Federal Court  Cour fédérale

Date: 20131028

Docket: T-1331-12

Citation: 2013 FC 1100

Ottawa, Ontario, October 28, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

LINO TASSONE AND MARIA TASSONE

Applicants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In this application, the applicants, Lino and Maria Tassone, seek to set aside two jeopardy orders granted on an *ex parte* basis under subsection 225.2(2) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the ITA] by my colleague, Justice de Montigny, on May 24, 2012 [the Jeopardy Orders or the Orders]. These Orders allowed the respondent, the Minister of National Revenue [the Minister] to commence collection activities against the applicants without abiding by the notice provisions stipulated in section 225.1 of the ITA.

[2] In this application, the applicants argue that the Jeopardy Orders should be set aside for three reasons:

1. the respondent Minister failed to provide full and frank disclosure of all relevant facts in the *ex parte* application;
2. the materials now before the Court raise a reasonable doubt as to whether the collection of all or part of the tax with which the applicants have been assessed would have been jeopardised by the delay associated with the Minister proceeding on notice to the applicants as is normally required under section 225.1 of the ITA; and
3. the Minister has not demonstrated on the balance of probabilities that such delay would likely jeopardise the ability of the Canada Revenue Agency [CRA] to collect the taxes alleged to be owing.

[3] For the reasons set out below, I have determined that none of these points has merit and accordingly this application will be dismissed, with costs.

Background

[4] The applicants are Canadian residents and have not filed income tax returns for the taxation years 2004 to 2011, inclusive. The CRA conducted a net worth assessment of the applicants and in May 2012 issued preliminary Notices of Assessment to them for the 2004 to 2011 taxation years for a total of $5,659,521.00 in undeclared revenue. Based on these Notices, the applicants are currently each assessed for $3,602,106.60 (which the respondent concedes is the total payable but as it is not yet possible to determine which of the applicants is responsible for that amount, Notices of

Assessment for the full amount claimed were issued to both applicants). They have both filed Notices of Objection in respect of the each of the Notices of Assessment. However, neither of the applicants filed an affidavit in support of this application and thus avoided cross-examination by the respondent.

[5] The evidence gathered by CRA in its audit demonstrates that the applicants had indicated in connection with several applications for financing that each of them earned significant employment revenues from a group of family-owned companies operating a chain of restaurants known as "California Sandwiches" in several of the 2004 to 2011 taxation years. More specifically, Lino Tassone claimed to have earned $200,000.00 in 2011 in the application submitted in respect of Questrade and Maria Tassone claimed to have earned $45,000.00 in 2005, $99,600.00 in 2006 and $50,000 in 2008 in the applications submitted in respect of TD Canada Trust, the Toronto Real Estate Board and BMW.

[6] The audit that the CRA conducted also disclosed that there were significant sums deposited to the Tassones' Canadian bank accounts from unexplained sources over the 2004 to 2011 period. The audit further revealed that in 2007 and 2008 the Tassones controlled a Panamanian company, Balboa Internacional Associada S.A. [Balboa] and that Balboa had significant assets that the CRA has not been able to fully trace. The audit, however, did show that in 2007 Balboa apparently lent $2,000,000.00 to Mr. Tassone's uncle, Tony Papa, in respect of whom the CRA also obtained a jeopardy order (see in this regard *Papa, Re*, 2009 FC 49, 2009 DTC 5045 [*Re Papa*]). Mr. Papa is alleged to owe several million dollars in unpaid taxes but in 2008 granted to Balboa mortgages on

Canadian properties held by non-arm's length parties, thereby forestalling the CRA's ability to realize on those assets.

[7] The only asset of value in Canada that the CRA has been able to determine that the applicants own is their home in Toronto, which is in Maria Tassone's name. As of January 23, 2012, the home was assessed to be worth $1,210,000.00.

[8] On the *ex parte* application, the Minister argued that the CRA feared that the Tassones might sell or encumber their home if the CRA were required to proceed with collection activities against the applicants on the notice required under section 225.1 of the ITA. In the affidavit filed in support of the Jeopardy Orders, the CRA's auditor, Bruno Gagnière, explained the bases for this fear. These included:

- Mr. Tassone denied knowing anything about Balboa when questioned by Mr. Gagnière, despite being at one point the President of that company, and, indeed, slammed the door in Mr. Gagnière's face when he learned he was a CRA auditor from Québec;
- Balboa had allowed Tony Papa to sign a mortgage on its behalf, obtaining security over Mr. Papa and his wife's Canadian real estate property, thereby frustrating the CRA's efforts to realize on those properties for the significant unpaid taxes Mr. Papa owes. Moreover, the funds apparently advanced by Balboa to Mr. Papa were allegedly advanced well before the mortgages were granted;
- the applicants have not filed tax returns for any of the taxation years 2004 to 2011 but had significant net worth and expenses and had represented several times in

connection with obtaining credit that they earned employment income, as discussed above;

- there were several large unexplained deposits and withdrawals in the applicants' Canadian bank and brokerage accounts that Mr. Gagnière could not trace the source of;
- in 2007 and 2008 the applicants signed several documents that showed Mr. Tassone as being the President of Balboa and Mrs. Tassone as being its Secretary;
- the Tassones operated Balboa as something of a sham or cover as they had Balboa write Mrs. Tassone cheques totalling over $30,000.00, had several personal restaurant expenses charged to a debit card on one of Balboa's Panamanian bank accounts, caused some shares that Mr. Tassone had purchased to be issued in Balboa's name and had Balboa sign the lease and in 2007 and 2008 pay the lease payments for premises in Toronto leased to another Panamanian company that the applicants were associated with, namely Kyoto Holdings Inc.; and
- the fact that Mr. Tassone had neglected to pay approximately $9,000.00 in taxes that the CRA had previously assessed until the CRA garnished one of Mr. Tassone's brokerage accounts.

[9] With this background in mind, it is now possible to examine each of the issues raised by the applicants in this application.

Did the Minister fail to provide full and frank disclosure of all relevant facts in its *ex parte* application?

[10] The case law recognises that the Minister must make full and frank disclosure in an *ex parte* application for a jeopardy order and that failure to do so will result in the order's being set aside in a review application made under subsection 225.2(8) of the ITA even if the evidence before the Court demonstrates that there was a valid case for the order being issued. Thus, lack of full and frank disclosure is a stand-alone basis for review of an *ex parte* jeopardy order (*Re Papa* at para 21). However, full and frank disclosure does not require the disclosure of material that is irrelevant to whether or not a jeopardy order should be issued (*Minister of National Revenue v Rouleau* (1995), 101 FTR 57, 95 DTC 5597 (Fed TD) at para 10).

[11] In order to be satisfied that a jeopardy order is warranted under subsection 225.2(2) of the ITA, the judge hearing the *ex parte* application must be 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 jeopardised by a delay in the collection of that amount. The standard of proof on the *ex parte* application is not the balance of probabilities. Rather, what is required is proof that "while falling short of a balance of probabilities, nevertheless connotes a *bona fide* belief in a serious possibility based on credible evidence" (*Re Papa* at para 16). Accordingly, all evidence that the Minster is in possession of that is relevant to whether the collection of taxes might be jeopardised must be disclosed by the Minister on the *ex parte* application.

[12] Here, the applicants argue that the respondent Minister did not make full and fair disclosure principally because Mr. Gagnière did not file his working papers nor disclose that a large percentage of the income attributed to the applicants by the CRA arose from unexplained share transfers

between two accounts of Balboa, which is a non-resident corporation and thus not subject to Canadian tax. Although not contesting that there was some evidence that the applicants controlled Balboa (at least between 2006 and 2008), the applicants argue that a mere transfer from one account to another is not an expenditure and, therefore, that these amounts transferred by Balboa ought not have been included as expenditures by the CRA in its net worth assessment of the applicants. The applicants argue that the fact that the CRA's Notices of Assessment were based in large part on the transfers made by Balboa between its own accounts was a material fact that Justice de Montigny ought to have been made aware of and that failure to disclose this fact should result in his Orders' being set aside.

[13] While it is true that the respondent Minister did not disclose Mr. Gagnière's working papers in the materials filed to obtain the *ex parte* Orders, contrary to what the applicants claim, Mr. Gagnière *did* disclose in his affidavit that a significant part of the expenditures he attributed to the applicants in the net worth analysis came from share transfers between two Balboa accounts in Panama. This is made clear in para 17 of his affidavit, where Mr. Gagnière deposes that between 2006 to 2008, $1,888,963.29 was transferred between two different accounts maintained by Balboa in Panama. The original French text of the affidavit that was before Justice de Montigny is clearer on this point than the English translation that the applicants filed before me. It provides: "En ce qui concerne les années d'impositions 2006 à 2008 en particulier, la somme de 1 888 963,29 $ a été transférée par Lino et Maria Tassone à partir d'un compte de courtage détenu par [Balboa] au Panama au compte bancaire # 4010126217, au nom de Balboa … à la banque Credicorp située au Panama". Thus, contrary to what the applicants claim, there was no material non-disclosure by the Minister on this point.

[14] The applicants assert that this case is similar to *Minister of National Revenue v Robarts*, 2010 FC 875, 2010 DTC 5145 [*Robarts*], where my colleague, Justice Martineau, set aside a jeopardy order in circumstances where the Minister had based the *ex parte* application largely on the fact that the taxpayer had withdrawn over $100,000.00 from his bank account and had transferred half of his property to a third-party. However, in that case, the Minster had failed to disclose that the taxpayer had in fact re-deposited the money two months later.

[15] This case is fundamentally different from the situation in *Robarts*. Here, unlike there, the applicants have been unable to point to any relevant fact that the Minster failed to disclose on the *ex parte* application. Moreover, in my view, there is no need for disclosure of the auditor's working papers as part of the *ex parte* application materials in the circumstances of this case. What is relevant in respect of a jeopardy order is whether there is a reasonable possibility that the payment of taxes owing may be in jeopardy, not the amount of the assessments (see e.g. *Minister of National Revenue v Services ML Marengère Inc*, 2000 DTC 6032, 176 FTR 1 at para 64). In this case, the working papers are only relevant to the amount of taxes assessed and not to the risk that their collection might be jeopardised. Therefore, contrary to what the applicants claim, the Minster did not fail to provide full and frank disclosure and the first ground advanced by the applicants is thus without merit.

Have the applicants raised a reasonable doubt as to whether the collection of all or part of the tax assessed would have been jeopardised if the Minister had proceeded on notice?

[16] The final two issues raised by the applicants concern the basis for the issuance of the Jeopardy Orders. In this regard, the case law establishes that the reviewing judge's inquiry under

subsection 225.2(8) of the ITA is governed by the two-stage test laid out by Justice Lemieux in *Minister of National Revenue v Reddy*, 2008 FC 208, 329 FTR 13 [*Reddy*]:

i. First, the applicant bears the initial burden of establishing that there are reasonable grounds to doubt that the collection of all or any part of the amount assessed would be jeopardised by a delay in the collection of that amount. An applicant may muster this evidence by affidavits and/or by cross-examination of affiants who signed affidavits filed by the respondent (*Reddy* at para 7); and

ii. If the applicant succeeds 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 of the amount would be jeopardised by delay. The reviewing Court may consider evidence originally presented on behalf of the Minister in support of the jeopardy order and "any additional evidence by affidavit or from cross-examination of affiants, presented by either party in relation to the motion for review" (*Reddy* at para 8).

[17] Here, there is no need to move to the second stage of the analysis as the applicants have failed to meet their initial burden of establishing that there are reasonable grounds to doubt that the collection of the amounts owing might have been jeopardised if the Jeopardy Orders were not issued. On the contrary, the evidence demonstrates ample grounds for such doubt, including the applicants' "unorthodox behaviour" in failing to report income yet at the same time having claimed to have earned significant employment income from family-based businesses; their failure to report income despite having significant assets and expenditures; and their apparent use of Balboa as a cover to funnel funds to themselves or to another of their companies. In addition, Balboa was

recently the vehicle used by Mr. Tassone's uncle, Tony Papa, to shield his Canadian assets from seizure for unpaid taxes. While, as the applicants argue, there is no proof that the applicants would leave Canada or necessarily encumber their home to avoid payment of the taxes with which they might be finally assessed, on a jeopardy application the Minster need not prove that recovery will be jeopardised. Rather, the Minister need only establish that there are reasonable grounds to believe that this may occur. Here, such doubt exists given the applicants' past behaviour and the ease with which they and Mr. Papa have in past used Balboa to achieve their ends.

[18] This case is somewhat similar to *144945 Canada Inc, Re*, 2003 FCT 730, 237 FTR 1 where this Court dismissed an application to set aside a jeopardy order. There, the applicant failed over several years to file income tax returns within the timeframes required by the ITA and what returns that were filed were sorely deficient. The applicant in that case also failed to comply with a CRA requirement issued pursuant to section 231.2 of the ITA and the officers of the applicant had serious personal financial problems and had neglected their obligations as officers. This was found to be sufficient to have warranted the issuance of a jeopardy order as the applicants had failed to raise a serious doubt about the correctness of the order. Here, for the reasons noted, a similar conclusion is warranted.

[19] Thus, the Minister did make full and frank disclosure before Justice de Montigny on the *ex parte* application and the applicants have failed to discharge their initial burden of raising reasonable doubt that the test in subsection 225.2(2) of the ITA was met. This application will accordingly be dismissed.

Costs

[20] The parties agreed that the costs of this application should follow the event but differed as to quantum, with the applicant suggesting a lump sum in the range of $1,500.00 to $2,000.00 and the respondents suggesting a lump sum of $4,500.00. In the exercise of my discretion and taking into account the complexity of the issues raised in this application, I fix costs in the all-inclusive lump sum amount of $2,500.00.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed, with costs in the all-inclusive lump sum amount of $2,500.00.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1331-12

STYLE OF CAUSE: LINO TASSONE AND MARIA TASSONE v THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: TORONTO, ONTARIO

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REASONS FOR JUDGMENT AND JUDGMENT: GLEASON J.

DATED: OCTOBER 28, 2013

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