

Date: 20080725

Docket: T-543-08

Citation: 2008 FC 902

Ottawa, Ontario, July 25, 2008

PRESENT: The Honourable Mr. Justice Beaudry

In the matter of the *Income Tax Act*

and

**In the matter of an assessment or assessments by the
Minister of National Revenue under one or more
of the *Income Tax Act, Canada Pension,
Employment Insurance Act,***

AGAINST:

**JOHN FELIX ALEXANDER
8560 Hélène
LaSalle (Québec) H8N 1Z4**

REASONS FOR ORDER AND ORDER

[1] On April 7, 2008, the applicant obtained an *ex parte* judgment rendered by Justice Anne Mactavish (Jeopardy order) against the respondent under subsection 225.2(2) of the *Income Tax Act* (the Act) to collect and/or guarantee the payment by the respondent of the amount of \$228,377.94 due pursuant to Notices of Assessment dated April 7, 2008 for the Taxation Years 2002, 2003, 2004, 2005 and 2006.

[2] The respondent filed a motion under subsection 225.2(8) of the Act to quash, set aside and annul the Jeopardy order.

[3] The main submissions advanced by the respondent are as follows:

- there are no allegations in any of the supporting affidavits in support of the motion for the Jeopardy order that the collection of all or part of the assessed tax would be jeopardized by a delay in collection;
- some allegations in the affidavits (surrender letter, possible extradition of the respondent to the United States, commercial transactions related to fraudulent telemarketing) are misleading, pure conjecture and speculations;
- the indictment in the United States against the respondent refers only to two counts of fraud totalling \$4,000 and not \$1,956,578.99 as alleged in the affidavits;
- the affidavits signed in support of the Jeopardy orders were signed prior to the Assessment being processed, thereby rendering the motion to obtain the Jeopardy order null and void;
- full disclosure of the respondent's situation was not made to the Court by the respondent.

[4] The applicant argues that it has met the legal test provided by the case law to obtain the Jeopardy order: the respondent is in debt of over \$200,000 to the applicant; he is charged in the United States for fraud; his net worth cannot be explained by his declared income and he sold one of

his immovable properties in March 2008, just a few days before he received the Assessments. All those circumstances support the initial motion for the Jeopardy order.

[5] The Act stipulates the following at paragraphs 225.2(2), 225.2(8) and 244(15):

225.2(2) Authorization to proceed forthwith

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.

225.2(8) Review of authorization

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.

225.2(2) Recouvrement compromis

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.

225.2(8) Révision de l'autorisation

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.

244(15) Date when assessment made

(15) Where any notice of assessment or determination has been sent by the Minister as required by this Act, the assessment or determination is deemed to have been made on the day of mailing of the notice of the assessment or determination.

244(15) Date d'établissement de la cotisation

(15) Lorsqu'un avis de cotisation ou de détermination a été envoyé par le ministre comme le prévoit la présente loi, la cotisation est réputée avoir été établie et le montant, déterminé à la date de mise à la poste de l'avis de cotisation ou de détermination.

[6] The initial burden under section 225.2(8) is on the respondent. He has 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 or any part of the amounts assessed would be jeopardized by delay in the collection (*Canada (Minister of National Revenue – M.N.R.) v. Services M.L. Marengère*, [1999] F.C.J. No. 1840 (F.C.T.D.)).

[7] If the respondent succeeds, then the Court has to examine the evidence upon which the Jeopardy order was obtained as well as any other evidence that would show on a balance of probabilities that the collection would be jeopardized by delay (*Canada (Minister of National Revenue – M.N.R.) v. 144945 Canada Inc.*, 2003 FCT 730, [2003] F.C.J. No. 937 at paragraph 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.

[8] In *Canada (Minister of National Revenue – M.N.R.) v. Thériault-Sabourin*, 2003 FCT 124, [2003] F.C.J. No. 168, Justice Layden-Stevenson summarized the case law in similar matters and added *obiter* from other judges at paragraph 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. 442 (F.C.T.D.).

[9] In the case at bar, I find that the respondent has met the initial test.

[10] Although, as we shall see, I find in the end in favour of the respondent, I disagree with him on his interpretation of section 244(15) of the Act. He argues that because the Assessments are dated after the signature of the affidavits in support of the motion for the Jeopardy order, and because Assessments are deemed to have been made on the date of mailing, the Assessments did not exist at the time of the signature of the affidavits.

[11] I am of the opinion that subsection 244(15) creates a presumption as a starting date for the calculation of interests. Even if I am wrong on this, the evidence shows that at the time that Annie Najm (person in charge for the audit) signed her affidavit she had the Assessments on hand (Applicant's Reply, pages 13-18).

[12] I also disagree with the respondent's proposition that it was up to the person conducting the audit to obtain the documents supporting his allegation that he inherited approximately \$80,000 from his father. Although the respondent provided the information as to the probable location of the documents, it is my opinion that it was his responsibility, and not that of the person conducting the audit to recuperate and produce the relevant information to Mrs. Najm.

[13] In the present case, the evidence shows that the respondent was under audit since September 2007. There is no allegation in Mrs. Najm's affidavit that the respondent refused or failed to provide any documents or information which she requested.

[14] On April 4, 2008, the respondent called Mrs. Najm to inquire about the status of his file and told her that he had sold one of his properties because he had no income and wanted to pay his high interest debts and improve his financial situation. He did not know at that time that he would receive in the near future the Assessments (dated April 7, 2008) from the applicant.

[15] The respondent filed with the Court his account activity at TD Canada Trust from March 31, 2008 to April 7, 2008 (pages 61-62, exhibit "H", Notice of Motion to Review). This document

indicates that out of the net proceed of the sale of his property (nearly \$119,000), numerous and important amounts were transferred or paid to Visa, TD mortgage, for line of credit and loans from bank institutions. I therefore agree with the respondent that the sale of his property could not have been and was not a reaction to the Assessments or an attempt to jeopardize the collection of the taxes due to the applicant.

[16] The applicant knew since December 2007 that the respondent had been charged for telemarketing fraud in the USA for \$4,000. The respondent is presumed innocent until found guilty and I cannot come to the conclusion that the recovery of the taxes assessed against him has been put in jeopardy by his past conduct. There is no evidence that he tried or is trying to leave the country without paying his debts.

[17] The respondent asserts that he is entitled to costs on a solicitor and client basis. I do not agree. I cannot find in this file, evidence of reprehensible, outrageous and abuse of conduct on the part of the applicant.

ORDER

THIS COURT ORDERS that the motion is granted. The Order granted on April 7, 2008 by Justice Anne Mactavish is set aside, quashed and annulled. The certificate in file ITA-4211-08 against the respondent's property legally described as Lot No.1 500 163 of the Cadastre of Québec, and registered at the Registry Office of Montréal under number 15099040 on April 8, 2008 is quashed, set aside, annulled, radiated and discharged. All the proceedings in the execution of the said Order, in particular the garnishment of the respondent's account number 6250068 at TD Canada Trust on or about April 7, 2008, is quashed, annulled and set aside. The applicant shall pay to the respondent costs by way of a lump sum of \$2,000.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-543-08

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AGAINST: **JOHN FELIX ALEXANDER
8560 Hélène
LaSalle (Québec) H8N 1Z4**

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: July 23, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** Beaudry J.

DATED: July 25, 2008

APPEARANCES:

Julie Mousseau FOR APPLICANT

John Glazer FOR RESPONDENT

SOLICITORS OF RECORD:

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