

Federal Court



Cour fédérale

Date: 20120810

Docket: T-70-12

Citation: 2012 FC 977

Ottawa, Ontario, August 10, 2012

PRESENT: The Honourable Mr. Justice Near

IN THE MATTER OF RAYMOND GUY JOSEPH PATRY also known as Ray Patry
and Drew Richards and TARA DAWN PATRY and an application by the Minister of
National Revenue under section 225.2 of the *Income Tax Act*

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

**RAYMOND GUY JOSEPH PATRY
ALSO KNOWN AS RAY PATRY
AND DREW RICHARDS
AND TARA DAWN PATRY**

Respondents

REASONS FOR ORDER AND ORDER

[1] The Respondents (Mr. Raymond Guy Joseph Patry and Mrs. Tara Dawn Patry) bring this motion under subsection 225.2(8) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (ITA) for review of the ex parte order (or Jeopardy Order) sought by the Minister of National Revenue (the Minister) and rendered on January 12, 2012 by Justice François Lemieux of this Court.

[2] For the reasons set out below, the Jeopardy Order should be set aside.

I. Background

[3] Canada Revenue Agency (CRA) reassessed the Respondents for the 2006 and 2007 taxation years. Third party civil penalties were also imposed in relation to tax returns prepared by Mr. Patry for his clients from the 2004 to 2007 taxation years. The Respondents filed a Notice of Objection to these reassessments and penalties and are pursuing litigation at the Tax Court.

[4] In addition, they are charged with certain offences under the ITA and *Excise Tax Act*, RSC, 1985, c E-15.

[5] In obtaining a Jeopardy Order, the Minister satisfied the Court that there were reasonable grounds to believe that the collection of the amount assessed for tax by the Minister against the Respondents would be jeopardized by delay in collection. The entire amount assessed is around \$900,000, with \$160,000 being the actual tax owing and the remainder comprising of administrative penalties and interest. The CRA was able to take actions such as obtaining certificates related to the tax debt and applying to register them against the title of the Respondents' principal residence.

II. Legal Framework

[6] The legislative provision that underlies these proceedings is section 225.2 of the ITA. Under subsection 225.2(2), the Minister is able to bring an ex parte motion for a Jeopardy Order to a judge of this Court. If the judge is satisfied that there are reasonable grounds to believe that the collection of all or any part of the amount assessed in respect of the taxpayer would be jeopardized by a delay in the collection of that amount, the Minister is given authorization by way of the jeopardy order to take forthwith any of the actions described in paragraphs 225.1(1)(a) to 225.1(1)(g). Once a jeopardy order is granted, the taxpayers (or the Respondents in this case) may apply to the Court for review as provided in subsection 225.2(8).

[7] In my present role as the reviewing judge, I must determine the question summarily and may confirm, set aside or vary the authorization and make such other order considered appropriate (subsection 225.2(1)). Factors relevant to reviewing a jeopardy order were addressed by my colleague Justice Lemieux in *Canada (Minister of National Revenue – MNR) v Services ML Marengère Inc* (1999), 176 FTR 1, [1999] FCJ 1840 at para 63).

[8] My inquiry is governed by a two-stage test (see for example *Canada (Minister of National Revenue – MNR) v Reddy*, 2008 FC 208, [2008] FCJ no 261, *Canada (Minister of National Revenue – MNR) v Accredited Home Lenders Canada Inc*, 2012 FC 461, [2012] FCJ no 499 at paras 8-9). First, the Respondents bear the burden of establishing that there are reasonable grounds to doubt that the collection of all or any part of the amount assessed against them would be jeopardized by a delay in the collection of that amount. If the Respondents succeed at the first stage, the burdens

shifts to the Minister to justify the Jeopardy Order by demonstrating that, on a balance of probabilities, it is more likely than not that the collection would be jeopardized by delay. Also relevant is whether the Minister made full and frank disclosure on its original ex parte motion (see *Services ML Marengère*, above).

III. Analysis

[9] The Respondents submit, among other things, that the Jeopardy Order was made in the absence of reasonable and probable grounds and without the benefit of complete information. The evidence fails to establish that they have conducted their affairs in an unorthodox manner so as to waste, transfer, dissipate or liquidate assets and place them beyond the reach of the Minister (*Canada v Goldbeck* (1990), 90 DTC 6575. To the contrary, they have contested the reassessments through proper channels and their net worth has not changed substantially during the relevant period.

[10] The Minister maintains that the Respondents' evidence does not illustrate any material change in the facts underlying the Jeopardy Order sufficient to meet the burden of reasonable grounds to doubt it should have been made in this case. Rather, the evidence, taken as a whole, reinforces that the Respondents have engaged in unorthodox behaviour with respect to the sale of property and their financial records. The Minister believes the Jeopardy Order should be confirmed, primarily to prevent the Respondents from placing equity from the sale of their home beyond its reach and thereby jeopardizing collection.

[11] In the course of my analysis, I will identify the evidence presented by the Respondents that leads me to conclude there are reasonable grounds to doubt collection would be jeopardized by delay under the circumstances. Thereafter, I will address the second stage of the test as to the Minister's continued justification for the Jeopardy Order by considering the totality of the evidence presented to satisfy subsection 225.2(2).

A. *Reasonable Grounds to Doubt Collection in Jeopardy*

[12] To satisfy this stage of the test, the Respondents have the burden "to muster evidence, whether by affidavits, by cross-examination of the Affiants on behalf of the Crown, or both, that there are reasonable grounds to doubt that the test required by paragraph 225.2(2) has been met" (see *Reddy*, above at para 7).

[13] In my opinion, the Respondents have met this initial burden in the present case. Based on the evidence now presented to me, various factual inconsistencies are apparent in the grounds offered to support the Jeopardy Order.

[14] A primary justification was the potential consequences of a sale of the Patry home. The Minister highlighted that the "only known exigible asset is the Property which is currently listed for sale." It was anticipated that should the home be sold, any "proceeds realized would be provided to other creditors or otherwise placed beyond the reach of the Minister." The centrality of the house sale to the decision to seek a Jeopardy Order was confirmed during cross-examination on the affidavit of CRA Representative, Laurie Auld.

[15] The house was never sold. Although listed for sale at one time, it was subsequently taken off the market. The home has not been listed for sale since November 28, 2011. Even the Minister concedes that the listing of the home for sale on its own is insufficient to establish that collection would be jeopardized by delay. Irrespective of the motivation for listing claimed by the Minister or the belief that the house may be sold at some point in the future, the specificity provided by the Respondents on this matter undermines the stated reason for obtaining the Jeopardy Order based on an actual or impending house sale.

[16] In addition, the most recently assessed value of the home was not used for the purpose of the Minister's affidavit. It was suggested that the house was not an appreciating asset and was appraised at \$1,231,000. According to the material provided by the Respondents, however, the true appraised value of the house is between \$1,850,000 and \$1,928,000. Its value continues to appreciate. As a consequence, the equity available to the Respondents to satisfy any debts to the Minister is higher than what was initially implied in the Minister's materials.

[17] More significantly, it is recognized that where a taxpayer has sold real estate that is the only asset to satisfy the cash debt and the cash received on the sale is still available to satisfy the debt, the sale itself does not constitute grounds for a jeopardy order (*Canada (Minister of National Revenue – MNR) v Landru*, [1993] 1 CTC 93, [1992] SJ no 519; *Deputy Minister of National Revenue, Taxation v Quesnel*, 2001 DTC 5602).

[18] It is also unclear why the Minister is convinced that the proceeds from any potential sale of the house would necessarily be used to pay other creditors (where the only major creditor would be in relation to the Respondents' mortgage) or otherwise be placed beyond the reach of the Minister. Mere suspicion or concern is not sufficient to establish reasonable grounds (*Danielson v Minister of National Revenue* (1986), 86 DTC 6495; *Her Majesty the Queen v Satellite Earth Station Technology Inc* (1989), 89 DTC 5506).

[19] There is no clear indication that the Respondents have engaged in unorthodox behaviour "which raises a reasonable apprehension that it would be difficult to trace funds or recover them for the tax debt" (*Laframboise v Her Majesty the Queen* (1986), 86 DTC 6396; *Canada (Minister of National Revenue) v Rouleau* (1995), 95 DTC 5597). As Justice Luc Martineau summarized in *Canada (Minister of National Revenue – MNR) v Robarts*, 2010 FC 875, [2010] FCJ no 1082 at para 61:

[61] The jurisprudence has not given a definition to the phrase "unorthodox behaviour", although it has given many examples of what it considers to be unorthodox behaviour. A few examples are as follows:

- (a) Keeping large amounts of cash in places such as one's apartment, safety deposit boxes and a cold storage depot locker (*Minister of National Revenue v. Rouleau*, [1995] 2 C.T.C. 442, 101 F.T.R. 57 at para. 6);
- (b) Keeping large amounts of cash, untraceable through normal banking records, in the trunk of an automobile (*Minister of National Revenue v. Arab*, 2005 FC 264, [2005] 2 C.T.C. 107 at para. 20);
- (c) Keeping double accounts for a restaurant, with one being for entries in the sales journal, the general ledger and income tax returns, and the other being for additional sales not reported by the holding company of the restaurant (*Delaunière, re*, 2007 FC 636, 2008 D.T.C. 6274 (Eng.) at para. 4);

(d) Keeping large amounts of cash in a safety deposit box, a filing cabinet in one's house and in the pocket of a housecoat (*Mann v. Minister of National Revenue*, 2006 FC 1358, [2007] 1 C.T.C. 243 at para. 43); and

(e) Advancing funds to a company about to be dissolved in order to avoid paying income tax (*Laquerre, re*, 2008 FC 459, 2009 D.T.C. 5024 (Eng.) at para. 11).

[20] Similar to Justice Martineau in *Robarts*, above, I am not convinced that the Respondents' behaviour falls within the same category as these examples. The Minister relies almost exclusively on the sale of property in 2007 and 2008 underlying the reassessments. The suspicious deposits to an unidentified third party initially flagged by the Minister have since been explained by the Respondents as being traceable to transfers between Mr. Patry's business and personal bank accounts.

[21] In light of these factual inconsistencies, there are reasonable grounds to doubt that the collection of all or any part of the amount assessed against the Respondents would be jeopardized by a delay in the collection of that amount. I must now turn my attention to whether the rest of the evidence presented by the Minister remains sufficient to confirm the original Jeopardy Order.

B. *Minister's Justification Insufficient to Satisfy Subsection 225.2(2)*

[22] The Minister insists there continues to be ample evidence of the Respondents' unorthodox behaviour. In general, it is unclear how they are able to maintain their present standard of living. The Minister again points to the Respondents' past conduct and financial records.

[23] Although I have already raised concerns about the Minister's heavy reliance on evidence related to an impending house sale, it is contended that should the Jeopardy Order be overturned, the Respondents will simply list their home for sale once again. It was merely taken off the market during the holiday season.

[24] According to the Minister, once the house is sold, the proceeds will be used to pay living expenses and legal counsel (something the Respondents should not be permitted to do in funding the counsel of their choice). This will dissipate the equity in the house to the extent that the Minister will be unable to collect on the entire amount assessed of approximately \$900,000, particularly when the costs associated with the sale of the home are taken into consideration. The Jeopardy Order is required to secure payment.

[25] The Minister further argues that I am unable to look behind the assessments, must assume the tax debts are valid, and the amount comprising of penalties is irrelevant under the circumstances.

[26] I acknowledge that the house was listed for sale, then taken off the market and that there is a likelihood of it being sold in the future. Based on this evidence, however, I am not prepared at this point to find that the proceeds will be used in a way that will dissipate the assets to the extent suggested by the Minister to warrant maintaining the application of the Jeopardy Order.

[27] In my view, it is relevant to look behind the assessment both to consider the type of behaviour the taxpayers have been engaged in to assist in determining whether there has been anything unorthodox on their part and to recognize the nature of the debt owing, i.e. the

apportionment of taxes and administrative penalties owing. While Justice Martineau acknowledged that assessments should be assumed valid in *Robarts*, above at para 68, he also confirmed that if the record shows that the 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 assertion must necessarily be called in to question (see also *Canada (Minister of National Revenue – MNR) v Douville*, 2009 FC 986, [2009] FCJ no 1218 at paras 16, 20).

[28] Given that the vast majority of the amounts assessed as owing in this case consist of administrative penalties and interest, in my view, it would be unfair to allow the Jeopardy Order to have the effect of preventing the Respondents from utilizing any equity in their house whatsoever for living expenses or counsel. While one can speculate that the Respondents may use funds for this purpose if the house is sold, there is absolutely no evidence before that suggests the amounts would be so high as to deplete the \$800,000 to \$1,000,000 in equity such that the Minister would not be able to realize upon whatever debt may remain at the conclusion of this dispute.

[29] The Minister has simply not shown to my satisfaction that the proceeds of a possible sale of the house should the Jeopardy Order be lifted will result in the dissipation of the equity in the house to the extent that the amounts owed to the Minister will be lost.

IV. Conclusion

[30] As a consequence, I am allowing the Respondents' motion, with costs in the normal amount. The Jeopardy Order is set aside and the Minister is ordered to forthwith withdraw from taking or pursuing collection actions with respect to the tax debt.

ORDER

THIS COURT ORDERS that the Respondent's motion is allowed, with costs in the normal amount. The Jeopardy Order is set aside and the Minister is ordered to withdraw from taking or pursuing collections actions with respect to the tax debt.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-70-12

STYLE OF CAUSE: MINISTER OF NATIONAL REVENUE v
RAYMOND GUY JOSEPH PATRY ET AL

PLACE OF HEARING: VANCOUVER

DATE OF HEARING: MAY 22, 2012

**REASONS FOR ORDER
AND ORDER BY:** NEAR J.

DATED: AUGUST 10, 2012

APPEARANCES:

Nicole Johnston FOR THE APPLICANT

David Rosenberg, Q.C.
Graham Kosakoski FOR THE RESPONDENTS

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