

Federal Court



Cour fédérale

**Date: 20090721**

**Docket: T-1369-08**

**Citation: 2009 FC 739**

**Ottawa, Ontario, July 21, 2009**

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

**BETWEEN:**

**WHITEWATER GOLF CLUB INC.**

**Applicant**

**and**

**MINISTER OF NATIONAL REVENUE**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] By order dated July 24<sup>th</sup>, 2008, issued *ex parte* in Ottawa, Ontario, pursuant to subsection 231.2(3) of the *Income Tax Act*, R.S.C. 1985, c.1 (5<sup>th</sup> Supplement), as amended (the ITA), and paragraph 289(3) of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the ETA), I authorized the Minister of National Revenue (the Minister) to impose on the applicant, Whitewater Golf Club Inc. (Whitewater), a requirement that it provides the Minister with certain information and documents relating to a group of unnamed persons (the authorization).

[2] The required information is with regard to Whitewater's November 30, 2003 through November 30, 2005 taxation years, and includes: the names and addresses of persons or corporations to whom Whitewater supplied goods or services; sales journals, sales invoices or other supporting documentation; any and all accounting documents under Whitewater's control or in its possession concerning monies received with regard to the sale of goods or services; any and all documentation concerning monies received from the sale of goods or services to customers (members) including all bank statements, bank deposit books, and records of monies received from customers (members).

[3] The authorization and the notice to the respondent were served upon Whitewater's representative on July 31, 2008. Before me is an application by Whitewater for a review of the authorization pursuant to subsections 231.2(5) and (6) of the ITA and paragraph 289(5) of the ETA. Furthermore, Whitewater is seeking an order dismissing the Minister's originating application (T-1099-08). For the reasons that follow, the application for review will be dismissed.

[4] The Canadian income tax system is a self-reporting and self-assessing system (*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627) (*McKinlay Transport*). However, the Minister is given significant statutory powers to enable him to identify incidents of non-compliance and to take corrective action. In this regard, it bears mentioning that taxpayers have a very low expectation of privacy in their business records relevant to the determination of their tax liability: *McKinlay Transport*, above and *Redeemer Foundation v. Canada (National Revenue)*, [2008] S.C.R. 643, (*Redeemer*) at para. 25.

[5] The powers of the Minister include a number of tools that permit the Minister to compel the production of information the Minister considers necessary to fulfil his mandate. One of those tools is found in subsection 231.2(1) of the ITA, and it permits the Minister, in certain circumstances, to compel the production of information about unnamed persons if the Minister first obtains the approval of a judge (defined in section 231 to mean a judge of the Federal Court or a judge of the superior court of the relevant province or territory). It reads in relevant part as follows:

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), [...] by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,

- (a) any information or additional information, including a return of income or a supplementary return; or
- (b) any document.

231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), [...] par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :

- a) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;
- b) qu'elle produise des documents.

[6] Recourse to subsection 231.2(2) is made when the Minister wishes to verify whether an ascertainable class of persons has complied with the ITA and information relevant to that question is

accessible by someone who has no statutory obligation to provide it to the Minister in the form of an information return or in the course of the Minister's examination of the person's own tax affairs.

Subsection 231.2(2) reads as follows:

231.2 (2) The Minister shall not impose on any person (in this section referred to as a "third party") a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

231.2 (2) Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).

[7] The procedure to be followed when the Minister wishes to seek judicial authorization to compel the production of information about unnamed persons is set out in subsections 231.2(3) to (6). If the application is successful and the Minister acts on the authorization, the third party has an opportunity to apply to the same judge, or a judge of the same court, for a review of the authorization. That review may result in the authorization being cancelled, confirmed or varied.

Subsections 231.2(3) to (6) read as follows:

231.2 (3) On ex parte application by the Minister, a judge may, subject to such conditions as the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection 231.2(1) relating to an unnamed person or more than one unnamed person (in this section referred to as the "group") where the judge is

231.2 (3) Sur requête ex parte du ministre, un juge peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une personne non désignée nommément ou plus d'une personne non désignée nommément — appelée «

satisfied by information on oath that	groupe » au présent article —, s'il est convaincu, sur dénonciation sous serment, de ce qui suit :
(a) the person or group is ascertainable; and	a) cette personne ou ce groupe est identifiable;
(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.	b) la fourniture ou la production est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente loi.
(4) Where an authorization is granted under subsection 231.2(3), it shall be served together with the notice referred to in subsection 231.2(1).	(4) L'autorisation accordée en vertu du paragraphe (3) doit être jointe à l'avis visé au paragraphe (1).
(5) Where an authorization is granted under subsection 231.2(3), a third party on whom a notice is served under subsection 231.2(1) may, within 15 days after the service of the notice, apply to the judge who granted the authorization or, where the judge is unable to act, to another judge of the same court for a review of the authorization.	(5) Le tiers à qui un avis est signifié ou envoyé conformément au paragraphe (1) peut, dans les 15 jours suivant la date de signification ou d'envoi, demander au juge qui a accordé l'autorisation prévue au paragraphe (3) ou, en cas d'incapacité de ce juge, à un autre juge du même tribunal de réviser l'autorisation.
(6) On hearing an application under subsection 231.2(5), a judge may cancel the authorization previously granted if the judge is not then satisfied that the conditions in paragraphs 231.2(3)(a) and 231.2(3)(b) have been met and the judge may confirm or vary the authorization if the judge is satisfied that those conditions	(6) À l'audition de la requête prévue au paragraphe (5), le juge peut annuler l'autorisation accordée antérieurement s'il n'est pas convaincu de l'existence des conditions prévues aux alinéas (3)a) et b). Il peut la confirmer ou la modifier s'il est convaincu de leur existence.

have been met.

[8] At issue in the present proceedings is the Minister's compliance with the second condition for a judicial authorization under subsection 231.2(3) of the ITA that "the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act". Thus, the applicant submits that in the course of the audit being performed by the Canada Revenue Agency (CRA), the Minister requested the names of its corporate members in furtherance of that audit and not for the purpose of reviewing the compliance by said members with the provisions of the ITA or the ETA. The applicant further submits that the Minister, in making the *ex parte* application, did not provide full disclosure of all material facts and evidence it relied on in the material used to support its application.

[9] The CRA is conducting a full compliance audit of the applicant for income tax and GST/HST purposes. As part of this audit the CRA requested a copy of the financial statements, specifically working papers from the accountant and a copy of the electronic books and records of Whitewater. By exchange of correspondence during the months of December 2006 and January 2007 the applicant's counsel informed CRA that the applicant would only be providing paper copies of the records requested due to the fact that the electronic records contained the names of members of Whitewater. A letter, dated November 2007, from the Minister's counsel, Mr. MacPhee, to the applicant's counsel stated: "I have spoken with my client on this matter, and they have confirmed that Whitewater Golf Club Inc. is the only party under audit, and the records sought are necessary to properly complete their audit."

[10] Nonetheless, the Minister acknowledges that CRA's position on how to proceed on this matter changed somewhat from the time the information in issue was first sought. Although it was initially the position of the CRA audit that the members' names would only be used as part of the audit of Whitewater, the CRA later amended its position on this matter and assured the Court that the unnamed persons being sought would also be investigated to ensure compliance with the *ITA* and the *ETA*. This change of position was clearly set forth in the Minister's originating application (T-1099-08).

[11] The applicant submits that the Minister's assertion, following which the information is now sought to verify compliance with the legislation in question, is not *bona fide* and that this position was only adopted to bring it within the requirements of the *ITA* to obtain the authorization, in breach of the Minister's obligation to conduct a tax audit in good faith and to act judiciously in the exercise of its audit powers *M.N.R. v. Greater Montréal Real Estate Board*, 2007 FCA 346, [2007] F.C.J. No. 1477 F.C.A. at para. 48).

[12] The Minister submits that at the outset of this audit the CRA was provided with "screener's comments" giving direction as to how to conduct the CRA audit. Based on said comments as well as CRA's review of this matter, it was determined that one of the purposes of the Whitewater audit was also to ensure the compliance of corporate members with regards to the limitation of the deductibility of golf membership by these corporate members.

[13] Nonetheless, the applicant further submits that while referred to by Ms. Mary Davies in her affidavit sworn on May 21, 2008 filed in support of the Minister's *ex parte* initial application, the screener's comments were never filed as exhibits and thus the Minister failed to provide full disclosure of all material facts and evidence it relied on to support its application.

[14] The grounds of review of an authorization granted under subsection 231.2(3) of the *ITA* and paragraph 289(3) of the *ETA* have previously been stated. Thus, this Court will vary or cancel the authorization previously granted only if it is not satisfied that the conditions in subsections 231.2(3)(a) and 231.2(3)(b) have been met.

[15] The recent decision of the Supreme Court in *Redeemer* further confirmed at para. 27 that:

[I]f an organization's charitable program is not valid, then both the charity and any of its donors who claim tax credits are non-compliant. The CRA has a valid interest in investigating both. The same would be true of any other relationship involving reciprocal tax treatment. [...]

[16] The authorization at issue will be confirmed, as the Court is satisfied that the requirement is imposed in good faith by the Minister in order to verify compliance by Whitewater Gold Club members with their duties and obligations under the *ITA*. Moreover, the applicant has provided no compelling rationale for this Court to vary the authorization, and I see no sound reason for restricting today the requirement to corporate members since non-corporate members may have also claimed non-allowable deductions or GST refunds.



[17] The applicant has provided no objective evidence to support its allegation of bad faith. The Minister's change of position regarding the audit of the Whitewater members themselves, which resulted in the Minister seeking the authorization at issue, is not a sufficient ground by itself to annul the authorization. Indeed, this change of position was clearly stated in the material filed in support of the *ex parte* application. The case at hand is precisely that of a relationship involving reciprocal tax treatment as referred to in *Redeemer*. It appears to me that the Minister took the more prudent approach of seeking judicial authorization and followed the suggestion previously made by applicant's counsel that judicial authorization be obtained.

[18] In conclusion, the applicant's submissions regarding the Minister's failure to fully disclose the material in support of which the Whitewater members are not being audited has no legal or reasonable basis. Furthermore, there is no obligation under the *ITA* regarding the nature of the particular evidence that has to be filed in support of an application *ex parte* for an authorization. There was certainly no obligation in this case to produce protected material with the affidavit of Mary Davies. The only conditions to be satisfied are those set forth in subsections 231.2(3)(a) and 231.2(3)(b) of the *ITA* which have clearly been met. Again, there is sufficient proof on the record that the information was sought by the Minister to ensure the member's compliance under paragraph 18(1)(l) of the *ITA*. At the hearing of this application, other valid grounds to verify compliance, such as GST refunds, were also provided by Minister's counsel. Finally, the records of members exist and the applicant cannot simply refuse their access on the ground that it is not obliged by law to maintain such records.

[19] The application of Whitewater will be dismissed and the authorization confirmed. Costs will be in favour of the respondent.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** the application to review the authorization is dismissed with costs in favour of the respondent.

“Luc Martineau”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-1369-08

**STYLE OF CAUSE:** **WHITEWATER GOLF CLUB INC.  
v. MINISTER OF NATIONAL**

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 17, 2009

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

**DATED:** July 21, 2009

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