Docket: 2008-1643(IT)G

BETWEEN:

DOLORES ROMANUK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on January 24, 2012 at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	David W. Chodikoff Patrick Déziel
Counsel for the Respondent:	Bobby Sood Craig Maw

ORDER

Upon consideration of a Motion by the Appellant for an order granting her leave to file a Second Amended Notice of Appeal in which to plead, as a new issue, that there has been a violation of the *Canadian Charter of Rights and Freedoms,* the Motion is dismissed with costs to the Respondent in any event of the cause.

Signed at Ottawa, Canada, this 21st day of February 2012.

"V.A. Miller"

V.A. Miller J.

Citation: 2012TCC58
Date: 20120221
Docket: 2008-1643(IT)G

BETWEEN:

DOLORES ROMANUK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

V.A. Miller J.

[1] This is a motion by the Appellant pursuant to section 54 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*"). She seeks an order granting her leave to file a Second Amended Notice of Appeal ("proposed pleadings") in which she raises, as a new issue, that there has been a violation of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

[2] The appeal concerns the disallowance of losses claimed by the Appellant in the 1995, 1996 and 1997 taxation years from a software tax shelter investment called Softcom Solutions – Partnership ("SSP").

[3] The additional facts pled by the Appellant in the proposed pleadings are:

> 4. John Haisanuk, a CRA auditor (the "**Auditor**") began communicating with the partnership in 1995 respecting the Partnership's application for a tax shelter number.
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> 32. On October 31, 1996, the Auditor wrote to the Partnership to notify the partnership of an upcoming audit.

33. In December, 1996, the Auditor began communicating with Special Investigations in Calgary and began providing Special Investigations with documents pertaining to the Partnership.

34. In January, 1997, the Auditor attended at the offices of the Partnership, conducted interviews with various partners and was provided with copies of the Software.

35. On April 8, 1997, the Auditor informed Special Investigations in Calgary that he intended to send the file to Special Investigations in Mississauga.

36. On May 30, 1997, the Auditor met with members of the Partnership at the office of David Muttart, who at the time was counsel for the Partnership. During this meeting, the Auditor made further requests for documents and information.

37. The Auditor referred the file to Special Investigations in June, 1997.

38. In August, 1997, Wally Dove sent a letter to the Auditor attaching the documentation requested by the Auditor at the May 30, 1997 meeting.

39. On September 9, 1997, the Partnership was informed that the file had been referred to Special Investigations.

[4] The new issues raised by the Appellant in the proposed pleadings are:

(a) Whether the Canada Revenue Agency ("CRA") used its audit powers under the *Income Tax Act* (the "*Act*") to compel the Partnership to provide information after the audit had become a criminal investigation in contravention of the *Charter*.

(b) If the answer to the first issue is yes, whether the evidence obtained in contravention of the *Charter* should be excluded pursuant to section 24 of the Charter; and, the assessments vacated.

[5] The materials presented to the court on this motion consisted of the Appellant's affidavit which was filed in support of the motion, a transcript of the Appellant's cross examination with respect to her affidavit and counsels' oral and written argument. Attached to the transcript were two letters which had been sent to SSP by the audit section of CRA. The first letter dated October 31, 1996 was sent to the attention of Wally Dove and in it the auditor requested all the books and records of SSP. The second letter dated April 9, 1997 was sent to the attention of Sonya Zenz and it was a 30 day proposal letter.

[6] The CRA performed a field audit of SSP's books and records on January 14, 15 and 16, 1997. The Appellant was not present during the audit. She was neither

questioned by the auditor nor did she give any information to him. I have inferred from the transcript of the cross examination on her affidavit that the Appellant was not consulted by her partners who prepared a response to the auditor's letter of October 31, 1996.

[7] Counsel for the Appellant did not state that the Appellant attended the meeting with the auditor on May 30, 1997 and I have concluded that she did not.

[8] Wally Dove and Sonya Zenz were charged criminally but the charges were stayed because of delay.

[9] On a motion to amend pleadings, it is open to the motions judge to evaluate the fundamentals of the proposed amendment to ensure that the amendment conforms to the minimum requirements of pleadings under the *Rules*. A proposed amendment to a pleading which, on its face, does not raise a cause of action, should not be allowed. See *Canada v. Fluevog*, 2011 FCA 338.

[10] I have reviewed all the material presented and I conclude that this motion must be dismissed because the proposed issue does not disclose a reasonable cause of action.

[11] The Appellant has claimed a breach of a *Charter* right but she does not identify the right in question and she does not claim that it was any of her personal rights which were breached. The rights guaranteed by the *Charter* are personal rights. (See paragraph 45 of *R. v. Edwards*, [1996] 1 S.C.R. 128). If there was a breach of a *Charter* right, then that right belonged to another individual who may have standing to bring the issue to Court.

[12] It is the Appellant's position that CRA used its audit powers to compel SSP to provide information after CRA had commenced a criminal investigation and that it was this conduct which caused a *Charter* breach.

[13] The Appellant's position was not supported by the material presented at the hearing. That material disclosed that SSP was never compelled to provide information. SSP was never served with a search warrant or a Requirement to Provide Documents or Information pursuant to section 231.2 of the *Income Tax Act*. The CRA sent two letters to SSP and those letters did not amount to coercion or compulsion. They were the normal letters sent to a taxpayer in the course of an audit by CRA. The letter dated October 31, 1996 requested the books and records of SSP. In the letter dated April 9, 1997, the CRA informed the partners of SSP of the outcome of its audit; it proposed to reassess all the partners of SSP; and, it gave the partners 30 days to make any representations regarding the proposed reassessments.

[14] According to the new facts in the proposed pleading, Wally Dove, a partner in SSP, sent information to CRA after it had referred the file for criminal investigations. It is my opinion that this conduct may be a factor when determining penal liability but it is not a factor when considering the civil liability of the Appellant. My opinion is supported by the decision of the Supreme Court of Canada in *R. v. Jarvis*, [2002] 3 S.C.R. 757 where they distinguished between the CRA's audit and investigation functions. That Court wrote:

> 88 In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.
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> 89 To begin with, the mere existence of reasonable grounds that an offence may have occurred is by itself insufficient to support the conclusion that the predominant purpose of an inquiry is the determination of penal liability. Even where reasonable grounds to suspect an offence exist, it will not always be true that the predominant purpose of an inquiry is the determination of penal liability. In this regard, courts must guard against creating procedural shackles on regulatory officials; it would be undesirable to "force the regulatory hand" by removing the possibility of seeking the lesser administrative penalties on every occasion in which reasonable grounds existed of more culpable conduct. This point was clearly stated in *McKinlay Transport*, *supra*, at p. 648, where Wilson J. wrote: "The Minister must be capable of exercising these [broad supervisory] powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act." While reasonable grounds indeed constitute a necessary condition for the issuance of a search warrant to further a criminal investigation (s. 231.3 of the ITA; *Criminal Code*, s. 487), and might in certain cases serve to indicate that the audit powers were misused, their existence is not a sufficient indicator that the CCRA is conducting a *de facto* investigation. In most cases, if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered.
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> 90 All the more, the test cannot be set at the level of mere suspicion that an offence has occurred. Auditors may, during the course of their inspections, suspect all manner of taxpayer wrongdoing, but it certainly cannot be the case that, from the moment such suspicion is formed, an investigation has begun. On what evidence could investigators ever obtain a search warrant if the whiff of suspicion were enough to freeze auditorial fact-finding? The state interest in

> prosecuting those who wilfully evade their taxes is of great importance, and we should be careful to avoid rendering nugatory the state's ability to investigate and obtain evidence of these offences.

[15] In *R. v. Jarvis (supra)* the Supreme Court of Canada also confirmed that the CRA was entitled to conduct parallel criminal investigations and civil audits. They wrote:

> 97 The predominant purpose test does not thereby prevent the CCRA from conducting parallel criminal investigations and administrative audits. The fact that the CCRA is investigating a taxpayer's penal liability, does not preclude the possibility of a simultaneous investigation, the predominant purpose of which is a determination of the same taxpayer's tax liability. However, if an investigation into penal liability is subsequently commenced, the investigators can avail themselves of that information obtained pursuant to the audit powers prior to the commencement of the criminal investigation, but not with respect to information obtained pursuant to such powers subsequent to the commencement of the investigation into penal liability. This is no less true where the investigations into penal liability and tax liability are in respect of the same tax period. So long as the predominant purpose of the parallel investigation actually is the determination of tax liability, the auditors may continue to resort to ss. 231.1(1) and 231.2(1).
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> …
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> 103 …In this respect, as previously stated, it is clear that, although an investigation has been commenced, the audit powers may continue to be used, though the results of the audit cannot be used in pursuance of the investigation or prosecution.

[16] I have concluded from the material before me that the predominant purpose of the civil audit was to assess the Appellant's civil tax liability. The Appellant has not alleged that she was the subject of a criminal investigation and she was never charged with an offence. The proposed amendments do not allege that penal liability was the predominant purpose of the audit.

[17] For all of these reasons, the motion is dismissed with costs to the Respondent in any event of the cause.

Signed at Ottawa, Canada, this 21st day of February 2012.

"V.A. Miller"

V.A. Miller J.

CITATION:	2012TCC58
COURT FILE NO.:	2008-1643(IT)G
STYLE OF CAUSE:	DOLORES ROMANUK AND THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 24, 2012
REASONS FOR ORDER BY:	The Honourable Justice Valerie Miller
DATE OF ORDER:	February 21, 2012

APPEARANCES:

Counsel for the Appellant:	David W. Chodikoff Patrick Déziel
Counsel for the Respondent:	Bobby Sood Craig Maw

COUNSEL OF RECORD:

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