**Date: 20080508**

**Docket: T-2160-07**

**Citation: 2008 FC 589**

**Ottawa, Ontario, May 8, 2008**

**PRESENT: The Honourable Mr. Justice Beaudry**

**BETWEEN:**

**INCOME TAX (HER MAJESTY THE QUEEN)**

**Respondent**

**and**

**KAREN ABERGEL**

**Applicant**

## REASONS FOR ORDER AND ORDER

[1] On December 13, 2007, the respondent obtained a jeopardy order under subsection 225.2(2) of the *Income Tax Act*, 1985, c. 1 (5th Supp.) (Act), against applicant Karen Abergel (applicant). The applicant filed this application seeking a review of that order pursuant to subsection 225.2(8) of the Act.

**FACTS**

[2] The applicant has a tax debt of $186,909.60, as indicated in three notices of reassessment dated December 11, 2007, based on section 160 of the Act. The notices were the result of transfers of property from the applicant's father, Ralph Amiram Abergel (Mr. Abergel), who himself had a total amount owing to the Canada Revenue Agency (CRA) of $2,320,258.03 as at November 29, 2007. The transfers involved $149,000 in securities and a cash transfer of $48,409.60 on January 31, 2001. A total of $89,500 was allegedly also transferred to the applicant in four cheques dated February 25, 2003, and September 29, 2003.

[3] Instead of sending the three notices of assessment to the applicant, the respondent decided to file an *ex parte* application under subsection 225.2(2) of the Act with the Court on December 12, 2007, fearing a delay would jeopardize collection of the debt.

[4] The respondent recently sent the applicant two other notices of assessment totalling $92,341.18 (March 17, 2008: $18,641.18; March 26, 2008: $73,700).

**ANALYSIS**

*Standard of review*

[5] The initial burden of proof and the degree of intervention by the Court under subsection 225.2(8) have been addressed in many decisions. According to the case law, the initial onus is on the applicant to show reasonable grounds for believing that the condition prescribed in subsection 225.2(2) was not satisfied. If the applicant is successful, the Court must consider the evidence

before the authorizing judge and any other evidence and determine whether, on a balance of probabilities, a delay would jeopardize collection (*Canada v. Satellite Earth Station Technology Inc.*, [1989] F.C.J. No. 912 (F.C.T.D.), at paragraph 16; *Canada (Minister of National Revenue – M.N.R.) v. Services M.L. Marengère Inc.*, [1999] F.C.J. No. 1840 (F.C.T.D.), at paragraph 63(5)).

[6] In *Canada (Minister of National Revenue) v. 144945 Canada Inc.*, 2003 FCT 730, [2003] F.C.J. No. 937, Blanchard J. wrote the following at paragraph 9:

> [9] In *Canada (Minister of National Revenue) v. Moss*, [1997] F.C.J. No. 1583 (QL), Muldoon J. stated, at para. 10-11, that (i) the taxpayer has the initial onus to show reasonable grounds the Minister did not satisfy her onus before the Court in the *ex parte* hearing; and (ii) if so, the Court must consider the evidence before the authorizing judge and additional evidence to find whether on a balance of probability the collection would be jeopardized by the delay.

[7] In the case at bar, having considered all the evidence, that is, the application record, the respondent's application record, the applicant's reply record, the transcripts of the examinations of the applicant and of Susan Auchu, her solemn affirmation and the supporting documents, I am satisfied that the applicant has completed the first step.

[8] The Court must therefore consider the evidence before Mr. Justice Shore and the evidence adduced with this application.

[9] In *Canada (Minister of National Revenue – M.R.N.) v. Thériault-Sabourin*, 2003 FCT 124, [2003] F.C.J. No. 168, Madam Justice Layden-Stevenson very aptly summarized the case law, referring to paragraphs 62 and 63 of *Marengère Inc, supra*:

[13] The law regarding review of a jeopardy order was summarized by Lemieux J. in ***Canada (Minister of National Revenue) v. Services M.L. Marengère Inc.*** (1999), 176 F.T.R. 1:

> 62. The current jeopardy collection provisions in the Income Tax Act were introduced in 1988 and are a refinement to what previously existed in that the authorization and supervision of this Court is provided for. The legal principles applicable to a section 225.2(8) review of an *ex parte* jeopardy order are clearly established by this Court as illustrated in Danielson v. Canada (Deputy Attorney General), [1987] 1 F.C. 335 (T.D.), 1853-9049 Québec Inc. v. The Queen, [1987] 1 C.T.C. 137 (T.D.), Canada v. Satellite Earth Station Technology Inc., [1989] 2 C.T.C. 201 (T.D.) and Her Majesty the Queen v. Robert Duncan, [1992] 1 F.C. 713 (T.D.).
>
> 63. From this jurisprudence, I take the following principles:
>
> > (1) The perspective of the jeopardy collection provision goes to the matter of collection jeopardy by reason of delay normally attributable to the appeal process. The wording of the provision indicates that it is necessary to show that because of the passage of time involved in an appeal, the taxpayer would become less able to pay the amount assessed. In other words, the issue is not whether the collection per se is in jeopardy but rather whether the actual jeopardy arises from the likely delay in the collection.
> >
> > (2) In terms of burden, an applicant under subsection 225.2(8) has the initial burden to show that there are reasonable grounds to doubt that the test required by subsection 225.2(2) has been met, that is, the collection of all or any part of the amounts assessed would be jeopardized by the delay in the collection. However, the ultimate burden is on the Crown to justify the jeopardy collection order granted on an ex parte basis.

> (3) The evidence must show, on a balance of probability, that it is more likely than not that collection would be jeopardized by delay. The test is not whether the evidence shows beyond all reasonable doubt that the time allowed to the taxpayer would jeopardize the Minister's debt.
>
> (4) The Minister may certainly act not only in cases of fraud or situations amounting to fraud, but also in cases where the taxpayer may waste, liquidate or otherwise transfer his property to escape the tax authorities: in short, to meet any situation in which the taxpayer's assets may vanish in thin air because of the passage of time. However, the mere suspicion or concern that delay may jeopardize collection is not sufficient per se. As Rouleau J. put it in 1853-9049 Québec Inc., supra, the question is whether the Minister had reasonable grounds for believing that the taxpayer would waste, liquidate or otherwise transfer its assets, so jeopardizing the Minister's debt. What the Minister has to show is whether the taxpayer's assets can be liquidated in the meantime or be seized by other creditors and so not available to him.
>
> (5) An ex parte collection order is an extraordinary remedy. Revenue Canada must exercise utmost good faith and insure full and frank disclosure. On this point, Joyal J. in Peter Laframboise v. The Queen, [1986] 3 F.C. 521 at 528 said this:

The taxpayer's counsel might have an arguable point were the evidence before me limited exclusively to that particular affidavit. As Counsel for the Crown reminded me, however, I am entitled to look at all the evidence contained in the other affidavits. These affidavits might also be submitted to theological dissection by anyone who is dialectically inclined but I find on the whole that those essential elements in these affidavits and in the evidence which they contain pass the well-known tests and are sufficiently demonstrated to justify the Minister's action.

> In Duncan, supra, Jerome A.C.J., after quoting Joyal J. in Laframboise, supra, viewed the level of disclosure required by the Minister as one of adequate (reasonable) disclosure.

[10] At paragraph 14 of her decision, Layden-Stevenson J. added the opinions of other judges:

> [14] I would add to the principles articulated by Lemieux J., the propositions that follow:
>
> (a) The sale of assets alone does not justify a jeopardy order: ***Canada (Minister of National Revenue) v. Landru*** (1993), 1 C.T.C. 93 (Sask. Q.B.).
>
> (b) The taxpayer's inability to pay the amount assessed at the time of the direction is not by itself conclusive or determinative: ***Danielson***, *supra*.
>
> (c) The nature of the assessment itself may raise a reasonable apprehension that the taxpayer had not been conducting [her] affairs in what might be called an orthodox fashion and can therefore contribute to the reasonable grounds to believe that the collection of the amount assessed would be jeopardized by delay: ***Canada (Minister of National Revenue) v. Laframboise***, [1986] 3 F.C. 521 (T.D.); ***Canada (Minister of National Revenue) v. Rouleau***, [1995] 2 C.T.C. 42 (F.C.T.D.).

[11] Bearing those principles in mind, I will briefly analyze the evidence.

*Evidence*

[12] It is important to note at the outset that I find no evidence that casts doubt on the good faith of Ms. Auchu (the respondent's agent) and of the applicant.

[13] Nor is there any evidence that the applicant committed fraud.

[14] In the application for an *ex parte* order, the respondent alleged close business ties between the applicant and her father, Mr. Abergel, who has exhibited delinquent fiscal behaviour. That behaviour is not at issue here. In support of the allegation of close business ties between Mr. Abergel and his daughter, the applicant, the respondent adduced the following evidence:

a) The applicant worked as manager/comptroller of 9086-8746 Québec Inc., of which Mr. Abergel is a shareholder and director. The applicant's duties included some management, business development and accounts control.

b) The applicant's duties were limited to bookkeeping from November 2005 to May 2006. The applicant's annual salary for her bookkeeping duties was supposed to be $100,000, slightly less than the salary she received for her duties as manager/comptroller. The respondent contends that the only plausible explanation for the applicant's large salary was her close relationship with Mr. Abergel.

c) The applicant's employment income between 2001 and May 2006 was from companies owned by her father, that is, 9086-8746 Québec Inc. and, before that, 9043-8243 Québec Inc.

d) The respondent also contends that the applicant is in debt and that the precariousness of her financial situation is a relevant fact in determining whether a delay would jeopardize collection of the tax debt, although it is not conclusive (*Canada (Minister of National Revenue – M.N.R.) v. Thériault-Sabourin*, *supra*, at paragraph 14(b);

*Bonnie Ellen Danielson v. Deputy Attorney General of Canada and The Minister of National Revenue*, 86 DTC 6518 (F.C.T.D.).

[15] The applicant acknowledged in her argument that she is currently in personal debt if the assessments are considered valid. However, she said that she will no longer be in debt if she succeeds with her notices of objection, as she anticipates she will.

[16] The respondent adduced before Shore J. evidence that much of the applicant's income came from her father. The respondent also argued that Mr. Abergel used his relationship with his daughter to protect his assets from being seized for tax purposes. Specifically,

a) most of the $115,000 down payment made when the applicant purchased her house in 2003 came from Mr. Abergel, who contributed $100,000;
b) securities valued at $197,406.60 were transferred to the applicant's personal account with Merrill Lynch in 2001;
c) the applicant agreed to these transfers of assets even though she knew that her father had a tax debt.

[17] The respondent added that the applicant is not very credible because she allegedly stated in a telephone conversation with Ms. Auchu that she would not accept service of an order under subsection 225.2(2) of the Act. Moreover, she apparently did not have a valid reason for filing her 2006 tax return late.

[18] The Court can easily understand that, before having a telephone conversation with Ms. Auchu, the applicant was surprised and even frustrated to learn that her assets had been seized. The fact that she would not accept service of an order does not mean, however, that she would try to squander her assets or avoid her tax debts.

[19] With respect to the reasons she gave in her January 17, 2008, affidavit for not filing her 2006 income tax return until 2008, the Court finds it odd to say the least that she wanted to know the maximum contribution she could make to her RRSP. Despite that vague explanation, the Court cannot conclude that a delay would jeopardize collection of the debt to the respondent.

[20] Nor does the evidence support a finding that the applicant, by act or omission, aided or assisted her father in avoiding payment of his tax debts. The facts of this matter can easily be differentiated from the facts of the matter in which Layden-Stevenson J. was asked to make a determination.

[21] Thus, in view of paragraphs 18 and 19 of the applicant's affidavit dated January 17, 2008, as indicated below, the order made by Shore J. will be set aside, apart from the legal hypothec on the residence at 5850 David-Lewis Street, Côte St-Luc, Quebec:

> [TRANSLATION]
>
> 18. I have no plans to sell my house or otherwise protect it from the CRA.
>
> 19. I also have no plans to sell or otherwise dispose of any other asset I own in order to avoid my tax or other liabilities.

## ORDER

**THE COURT ORDERS that** the application be allowed. The order dated December 13, 2007, is set aside, except with respect to the legal hypothec registered against the residence at 5850 David-Lewis Street, Côte St-Luc, Quebec, which remains in force. On the issue of costs, the respondent shall pay the applicant a total amount of $2,000.

**"**Michel Beaudry"

Judge

Certified true translation
Susan Deichert, Reviser

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2160-07 |
| **STYLE OF CAUSE:** | INCOME TAX (HER MAJESTY THE QUEEN) AND KAREN ABERGEL |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | May 1, 2008 |
| **REASONS FOR ORDER AND ORDER:** | BEAUDRY J. |
| **DATED:** | May 8, 2008 |

**APPEARANCES:**

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|---|---|
| Pierre Lamothe | FOR THE RESPONDENT |
| Christopher R. Mostovac | FOR THE APPLICANT |

**SOLICITORS OF RECORD:**

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|---|---|
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| STARNINO MOSTOVAC<br>Montréal, Quebec | FOR THE APPLICANT |