). I therefore decline to consider the other issues raised by Mr. Ben-Menashe in this Motion, including other submissions regarding why the Minister has

not established reasonable grounds to show that the Order was justified, and as the issue of the striking of the You Affidavit.

VII. Costs

[93] Following the hearing, counsel for the Parties conferred, in an attempt to agree to a quantum for costs. They subsequently agreed that, in the event of a decision in favor of the Minister, an amount of $16,799.58 be awarded as costs payable by Mr. Ben-Menashe; and in the event that the decision was favorable to Mr. Ben-Menashe, the amount payable by the Minister as costs would be $17,179.60. The slight difference between the two amounts arose from the fact that the Minister does not claim taxes on disbursements.

[94] I note that counsels' post-hearing civility was indicative of the manner in which they conducted themselves at all other points in this litigation, including during its case management phase. They are all to be commended for their professionalism.

[95] Given the outcome, the latter amount of $17,179.60, which I find to be reasonable in the context of this motion, will be payable by the Minister.

VIII. Conclusion

[96] For the reasons outlined above, the Motion for reconsideration is allowed and the Order is set aside. Costs are awarded to Mr. Ben-Menashe, payable by the Minister, in the amount of $17,179.60.

JUDGMENT in T-457-22

THIS COURT'S JUDGMENT is that:

1. This Motion is allowed.

2. The Jeopardy Order granted by this Court on March 8, 2022 is set aside.

3. Costs are awarded to the Respondent in the amount of $17,179.60.

"Alan S. Diner"
Judge

ANNEX A

Income Tax Act, RSC, 1985, c 1 (5th Supp)
Loi de l'impôt sur le revenu, LRC (1985), ch 1 (5e suppl.)

Authorization to proceed forthwith

225.2 (2) Notwithstanding section 225.1, where, on ex parte application by the Minister, 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 a taxpayer would be jeopardized by a delay in the collection of that amount, the judge shall, on such terms as the judge considers reasonable in the circumstances, authorize the Minister to take forthwith any of the actions described in paragraphs 225.1(1)(a) to 225.1(1)(g) with respect to the amount.

Review of authorization

225.2 (8) Where a judge of a court has granted an authorization under this section in respect of a taxpayer, the taxpayer may, on 6 clear days notice to the Deputy Attorney General of Canada, apply to a judge of the court to review the authorization.

No appeal from review order

225.2 (13) No appeal lies from an order of a judge made pursuant to subsection 225.2(11).

Tax liability re property transferred not at arm's length

160 (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

(a) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,

Recouvrement compromis

225.2 (2) Malgré l'article 225.1, sur requête ex parte du ministre, le juge saisi autorise le ministre à prendre immédiatement des mesures visées aux alinéas 225.1(1)a) à g) à l'égard du montant d'une cotisation établie relativement à un contribuable, aux conditions qu'il estime raisonnables dans les circonstances, s'il est convaincu qu'il existe des motifs raisonnables de croire que l'octroi à ce contribuable d'un délai pour payer le montant compromettrait le recouvrement de tout ou partie de ce montant.

Révision de l'autorisation

225.2 (8) Dans le cas où le juge saisi accorde l'autorisation visée au présent article à l'égard d'un contribuable, celui-ci peut, après avis de six jours francs au sous-procureur général du Canada, demander à un juge de la cour de réviser l'autorisation.

Ordonnance sans appel

225.2 (13) L'ordonnance rendue par un juge en application du paragraphe (11) est sans appel.

Transfert de biens entre personnes ayant un lien de dépendance

160 (1) Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :

a) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;

(b) a person who was under 18 years of age, or
(c) a person with whom the person was not dealing at arm's length,

the following rules apply:

(d) the transferee and transferor are jointly and severally, or solidarily, liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the Income Tax Act, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted for it, and

(e) the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of

b) une personne qui était âgée de moins de 18 ans;
c) une personne avec laquelle elle avait un lien de dépendance,

les règles suivantes s'appliquent :

d) le bénéficiaire du transfert et l'auteur du transfert sont solidairement responsables du paiement d'une partie de l'impôt de l'auteur du transfert en vertu de la présente partie pour chaque année d'imposition égale à l'excédent de l'impôt pour l'année sur ce que cet impôt aurait été sans l'application des articles 74.1 à 75.1 de la présente loi et de l'article 74 de la Loi de l'impôt sur le revenu, chapitre 148 des Statuts revisés du Canada de 1952, à l'égard de tout revenu tiré des biens ainsi transférés ou des biens y substitués ou à l'égard de tout gain tiré de la disposition de tels biens;
e) le bénéficiaire du transfert et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :
(i) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,
(ii) le total des montants représentant chacun un montant que l'auteur du transfert doit payer en vertu de la présente loi (notamment un montant ayant ou non fait l'objet d'une cotisation en application du paragraphe (2) qu'il doit payer en vertu du présent article) au cours de l'année d'imposition où les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années.

Toutefois, le présent paragraphe n'a pas pour effet de limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi ni celle du bénéficiaire du transfert quant aux intérêts dont il est redevable en vertu de la présente

the amount that the transferee is liable to pay because of this subsection.

loi sur une cotisation établie à l'égard du montant qu'il doit payer par l'effet du présent paragraphe.

Appeal

169 (1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

(a) the Minister has confirmed the assessment or reassessed, or

(b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.

Appel

169 (1) Lorsqu'un contribuable a signifié un avis d'opposition à une cotisation, prévu à l'article 165, il peut interjeter appel auprès de la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation :

a) après que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation;

b) après l'expiration des 90 jours qui suivent la signification de l'avis d'opposition sans que le ministre ait notifié au contribuable le fait qu'il a annulé ou ratifié la cotisation ou procédé à une nouvelle cotisation;

toutefois, nul appel prévu au présent article ne peut être interjeté après l'expiration des 90 jours qui suivent la date où avis a été envoyé au contribuable, en vertu de l'article 165, portant que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation.

FEDERAL COURT

SOLICITORS OF RECORD

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