Date: 20071130

Docket: T-1424-07

Citation: 2007 FC 1254

IN THE MATTER OF THE *INCOME TAX ACT*

and

IN THE MATTER OF A TAX ASSESSMENT MADE BY THE CANADA REVENUE AGENCY UNDER THE *INCOME TAX ACT*

AGAINST:

JEANETTE WACHSMANN-ZAHLER
6243 Wilderton Avenue
Montréal, Québec
H3S 2L3

REASONS FOR ORDER

PINARD J.

[1] This is an application under subsection 8 of section 225.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act).

[2] The following provisions of the Act are relevant:

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

225.2 (2) Malgré l'article 225.1, sur requête *ex parte* du ministre, le juge saisi autorise le ministre à prendre immédiatement des mesures visées aux alinéas 225.1(1)*a*) à *g*) à l'égard du montant d'une cotisation établie relativement à un contribuable, aux conditions qu'il estime raisonnables dans les circonstances, s'il est convaincu qu'il existe des motifs raisonnables de

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.

. . .

(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.

croire que l'octroi à ce contribuable d'un délai pour payer le montant compromettrait le recouvrement de tout ou partie de ce montant.

[. . .]

(8) Dans le cas où le juge saisi accorde l'autorisation visée au présent article à l'égard d'un contribuable, celui-ci peut, après avis de six jours francs au sous-procureur général du Canada, demander à un juge de la cour de réviser l'autorisation.

* * * * * * * * * *

[3] On August 3, 2007, Mr. Justice François Lemieux of this Court authorized the Canada Revenue Agency (CRA), for which the Minister of National Revenue is responsible, to immediately implement against tax debtor Jeanette Waschsmann-Zahler (the taxpayer), one or several of the collection actions provided under subsection 225.1(1) of the Act. This authorization was granted on the basis of evidence establishing, *inter alia*, the following facts:

- On October 25, 2004, the CRA issued against the taxpayer four notices of reassessment for the 1997 to 2000 taxation years (the notices). The notices were based on unreported income from a capital gain of $1,193,333, on an unreported recaptured capital cost allowance of $685,540 and on refused interest expenses. The CRA therefore claimed, through the notices, payment of $980,324.82 in taxes. With regard to the taxable capital gain, it resulted from the sale of a

property in Mississauga, Ontario, in September 2000, a property in which the taxpayer apparently held some interest.

- After the Minister of National Revenue confirmed, on December 11, 2006, the notices of assessment to which the taxpayer had objected, she appealed to the Tax Court of Canada. This appeal is still pending.
- Indeed, since the notices were issued, the taxpayer has not sent the CRA any payment, so that as of July 26, 2007, the taxpayer's tax debt was $1,213,651.06.
- Between the 2001 to 2006 taxation years, the taxpayer reported to the Minister of National Revenue an average annual taxable income of $9,191.83.
- On September 23, 2005, in response to a request for disclosure of assets from the Revenue Collections Branch of the CRA, the taxpayer reported assets totalling $510,551.96, including a condominium located in Montréal, Quebec, where she was living, evaluated for real estate tax purposes at $324,900, and investments of $185,651.96, including $165,000 deposited in European banks.
- At the same time, the taxpayer stated that her condominium was for sale and that her investments had been made in Belgium. At the time the application was filed to obtain authorization pursuant to subsection 225.2(2) of the Act, the CRA was unaware of the state of these investments.
- On July 19, 2007, Mark Fidanza, who was then the CRA collection agent responsible for the taxpayer's file, learned that on July 3, 2007, she had sold her condominium located at 6111 du Boisé Avenue, apartment 2F, Montréal, Quebec, for $450,000, paid in cash by the purchaser.

- On July 20, 2007, Mr. Fidanza obtained a statement of account from Canada Trust indicating that the taxpayer's account balance was then $427,885, in all likelihood the proceeds from the sale of her condominium.
- On the same date, Mr. Fidanza asked Canada Trust for statements of any accounts held by the taxpayer at that institution. The statements of account from the Toronto Dominion Bank were received by the CRA on July 30, 2007.
- At the time that the order at issue was granted by Lemieux J., the CRA had no knowledge of any other registered seizable assets in which it would have had any rights or interest.
- In support of an *ex parte* motion filed in a proceeding that she had initiated in Ontario against her brother and her sister-in-law to recover her share of the proceeds from the sale of the property located in Mississauga, Ontario, in September 2000, she had failed to disclose certain facts which could have influenced the amount to which she could have been entitled.

[4] The evidence obtained since the authorization at issue was granted by Lemieux J. also indicates the following:

- On August 3, 2007, following the authorization at issue granted by Lemieux J., the CRA served the Toronto Dominion Bank (Canada Trust) branch located at 1555 Van Horne Avenue, Montréal, with that Court order authorizing one or several collection actions described under subsection 225.1(1) and a demand for payment based on section 224 of the Act. The Bank did remit $4,234.53, but it

refused to remit the balance of account number 3114613, on the grounds that it was a joint account.

- However, according to the statements the Bank provided to the CRA, the accounts contemplated by the demand for payment belonged to the taxpayer alone. Only her name was listed as the account holder.

* * * * * * * * * *

[5] The principles of the case law applicable to reviewing the authorization granted under subsection 225.2(2) of the Act were properly summarized by Lemieux J. in *Canada (Minister of National Revenue) v. Services M.L. Marengère Inc.*, [1999] F.C.J. No. 1840, at paragraphs 62 and 63:

> The current jeopardy collection provisions in *the Income Tax Act* were introduced in 1988 and are a refinement to what previously existed in that the authorization and supervision of this Court is provided for. The legal principles applicable to a section 225.2(8) review of an ex parte jeopardy order are clearly established by this Court as illustrated in *Danielson v. Canada (Deputy Attorney General)*, [1987] 1 F.C. 335 (T.D.), *1853-9049 Québec Inc. v. The Queen*, [1987] 1 T.C.C. 137 (T.D.), *Canada v. Satellite Earth Station Technology Inc.*, [1989] 2 T.C.C. 291 (T.D.) and *Her Majesty the Queen v. Robert Duncan*, [1992] 1 F.C. 713 (T.D.).
>
> From this jurisprudence, I take the following principles:
>
> (1) The perspective of the jeopardy collection provision goes to the matter of collection jeopardy by reason of delay normally attributable to the appeal process. The wording of the provision indicates that it is necessary to show that because of the passage of time involved in an appeal, the taxpayer would become less able to pay the amount assessed. In other words, the issue is not whether the collection per se is in jeopardy but rather whether the actual jeopardy arises from the likely delay in the collection.
>
> (2) In terms of burden, an applicant under subsection 225.2(8) has the initial burden to show that there are reasonable grounds to doubt that

the test required by subsection 225.2(2) has been met, that is, the collection of all or any part of the amounts assessed would be jeopardized by the delay in the collection. However, the ultimate burden is on the Crown to justify the jeopardy collection order granted on an *ex parte* basis.

(3) The evidence must show, on a balance of probability, that it is more likely than not that collection would be jeopardized by delay. The test is not whether the evidence shows beyond all reasonable doubt that the time allowed to the taxpayer would jeopardize the Minister's debt.

(4) The Minister may certainly act not only in cases of fraud or situations amounting to fraud, but also in cases where the taxpayer may waste, liquidate or otherwise transfer his property to escape the tax authorities: in short, to meet any situation in which the taxpayer's assets may vanish in thin air because of the passage of time. However, the mere suspicion or concern that delay may jeopardize collection is not sufficient per se. As Rouleau J. put it in *1853-9049 Quebec Inc.*, *supra*, the question is whether the Minister had reasonable grounds for believing that the taxpayer would waste, liquidate or otherwise transfer its assets, so jeopardizing the Minister's debt. What the Minister has to show is whether the taxpayer's assets can be liquidated in the meantime or be seized by other creditors and so not available to him.

(5) An *ex parte* collection order is an extraordinary remedy. Revenue Canada must exercise utmost good faith and insure full and frank disclosure. On this point, Joyal J. in *Peter Laframboise v. The Queen*, [1986] 3 F.C. 521 at 528 said this:

> The taxpayer's counsel might have an arguable point were the evidence before me limited exclusively to that particular affidavit. As Counsel for the Crown reminded me, however, I am entitled to look at all the evidence contained in the other affidavits. These affidavits might also be submitted to theological dissection by anyone who is dialectically inclined but I find on the whole that those essential elements in these affidavits and in the evidence which they contain pass the well-known tests and are sufficiently demonstrated to justify the Minister's action.

In *Duncan*, *supra*, Jerome A.C.J., after quoting Joyal J. in *Laframboise*, *supra*, viewed the level of disclosure required by the Minister as one of adequate (reasonable) disclosure.

[6] Applying all of these principles to this case, I am of the opinion that the taxpayer did not file evidence establishing reasonable grounds to doubt that the Minister had initially discharged the burden imposed on him by subsection 225.2(2) of the Act, and that she did not file evidence establishing that the Minister had not adequately disclosed all of the relevant facts.

[7] In fact, all of the facts set out above are not disputed. The taxpayer has merely proposed another interpretation, which is not enough to discharge her burden of showing reasonable grounds to doubt that the Minister did not discharge his burden.

[8] Otherwise, the application to review the authorization rests essentially on the allegation that the Minister failed to disclose facts – primarily the existence of the letter that Isaac Grubner sent to the Minister on February 5, 2002 – facts relating to the fairness of the notices of assessment issued on October 25, 2004. Further, in regard to the contents of Mr. Grubner's letter, the Minister, in his application before Lemieux J., acknowledged that it was possible that the taxpayer had not received her share of the profits from the sale of the property. Yet, the issue of whether the taxpayer's claim that she had been swindled would allow her to report no proceeds of disposition and be taxed accordingly is a matter for the Tax Court of Canada.

[9] As the Minister's counsel correctly pointed out, this evidence may be relevant to the appeal before the Tax Court of Canada, but it is not relevant to this application, since a notice of assessment is presumed to be valid unless it is varied at the objection stage or by a court (subsection 152(8) of the Act; *Minister of National Revenue v. MacIver*, [1999] 4 T.C.C. 203, at

paragraph 7; *Marengère Inc., supra,* at paragraphs 63 and 67 and *Canada (Minister of National Revenue) v. Arab*, 2005 FC 264, at paragraph 17). In any event, in the context of all of the evidence filed before Lemieux J., I do not see anything in Mr. Gruber's letter that could have a significant impact on the decision whether or not to immediately authorize one or several collection actions.

[10] Bear in mind that the extent of the disclosure expected of the Minister must be interpreted while taking into account the specific burden of proof that he must meet, i.e. to establish that there are reasonable grounds to believe that giving the taxpayer time to pay her tax debt would jeopardize the collection.

[11] In regard to the taxpayer's request for an alternative order to have part of the seized money returned to her, I find it is unfounded in law. The Act does not provide the option to reduce the amount of the tax debt recoverable by the mechanism provided under section 225.2 while taking into account the taxpayer's financial situation. As the Minister's counsel pointed out, if Parliament had intended to do so, it would have adopted a specific provision to that effect, as indeed it did in the context of restraint orders in criminal law, a seizure before judgment proceeding which has some similarities to the collection jeopardy provisions (*Criminal Code*, R.S.C. 1985, c. C-46). In my view, we must infer from Parliament's silence that it did not intend to give this option to taxpayers subject to an order under section 225.2 of the Act.

[12] With regard to the specific request that her mother be given the monthly income that the taxpayer receives from unknown sources, the taxpayer furthermore does not have the status to ask

for restitution if these amounts do indeed belong to her mother. The taxpayer cannot argue for a third party. It is her mother's responsibility, in the circumstances raised, to duly oppose the seizure by filing all relevant evidence.

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[13] For all of these reasons, the application for review filed by the taxpayer is dismissed with costs.

"Yvon Pinard"
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

Ottawa, Ontario
November 30, 2007

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1424-07
STYLE OF CAUSE:	IN THE MATTER OF A TAX ASSESSMENT MADE BY THE CANADA REVENUE AGENCY UNDER THE *INCOME TAX ACT* AGAINST JEANETTE WACHSMANN-ZAHLER
PLACE OF HEARING:	Montréal, Quebec
DATES OF HEARING:	November 7, 2007
REASONS FOR ORDER:	Pinard J.
DATE OF REASONS:	November 30, 2007

APPEARANCE:

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Ian Demers	FOR THE RESPONDENT

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