Date: 20090402

Docket: A-419-08

Citation: 2009 FCA 107

CORAM: **BLAIS J.A.**
EVANS J.A.
RYER J.A.

BETWEEN:

UNIVERSAL AIDE SOCIETY

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Vancouver, British Columbia, on April 2, 2009.

Judgment delivered from the Bench at Vancouver, British Columbia, on April 2, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: RYER J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Vancouver, British Columbia, on April 2, 2009)

RYER J.A.

[1] The Universal Aide Society (the "applicant") has brought this application pursuant to paragraph 168(2)(b) of the *Income Tax Act* (the "ITA"), R.S.C. 1985, c. 1 (5th Supp.) for an order extending the 30 day period that must expire before the Minister of National Revenue (the "Minister") is permitted to publish a notice (the "Notice of Intent to Revoke") of his intention to revoke the registration of the applicant as a registered charity, within the meaning of subsection 248(1) of the ITA ("registered charity"). The applicant requests that the 30 day period be extended

until its rights of objection and appeal in relation to the Notice of Intent to Revoke have been exhausted.

[2] The Notice of Application also requests a declaration that legal and accounting costs that the applicant may incur in responding to the Notice of Intent to Revoke may be treated as expenses incurred in pursuit of a charitable activity.

[3] In an amendment to the Notice of Application, the applicant seeks a declaration that the Notice of Intent to Revoke was not properly served on the applicant and is of no force and effect.

Background

[4] The applicant was incorporated on March 10, 1993 under the *Society Act*, R.S.B.C., 1996 c. 433, and was registered as a registered charity effective July 1, 1995.

[5] As a result of an audit of the applicant for the period from January 1, 2003 to December 31, 2005, the Minister identified five areas of potential non-compliance by the applicant with certain provisions of the ITA. These concerns were communicated to the applicant in a letter (the "Administrative Fairness Letter") dated May 6, 2008, which was sent to Ms. Susan Jill Sampson, the president and a director of the applicant, at her address in Qualicum Beach, British Columbia. On July 7, 2008, the applicant advised the Minister, that it did not wish to respond to the Administrative Fairness Letter.

[6] The 2003 information return filed by the applicant with the Minister specified that the applicant's address was a post office box in Gabriola, British Columbia. However, the applicant's 2004 and 2005 information returns specified that its address was 1364 Sea Lovers Lane in Gabriola.

[7] The Notice of Intent to Revoke, which was dated July 18, 2008, was sent by registered mail by the Minister to the applicant at the address of Ms. Sampson in Qualicum Beach. The applicant acknowledges that the Notice of Intent to Revoke was received by Ms. Sampson on August 4, 2008.

[8] On August 18, 2008, the applicant brought this application. On November 3, 2008, the applicant filed a notice of objection (the "Notice of Objection") to the Notice of Intent to Revoke.

Declaration that the Notice of Intent to Revoke is a nullity

[9] The applicant requests this Court to declare that the Notice of Intent to Revoke is of no force and effect because it was allegedly sent to the wrong address. The applicant does not dispute that it received the Notice of Intent to Revoke. Indeed, the applicant has brought this application and has filed the Notice of Objection as a result of its having received the Notice of Intent to Revoke. However, the applicant contends that the Notice of Intent to Revoke is a nullity because it was sent to the applicant at the address of Ms. Sampson, in Qualicum Beach, and not to the street address in Gabriola that was specified in its 2004 and 2005 information returns. In support of that contention, the applicant refers to the decision of this Court in *Canada v. 236130 British Columbia Ltd.*, 2006 FCA 352.

[10] In our view, that case is distinguishable from the present case. In that case, notices of reassessment were twice sent by ordinary mail to an incorrect address. The reassessments that were sent in the first mailing were returned to the Minister. The reassessments sent in the second mailing were ultimately received by the taxpayer, but not within the time period prescribed in the ITA. However, at no time did the taxpayer acknowledge receipt of the reassessments or otherwise respond to them. The issue in the case was whether the Minister had proved that the reassessments had been mailed to the taxpayer within the statutory period. The taxpayer denied receiving them and the evidence demonstrated that they had been mailed twice to an incorrect address.

[11] In the instant circumstances, the applicant has not only received the Notice of Intent to Revoke but has responded to it twice: by this application and by the Notice of Objection. Having acknowledged receipt of the Notice of Intent to Revoke, the applicant cannot now deny the validity of such receipt, especially since the applicant has not demonstrated that it has suffered any harm as a result of the Notice of Intent to Revoke having been sent to Ms. Sampson's address. The record shows that the Minister did not publish the Notice of Intent to Revoke in the *Canada Gazette* at the end of the 30 day period after July 18, 2008. Indeed, to this date, the Minister has refrained from publishing it.

[12] Accordingly, we are of the view that the Notice of Intent to Revoke was not invalid on the ground that it was mailed to an incorrect address. Whether a different conclusion would have been reached if the Notice of Intent to Revoke had been returned to the Minister and its receipt denied by the applicant is a question that need not be considered in this application.

Paragraph 168(2)(b) order

[13] The parties proceeded on the basis that the application to extend the 30 day period referred to in paragraph 168(2)(b) of the ITA must be considered in light of the tripartite test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, citing as authority the jurisprudence of this Court in *International Charity Association Network v. Canada (Minister of National Revenue)*, 2008 FCA 62, *Choson Kallah Fund of Toronto v. The Minister of National Revenue*, 2008 FCA 311, and *Millennium Charitable Foundation v. Minister of National Revenue*, 2008 FCA 414.

[14] The elements of the tripartite test, which all must be met before the application can succeed, are:

a) there is a serious issue to be tried;

b) the applicant will suffer irreparable harm if the requested order is not granted; and

c) the balance of convenience favours granting the order.

[15] We are satisfied that the relatively low threshold with respect to the first element of the test has been met. Indeed, the Crown has conceded this issue.

[16] The second element of the test was described by Sopinka and Cory JJ. in *RJR-MacDonald*, at page 341, as follows:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the

> eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[17] We are not persuaded that the applicant has met this element of the test. The applicant has failed to provide any evidence to demonstrate that it will suffer irreparable harm if the revocation of its status as a registered charity is allowed to proceed. While the applicant's memorandum of fact and law correctly asserts that reputational harm is an example of irreparable harm, the applicant has not provided any evidence of any actual harm, reputational or otherwise, that it will suffer if the requested order is not granted. As stated by this Court in *Haché v. Canada*, 2006 FCA 424, at paragraph 11:

> The moving parties must demonstrate, on a balance of probabilities, that the harm that they would suffer is irreparable: *Halford v. Seed Hawk Inc., 2006 FCA 167* at paragraph 12. Mere assertions do not suffice. Irreparable harm cannot be inferred. It must be established by clear and compelling evidence: *A. Lassonde Inc. v. Island Oasis Canada Inc.*, [2001] 2 F.C. 568 at paragraph 20.

[18] The applicant further asserts that the financial effects of a revocation of its status as a registered charity would be dramatic. In our view, this assertion is similarly unsupported by any evidence.

[19] Because the applicant has failed to establish the irreparable harm element of the *RJR-MacDonald* test, it is unnecessary for us to consider the "balance of convenience" element of that test.

Declaration with respect to legal and accounting costs

[20] The applicant requests a declaration with respect to the treatment of certain costs and expenses that it may incur in responding to the Notice of Intent to Revoke. In effect, the applicant is asking this Court to provide the equivalent of an advance income tax ruling of the type that can be requested from the Canada Revenue Agency.

[21] If the applicant were to incur any such costs, the applicant would be at liberty to characterize them as it deems appropriate in filing its income tax returns for the applicable period or periods in respect of which such costs may be relevant. If the Minister were to disagree with the applicant's characterization of such costs, it would appear to be open to the applicant to object to any assessment or reassessment that the Minister may raise and to have recourse to the Tax Court of Canada in the event that the Minister should confirm any such assessment or reassessment.

[22] We have not been persuaded that the Court has jurisdiction to make a declaration of the kind that the applicant seeks. This conclusion is consistent with the *dicta* of this Court in *Harris v. Canada (C.A.)*, [2000] 4 F.C. 37, where Sexton J.A., at paragraph [30], stated:

> I agree with the Attorney General's submission that one cannot bring in isolation an action for a declaration on a mere interpretation of the Act…

[23] Counsel for the applicant argued that the basis for this Court's jurisdiction to consider this portion of the application arises out of his assertion that there is a reasonable apprehension that the Minister will be biased when he considers, in the course of the normal assessment process, the

appropriateness of the treatment of the costs and expenses in question that the applicant may adopt in its future income tax returns. This matter was not raised by the applicant in its Notice of Application or its memorandum of fact and law. Accordingly, it is a point that this Court will not entertain.

[24] Finally, the absence of jurisprudential guidance with respect to the treatment of the costs and expenses that may be incurred in responding to the Notice of Intent to Revoke is not a basis for this Court to exercise a jurisdiction that it does not have.

Disposition

[25] For the foregoing reasons, the application will be dismissed, with costs.

"C. Michael Ryer"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DELIVERED FROM THE BENCH BY:	RYER J.A.

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