

Federal Court



Cour fédérale

Date: 20210319

**Dockets: T-389-21
T-392-21
T-393-21**

Citation: 2021 FC 242

Ottawa, Ontario, March 19, 2021

PRESENT: Mr. Justice Pentney

Docket: T-389-21

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

2276230 ONTARIO INC.

Respondent

Docket: T-392-21

AND BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

2417916 ONTARIO INC.

Respondent

Docket: T-393-21

AND BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

2466778 ONTARIO INC.

Respondent

ORDER AND REASONS

UPON the Minister of National Revenue (the Applicant) bringing a summary application seeking an Order that the Respondents provide the information or documents requested in the course of its audit;

CONSIDERING:

[1] The Applicant launched audits of the three Respondent companies, 2276230 Ontario Inc. (“227”), 2417916 Ontario Inc. (“241”), and 2466778 Ontario Inc. (“246”) in late June 2020. These audits were classified as “high risk” because the Applicant had identified substantial amounts of taxes owing by the Respondents for prior tax years, relating to an alleged scrap gold carousel scheme. It should be noted at the outset that the Respondents dispute this, and have launched a series of objections to these assessments.

[2] By letters dated July 9, 2020 (relating to 241), and July 14, 2020 (relating to 227 and 246), an auditor employed by the Canada Revenue Agency (CRA) informed the Respondents that the audits had commenced and requested that they provide certain business information, detailed below, pursuant to subsection 288(1) of the *Excise Tax Act*, RSC, 1985, c E-15 [ETA]. The letters fixed deadlines for the Respondents to provide the requested information: 241 was asked to provide the information on or before August 10, 2020, and 227 and 246 were asked to respond on or before August 14, 2020.

[3] Following a series of exchanges between CRA officials as well as counsel with the Department of Justice, a number of extensions were granted to the Respondents, the last of which expired on January 25, 2021. While the Respondents have provided some of the requested information, a number of items remain outstanding.

[4] The Applicant therefore initiated a summary application pursuant to section 289.1 of the *ETA*, seeking an order that the Respondents provide the missing information. The matters were set down for hearing on March 16, 2021. The Applicant brought three separate applications relating to each of the named corporate Respondents. In light of the connection between the matters, these applications were heard together and these reasons address all three applications. A copy of the Order and Reasons will be placed in each file.

[5] Having reviewed the record, including the evidence filed by the Applicant and the Respondents, as well as their submissions, I am granting the Applicant's application, for the reasons set out below.

[6] Section 289.1 of the *ETA* provides that the Minister may bring a summary application seeking an order that a person provide any information sought by the Minister under sections 288 or 289, if the Court is satisfied that:

- a) the person was required under sections 288 or 289 to provide any access, assistance, information or document;
- b) the person did not provide the access, assistance, information or document; and
- c) the information or document is not protected from disclosure by solicitor-client privilege.

[7] There is no dispute between the parties that the first and third criteria are met in this case: the Respondents were required to provide the information requested under section 288 of the *ETA*, and no claim of solicitor-client privilege has been advanced to explain the failure to provide the requested information.

[8] The dispute between the parties relates to the second criteria.

[9] The Applicant says that the Respondents have failed to provide the requested information and that no good reason has been provided to explain the delay, which, as of the date of the hearing, amounted to eight months. The Applicant argues that the Minister had good reason to pursue the audit, given that she has determined that there are taxes owing, and in view of the results of the prior assessments of the Respondents and the substantial taxes that are said to be owing (which involve sums in the millions of dollars in some instances).

[10] Despite the fact that the Applicant has granted the Respondents three separate extensions, the Respondents still have not provided all of the requested information. The Applicant notes that the periods covered by these audits are quite recent, and the requested information is

comprised of ordinary business records that the Respondents were required to keep and which should be readily available. To be more precise, the auditor's letters sought the following information:

- a) all electronic accounting data in an electronically readable format;
- b) a description of [the Respondents'] business activities;
- c) Articles of Incorporation and documentation to support any subsequent changes to the corporate officers and/or directors;
- d) shareholder information, including the share registry and any Director's Resolutions relating to the shares;
- e) an outline of [the Director's] duties and responsibilities in [the Respondents'] business operations;
- f) documentation to confirm the business location *i.e.*, a signed lease or purchase agreement;
- g) all books of original entry and records relating to accounts payable and accounts receivable;
- h) a business asset listing including invoices or documents for any capital assets that were acquired or disposed of during the Reporting Period;
- i) copies of [the Respondents'] GST/HST returns for the Reporting Period and all backup documentation;
- j) all bank statements, cancelled cheques, duplicate deposit slips, and deposit books for the Reporting Period;
- k) all credit card statements, line of credit statements and loan/mortgage documents, including the repayment schedules and the purpose of the loans;

- l) the corporate minute book;
- m) [the Respondents'] accountant's year end working papers;
- n) list of persons completing administration functions;
- o) a detailed listing of total sales and the GST/HST charged on those sales including all transactional details;
- p) all sales invoices and sales records;
- q) a detailed listing of the [Input Tax Credits (ITCs)] claimed including all transactional details;
- r) all purchase vouchers and expense invoices supporting ITCs;
- s) copies of all settlement reports and/or melt records for all scrap gold transactions; and
- t) any other records or working papers not listed that relate to the [Respondents'] business operations.

[11] As of the date of the hearing, out of the 60 separate requests for information directed to the three Respondents, the Applicant submits that 19 of the requests have not been answered at all, while 13 have only partially been answered. This includes certain items that are central to the audit being conducted, including copies of the GST/HST returns and backup documentation (item i), the detailed listing of total sales and the GST/HST charged on those sales (item o), as well as the detailed listing of the Input Tax Credits claimed (item q), all of which remain outstanding.

[12] The Applicant points out that the Respondents have repeatedly asked that the current audits be held in abeyance pending the resolution of the dispute regarding earlier assessments by the CRA in respect of different audit periods. In addition, the Respondents have sought blanket

and open-ended extensions to provide the requested information and documents, which have been refused. However, the Applicant notes that three extensions have been granted, and on several occasions the Respondents were advised that if specific reasons could be provided to explain the delay in obtaining certain of the requested documents, the Applicant was prepared to discuss a suitable time-frame for this information to be provided. The Applicant notes that the Respondents have not provided evidence to support any specific extensions of time relating to difficulties in obtaining particular documents.

[13] The Respondents argue that the application for a compliance order is premature. They say that they have continuously sought to comply with the various demands and obligations imposed on them by a series of CRA audits and reassessments, including the requests for information that form the basis for this proceeding. They argue that the CRA should have held these audits in abeyance pending the resolution of the dispute relating to the earlier reassessments, since they all involve the same basic issues but cover different dates. In the alternative, they say that the CRA could have expanded the scope of some of its previous audits, since the time-periods involved overlap to some degree, thus reducing their compliance burden.

[14] In relation to the delays in providing the requested information that is the subject of these proceedings, the Respondents say they have not refused to comply, and therefore, the second criteria in section 289.1 has not been met. Instead, the Respondents submit that they have made substantial efforts to comply and have made continuing disclosure of information as it became available, including further disclosures made shortly prior to the hearing.

[15] The Respondents point to the overall burden of protecting their rights by preparing and submitting detailed Notices of Objection relating to the earlier assessments, while also gathering

and providing the substantial volume of material requested by the CRA in relation to the current audits. The Respondents also submit they have experienced delays in obtaining various documents from their bank and their accountant because of the problems associated with the COVID-19 pandemic and the public health measures that have been put in place.

[16] The Respondents submit that the Applicant has not satisfied the second element of the test set out in section 289.1, and therefore its applications should be dismissed. The Respondents also argue that the Applicant's request amounts to an abuse of process, because its pursuit of these audits and its demands for information are oppressive given the financial impact on the Respondents, particularly considering the downturn in their business as a result of the COVID-19 pandemic and the various public health measures which have been imposed.

[17] I am not persuaded.

[18] First, I reject the Respondents' argument that section 289.1 can only be invoked where a taxpayer has "refused" to provide the requested information, because that does not reflect the specific wording of the provision. Although there are references in the jurisprudence to a compliance order being sought because the taxpayer has refused to comply, that is not technically what is required. Rather, the provision states that a compliance order may be granted if the Court "is satisfied that (a) the person was required under section 288 or 289 to provide the... information or document and did not do so..." (emphasis added). The French version confirms this interpretation: "s'il est convaincu de ce qui suit: (a) la personne n'a pas fourni [...] les renseignements ou les documents bien qu'elle en soit tenue par les articles 288 ou 289 [...]" (emphasis added).

[19] Second, although the Respondents have provided some of the information requested, they do not dispute that several of the requested elements remain outstanding. As noted in *Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67 [*Cameco*], prior cooperation in an audit is not itself a valid defence to a compliance order (para 39), nor is ongoing litigation relating to other matters (para 41). In addition, the fact that the requests may involve substantial documentation which the taxpayer may view as not proportional to the matter is not a relevant consideration (para 42). As stated by Justice Donald Rennie in that case:

[43] The Minister is entitled to determine the scope and manner of an audit, its course and direction; as noted in *BP Canada* at paragraph 82, “auditors must engage in extensive poke-and-check exercises, and are essentially left to their own initiative in verifying the amounts responded by the taxpayer.” Auditors are not bounded by strictures of pleadings or relevance. The course of an audit is directed by a multitude of factors, including the auditors’ experience, training, the state of the records, the tax history of the taxpayer as well as considerations external to the particular taxpayer.

[20] The Respondents point to their financial difficulties, but the evidence to support that claim is lacking. I agree with the Applicant that the Respondents’ affidavit evidence from the law clerk at their counsel’s firm should be given little weight in regard to this and other similar matters, both because it is very general and because it is replete with hearsay or double hearsay with no adequate explanation for why better evidence was not provided.

[21] It is not necessary for me to come to a determination of whether this is an appropriate case in which to draw an adverse inference against the Respondents under Rule 81(2) (see *Ottawa Athletic Club Inc (Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672 at paras 117-119; *O’Grady v Canada (Attorney General)*, 2016 FC 9 at paras 17-24). It is sufficient to note that I find the Respondents failed to provide the best evidence on their key arguments

relating to their financial circumstances, the efforts they made to try to obtain the requested information, and the difficulties they have experienced because of the restrictions associated with the current pandemic. The Respondents have also failed to explain why such evidence could not be provided (*Apotex Inc v Canada (Health)*, 2018 FCA 147 at paras 67-68). I will not strike the affidavit filed by the Respondents, but I do give it less weight on these questions because it is largely based on hearsay and it also includes many general statements rather than specific evidence about particular events from those directly involved.

[22] This is sufficient to dispose of most of the Respondents' submissions.

[23] I would simply add that to the extent that the Respondents say they have been delayed in obtaining documents because of the practical challenges associated with gaining access to any of their materials during the pandemic (including information from third parties such as their bank or accountant), their evidence is lacking on this point. The Respondents acknowledge that they have requested and received several extensions to provide the requested information. They do not challenge the Applicant's assertion that these are regular business records that they are required to keep. The Respondents' counsel has submitted some evidence of efforts that they took to obtain information from the bank and the accountant, but this relates to steps taken long after the initial requests were made by the CRA auditor, and this evidence is also lacking in any specific details about how or why the pandemic caused any delay.

[24] On this basis, I do not accept the Respondents' argument that the compliance order should be refused because the Applicant has failed to meet the second element of the test, or that they have established a valid reason for their delay in providing the requested information.

[25] The final matter to be addressed is the Respondents' submission that the Applicant's request for a compliance order amounts to an abuse of process. Although there were several grounds advanced in the Respondents' written submissions on this point, at the hearing the argument was narrowed. The Respondents now assert that the abuse of process arises because the Applicant persisted with its application for a compliance order despite being advised of the Respondents' efforts to comply (demonstrated by the further disclosure made shortly before the hearing). They further assert that the abuse of process arises because the Applicant is aware of the Respondents' difficulties in trying to gather and provide the requested information in the current proceedings while at the same time bearing the cost and burden of protecting their interests in relation to the earlier assessments by preparing and filing Notices of Objection.

[26] The Respondents point to the jurisprudence on abuse of process, which describes circumstances where government action has been found to be unfair, contrary to the interests of justice, or oppressive. They cite the description of the doctrine of abuse of process set out in the dissenting reasons of *R v Scott*, [1990] 3 SCR 979 at page 1006: "A judge has the power to stay or strike down proceedings which are oppressive or vexatious and violate the fundamental principles of justice underlying the community's sense of fair play and decency." They claim that this case falls into this category, and ask that the compliance order be denied.

[27] I am not persuaded.

[28] There is no evidence in the record to substantiate such a claim. As stated by the Federal Court of Appeal, "[w]hen pleading bad faith or abuse of power, it is not enough to assert, baldly, conclusory phrases such as 'deliberately or negligently,' 'callous disregard,' or 'by fraud and theft did steal'... Making bald, conclusory allegations without any evidentiary foundation is an

abuse of process...” (*Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 34 (citations omitted)).

[29] In this case, there is no evidence to suggest that the CRA audit has been launched for any purpose other than to ensure compliance with the *ETA*, or that the request for information was so wide, extraordinary, or unusual as to give rise to questions about its legitimacy in the context of the audit (assuming that such a claim could be brought, in the face of the wide authority granted to the Minister to set the timing, scope, and nature of the audit: see *Cameco; Saipem Luxembourg SA v Canada (Customs and Revenue Agency)*, 2005 FCA 218 at para 36).

[30] The Respondents argue that the application for a compliance order is abusive or oppressive because the Applicant is aware that they have spent considerable time and money dealing with previous matters, culminating in their filing of Notices of Objection and their statements that they intend to file appeals with the Tax Court of Canada relating to these matters.

[31] The evidence does not support this argument. The Notices of Objection were filed prior to the receipt of the letters relating to the current audits and the Respondents acknowledge that they have not yet filed any appeals with the Tax Court. While I accept that they have experienced a certain “compliance burden” relating to the various matters involving the reassessments and Notices of Objection, the evidence falls far short of establishing that the current audits amount to abuse or oppression. There is little information in the record about the size of the corporate Respondents, but I note that the Notices of Objection relate to prior assessments involving substantial sums of money.

[32] I find that the evidence does not support the Respondents' claim of abuse of process, and this argument is emphatically rejected. Nothing further needs to be said on this point.

THE COURT THEREFORE FINDS:

[33] For all of these reasons, the Applicant's applications for compliance orders under section 289.1 of the *ETA* is granted.

[34] The Respondents are directed to provide the information and documentation, which has not yet been provided to the Applicant, within 45 days of the date of this Order. The Applicant had originally requested that the Respondents be granted 20 days for the disclosure; the Respondents submitted that 90 days was more appropriate, in all the circumstances. Taking into account the time already elapsed, the fact that the Respondents have now had eight months notice of exactly what was requested, and the history of the matter until now, I have determined that 45 days is more than sufficient to permit the Respondents to make the necessary arrangements to deliver the remaining material.

[35] The details of the outstanding requests are set out in the paragraphs below, relating to each of the named corporate Respondents.

[36] In relation to Court File Number: T-389-21, 2276230 Ontario Inc. is hereby directed to produce the following information falling within the scope of the audit period, within 45 days of this Order:

- i. All electronic accounting data;
- ii. All books of original entry such as sales/purchase journals, cash receipts journal, general journal/ledger, and synoptic journal. Accounts payable and accounts receivable records;

- iii. Copies of the GST/HST returns and all backup documentation, including working papers reconciling GST/HST returns to the records;
- iv. All credit card statements, line of credit statements and loan/mortgage documents, including the repayment schedules and the purpose of the loans;
- v. The corporate minute book;
- vi. A detailed listing of total sales and the GST/HST charged on those sales;
- vii. All sales invoices and sales records including cash register tapes, sales reconciliation, shipping records, quotes, estimates, contracts, and project reconciliations;
- viii. A detailed listing of the input tax credits (ITCs) claimed;
- ix. All purchase vouchers and expense invoices supporting input tax credits; and
- x. Copies of all settlement reports and/or melt records for all scrap gold transactions.

[37] In relation to Court File Number: T-392-21, 2417916 Ontario Inc. is hereby directed to produce the following information falling within the scope of the audit period, within 45 days of this Order:

- i. All electronic accounting data;
- ii. All books of original entry such as sales/purchase journals, cash receipts journal, general journal/ledger, and synoptic journal. Accounts payable and accounts receivable records;
- iii. Copies of the GST/HST returns and all backup documentation, including working papers reconciling GST/HST returns to the records;
- iv. All credit card statements, line of credit statements and loan/mortgage documents, including the repayment schedules and the purpose of the loans;
- v. The corporate minute book;
- vi. A detailed listing of total sales and the GST/HST charged on those sales;

- vii. All sales invoices and sales records including cash register tapes, sales reconciliation, shipping records, quotes, estimates, contracts, and project reconciliations;
- viii. A detailed listing of the input tax credits (ITCs) claimed;
- ix. All purchase vouchers and expense invoices supporting input tax credits; and
- x. Copies of all settlement reports and/or melt records for all scrap gold transactions.

[38] In relation to Court File Number: T-393-21, 2466778 Ontario Inc. is hereby directed to produce the following information falling within the scope of the audit period, within 45 days of this Order:

- i. All electronic accounting data;
- ii. Documentation to confirm the business location, such as a lease agreement or a signed purchase agreement for the property;
- iii. All books of original entry such as sales/purchase journals, cash receipts journal, general journal/ledger, and synoptic journal. Accounts payable and accounts receivable records;
- iv. Copies of the GST/HST returns and all backup documentation, including working papers reconciling GST/HST returns to the records;
- v. All credit card statements, line of credit statements and loan/mortgage documents, including the repayment schedules and the purpose of the loans;
- vi. The corporate minute book;
- vii. The accountant's year end working papers;
- viii. A detailed listing of total sales and the GST/HST charged on those sales;
- ix. All sales invoices and sales records including cash register tapes, sales reconciliation, shipping records, quotes, estimates, contracts, and project reconciliations;
- x. A detailed listing of the input tax credits (ITCs) claimed;

- xi. All purchase vouchers and expense invoices supporting input tax credits; and
- xii. Copies of all settlement reports and/or melt records for all scrap gold transactions.

[39] On the issue of costs, in exercise of my discretion under Rule 400 of the *Federal Court Rules*, SOR/98-196, and in view of the fact that the Applicant was required to bring this application after lengthy delays and despite several extensions of deadlines being granted to the Respondents, and considering the result, I hereby order the Respondents to pay to the Applicant lump sum costs in the amount of \$1,000, inclusive of fees and disbursements.

[40] In light of the fact that the matters were heard together, the Respondents are family-owned corporations, and the records in these matters substantially overlapped, I am making one award of costs that will apply to all three applications.

ORDER in T-389-21, T-392-21, and T-393-21

THIS COURT ORDERS that:

1. The summary applications for a compliance order pursuant to section 289.1 of the *Excise Tax Act* is granted.
2. The Respondents are hereby ordered to produce the information set out below, in relation to each Court File and each corporate Respondent, within 45 days of this Order:
 - a. In relation to Court File Number: T-389-21, 2276230 Ontario Inc. is hereby directed to produce the following information falling within the scope of the audit period, within 45 days of this Order:
 - i. All electronic accounting data;
 - ii. All books of original entry such as sales/purchase journals, cash receipts journal, general journal/ledger, and synoptic journal.
Accounts payable and accounts receivable records;
 - iii. Copies of the GST/HST returns and all backup documentation, including working papers reconciling GST/HST returns to the records;
 - iv. All credit card statements, line of credit statements and loan/mortgage documents, including the repayment schedules and the purpose of the loans;
 - v. The corporate minute book;

- vi. A detailed listing of total sales and the GST/HST charged on those sales;
 - vii. All sales invoices and sales records including cash register tapes, sales reconciliation, shipping records, quotes, estimates, contracts, and project reconciliations;
 - viii. A detailed listing of the input tax credits (ITCs) claimed;
 - ix. All purchase vouchers and expense invoices supporting input tax credits; and
 - x. Copies of all settlement reports and/or melt records for all scrap gold transactions.
- b. In relation to Court File Number: T-392-21, 2417916 Ontario Inc. is hereby directed to produce the following information falling within the scope of the audit period, within 45 days of this Order:
- i. All electronic accounting data;
 - ii. All books of original entry such as sales/purchase journals, cash receipts journal, general journal/ledger, and synoptic journal. Accounts payable and accounts receivable records;
 - iii. Copies of the GST/HST returns and all backup documentation, including working papers reconciling GST/HST returns to the records;
 - iv. All credit card statements, line of credit statements and loan/mortgage documents, including the repayment schedules and the purpose of the loans;

- v. The corporate minute book;
 - vi. A detailed listing of total sales and the GST/HST charged on those sales;
 - vii. All sales invoices and sales records including cash register tapes, sales reconciliation, shipping records, quotes, estimates, contracts, and project reconciliations;
 - viii. A detailed listing of the input tax credits (ITCs) claimed;
 - ix. All purchase vouchers and expense invoices supporting input tax credits; and
 - x. Copies of all settlement reports and/or melt records for all scrap gold transactions.
- c. In relation to Court File Number: T-393-21, 2466778 Ontario Inc. is hereby directed to produce the following information falling within the scope of the audit period, within 45 days of this Order:
- i. All electronic accounting data;
 - ii. Documentation to confirm the business location, such as a lease agreement or a signed purchase agreement for the property;
 - iii. All books of original entry such as sales/purchase journals, cash receipts journal, general journal/ledger, and synoptic journal.
Accounts payable and accounts receivable records;
 - iv. Copies of the GST/HST returns and all backup documentation, including working papers reconciling GST/HST returns to the records;

- v. All credit card statements, line of credit statements and loan/mortgage documents, including the repayment schedules and the purpose of the loans;
 - vi. The corporate minute book;
 - vii. The accountant's year end working papers;
 - viii. A detailed listing of total sales and the GST/HST charged on those sales;
 - ix. All sales invoices and sales records including cash register tapes, sales reconciliation, shipping records, quotes, estimates, contracts, and project reconciliations;
 - x. A detailed listing of the input tax credits (ITCs) claimed;
 - xi. All purchase vouchers and expense invoices supporting input tax credits; and
 - xii. Copies of all settlement reports and/or melt records for all scrap gold transactions.
3. The Respondents shall pay to the Applicant lump sum costs in the amount of \$1,000, inclusive of fees and disbursements, which will cover the costs for all three Court files.

“William F. Pentney”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: T-389-21, T-392-21 AND T-393-21

DOCKET: T-389-21

STYLE OF CAUSE: THE MINISTER OF NATIONAL REVENUE v 2276230
ONTARIO INC.

AND DOCKET: T-392-21

STYLE OF CAUSE: THE MINISTER OF NATIONAL REVENUE v 2417916
ONTARIO INC.

AND DOCKET: T-393-21

STYLE OF CAUSE: THE MINISTER OF NATIONAL REVENUE v 2466778
ONTARIO INC.

PLACE OF HEARING: HEARD BY VIDEOCONFERENCE IN OTTAWA,
ONTARIO AND TORONTO, ONTARIO

DATE OF HEARING: MARCH 16, 2021

ORDER AND REASONS: PENTNEY J.

DATED: MARCH 19, 2021

APPEARANCES:

Rita Araujo
Ben Mitchell

FOR THE APPLICANT

Jason Rosen
Arad Moslehi

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Attorney General of Canada
Toronto, Ontario

FOR THE APPLICANT

Rosen Kirshen Tax Law
Barristers and Solicitors
Toronto, Ontario

FOR THE RESPONDENTS