Federal Court  Cour fédérale

Date: 20100903

Docket: T-510-10

Citation: 2010 FC 875

Ottawa, Ontario, September 3, 2010

PRESENT: The Honourable Mr. Justice Martineau

IN THE MATTER OF BRENT ROBARTS
and an application by the Minister of National Revenue
under section 225.2 of the *Income Tax Act*

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

BRENT ROBARTS

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a review of a jeopardy order issued under subsection 225.2(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) by a judge of this Court on April 12, 2010 (the Order). For the reasons indicated below, the Order should be set aside.

I – LEGAL FRAMEWORK

[2] The general rule, pursuant to subsection 225.1(1) of the Act, is that the Minister of National Revenue (the Minister) is restricted from collecting amounts owing by a taxpayer until 90 days after the day on which the notice of assessment is mailed.

[3] Nevertheless, where a judge upon an *ex parte* application by the Minister is satisfied that there are reasonable grounds to believe that the collection of all or any part of the amount assessed in respect of the taxpayer would be jeopardized by a delay in the collection of that amount, the judge shall authorize the Minister to take forthwith any of the actions described in paragraphs 215.1(1)(*a*) to 225.1(1)(*g*) of the Act (the collection actions).

[4] That being said, the taxpayer may apply to a judge of the Court to review the authorization. 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. No appeal lies from such an order. See paragraphs 225.2(8), (9), (11) and (13) of the Act.

[5] There is no dispute concerning the guiding factors which are well known relating to the review of a jeopardy order (see *Minister of National Revenue v. Services M.L. Marengère Inc.*, [2000] 1 C.T.C. 229, 2000 D.T.C. 6032 at paragraph 63 (*Services M.L. Marengère*)). A two-stage test governs the review which involves aspects of an appeal and a hearing *de novo*.

[6] First, the taxpayer must provide evidence that there are reasonable grounds to doubt that the collection of all or any part of the amount assessed against him would be jeopardized by a delay in the collection of that amount. However, even where a taxpayer fails to meet their initial evidentiary burden, it remains open to the reviewing judge to set aside a jeopardy order where the Minister has not met the obligation to make a full and frank disclosure.

[7] Where the taxpayer has met this initial threshold, the Minister then has the ultimate burden to show that the jeopardy order was justified. At that latter stage, the Court will review all the evidence on record and ask itself whether, on the whole of the evidence submitted by the parties, there are reasonable grounds to believe that the collection of any part of the assessed amount would be jeopardized by delay.

II – *EX PARTE* APPLICATION MADE BY THE MINISTER

[8] The named respondent, Mr. Brent Robarts, who is 64-years-old, is a businessman of the city of Kelowna, British Columbia.

[9] On February 1, 2010, the respondent was reassessed for taxes owing in the amount of $1,265,953.57 (the Tax Debt) for his 2005, 2006 and 2008 tax years as appears from the notices of reassessments (the Reassessments) mailed at that time by the Canada Revenue Agency (the CRA).

[10] On April 6, 2010, the Minister applied for a jeopardy order with respect to the Tax Debt.

[11] A first affidavit by Ms. Amy Walterhouse, sworn April 7, 2010 (the April affidavit) containing the main allegations against the respondent, was made in support of the Minister's application. There is also a second affidavit by Ms. Walterhouse, also sworn April 7, 2010, but its relevance for the purpose of this review is limited (its only object concerns the production of the Reassessments).

[12] Ms. Walterhouse is the CRA officer assigned to Mr. Robarts' collection file.

[13] The Minister's view, based on the affidavits of Ms. Walterhouse, is that there were (and continue to be) reasonable grounds to believe that the collection of the Tax Debt would be jeopardized if delayed.

[14] Five grounds were alleged at paragraph 36 of the April affidavit:

(i) The funds in the respondent's known bank accounts, which totalled approximately $687,706.62, were the only known significant asset of the respondent that was sufficient to pay all or part of the Tax Debt.

(ii) The respondent was in the position to withdraw the funds before the CRA was otherwise able to certify the debt and garnish his bank accounts.

(iii) The respondent had significantly under-reported his income. He had failed to accurately report business income and rental income in respect to his tax matters in the past.

(iv) The 90-day statutory stay relating to the Reassessments was still in effect. Thus, the respondent could file notices of objection to the Reassessments; the Minister would be unable to collect until the conclusion of any objection or appeal period.

(v) The respondent had been conducting his tax affairs in an unorthodox manner. He appeared to have dissipated two substantial assets immediately after being notified of the Reassessments.

[15] As Ms. Walterhouse explained in her April affidavit, on March 23, 2010, she conducted searches of various registries in British Columbia and of the respondent's known financial accounts held with CIBC, ING Direct and Scotiabank iTrade in an effort to locate any assets belonging to the respondent. She found out on this occasion that earlier on, that is, on January 27, 2010, the respondent had withdrawn $109,000 from one of his Scotiabank iTrade accounts and that on January 28, 2010 he had transferred his half interest in a property located in Arizona to Ms. Voll (the Arizona property). This occurred just days after she had spoken with the respondent about the Reassessments.

[16] Mr. Justice Zinn was satisfied that the evidence the Minister put forward in support of the application showed that there were reasonable grounds to believe that the collection of the Tax Debt would be jeopardized if delayed, and as such, granted the Order on April 12, 2010.

[17] Following the issuance of the Order, the CRA froze and seized all the respondent's bank accounts and assets. Indeed the CRA has seized $147,178.67 from accounts held with CIBC and

ING Direct and has placed a freeze on the Scotiabank iTrade accounts and the $250,000 RRSP held with the CIBC (collectively the Funds).

III – THE PRESENT MOTION IN REVIEW

[18] The respondent asks this Court to set aside the Order and to order the Minister to lift the seizure and freeze of the Funds.

[19] The respondent has no assets in his name in Canada other than the Funds. Denying that he had any intention to dissipate his assets or put them out of reach of the Minister, the respondent submits to the Court that his bank accounts already included registered plans and guaranteed investment certificates, which are long-term investments. Indeed, any income that the respondent has earned recently is from trading securities through his Scotiabank iTrade account. Otherwise, he is not able to earn income to support himself.

[20] The respondent also stresses that nothing allowed the Minister to conclude that he had failed to accurately report income and invokes his good faith. Notices of objection to the Reassessments have been filed. Indeed, whether the respondent has “significantly under-reported his income” is the very issue for the determination by the appeals division of the CRA and the Tax Court of Canada. There were a number of reasons for his belief that such income did not need to be reported. Moreover, he also points out that he never earned rental income and that the Minister exaggerated his request for the issuance of a jeopardy order with unsubstantiated claims.

[21] The respondent also challenges the suggestion made by the Minister that he has been "conducting his tax affairs in an unorthodox manner as he appears to have dissipated two substantial assets." Indeed, the Minister has failed to present relevant evidence with respect to the withdrawal of $109,000 in January 2010.

[22] In a nutshell, the respondent submits that the Order was made:

(a) without the benefit of complete information, which information was readily available to the Minister;

(b) based on an incomplete summary of the relevant law;

(c) based on unsubstantiated facts which were presented in an effort to taint the respondent's character; and

(d) based on misrepresentations with respect to relevant caselaw crucial to the Minister's submissions.

[23] To support his grounds of attack, the respondent has provided an affidavit and has also produced an affidavit by Ms. Corina Voll, both sworn on May 5, 2010. Since 1993, Ms. Voll has lived on and off with the respondent. This evidence, which was not before Mr. Justice Zinn, explains the taxpayer's basis for challenging the Reassessments and also clarifies the circumstances and intentions of the taxpayers with respect to the two transactions which Ms. Walterhouse qualified in her April affidavit as "unorthodox behaviour" and a "dissipation of assets".

[24] On the other hand, the Minister submits the Order should be upheld on the basis that:

(a) The respondent has failed to provide reasonable grounds to doubt that the test for granting the Order has been met;

(b) The evidence put forward by the respondent is insufficient to disturb the findings of Mr. Justice Zinn;

(c) The Minister made full and frank disclosure to this Court with respect to all information relevant to the application for the Order known at that time.

[25] Thus, the Minister submits that it was reasonable to conclude here that, if the Order was not granted, the collection of all or any part of the amount assessed would be jeopardized by a delay in the collection of that amount. In this regard, the Minister submits that the evidence already produced and the explanations of the respondent are insufficient to reasonably doubt that the collection of the Tax Debt would be jeopardized by the granting of a delay.

[26] In addition to relying on the April affidavit, the Minister also relies on the third affidavit of Ms. Walterhouse sworn on July 15, 2010 and appended material (the July affidavit). The main purpose of the July affidavit is to respond to the allegations made by the respondent that there was no prompt and frank disclosure at the time of the making of the application.

[27] In her July affidavit, Ms. Walterhouse explains that she provided all relevant information in the possession of CRA at the time the jeopardy application was made. First, she did not know that the respondent had deposited $109,000 back in his Scotiabank iTrade account despite making

requests for the most current information. Second, none of the information proffered to the Court with respect to the transfer of the half interest of the Arizona property was known to the CRA and, at the time the application was made, the Minister fully disclosed that the CRA was intending to raise assessments against Ms. Voll pursuant to section 160 of the Act.

IV – DETERMINATION AND FINDINGS BY THE REVIEWING JUDGE

[28] The present motion made by the respondent to set aside the Order should be allowed.

[29] First, I am not satisfied that the obligation to make a full and frank disclosure has been met by the Minister.

[30] Second, I find the respondent has provided cogent evidence that there are reasonable grounds to doubt that the collection of all or any part of the Tax Debt would be jeopardized by a delay.

[31] Third, on the whole of the evidence submitted by the parties, the Minister has not shown to the satisfaction of the Court that the Order and collection actions taken as a result are justified considering the particular circumstances of this case.

[32] Four, provided that there is not a change of situation and that the respondent respects all the undertakings mentioned in his affidavit, there is no reason to maintain the seizure and freeze of the Funds.

V – OBLIGATION TO MAKE A FULL AND FRANK DISCLOSURE NOT FULFILLED BY THE MINISTER

[33] The Minister had the duty to exercise utmost good faith and to insure full and frank disclosure (*Minister of National Revenue v. Services M.L. Marengère Inc.*, [2000] 1 C.T.C. 229, 2000 D.T.C. 6032 at paragraph 63). This duty stems directly from the fact that the hearings for the issuing of jeopardy orders are necessarily *ex parte*, and thus the Minister must fairly present the situation in its entirety, in the respondent's absence.

[34] This duty of disclosure has been described and defined in various ways by the jurisprudence.

[35] In all *ex parte* matters the applicant is obliged to draw to the attention of the Court all facts in issue, even those which it considers unhelpful or inconvenient, and all relevant case law. (*Minister of National Revenue v. Arab*, 2005 FC 264, [2005] 2 C.T.C. 107 at paragraph 11). Indeed, full and frank disclosure requires that the Minister disclose "what might reasonably be regarded as [known] weaknesses". (*Minister of National Revenue v. 159890 Canada Inc.*, [1997] 3 C.T.C. 284, 97 D.T.C. 5495 at paragraph 10). Overall, the disclosure must be "adequate" or "reasonable" as determined by the circumstances (*R. v. Chamas*, 2006 FC 1548, [2007] 2 C.T.C. 16 at paragraph 37).

[36] First, it now appears from the new evidence brought to the attention of the Court that the inquiry made by Ms. Walterhouse on March 23, 2010, was incomplete and that important material facts (apparently these facts were not known to the Minister, as explained by Ms. Walterhouse in her July affidavit) were omitted from the April affidavit and the presentation made by counsel to the Court in April 2010.

[37] The alleged omission to make a full and frank disclosure concerns the withdrawal of $109,000 on January 27, 2010 from one of the respondent's Scotia iTrade accounts two days after he was notified of the Reassessments. In her April affidavit, Ms. Walterhouse states that she had been unable to further trace the $109,000. Thus, she believed that the respondent was dissipating his only remaining assets, which were the Funds that would satisfy the Tax Debt. However, the respondent's Scotia iTrade account for March 2010 clearly demonstrates that the Minister's representative assumption was based on erroneous information since the amount of $109,000 was re-deposited on March 10, 2010.

[38] The respondent argues that the Minister's failure to report to the Court that the $109,000 had been credited back to his bank account on March 10, 2010, amounts to a violation of the Minister's duty of full and frank disclosure. He contends that the erroneous information that the $109,000 was untraceable was the central piece of information that the Minister relied on to request the jeopardy order. Thus, given that the correct information was available to Ms. Walterhouse prior to signing her April affidavit, the Minister's omission directly affected the outcome of the Court's decision.

[39] I agree with the respondent. In my opinion, the Minister's failure to report the reappearance of the $109,000 in the respondent's bank account on March 10, 2010 falls squarely in the category of an omission that was directly relevant to the authorization of the jeopardy order obtained a month afterwards. Indeed, apart from the allegation made by Ms. Walterhouse that the respondent had also transferred his half-interest in the Arizona property to Ms. Voll, the disappearance of the $109,000 from the Scotia iTrade account, was the Minister's only proof that the respondent was dissipating his sole Canadian assets, i.e. the Funds.

[40] Upon signing the April affidavit, Ms. Walterhouse should have assured herself that all relevant inquiries had been made with respect to transactions made in March 2010 and that up-to-date information was readily available from the financial institution or made available by the taxpayer. On March 11, 2010, Ms. Walterhouse was advised by Mr. John De Pompa, Director of Compliance at Scotia iTrade, that the March statements would be prepared at the beginning of April 2010, yet she did not subsequently ask that these statements be provided by the financial institution.

[41] While the omission to report the March 10, 2010 deposit of $109,000 was apparently made with no malicious intent, it severely undermines the *ex parte* application that was made by the Minister on April 6, 2010. The jeopardy order issued on the basis of these misleading, incomplete or incorrect facts cannot stand in the circumstances. (*Papa, re*, 2009 FC 49, [2009] 4 C.T.C. 93 at paragraphs 21 to 23; *Canada (Commissioner of Competition) v. Air Canada* (2000), [2001] 1 F.C. 219 (Fed. T.D.) at paragraph 13).

[42] While the omission mentioned above is determinative, the respondent also argues that there were misrepresentations with respect to relevant caselaw crucial to the Minister's submissions.

[43] The Minister relied heavily on the *Minister of National Revenue v. Cormier-Imbeault*, 2009 FC 499, [2009] 6 C.T.C. 45 (*Cormier-Imbeault*), as justification for the jeopardy order, suggesting to the Court that the facts were very similar.

[44] At paragraph 22 of the Minister's written submissions, counsel states that in *Cormier-Imbeault*:

> The Minister made an application for a jeopardy order on the basis that the taxpayer's only remaining asset was money in a bank account. As well, the taxpayer had transferred his half-interest in a house in which he jointly owned with his wife upon learning that the CRA was in a position to undertake collection measures. Shore J. granted the Minister's application for a jeopardy order and stated in his reasons that the taxpayer was in a position to withdraw all or part of the amounts held in the bank account at any moment.

[45] The respondent now submits that the above recital of the facts in *Cormier-Imbeault* is incomplete and that the Minister's failure to accurately set out the reasoning of Justice Shore is not in keeping with the standard of the outmost good faith and disclosure.

[46] Justice Shore states in *Cormier-Imbeault*, at paragraph 7, a number of factors established by case law that can justify a jeopardy order:

(a) there are reasonable grounds to believe that the taxpayer has acted fraudulently;

(b) the taxpayer has proceeded to liquidate or transfer his or her assets;

(c) the taxpayer is evading his or her tax liabilities; and

(d) the taxpayer has assets that could potentially lessen in value over time, deteriorate or perish.

[47] From a reading of Justice Shore's analysis found at paragraph 8, we can see that Ms. Cormier-Imbeault's only assets having a realizable value were the amounts held in a bank account and half of her undivided ownership of the family residence. In addition, Justice Shore noted that in fact, in the past, there had been many withdrawals made in the bank account. Furthermore, Mr. Imbeault's previous conduct indicated that "he is not trustworthy", namely the taxpayer:

(a) had already pleaded guilty to tax evasion;

(b) had transferred his half of the family residence to Ms. Cormier-Imbeault upon learning that the CRA was in a position to undertake collection measures; and

(c) had hidden the existence of the bank account and the amount of almost $600,000 from the CRA.

[48] Noting that the money in the bank could be withdrawn at any time, Justice Shore concluded that it was urgent and imperative that the CRA be in a position to seize the bank account. Besides authorizing the applicant to take forthwith collection actions, furthermore, in accordance with subsection 225.2(3) of the Act, Justice Shore also authorized the applicant to serve to the taxpayers the notices of assessment at the same time as the jeopardy order. It must be remembered that

subsection 225.2(3) of the Act further requires that the judge be satisfied that "the notice of assessment by the taxpayer would likely further jeopardize the collection of the amount".

[49] Given the above, questions could legitimately be raised of whether the Minister acted in accordance with its duty of utmost good faith in not bringing to the attention of Justice Zinn that the decision made by Justice Shore in *Cormier-Imbeault* and relied upon by the applicant in paragraph 22 of their written submissions, was rendered *ex parte*, both under subsections 225.2(2) and (3) of the Act. We can see that very important factual elements and salient features of the reasoning are omitted by counsel.

[50] Although good faith must be presumed, again, this oversimplification in the Minister's presentation leaves a sour taste. It is true that the decision rendered in *Cormier-Imbeault* is included in the applicant's book of authorities. However, in view of the urgency of the matter, it is not generally expected that, at this stage, the Judge will go beyond the Minister's presentation. Considering that the application for a jeopardy order is made *ex parte*, such important omissions on relevant case law from the Minister's written submissions, are certainly not compliant with the spirit of these extraordinary procedures.

[51] Be that as it may, there are further reasons to set aside the Order as discussed below.

VI – INITIAL BURDEN OF PROOF MET BY THE RESPONDENT

[52] The evidence on record consists of the sworn affidavits of Ms. Walterhouse, Mr. Robarts and Ms. Voll, who have not been cross-examined on their affidavits. There is no reason to find any one of them not credible.

[53] At the hearing of this motion, both counsels indicated to the Court that the veracity of facts recited in these affidavits was not in issue. What is challenged by the parties is the weight to be given by the Court to the evidence respectively filed by the Minister and the respondent, each party submitting that they have discharged themselves of their burden of proof.

[54] Having analyzed the evidence and closely read the parties' materials in light of their respective submissions and the principles earlier exposed at paragraphs 5 to 7 of the present reasons for order, the respondent has met the initial burden of satisfying the reviewing Judge that there are reasonable grounds to doubt that the collection of all or any part of the amount assessed against him would be jeopardized by a delay in the collection of that amount.

[55] As aforementioned, five grounds were alleged by the Minister in support of its application to obtain a jeopardy order:

> (a) The funds in the respondent's known bank accounts, which totalled approximately $687,706.62, were the only known significant asset of the respondent that was sufficient to pay all or part of the Tax Debt;

(b) The respondent was in the position to withdraw the funds before the CRA was otherwise able to certify the debt and garnish his bank accounts;

(c) The respondent had significantly under-reported his income. He had failed to accurately report business income and rental income in respect to his tax matters in the past;

(d) The 90-day statutory stay relating to the Reassessments was still in effect. Thus, the respondent could file notices of objection to the Reassessments; the Minister would be unable to collect until the conclusion of any objection or appeal period; and

(e) The respondent had been conducting his tax affairs in an unorthodox manner. He appeared to have dissipated two substantial assets immediately after being notified of the Reassessments.

[56] At the hearing of the present motion, counsel for the Minister was ready to concede that taken alone or cumulatively, the four grounds listed at subparagraphs (i) to (v) of paragraph 36 of the April affidavit of Ms. Walterhouse may not have been sufficient to allow the issuance of a jeopardy order. However, the fifth ground listed at paragraph (v) above was determinative. It concerns the two actions taken by the respondent after he learned late January 2010 that the Reassessments were coming.

[57] As aforesaid, the Minister based himself on the following facts:

(a) On January 27, 2010, the respondent had withdrawn $109,000 from one of his Scotiabank iTrade accounts; and

(b) On January 28, 2010 he had transferred his half-interest in the Arizona property to Ms. Voll.

[58] In the case at bar, the Minister has submitted that the above actions constitute unorthodox behaviour which raises a reasonable apprehension that it would be difficult to trace funds or recover them for the Tax Debt. Having considered the explanations given by the respondent and Ms. Voll (with respect to the Arizona property), there are no reasonable grounds to believe that the collection of the Tax Debt would be jeopardized by delay in view of these two isolated actions. Their explanations are plausible and are not contradicted by other evidence on record. This evidence shed a new light on the Minister's fear that the respondent was about to liquidate the Funds.

[59] First, with respect to the withdrawal of $109,000 from his Scotiabank iTrade account on January 27, 2010, the respondent explains in his affidavit that he intended on combining that amount with $101,000 in his CIBC account and purchasing a CIBC money market certificate for $210,000. Market conditions at that time suggested that a money market certificate could be had at an interest rate of nearly 3%. However, the rates stayed low (near 1.25%) so he decided not to purchase the money market certificate and sent the cheque for $109,000 back to Scotia iTrade to redeposit in his account, which was done on March 10, 2010, as appears from the March statement produced with the respondent's affidavit. I find the respondent's explanations entirely plausible.

[60] Second, with respect to the transfer of his half interest in a property in Arizona on January 28, 2010 to Ms. Voll, the respondent explains that the Arizona property was purchased with funds that both he and Ms. Voll considered to belong to the latter. The property was put into both their names on agreement that the respondent would purchase a condominium in Kelowna in both their names. As he was unable to fulfill his end of that bargain, he was only ensuring that the title to the property reflected the true ownership of the property. Besides, the property was transferred into Ms. Voll's name after she made a demand for repayment of debt. Again, while the timing of this transfer may look suspicious, the explanations provided by the taxpayers are plausible and should not be discarded by the Court.

[61] The jurisprudence has not given a definition to the phrase "unorthodox behaviour", although it has given many examples of what it considers to be unorthodox behaviour. A few examples are as follows:

(a) Keeping large amounts of cash in places such as one's apartment, safety deposit boxes and a cold storage depot locker (*Minister of National Revenue v. Rouleau*, [1995] 2 C.T.C. 442, 101 F.T.R. 57 at para. 6);

(b) Keeping large amounts of cash, untraceable through normal banking records, in the trunk of an automobile (*Minister of National Revenue v. Arab*, 2005 FC 264, [2005] 2 C.T.C. 107 at para. 20);

(c) Keeping double accounts for a restaurant, with one being for entries in the sales journal, the general ledger and income tax returns, and the other being for additional

sales not reported by the holding company of the restaurant (*Delaunière, re*, 2007 FC 636, 2008 D.T.C. 6274 (Eng.) at para. 4);

(d) Keeping large amounts of cash in a safety deposit box, a filing cabinet in one's house and in the pocket of a housecoat (*Mann v. Minister of National Revenue*, 2006 FC 1358, [2007] 1 C.T.C. 243 at para. 43); and

(e) Advancing funds to a company about to be dissolved in order to avoid paying income tax (*Laquerre, re*, 2008 FC 459, 2009 D.T.C. 5596 (Eng.) at para. 11).

[62] The respondent's behaviour is clearly not in the same category as the above examples. The Minister flagged two suspicious incidents, namely the transfer of the half ownership in the Arizona property to Ms. Voll and the withdrawal of the $109,000, and the respondent has provided a reasonable explanation for each incident. Therefore, there are reasonable grounds to doubt that the collection of all or any part of the amount assessed against the respondent would be jeopardized by a delay in the collection of that amount.

[63] I will now examine the rest of the evidence pertaining to the other grounds raised by the Minister to sustain their allegation that there were (and continue to be) reasonable grounds to believe that the collection of the Tax Debt would be jeopardized if delayed.

VII – TEST ESTABLISHED BY SUBSECTION 225.2(2) OF THE ACT NOT MET BY THE MINISTER

[64] Subsection 225.2(2) of the Act requires the Minister to show "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 …" (emphasis mine). Reasonable grounds to believe in the context of subsection 225.2(2) of the Act has been held to constitute a standard of proof that "while falling short of a balance of probabilities, nevertheless connotes a bona fide belief in a serious possibility based on credible evidence." (see *Canada (Minister of National Revenue - M.N.R.*) v. 514659 B.C. Ltd., 2003 FCT 148, at para. 6; *Qu v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 399, at para. 24; *Papa, re*, 2009 FC 49, [2009] 4 C.T.C. 93 at para. 16 (*Papa*).

[65] I have already dismissed the allegation made by the Minister that the respondent had been conducting his tax affairs in an unorthodox manner because he appeared to have dissipated two substantial assets immediately after being notified of the Reassessments. This leaves the other allegations made by the Minister to the effect that the Funds were the only known significant asset of the respondent, that he was in the position to withdraw the Funds before the CRA was otherwise able to certify the Tax Debt and garnish his bank accounts, that he had failed to accurately report business income and rental income regarding these tax matters in the past, and that the 90-day statutory stay relating to the Reassessments was still in effect when the Minister applied for a jeopardy order.

[66] Ms. Walterhouse's April affidavit first explains the basis of the Reassessments. Following the completion on January 4, 2010 of the internal audit conducted by the CRA, the Minister considered that the respondent had not accurately reported business income regarding two properties located in Surrey, as well as capital gains regarding a third property in Kelowna. These sale transactions occurred on October 31, 2005, August 31, 2006 and April 29, 2008 respectively. Thus, the respondent was reassessed for taxes owing in the amount of $1,265,953.57. Notices of opposition have been filed by the respondent.

[67] The respective positions taken by the Minister and the respondent with respect to the merit of the Reassessments are highly debatable. The general rule established by the jurisprudence is that the correctness of an assessment is determined in a different forum from that where the jeopardy order is challenged. At the stage of challenging the jeopardy order, the validity of the assessments must simply be accepted by the Court (*Services M.L. Marengère Inc.*, at paras 64 and 73; *Minister of National Revenue v. Reddy*, 2008 FC 208, [2008] 3 C.T.C. 10 at para. 30). However, this does not necessarily mean that the Court should not examine the evidence submitted contesting the assessment, when evaluating whether or not a jeopardy order is warranted.

[68] If the record shows that a good portion of the evidence used by the Minister to justify the jeopardy order is seriously challenged by the taxpayer, the Court cannot simply ignore these submissions when determining whether the jeopardy order should stand. The Minister's

assertions must necessarily be called into question (see *Minister of National Revenue v. Douville*, 2009 FC 986, 357 F.T.R. 316 at paras 16 and 20).

[69] In the case at bar, Ms. Walterhouse herself, in her April affidavit, has made a number of factual allegations that go beyond the mere fact that Reassessments were issued on February 1, 2010. These allegations were made in an effort to taint the taxpayer's character and form the basis for the issuance of the Order. Ms. Walterhouse alleges that the respondent had significantly under-reported his income and that he had failed to accurately report business income and rental income in respect to his tax matters in the past.

[70] It is not challenged that on February 25, 2010, the respondent informed Ms. Walterhouse that he had retained a tax lawyer to assist him in his objections to the Reassessments and had asked that all future correspondence regarding these issues be directed to his lawyer. Ms. Waltherhouse confirms in her April affidavit that she was aware of the fact that the respondent had discussed with his lawyer the possibility of making payments in order to reduce the interest accruing on his Tax Debt. That being said, on March 8, 2010, respondent's counsel confirmed to the CRA's representative in charge of collection that he would be filing notices of objection to the Reassessments.

[71] I can say at this point that the Minister's evidence, which is contradicted in many regards by the respondent's evidence, does not allow me to conclude, as pressed in Ms. Walterhouse's affidavit, that the respondent has "significantly under reported his income" and that he has "failed to

accurately report business income and rental income." First, the respondent vehemently denies having ever earned rental income. Second, the respondent may have been mistaken in reporting some gains and may not have been justified in not reporting others, but the proper tax treatment of those gains will be determined in due course. Third, at the hearing, counsel for the respondent agreed that the Court could not draw a negative inference out of the respondent's omissions to report these gains because this litigious question has not been settled yet.

[72] From a reading of Ms. Walterhouse's affidavit, it also appears that the only assets in Canada belonging to the respondent have been constituted of sums of money deposited in various financial institutions, notably the accounts held with CIBC, ING Direct and Scotiabank iTrade. On the other hand, as corroborated by the respondent in his affidavit, this situation has been in existence for a number of years. In the past three years, he has been trading securities and conducting his trades through his Scotia iTrade account. By their very nature, liquid assets may be easily dissipated or put beyond the reach of the Minister, but this is not, by itself, a reasonable ground for believing the taxpayer will waste, liquidate or otherwise transfer such assets so as to make it unavailable to the Minister. (*Minister of National Revenue v. Rouleau*, [1995] 2 C.T.C. 442, 101 F.T.R. 57 at para. 9; *Mann v. Minister of National Revenue*, 2006 FC 1358, [2007] 1 C.T.C. 243 at para. 39; *R. v. Paryniuk*, 2003 FC 1505, 2004 D.T.C. 6023 at para. 14)

[73] The question of whether the assets seized are sufficient to satisfy the alleged Tax Debt is not definitive when evaluating whether a jeopardy order should be granted. The fact that the taxpayer was unable to pay the amount assessed at the time of the assessment is not, by itself,

conclusive or determinative (see *Danielson v. Canada (Deputy Attorney General)*, [1986] 2 C.T.C. 380, 7 F.T.R. 42 at paras 7 and 15 (*Danielson*). Evidence that the taxpayer was dissipating his assets or moving his assets out of the jurisdiction would be required (*Danielson*, above, at para. 8). Other factors such as lying about one's assets, the disposition made of one's assets and involvement in nefarious activities would also be considered (*Minister of National Revenue v. Ament*, 97 D.T.C. 5033, 124 F.T.R. 135 at para. 23).

[74] I agree with the respondent that the totality of the actions taken between the date he learned that the Reassessments were coming (i.e. January 25, 2010) and the date the Minister applied for a jeopardy order (i.e. April 6, 2010) must be considered by the Court. Furthermore, several of the respondent's financial characteristics and actions could easily be misinterpreted, when in fact, they appear to be reasonable where the totality of the evidence is considered. In the case at bar, the respondent has only had liquid assets for several years and has not made many withdrawals over the years. In fact, he undertook in his affidavit to be conservative with his stock activities and to not withdraw any sums of money until the Tax Debt has been evaluated and finalized.

[75] Ms. Walterhouse volunteered to call the respondent on January 25, 2010, to tell him that the Reassessments were coming. This was apparently not a case where the Minister felt that a jeopardy order should be issued before the notice of assessment was received by the taxpayer because this would likely further jeopardize the collection of the amount (see paragraph 225.2(3) of the Act).

[76] The withdrawal of the $109,000 on January 27, 2010 was the single most important fact the Minister relied upon when he made an application for a jeopardy order on April 6, 2010. That fact was incorrect as the money was re-deposited on March 10, 2010. During the months of February and March 2010, the Funds were untouched by the respondent who would have had ample time to dispose of said funds prior to the making of the Minister's application.

[77] Mere suspicion or concern is not sufficient to establish reasonable grounds. The respondent's explanation that he transferred his half of the Arizona property to Ms. Voll in late January 2010 to better reflect the true ownership of the property is plausible, in light of the loans made between the parties and the state of their relationship at the time. In any event, as stated at paragraph 31 of Ms. Walterhouse's April affidavit, Ms. Voll will be assessed pursuant to section 160 of the Act for the respondent's Tax Debt. Thus, the amount assessed, therefore, is not put beyond the reach of the Minister nor is it jeopardized by delay, further considering that the Arizona property had been bought a long time before the Reassessments and was always out of the reach of the Minister.

[78] In view of this evidence, as of April 6, 2010, there were certainly no reasonable grounds for believing the respondent would waste, liquidate or otherwise transfer property so as to make it unavailable to the Minister. The same conclusion holds today in view of the totality of the evidence submitted by the parties.

[79] In this regard, at paragraphs 62 to 64 of his sworn affidavit dated May 5, 2010, , the respondent has made a series of undertakings in an effort to prove to the Court his good faith and his willingness to comply with the reassessment process, in the absence of a jeopardy order. Indeed, the respondent has undertaken:

- Not to waste, liquidate or transfer out of Canada any of his assets until the resolution of the outstanding tax dispute with the CRA.
- Not to deplete the capital of any of his investments until the resolution of the outstanding tax dispute with the CRA.
- To conduct his financial affairs in a conservative manner until the resolution of the outstanding tax dispute with the CRA.

[80] The undertakings above constitute a relevant factor in deciding whether or not it is appropriate in the circumstances to confirm, set aside or vary the Order previously made by Justice Zinn on April 12, 2010 (see *Danielson*, above; *1853-9049 Qué. Inc. c. R*, [1987] 1 C.T.C. 137, 9 F.T.R. 63; *Sagman, re*, 2004 FC 1630, [2005] 1 C.T.C. 165; *Minister of National Revenue v. Douville*, 2009 FC 986, 357 F.T.R. 316).

[81] Good faith must be presumed. Acknowledging the undertakings made by the respondent, I have no indication today that the respondent will not respect his undertakings or that he is otherwise untrustworthy. Although certain actions taken by the respondent appeared suspicious to the tax authorities, I am ready to give him the benefit of the doubt.

[82] Having thoroughly reviewed the evidence and relevant case law and applicable legal principles, overall, I am not satisfied that there are reasonable grounds to believe that the collection of the Tax Debt would be jeopardized by delay.

VII – CONCLUSION

[83] In view of the foregoing, the present motion made by the respondent shall be allowed.

[84] Consequently, the Order shall be set aside and the Minister shall be ordered to forthwith withdraw from taking or pursuing collection actions with respect to the Tax Debt, including the seizure and freeze of the Funds which must be promptly lifted by the CRA. This is without prejudice to the Minister's right to make a new application if there is a change of situation or if the respondent fails to comply with the undertakings made to the Court.

[85] Considering the result, costs shall be in favour of the respondent.

ORDER

THIS COURT ORDERS that:

1. The motion made by the respondent is allowed;
2. The Order rendered on April 12, 2010 is set aside;
3. The Minister shall forthwith withdraw from taking or pursuing collection actions with respect to the Tax Debt, including the seizure and freeze of the Funds which must be promptly lifted by the CRA;
4. The present Order is made without prejudice to the Minister's right to make a new application if there is a change of situation or if the respondent fails to comply with the undertakings made to the Court; and
5. Costs are in favour of the respondent.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-510-10
STYLE OF CAUSE:	**THE MINISTER OF NATIONAL REVENUE** **v.** **BRENT ROBARTS**
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	August 18, 2010
REASONS FOR ORDER AND ORDER:	MARTINEAU J.
DATED:	September 3, 2010

APPEARANCES:

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Mark W. Baron Matt Kraemer	FOR THE RESPONDENT

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