

Date: 20071221

Docket: T-861-06

Citation: 2007 FC 1358

Ottawa, Ontario, December 21, 2007

PRESENT: THE HONOURABLE MADAM JUSTICE DAWSON

BETWEEN:

ARTHUR ROMAN ZINS

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On December 8, 2005, the Tax Court of Canada issued its judgment in respect of Mr. Arthur Zins' appeal from a notice of reassessment issued in respect of the 1998 taxation year.

[2] As the Tax Court of Canada, in reasons styled *Zins v. Canada*, [2006] 1 C.T.C. 2603, explained:

In the last four months of 1998 Mr. Arthur Zins was involved in a telemarketing arrangement. He conducted his activities under the guise of the Jewish Men's Group. He was ultimately convicted of fraud in connection with these activities, and funds seized by the

police were released to charities pursuant to a restitution order. This case deals with the determination of Mr. Zins' net income for income tax purposes arising from his illegal telemarketing activities.

[3] The Tax Court found that the matter should be referred back to the Minister of National Revenue (Minister) on the basis that:

- (i) the sum of \$43,614.00 was to be included in Mr. Zins' income for the 1998 taxation year;
- (ii) Mr. Zins was liable for penalties under subsection 163(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act), arising from the failure to report the additional income of \$43,614.00; and
- (iii) Mr. Zins was entitled to costs to the extent of 50% of the Tax Court's tariff.

[4] An appeal of the decision of the Tax Court was dismissed by the Federal Court of Appeal on October 3, 2007. See: *Zins v. Canada*, [2007] F.C.J. No. 1294 (C.A.) (QL).

[5] In this application, said to be brought pursuant to Rule 423 of the *Federal Courts Rules*, SOR/98-106, Mr. Zins seeks the following relief:

1. an Order that the Respondent fairly apply such guidelines as are in operation in the normal course of Canada Revenue

Agency's [CRA] equitable application of 'fairness' and 'remissions' procedures to review if the applicant is in such 'financial hardship' position as to warrant a significant reduction or nullification of as much as \$49,000 of tax liability, including interest and penalties pertaining to some years between 1992 and 2005.

2. an Order that the Respondent 'set off' an amount of some \$19,000 as being the amount claimed by the applicant as to 50% of his allowable actual losses incurred in successfully pursuing a reduction of some \$55,000 of income assessment in the Tax Court of Canada.
3. an Order that the Respondent 'set off' an estimated sum of up to \$10,000 as being a reduction in the tax liability pertaining to a proven expense of some \$38,272 paid out to 4 deserving recipients in years 2002 and 2003 as a result of a police seizure in December, 1998 of the same source income, that is, the sum of \$38,272, being an expense in subsequent years as a result of a specified 1998 income producing activity.
4. an Order that the Respondent recover an amount not exceeding \$37,000 pertaining to 1998 taxes, penalties and interest from 4 identified third parties who were recipient of an aggregate of \$38,272 of the same source 1998 income in issue, such estimated 1998 tax liability not exceeding \$37,000, being in full and final satisfaction of the appellant's tax liability pertaining to 1998, such Order, if implemented being pursuant to section 224.3(1) of the *Income Tax Act* and/or such other sections of the *Income Tax Act*, or other pertinent policies and practices of Canada Revenue Agency as may indicate circumstances of due recovery of a taxpayer's liability from third party recipients related to the same source income in issue.
5. an Order that, in an alternative to recovering an estimated amount of 1998 tax liability not exceeding \$37,000 in issue from third parties (see item 4. above), this Court may wish to deem the receipt of the subject \$38,272 income by 4 identified third parties, who happen to be non-profit charitable groups, as the equivalent of the applicant having paid taxes, whereas the 1998 tax liability, if recovered from the third parties, would in any case have been ultimately allocated to the public good through the tax disbursement system, in that the subject liability in an amount not exceeding \$38,272 is already in the hands of the public good,

and to demand such further 1998 tax liability beyond the \$38,272 from the applicant, may with respect, run contrary to Canada Revenue Agency's policies against the equivalent of 'double taxation'.

6. an Order to stay collections proceedings until such time that the applicant's issues as to any due reductions in his tax liabilities as outlined in items 1. through 5. above are dealt with, in appropriate forums with due process of law, as not to prematurely and unfairly jeopardize the applicant's solvency, employability and health in any undue or capricious haste, with respect to such substantiated relief to which the applicant may be fairly entitled.
7. an Order to implement such additional venues or procedures as this Court may deem appropriate, which may lead to a fair disposition of the issues in this application, as set out above, whereas some such venues or procedures may include referral back to the Minister, referral back to the Tax Court of Canada, referral to the Federal Court of Appeal, Request to Admit proceedings, etc.

[6] Each head of relief sought will be considered in turn.

(1) The request for application of the CRA's fairness and remissions procedures.

[7] Mr. Zins makes the following submissions in connection with this request:

10. CRA's Remissions Procedures

The applicant herein submits that:

- a) based on financial information the respondent has had in hand since early 2005, the applicant herein had requested consideration from CRA some 1 ½ years ago to forgive all tax liability owing by the applicant, including forgiveness of interest and penalties by way of CRA's existing Remissions procedures,

- b) whereas the applicant's request for CRA's application of remissions procedures (please refer to item 10 a) above) is indicated in item 12 of the applicant's affidavit herein where pertinent excerpts are:

"... 12. ... I wrote a letter dated March 16, 2006 to one Mr. Vishnu Persaud of CRA's North Toronto Tax Services Office (please refer to sidebarred portions of a copy of that March 16, 2006 letter under Appendix 4 attached herein) whereas pertinent excerpts from that letter ... I am presuming that you are substantially in agreement that the information you have in hand over the past year ... has put me in a growing deficit position of well over \$1,000 monthly ... Other than the 1998 tax liability, I understand I am some several thousand dollars indebted to CRA for several other years. ... whereas I trust you will advance my qualifications for 'fairness' and 'remission' relief for all such indebted years in a consolidated fashion. ...",

- c) as there has been no response by CRA as to any consideration of their remissions procedure to the applicant's case at hand, the applicant respectfully submits that CRA has unfairly and inequitably caused undue delay in not applying CRA's remissions procedures in a substantiated forgiveness of all the applicant's tax debt in issue,
- d) in reference to item 10 c) above, the applicant suggests it would be prudent for this Court to invoke an assessment of the applicant's circumstances with a view to substantiating a forgiveness of all the applicant's income tax debt in issue in accordance with CRA's existing remissions procedures.

11. CRA's Fairness Procedures

- a) by way of a letter of March 16, 2006 (please refer to item 10 b) above), the applicant herein has requested CRA to apply CRA's fairness guidelines in an equitable fashion, as to substantiate forgiveness of all interest and penalties of the applicant's tax debt,
- b) as at this writing, CRA has sent a 'fairness' information package dated August 9, 2006 (some 2 months after the June 9, 2006 affidavit enclosed in this applicant's record) to the appellant requesting such information as to substantiate an application for forgiveness of the interest and penalties of the applicant's tax debt,

- c) whereas the applicant submits herein that since early 2005 and with respect to ensuing pertinent correspondence, CRA has had information in hand as to substantiate a forgiveness of all interest and penalties for all tax debt owing by the applicant, where such information exchange process is described in item 8 of the applicant's affidavit herein, with pertinent excerpts as follows:

“ATTN: MR. VISHNU PERSAUD / March 10, ... The Honourable John McCallum ... has asked me to reply to your letter of September 19, 2005 ... if you choose to appeal to the next court level, adequate security in lieu of full payment would be satisfactory until the dispute is resolved ... CRA may consider canceling or waiving interest if an individual is experiencing financial hardship ... I note that ... you are presently making monthly payments of \$100 ... It may be noteworthy that since the January 12, 2006 decision to suspend collections, there has been no further mention of any ‘adequate security in lieu’ associated with this suspension of collections. In this regard, I can only presume that the information you have in hand ... see references to income-expense-medical information submitted to CRA’s Ms. Wong dated February 12 and March 1, 2005 ... and confirmation of my job loss in mid July 2005 of a second job ... and confirmation of some \$2,000 in dental expenses ... have all confirmed a continuing level of ‘impecuniosity’ justifying no further request for ‘adequate security in lieu’ ...”

- d) as there has been no response by CRA as to any consideration of their fairness procedure to the applicant's case until the letter of August 9, 2006 (please refer to item 11 b) above), the applicant respectfully submits that CRA has unfairly and inequitably caused undue delay in not applying CRA's fairness procedures in a substantiated forgiveness of all the applicant's interest and penalties as to the tax debt in issue,
- e) in reference to item 11 d) above, the applicant suggests it would be prudent for this Court to expedite an assessment of the applicant's circumstances with a view to substantiating a forgiveness of all the applicant's interest and penalties in issue. [emphasis in original]

[8] In response, the Minister filed the affidavit of the Team Manager of Revenue Collections at the Toronto North Tax Services Office of the CRA. In that affidavit, the Team Manager swore that:

2. I reviewed the collections files of Arthur Roman Zins, the CRA computer records pertaining to Arthur Roman Zins, and the specific Fairness Registry database, and I can confirm that the Minister has not deliberated and issued a decision with respect to a request for interest and penalty relief or for a remissions order pertaining to the 1998 taxation year of Arthur Roman Zins.
3. I am advised by Pat Muir, Collections Officer of the CRA, that she sent a letter dated August 9, 2006, with a fairness package to Arthur Roman Zins for his completion. Attached hereto as Exhibit "A" to this affidavit is a copy of the letter dated August 9, 2006.
4. I have reviewed the collections file of Arthur Roman Zins, the CRA computer records pertaining to Arthur Roman Zins, and the specific Fairness Registry database, and I can confirm that the Minister did not subsequently receive a response from Mr. Zins to the August 9, 2006 letter of Pat Muir requesting that he complete the fairness package.

[9] Neither Mr. Zins nor the Team Manager was cross-examined on their affidavits.

[10] In oral argument, Mr. Zins conceded that he did not complete the requested forms in support of his request for relief because he felt that the CRA had been non-responsive to his request for application of subsection 224.3(1) of the Act and he had not been treated fairly.

[11] Mr. Zins has failed to establish, in respect of both the remissions and fairness procedures, that current and complete information was provided to the Minister that would allow the Minister to properly consider Mr. Zins' March 10, 2006, request for relief. As such, this application is

premature. Mr. Zins must provide the required information to the Minister and then allow a reasonable period of time for a decision to be made.

[12] To the extent that Mr. Zins asks the Court to order the Minister to apply the relevant fairness or remission procedures, this is a request in the nature of *mandamus*. One of the requirements to be met before an order of *mandamus* may issue is that there must be a clear right to the performance of a public duty and, in particular, the person seeking *mandamus* must have satisfied all of the conditions precedent giving rise to the duty. See: *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.) at paragraph 45, aff'd [1994] 3 S.C.R. 1100.

[13] Mr. Zins' failure to establish that all of the required information was provided to the Minister prevents the Court from granting relief in the nature of *mandamus*.

[14] To the extent that Mr. Zins suggests that the Court itself ought to grant such relief as may be justified by application of the fairness or remissions procedures, that discretion is vested in the Minister under the Act and can be exercised only by the Minister or his delegate. The Court has no jurisdiction to exercise the Minister's discretion.

(2) The request for a set off in respect of the costs awarded by the Tax Court.

[15] Mr. Zins calculates that he is entitled to the sum of \$19,974.22 on account of costs ordered by the Tax Court. The Minister does not accept the propriety of that calculation.

[16] In this Court, Mr. Zins asks that the Court reduce his tax debt by the amount of \$19,974.22.

[17] The quantification of the costs ordered payable by the Tax Court is not within the jurisdiction of this Court. Ultimately, if the parties cannot agree, those costs are to be settled by the Tax Court in accordance with its rules. Until that is done, there can be no set-off of competing obligations.

(3) The request for a determination that Mr. Zins' tax liability be reduced on account of an expense in the amount of \$38,272.00.

[18] In his written submissions, Mr. Zins sought to reduce his tax liability by the sum of \$38,272.00, which was paid to four charities that Mr. Zins claimed to represent while carrying-out his telemarketing scheme. That payment was made from funds seized from Mr. Zins. The monies were paid to the charities pursuant to a conditional sentence order of the Superior Court of Justice of Ontario (restitution order).

[19] I do not understand Mr. Zins to still pursue this ground of relief because, in oral argument, he conceded the finality of the decision of the Federal Court of Appeal in respect of the calculation his tax liability for the 1998 taxation year.

[20] However, for clarity, this claim for an alteration of Mr. Zins' tax obligation can not succeed because this issue was considered and rejected by the Tax Court. The Tax Court has the exclusive, original jurisdiction to hear appeals from the Minister's assessment of tax liability, and this Court cannot collaterally attack or alter decisions of the Tax Court.

(4) The request that the Minister pursue the collection of monies from the charities which received the funds seized from Mr. Zins and which were paid pursuant to the restitution order.

(5) The request, in the alternative, that the Court deem that the payments made to the charities be payments made by Mr. Zins on account of his tax obligation.

[21] These requests for relief are based upon subsection 224.3(1) of the Act, which provides:

224.3(1) Where the Minister has knowledge or suspects that a particular person is holding moneys that were seized by a police officer in the course of administering or enforcing the

224.3(1) S'il sait ou soupçonne qu'une personne donnée détient des fonds qui ont été saisis par un membre d'un corps policier, dans le cadre de l'application du droit criminel du Canada,

criminal law of Canada from another person (in this section referred to as the “tax debtor”) who is liable to make a payment under this Act or under an Act of a province with which the Minister of Finance has entered into an agreement for the collection of taxes payable to the province under that Act and that are restorable to the tax debtor, the Minister may in writing require the particular person to turn over the moneys otherwise restorable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor’s liability under this Act or under the Act of the province, as the case may be.

[emphasis added]

entre les mains d’une autre personne (appelée « débiteur fiscal » au présent article) tenue de faire un paiement en vertu de la présente loi ou d’une loi d’une province avec laquelle le ministre des Finances a conclu un accord en vue de recouvrer les impôts payables en vertu de cette loi, et qui doivent être restitués au débiteur fiscal, le ministre peut exiger par écrit de la personne donnée que les fonds autrement restituables au débiteur fiscal soient en totalité ou en partie remis au receveur général au titre de l’obligation du débiteur fiscal existant en vertu de la présente loi ou de la loi de la province, selon le cas.
[Le souligné est de moi.]

[22] Turning first to the request that the Minister pursue collection from the four charities, there are, in my respectful view, two reasons why this request must fail.

[23] First, subsection 224.3(1) of the Act is properly characterized as an enforcement tool available to the Minister. It is one of many found in the Act, and the Minister has the discretion to direct in any case what collection methods will be pursued. The Court cannot direct to the Minister what collection methods are to be used by him in any particular case.

[24] Second, while the Minister must exercise his discretion in good faith, there is no suggestion in the present case that the Minister acted in an oppressive or unfair manner. Indeed, it would appear that, on the facts of this case, the Minister was prevented by the Act from having recourse to subsection 224.3(1).

[25] This is so because, in the circumstances applying to Mr. Zins, paragraph 225.1(1)(f) of the Act prevented the Minister from requiring any person to turn over monies under subsection 224.3(1) of the Act until after the "collection-commencement day". The collection-commencement day was, pursuant to paragraph 225.1(1.1)(c) of the Act, 90 days after the date on which the notice of assessment was mailed to Mr. Zins. That was 90 days after July 5, 2002, or about October 5, 2002. Subsections 225.1(1) and 225.1(1.1) of the Act are set out in the Appendix to these reasons.

[26] It follows, therefore, that the Minister could not have recourse to subsection 224.3(1) of the Act before on or about October 5, 2002. By then, the monies at issue had been ordered to be paid to the four charities pursuant to the restitution order. Therefore, the monies were no longer restorable to Mr. Zins as required for subsection 224.3(1) of the Act to have any application.

[27] Turning to the alternate request that the Court deem the receipt of the sum of \$38,272.00 by the four charities to be "the equivalent of the applicant having paid taxes", I know of no jurisdiction in this Court to do so. Taxes are either paid or unpaid. The Court can not deem a tax to be paid.

(6) The request for an order staying collection proceedings.

[28] As a matter of law, for the Court to be able to grant a stay, the party seeking the stay must satisfy the Court that:

1. There is a serious issue to be tried.
2. Irreparable harm will result if the stay is not granted.
3. The balance of convenience favors granting the stay.

[29] Each of those three elements must be established. See: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[30] The evidence fails to persuade me that any one of the three required elements has been proven. It follows that no stay may be granted.

(7) **The request for further relief.**

[31] No specific, alternate relief was sought.

Conclusion and Costs

[32] For these reasons, this application will be dismissed.

[33] As a general principle, costs are awarded to the successful party in litigation. In this case, I see no reason to depart from that principle.

[34] If successful, the Minister sought costs fixed in the amount of \$500.00. Mr. Zins agreed that this is a reasonable amount, but he sought three months in which to pay any such award. That request is granted.

JUDGMENT

FOR THE ABOVE REASONS, THIS COURT ORDERS AND ADJUDGES that:

1. This application is dismissed.

2. On or before March 31, 2008 Arthur Roman Zins shall pay to Her Majesty the Queen costs, which are fixed in the all-inclusive amount of \$500.00.

“Eleanor R. Dawson”

Judge

APPENDIX

Subsections 225.1(1) and 225.1(1.) of the Act read as follows:

225.1(1) If a taxpayer is liable for the payment of an amount assessed under this Act, other than an amount assessed under subsection 152(4.2), 169(3) or 220(3.1), the Minister shall not, until after the collection-commencement day in respect of the amount, do any of the following for the purpose of collecting the amount:	225.1(1) Si un contribuable est redevable du montant d'une cotisation établie en vertu des dispositions de la présente loi, exception faite des paragraphes 152(4.2), 169(3) et 220(3.1), le ministre, pour recouvrer le montant impayé, ne peut, avant le lendemain du jour du début du recouvrement du montant, prendre les mesures suivantes :
(a) commence legal proceedings in a court,	a) entamer une poursuite devant un tribunal;
(b) certify the amount under section 223,	b) attester le montant, conformément à l'article 223;
(c) require a person to make a payment under subsection 224(1),	c) obliger une personne à faire un paiement, conformément au paragraphe 224(1);
(d) require an institution or a person to make a payment under subsection 224(1.1),	d) obliger une institution ou une personne visée au paragraphe 224(1.1) à faire un paiement, conformément à ce paragraphe;
(e) [Repealed, 2006, c. 4, s. 166]	e) [Abrogé, 2006, ch. 4, art. 166]
(f) require a person to turn over	f) obliger une personne à remettre des fonds,

moneys under subsection 224.3(1), or

conformément au paragraphe 224.3(1);

(g) give a notice, issue a certificate or make a direction under subsection 225(1).

g) donner un avis, délivrer un certificat ou donner un ordre, conformément au paragraphe 225(1).

225.1(1.1) The collection-commencement day in respect of an amount is

225.1(1.1) Le jour du début du recouvrement d'un montant correspond :

(a) in the case of an amount assessed under subsection 188(1.1) in respect of a notice of intention to revoke given under subsection 168(1) or any of subsections 149.1(2) to (4.1), one year after the day on which the notice was mailed;

a) dans le cas du montant d'une cotisation établie en vertu du paragraphe 188(1.1) relativement à un avis d'intention de révoquer l'enregistrement délivré en vertu du paragraphe 168(1) ou l'un des paragraphes 149.1(2) à (4.1), un an après la date de mise à la poste de l'avis d'intention;

(b) in the case of an amount assessed under section 188.1, one year after the day on which the notice of assessment was mailed; and

b) dans le cas du montant d'une cotisation établie en vertu de l'article 188.1, un an après la date de mise à la poste de l'avis de cotisation;

(c) in any other case, 90 days after the day on which the notice of assessment was mailed.

c) dans les autres cas, 90 jours suivant la date de mise à la poste de l'avis de cotisation.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-861-06

STYLE OF CAUSE: ARTHUR ROMAN ZINS, Applicant and
CANADA REVENUE AGENCY, Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 4, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** DAWSON, J.

DATED: DECEMBER 21, 2007

APPEARANCES:

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