Federal Court Cour fédérale

Date: 20150909

Docket: T-410-13

Citation: 2015 FC 1050

Toronto, Ontario, September 9, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

RRSP TRUST OF JAMES T. GRENON

Respondent

and

JAMES T. GRENON

Intervener

ORDER AND REASONS

I. Introduction

[1] This is a Motion for reconsideration of an Order made by Justice Barnes of this Court on March 7, 2013, wherein he granted an *ex parte* motion brought by the Minister of National Revenue [MNR], pursuant to section 225.2(2) of the *Income Tax Act* (RSC, 1985, c 1 (5th Supp) [ITA]. This kind of order is commonly referred to as a jeopardy order, since it is issued when a judge is 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 jeopardized by a delay in the collection of that amount. The Order allowed the MNR to take collection actions pursuant to section 225.1(1)(a) to (g) of the *ITA* with respect to the income tax debt of the Respondent taxpayer, CIBC RRSP Trust [Respondent, Trust]. CIBC Trust Corporation [Trustee] serves as the trustee for the Trust, while the Trust's annuitant, Mr. Grenon, is an intervener in this matter.

[2] On December 4, 2013, Prothonotary Lafrenière granted Mr. Grenon leave to intervene in the present Motion for reconsideration, and "generally have rights as though he were a party to the motion" (Respondent's Motion Record [RMR], p. 2).

[3] Further directions were provided on December 8, 2014, when Prothonotary Lafrenière specified the evidence upon which this Motion was to proceed, which included evidence from a separate motion initiated by Mr. Grenon to set aside a jeopardy order made against him personally (referred to by Prothonotary Lafrenière as the 411 matter, based on the docket number assigned to it). It is worth noting that the jeopardy order made against Mr. Grenon in the 411 matter was vacated upon consent of the MNR by Justice Mactavish on August 12, 2014 (T-411-13).

II. Jeopardy Orders

[4] As a general rule, the MNR is restricted from engaging in collection activities under section 225.1; such as commencing legal proceedings, requiring an institution or person to make payments or requiring a person to turn over money; until 90 days after a notice of assessment has been sent (section 225.1(1.1)(c)). These restrictions on collection remain in place if the taxpayer serves a notice of objection, or appeals the assessment to the Tax Court of Canada (sections 225.1(2)-225.1(3)).

[5] *Ex parte* jeopardy orders are extraordinary remedies, meant to ensure that the taxpayer does not waste, liquidate or otherwise transfer assets during the legal process so as to jeopardize collection of the MNR's debt (*Services ML Marengère Inc (Re)* [*Marengère*], 1999 CanLII 9004 at para 63; *Canada (National Revenue) v Patry*, 2012 FC 977 at para 6). Given the absence of the taxpayer's submissions before the judge when an *ex parte* application for a jeopardy order is made, when seeking such an order, the Crown must make the application in good faith and ensure full and frank disclosure that is reasonable in the circumstances (*Marengère* at para 63; *Canada (National Revenue) v Accredited Home Lenders Canada Inc*, 2012 FC 461 at para 9 [Home Lenders]). "Full and frank disclosure" includes an obligation on the Crown to point the Court to the relevant jurisprudence; to draw to the attention of the Court all facts in issue, even those which it considers unhelpful or inconvenient; and to disclose reasonably foreseeable weaknesses in its case (*Canada (National Revenue) v Robarts*, 2010 FC 875 at para 35).

[6] Once an *ex parte* jeopardy order has been issued, the taxpayer has 30 days in which to initiate a review by a Federal Court judge (sections 225.2(8)-225.2(9)).

[7] It is clear that before a judge can issue an *ex parte* jeopardy order, the MNR must demonstrate reasonable grounds to believe that collection of the tax debt would be jeopardized by a delay in its enforcement. Indeed, the *ITA* explicitly provides as much:

> 225.2(2) Notwithstanding section 225.1, where, on ex parte application by the Minister, a judge is 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 jeopardized by a delay in the collection of that amount, the judge shall, on such terms as the judge considers reasonable in the circumstances, authorize the Minister to take forthwith any of the actions described in paragraphs 225.1(1)(a) to 225.1(1)(g) with respect to the amount. [Emphasis added]

[8] The provisions pertaining to the review of the *ex parte* jeopardy order, however, make no mention of the onus the MNR must meet in light of the submissions of the taxpayer.

> 225.2(8) Where a judge of a court has granted an authorization under this section in respect of a taxpayer, the taxpayer may, on 6 clear days notice to the Deputy Attorney General of Canada, apply to a judge of the court to review the authorization.
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> …..
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> (11) On an application under subsection 225.2(8), the judge shall determine the question summarily and may confirm, set aside or vary the authorization and make such other order as the judge considers appropriate.

[9] In my view, there is some ambiguity in the jurisprudence as to what the burden of proof is once an *ex parte* jeopardy order has been issued and a motion is brought to have it reconsidered. In other words, upon review, once a taxpayer establishes reasonable grounds to doubt the test has been met, must the MNR demonstrate reasonable grounds to believe collection would be jeopardized by a delay, or must she prove on a balance of probabilities that collection would be so jeopardized?

[10] In some cases, the onus upon review appears to be the same one the MNR must meet to obtain the *ex parte* jeopardy order ─ reasonable grounds to believe collection would be jeopardized by the delay. For example, Justice Gauthier (as she then was) stated in *Delaunière (Re)*, 2007 FC 636 at para 3, that "[t]he Court must decide whether or not the totality of evidence before it (the original evidence submitted to Noël J. and additional evidence submitted by the two parties for the present application) establishes that there are reasonable grounds to believe that the collection of the amounts assessed in respect of the debtors would be jeopardized by a delay in the collection of those amounts". See also *Deschênes (Re)*, 2013 FC 87 at para 22; *Canada v Proulx*, 2011 FC 1231 at para 43.

[11] However, it appears that other cases impose a higher threshold upon review – that once the taxpayer establishes reasonable grounds to doubt that the test for an *ex parte* jeopardy order has been met, the MNR is then required to prove on a balance of probabilities that collection will be delayed. In the words of Justice Near (as he then was) in *Canada (National Revenue) v Patry*, 2012 FC 977 at para 8:

> [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. <u>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</u>. Also relevant is whether the Minister made full and frank disclosure on its original ex parte motion (see Services ML Marengère, above). [Emphasis added]

See also: *Services Marengère* at para 63; *Tassone v Canada (National Revenue)*, 2013 FC 1100 at para 16.

[12] When interpreting the *Income Tax Act*, Courts must minimize judicial innovation in the absence of clear statutory language, as the creation of new tax rules is matter best left to Parliament (*Ludco Enterprises Ltd v Canada*, 2001 SCC 62 at para 38). In my view, it would seem inconsistent with this approach that the onus on the Minister would ratchet up automatically upon review, without any legislative instruction.

[13] A lower threshold also better aligns with the preventative purpose of the section, as section 225.2 is meant to ensure that the taxpayer's assets don't "vanish into thin air", making the eventual collection of the Minister's debt a practical impossibility. It should be noted, however, that mere suspicion or concern does not constitute reasonable grounds to believe that collection would be delayed (*Marengère* at para 63).

[14] This said, I do not need to conclusively decide the onus for a jeopardy order upon review at this point in time. There were limited submissions on this topic at the hearing, and more importantly, for reasons I shall explain, the MNR would not meet her burden under either the "balance of probabilities" or the "reasonable grounds to believe" thresholds in this case.

[15] Once a jeopardy order has been confirmed, set aside or varied by a reviewing judge, that decision is final and is not subject to further appeal (ss.225.2(11)-225.2(13); *Tennina v Canada (National Revenue)*, 2010 FCA 25 at para 3).

III. Facts

[16] Mr. Grenon is a successful Canadian investor, now resident in New Zealand. He is the annuitant of the self-directed Trust, which is a Canadian taxpayer pursuant to section 104(2) of the *ITA,* and can be assessed as such. CIBC Trust Corporation, as the trustee of the RRSP Trust, is subject to certain duties and obligations under the *ITA*, including being jointly liable with the Trust for outstanding taxes, to the extent that the Trust property is in CIBC Trust's possession or control (section 159(1)(a)).

[17] On February 2012, Mr. Grenon and his partner were approved for permanent residence visas by the Government of New Zealand, the news of which he shared with his friends and business associates. He put his Calgary home up for sale, and moved to New Zealand in October 2012.

[18] On April 24, 2012 the Canada Revenue Agency [CRA] sent Mr. Grenon a proposal letter seeking further input from him regarding income generated from some of the investments made in the Trust (Intervener's Motion Record [IMR], Vol II, Tab 6, p. 14). CRA's proposed reassessment against the Trust was in the neighbourhood of $157 million.

[19] Mr. Grenon received a second proposal letter dated February 8, 2013 which modified the reassessment of the Trust slightly, to $167 million (IMR, Vol II, Tab 6, pp. 16-17). Around the end of February 2013, the CRA issued reassessments for unpaid tax debt against the Trust for $283 million and against Mr. Grenon personally for $205 million (IMR, Vol II, Tab 6, p. 17).

The value of the funds in the Trust as of October 31, 2013, as agreed by the parties, was $204 million (IMR, Vol II, Tab 7, p. 2).

[20] The MNR was granted the *ex parte* Jeopardy Order at issue on March 7, 2013. The evidence before Justice Barnes, particularly an affidavit from a Resource Officer with CRA's Aggressive Tax Planning Team in Calgary, described several transactions which in the officer's view indicated that the collection of the debt was in jeopardy.

[21] For example, in October 2012, Mr. Grenon transferred funds out of the Trust into another RRSP. In February 2013, Mr. Grenon requested approximately $55 million of those funds to be shifted offshore to an account in Auckland, New Zealand (IMR, Vol II, Tab 6, pp. 10-12; IMR, Vol III, Tab 9, pp. 16-17). Also in February 2013, Mr. Grenon requested the transfer of nearly $15 million out of the Trust into a high interest account (IMR, Vol I, Tab 1, p. 3).

[22] Mr. Grenon, in this motion, argues that concerns relating to collection are not supported by the evidence. For instance, he argues that the $55 million transfer mentioned above was made for entirely legitimate purposes – (i) to deregister the RRSP assets prior to a new tax treaty coming into force between Canada and New Zealand that would raise the withholding tax rate from 15% to 25%; (ii) to have cash to pay the applicable withholding taxes upon deregistration; and (iii) comply with RRSP rules requiring the withdrawal of certain kinds of income.

IV. Analysis

[23] The Respondent (Trust) takes no position on the merits of this Motion for reconsideration. The Intervener, Mr. Grenon, who has the rights of a party in this case, argues that the jeopardy order is unnecessary upon a comprehensive examination of the facts. I agree.

[24] As argued at the hearing, what the MNR observed when the application for the *ex parte* jeopardy order was filed were substantial assets were being withdrawn in a relatively short time frame from the Trust, some of it moving to overseas accounts.

[25] Accompanying these transfers was evidence that Mr. Grenon's driver's license had been cancelled because he no longer lived in Canada and his Canadian home had been sold. When jeopardy orders have been upheld, the factual circumstances frequently contain an element of criminality or otherwise questionable or nefarious behaviour. For example, this Court has shown concern when the facts point to allegations of fraud (*Canada (Minister of National Revenue) v Thériault-Sabourin*, 2003 FCT 124 at para 15), connection to organized criminal activity (*Canada v Laframboise*, [1986] 3 FC 521 at para 9) and history of non-compliance with tax authorities (*Canada (Customs and Revenue Agency) v 144 945 Canada Inc*, 2003 FCT 730 at para 18).

[26] While the transfers from the Trust and the relocation of Mr. Grenon may have provided an initial impression that the Trust had the potential to be hollowed out before an opportunity for collection arose, upon hearing submissions from all the parties and reviewing their evidence, I do not believe that the MNR has shown reasonable grounds to believe that the assets of the taxpayer are currently in danger of debt collection.

[27] Informing my view is not only that the Trustee would be jointly liable if the assets of the taxpayer were distributed such that the assets left would be less than the tax debt (section 159(1)(a)), but also that pursuant to section 159(2), the Trustee would need to obtain a "clearance certificate" prior to distributing assets for a tax debt which it may be reasonably expected to become liable:

> 159(2). Every legal representative (other than a trustee in bankruptcy) of a taxpayer shall, before distributing to one or more persons any property in the possession or control of the legal representative acting in that capacity, obtain a certificate from the Minister, by applying for one in prescribed form, certifying that all amounts
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> (a) for which the taxpayer is or can reasonably be expected to become liable under this Act at or before the time the distribution is made, and
>
> (b) for the payment of which the legal representative is or can reasonably be expected to become liable in that capacity

[28] If the Trustee does not obtain a clearance certificate, section 159(3)(a) dictates that it would become personally liable for the amounts owing to the extent of the value of the distributed property:

> 159(3). If a legal representative (other than a trustee in bankruptcy) of a taxpayer distributes to one or more persons property in the possession or control of the legal representative, acting in that capacity, without obtaining a certificate under subsection (2) in respect of the amounts referred to in that subsection,
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> (a) the legal representative is personally liable for the payment of those amounts to the extent of the value of the property distributed;

[29] As a result, both the Trust and its Trustee have particularly strong compliance and monetary incentives going forward to refrain from distributing the assets of the taxpayer in a

manner which would hinder debt collection by the MNR. Indeed, the $55 million and $15 million transactions of concern noted above were both requests received by the Trust *prior* to the issuance of CRA's reassessments (IMR, Vol II, Tab 6, pp. 11, 16).

[30] The evidence before me does not indicate that either the Trust or Trustee have been failing to comply with their respective duties under the *ITA* thus far (IMR, Vol II, Tab 8, p. 28). While the parties differ on whether the correctness of CRA reassessments are a relevant consideration to whether the jeopardy order is warranted, I do not need to address this issue for the reasons above.

[31] Consequently, I find that the MNR has not demonstrated reasonable grounds to believe that the collection of its debt against the taxpayer would be threatened. I hereby allow the Motion and set aside the Jeopardy Order of March 7, 2013.

ORDER

THIS COURT ORDERS that

1. This motion is allowed.

2. The Jeopardy Order of March 7, 2013 is set aside.

3. Costs are awarded to both the Respondent and the Intervener.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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