

Federal Court



Cour fédérale

Date: 20130523

**Docket: T-1668-12
T-1879-12**

Citation: 2013 FC 544

Vancouver, British Columbia, May 23, 2013

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

PAUL MATTHEW JOHNSON

Applicant

and

**HER MAJESTY THE QUEEN
IN RIGHT OF CANADA
(THE MINISTER OF NATIONAL REVENUE)**

Respondent

REASONS FOR ORDER AND ORDER

[1] In these consolidated applications (the First Applications), Paul Matthew Johnson (the Applicant) seeks judicial review of actions of the Minister of National Revenue undertaken in the course of assessing liability for and collecting tax pursuant to the *Excise Tax Act*, RSC 1985, c E-15. In the motion presently at issue, the Respondent seeks leave to file a further affidavit (the Motion). This Motion was heard on the day previously scheduled for the hearing of the First Applications on their merits.

I. Background

[2] In April 2012, a partnership involving the Applicant (the Partnership), and the Applicant were notionally assessed for their GST/HST tax liability for reporting periods between July 1, 2011 and December 31, 2012 (the Old Assessments). In the First Applications, the Applicant seeks, *inter alia*: (i) declaratory relief dealing with the Minister's actions, (ii) an order quashing or setting aside the Old Assessments, and (iii) a stay of collection activities pursuant to the Old Assessments.

[3] The Respondent filed an affidavit of Terence Finlay, sworn on November 9, 2012 (the First Finlay Affidavit). Mr. Finlay is the Canada Revenue Agency auditor who was assigned to audit both the Partnership and the Applicant and he was directly involved in the actions which gave rise to the First Applications. Mr. Finlay was cross-examined by Applicant's counsel on December 6, 2012. During that examination Mr. Finlay indicated that the audits of the Partnership and the Applicant were ongoing and that, following receipt of further disclosure from the Royal Canadian Mounted Police (RCMP), the Old Assessments would be subject to a reassessments process.

[4] The Respondent moved on May 10, 2013 for leave pursuant to Rule 312(a) of the *Federal Court Rules* to file a further affidavit from Mr. Finlay, sworn on May 9, 2013 (the Second Finlay Affidavit).

[5] The Second Finlay Affidavit reveals that on January 23, 2013, Mr. Finlay received documentation from the RCMP related to the alleged drug-trafficking activities of the Partnership between October 1, 2011 and March 31, 2012 (the Disclosure Package). This information was incorporated into Mr. Finlay's ongoing audits. On February 22, 2013, he sent a letter to the

Partnership, with a copy to the Applicant, setting out proposed adjustments to the liability set out in the Old Assessments and offering an opportunity to respond (the Proposal Letter). No response was received and on April 17, 2013, Mr. Finlay concluded the audits for the period between October 1, 2011 and March 31, 2012. He also vacated the assessment of the Partnership's reporting period ending September 30, 2011 on the basis that no taxes were owed. The Minister reassessed the Partnership by Notice of (Re)assessment dated April 23, 2013, and the Applicant was reassessed in respect of his joint and several liability on May 3, 2013 (the New Assessments).

II. Submissions

[6] In oral argument on the Motion, counsel for the Respondent agreed that he would consent to the Applicant filing a single amended application for judicial review (the New Application) to replace the First Applications. He agreed that the New Application will incorporate facts and prayers for relief concerning the New Assessments, and that the Applicant will be entitled to seek orders quashing the New Assessments and staying related collection activities. In the New Application, the Applicant will also be entitled to continue to request declaratory relief in respect of the Minister's actions associated with the Old Assessments.

[7] Once this position was clear, counsel for the Applicant consented to an order granting leave to file the Second Finlay Affidavit.

[8] Counsel also agreed that:

- a. an order would be made scheduling the steps to be taken prior to the hearing of the New Application

- b. this case should be specially-managed
- c. they were both available for a one-day hearing of the New Application in Vancouver in the week of September 23, 2013
- d. the Respondent would immediately produce a copy of the Disclosure Package
- e. the Respondent would produce Mr. Finlay for cross-examination starting at 1:00 p.m. on May 22, 2013 and at other times to be agreed between counsel

[9] There was no consent on the issue of costs. The Applicant sought solicitor-and-client costs and the Respondent asked for costs in the cause. In my view, the Respondent made no effort to respect the date for the hearing of the First Applications in the sense that it did not file the Second Finlay Affidavit until approximately ten days before the hearing. This late filing was not justified because the Respondent knew the results of the audits in February when the Proposal Letter was prepared. Accordingly, the Applicant will have its costs of this Motion.

[10] The parties have consented to having this matter be specially-managed under Rule 384. However, since a schedule for preparation and a hearing date for the Application have been set on consent, it is my conclusion that an order is unnecessary. The parties are expected to meet the deadlines they set for themselves.

ORDER

FOR THESE REASONS, THIS COURT ORDERS THAT:

1. The Motion is granted and the Second Finlay Affidavit is to be filed.
2. The First Applications, which were scheduled for hearing on May 22, 2013, are adjourned *sine die* and need not be rescheduled because they will be replaced with the New Application.
3. The New Application will be heard on Wednesday, September 25, 2013 at 9:30 a.m. for one day.
4. The schedule for the pre-hearing preparation of the New Application is as follows:
 - By June 3, 2013: Applicant to file the New Application
 - By June 7, 2013: Respondent to file a record pursuant to Rule 317
 - By June 21, 2013: Applicant's further affidavits, if any, to be filed
 - By July 24, 2013: Respondent to file any further affidavits
 - By Aug 2, 2013: All cross-examinations to be completed
 - By Aug 23, 2013: Applicant's supplementary application record is to be filed
 - By Sept 13, 2013: Respondent's supplementary application record is to be filed
5. Costs of this motion are payable by the Respondent to the Applicant. Using items 5 and 6 of Federal Court Tariff B, Column IV as a guide and assigning 11 units, the costs are hereby fixed at \$1,544.84 and are payable by the end of June 2013.

“Sandra J. Simpson”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1668-12 and T-1879-12

STYLE OF CAUSE: PAUL MATTHEW JOHNSON v HER MAJESTY
THE QUEEN IN RIGHT OF CANADA
(THE MINISTER OF NATIONAL REVENUE)

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: May 22, 2013

**REASONS FOR ORDER
AND ORDER:** SIMPSON J.

DATED: May 23, 2013

APPEARANCES:

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