

Federal Court



Cour fédérale

Date: 20161129

Docket: T-283-13

Citation: 2016 FC 1322

Ottawa, Ontario, November 29, 2016

PRESENT: CHIEF JUSTICE CRAMPTON

BETWEEN:

MINISTER OF NATIONAL REVENUE

**Applicant
(Respondent on Motion)**

and

KPMG LLP

**Respondent
(Applicant on Motion)**

ORDER AND REASONS

[1] In this Motion, which is being dealt with in writing, KPMG LLP seeks to quash or cancel an Order of Justice Noël dated February 18, 2013. That Order authorized the Minister of National Revenue to impose on KPMG a requirement pursuant to s. 231.2(3) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp.) [the Act] to disclose confidential information relating to certain of its unnamed clients, including their identities and documentation relating to their participation in a tax structure known as the Offshore Company Structure [the Unnamed Persons Requirement].

[2] KPMG submits that the Unnamed Persons Requirement should be quashed or cancelled because Rule 208 of the Chartered Professional Accountants of Ontario's *Code of Professional Conduct* [the Code] provides that, subject to listed exceptions, "[a] member or firm shall not disclose any confidential information concerning the affairs of any client, former client, employer or former employer." I understand that KPMG is subject to a similar rule in several other provinces.

[3] The Minister responds that KPMG's duty of confidentiality, including pursuant to Rule 208 of the Code, does not prevent the Minister from requiring and obtaining information that is described in an Order issued by this Court pursuant to subsection 231.2(3). I agree.

[4] KPMG does not appear to take issue with the Minister's position on this matter. However, it invites the Court to exercise its discretion to grant the relief that it has requested, due to the existence of its obligation under Rule 208 (and similar rules that exist elsewhere in Canada), and because subsection 231.2(3) was amended effective June 26, 2013, to eliminate the Court's ability to issue orders under that provision on an *ex-parte* basis. According to KPMG, the Unnamed Persons Requirement appears to be one of the last, if not the last, such requirement issued under subsection 231.2(3), prior to its amendment in 2013.

[5] In support of its request, KPMG notes that Commentary 2 to Rule 208 recognizes that "[t]he duty of confidentiality does not excuse a member or firm from complying with a legal requirement to disclose information." KPMG further notes that Commentary 2 proceeds to state that "courts have held that a member or firm faced with a subpoena or other request to disclose

information should be aware of the member's obligation to bring to the attention of the court or other authority the member's duty of confidentiality to the client," and that, ultimately, it is for the court to determine "whether the confidentiality of the information should be maintained."

[6] I am not persuaded that this is an appropriate case in which to grant the relief requested by KPMG.

[7] One of the listed exceptions to the general confidentiality principle set out in Rule 208 of the Code permits disclosure of confidential information in the absence of client consent when "such information is required to be disclosed by order of lawful authority" (Rule 208.1(c)).

[8] Justice Noël's Order dated February 18, 2013, was such an order of lawful authority. KPMG has not suggested anything to the contrary and has not identified any legal principle or jurisprudence that might support the proposition that Rule 208 provides a sound basis for this Court to exercise its discretion to quash or cancel an order issued pursuant to a statute validly enacted by Parliament.

[9] In my view, the language of s. 231.2(3) of the Act is clear and overrides the general confidentiality rule imposed by Rule 208 of the Code. The mere fact that Rule 208, and similar rules in other provinces, exist would not ordinarily provide a sufficient basis to warrant the exercise of the Court's discretion to cancel or set aside an order validly issued pursuant to s. 231.2(3). There is nothing in the particular facts of this case that would warrant the exercise of such discretion. Indeed, cancelling or varying Justice Noël's Order based on KPMG's concerns

regarding confidentiality would appear to be inconsistent with Parliament's intent in enacting s. 231.2 (*R. v. McKinlay Transport Ltd.*, [1990] 1 SCR 627, at paras 36-38; *MNR v Sand Exploration Ltd.*, [1995] FCJ No 780 (QL), at paras 17-18 (TD)).

[10] As KPMG has advised its unnamed clients, and as recognized by the Minister, any claim of solicitor-client privilege that they may wish to make can be raised at the time of KPMG's compliance with the Unnamed Person's Requirement.

[11] The fact that s. 231.2(3) has been amended to remove the Minister's ability to seek the information described therein on *ex-parte* basis does not change the foregoing analysis.

[12] For the foregoing reasons, this motion is dismissed with costs.

ORDER

THIS COURT ORDERS THAT:

1. KPMG's Motion to cancel or vary Justice Noel's Order dated February 18, 2013, is dismissed with costs.

"Paul S. Crampton"

Chief Justice

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-283-13

STYLE OF CAUSE: MINISTER OF NATIONAL REVENUE V KPMG LLP

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: CRAMPTON C.J.

DATED: NOVEMBER 29, 2016

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