

Federal Court



Cour fédérale

Date: 20110817

Docket: T-1321-11

Citation: 2011 FC 1000

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 17, 2011

PRESENT: The Honourable Mr. Justice Shore

IN THE MATTER OF THE *INCOME TAX ACT*,

and

**IN THE MATTER OF NOTICES OF ASSESSMENT
BY THE MINISTER OF NATIONAL REVENUE
UNDER THE *INCOME TAX ACT*,**

AGAINST:

**NOUREDDINE ARIF
123 DES PERCE-NEIGE STREET
OTTERBURN PARK, QUEBEC J3H 5S3**

and

**MALIKA AFSAHI
123 DES PERCE-NEIGE STREET
OTTERBURN PARK, QUEBEC J3H 5S3**

REASONS FOR ORDER AND ORDER

(Authorization for immediate enforcement and for dispensation from complying with subsections 70(4) and sections 301, 304, *et seq* 359 and *et seq* 395 of the *Federal Court Rules*, SOR/98-106 (subsection 225.2(2) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) and subsection 1(1) and section 55 of the *Federal Courts Rules*))

I. Introduction

[1] The Court has before it a motion seeking authorization to take actions forthwith to collect the amounts owed by Malika Afsahi and Nouredine Arif (the taxpayers) as tax debts. The notices of reassessment, for the years 2006, 2007 and 2008, and for which the balance was \$109,123.92 on June 9, 2011, are based on a review of the cash flow in N. Arif's bank accounts and credit cards.

[2] Malika Afsahi is jointly and severally liable for her spouse's tax debts because he transferred the family home to her without consideration in July 2009, when he had a tax debt.

[3] There are reasonable grounds to believe that granting any additional delays to the taxpayers to pay the above-noted assessments would jeopardize collection, since they have already begun liquidating their last known assets, as described below.

II. Facts

[4] The following facts are from the affidavit of Gisele Frezza and the associated exhibits.

[5] Between October 30, 2009, and February 21, 2011, Revenu Québec conducted an audit of Nouredine Arif's tax file. The audit was based on the review of the cash flow in his accounts for the years 2006 to 2008.

[6] Following this audit, Revenu Québec found that Nouredine Arif had failed to report income totalling \$284,522 for these years.

[7] On March 24 and 25, 2011, Revenu Québec issued notices of reassessment against N. Arif, the balance of which was \$114,995.91 on August 4, 2011.

[8] On June 9, 2011, based on the audit and the notices of assessment issued by Revenu Québec, the Canada Revenue Agency (CRA) also issued its own notices of assessment, totalling \$109,753.33.

[9] On July 29, 2009, N. Arif transferred the ownership of their family home to his spouse without consideration.

[10] Therefore, the Minister of National Revenue found that Malika Afsahi was jointly and severally liable for her spouse's tax debt. On August 11, 2011, it issued her a notice of reassessment for the balance of the debt, in the amount of \$110,054.63.

[11] To meet their tax liabilities, the taxpayers no longer own anything other than their home in Otterburn Park and two cars for a total value of approximately \$10,000. The balance of the hypothecary loan is \$28,493 and the home is assessed at \$205,500. Since April 10, 2011, the home has been up for sale.

[12] Malika Afsahi has never reported any income. Nouredine Arif reported income of approximately \$26,000 for each of the past two years.

[13] On July 11, 2011, N. Arif sold an immovable on Galilée Street in Beloeil that he co-owned with his son.

[14] N. Arif's bank accounts audited by officer Frezza are virtually empty.

[15] During the audit carried out by Revenu Québec, N. Arif stated that he had kept significant amounts of cash for his brother, Mohammed Arif, claiming that it was to prevent him from gambling away the money and to allow him to pay the suppliers for his bar "Au p'tit canot".

[16] On February 24, 2008, N. Arif's brother was arrested in connection with a major cocaine trafficking case. Among other things, Mohammed Arif was using the bar "Au p'tit canot" to sell his wares. Since then, the bar has lost its liquor licence.

[17] During the audit, N. Arif stated that he did not know anything at the time about his brother's criminal activities.

[18] On April 26, 2011, during a search of Nouredine Arif's home, the police officers found 40 grams of cocaine and \$5,600 in cash. At that time, he was charged with drug trafficking and possession of drugs for the purpose of trafficking. He is liable to imprisonment. His preliminary inquiry was scheduled for October 31, 2011.

III. Issue

[19] Are there reasonable grounds to believe that granting the taxpayers the delay provided under section 225.1 of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (ITA), may jeopardize the tax debts owing to Her Majesty?

[20] Based on the written submission of the Minister of National Revenue's counsel, the Court concurs. This Court agrees and allows Her Majesty to take collection actions forthwith.

IV. Analysis

Application of subsection 225.2(2) of the ITA

[21] For the purposes of this motion, under subsection 225.2(2) of the ITA, there are reasonable grounds to believe that granting the taxpayers a delay to pay the debt owed to Her Majesty would jeopardize collection.

225.2 (1) In this section, “judge” means a judge or a local judge of a superior court of a province or a judge of the Federal Court.

(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

225.2 (1) Au présent article, « juge » s’entend d’un juge ou d’un juge local d’une cour supérieure d’une province ou d’un juge de la Cour fédérale.

(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

the judge considers reasonable in the circumstances, authorize the Minister to take forthwith any of the actions described in paragraphs 225.1(1)(a) to 225.1(1)(g) with respect to the amount.

[Emphasis added.]

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

[22] The delay prescribed by the ITA provides that Her Majesty cannot commence legal proceedings to collect her debt until 90 days after the day on which the notice of assessment was sent (subsection 225.1(1) and paragraph 225.1(1.1)(c) of the ITA).

[23] If the taxpayers serve a notice of objection to these assessments, the Minister will not be able to take any collection actions on the debt until 90 days after the day of mailing of the Minister's decision confirming the assessments, in whole or in part (subsection 225.1(2) of the ITA).

[24] Finally, if the taxpayers appeal from the Minister's decision to the Tax Court of Canada (TCC), the Minister will not be able to take any collection actions on the debt before the day of mailing of the TCC's possible decision confirming it in whole or in part (subsection 225.1(3) of the ITA).

[25] Therefore, without the authorization sought, the taxpayers may enjoy several months, even some years, before the Minister is able to take any collection actions on the amounts assessed, during which they could easily dispose of their assets.

[26] According to the well-established case law in this matter, Her Majesty demonstrated that because of the mere passage of time resulting from the delays provided under the ITA and granted to the taxpayers to challenge the assessments, collection of the debt would be jeopardized (*Canada (Minister of National Revenue – M.N.R.) v. Services M.L. Marengère Inc.* (1999), 176 F.T.R. 1, 1999 CanLII 9004 (FC) at para. 63; *Canada (Minister of National Revenue – M.N.R.) v. Mulé*, 2010 FC 1125 at para. 9).

[27] This type of remedy is not limited only to cases of fraud or the equivalent, but also when there are reasonable grounds to believe that a taxpayer could lose, liquidate, transfer or otherwise dispose of assets to avoid tax liabilities, or that property could be seized by other creditors, jeopardizing collection of the tax debt (*Services M.L. Marengère Inc.*, above; *Mulé*, above).

[28] For the following reasons, Her Majesty is of the view that the collection of the debt would be jeopardized should the taxpayers be granted the delay under the ITA.

Taxpayers' debt

[29] Revenu Québec conducted the audit of Nouredine Arif's file by reviewing the cash flow in his bank accounts and credit cards. Revenu Québec determined that significant amounts had flowed through N. Arif's accounts and that he had acquired assets that he could clearly not pay for with only the income that he had reported.

[30] As appears from Gisele Frezza's affidavit and the audit report, Revenu Québec noted that Nouredine Arif had been the owner of at least three immovables during the years audited, for which he had to have paid sums both upon purchase and upon making the hypothec payments.

[31] In support of its audit, Revenu Québec also calculated the payments made on the couple's vehicles and the large disbursements from N. Arif's accounts.

[32] Therefore, Revenu Québec noted that a grand total of \$557,438 had flowed through N. Arif's bank accounts and credit cards in the years audited. By comparison, he only reported a total of \$60,983 in income for the same years:

	2006	2007	2008
Reported income	\$20,440	\$14,069	\$26,474
Grand total of disbursements	\$228,099	\$184,410	\$144,929
Income added by Revenu Québec	\$51,200	\$157,325	\$75,997
Total adjusted income	\$71,640	\$171,394	\$102,471
Percentage of reported income	28.5%	8.2%	25.8%

[33] It is patently obvious that Nouredine Arif cannot have spent so much with only the income he reported. Further, after its calculations, Revenu Québec decided to impose a penalty of \$31,043, finding that he had shown gross negligence in his income tax returns.

[34] During the audit, N. Arif attempted to explain the discrepancies by saying that he had only acted as endorser in the purchase of two of the immovables (on Galilée and Spiller streets).

However, Revenu Québec rejected these explanations because the documents of purchase, sale and hypothec confirm that he was indeed the co-owner of the two immovables with his son Wadii.

[35] Further, on close examination, Nouredine Arif apparently spent “only” \$123,351 on the purchase of the immovables and related hypothec payments, whereas more than \$550,000 apparently flowed through his accounts. Therefore, his explanations, even if they turned out to be true, would only partly explain the expenses and the marked difference between them and the returns he filed.

Transfer of the family home and sale of the remaining assets

[36] On July 29, 2009, Nouredine Arif transferred ownership of the family residence to his spouse without consideration. Since she has never reported any income, it is completely reasonable to believe that N. Arif is paying the hypothec contracted in 2009 himself and that Ms. Afsahi has not paid any amount for the maintenance or hypothec on the home. In all likelihood, the sole objective of the transfer of ownership was to protect it from N. Arif’s possible creditors.

[37] In addition, the family residence has been up for sale since April 2011; the asking price has apparently even been reduced by \$10,000 since it was put up for sale.

[38] In addition, barely one month ago, on July 11, 2011, Nouredine Arif sold the immovable on Galilée Street that he had until then owned.

[39] Despite this sale, his bank account at the Beloeil Caisse populaire is virtually empty.

[40] Apart from the family residence, the taxpayers only own two cars for a combined value of approximately \$10,000. Thus, if they sold their home, it would be very difficult for Her Majesty to guarantee payment of the debt.

[41] Officer Frezza's research did not uncover what happened to the proceeds of the sale. Therefore, the taxpayers may have other accounts and may be able to repay their debts although the current facts do not support such intent.

[42] The home seems to be the taxpayers' last known asset that could cover their tax debts.

[43] The sale of the taxpayers' assets raises great concern as to their willingness to settle their tax debts. The liquidation of their immovable assets would also easily help shelter them from taxes and the significant discrepancies between the amounts reported by Nouredine Arif from 2006 to 2008 and the cash flow in his accounts suggest that he never intended to settle his debts.

[44] In light of the transfer of the family home in 2009, of the audit report by Revenu Québec and of N. Arif's unconvincing explanations regarding the significant cash flow in his accounts, there seems to be a clear lack of willingness in regard to his tax liabilities.

Impact of the criminal conduct

[45] Moreover, Nouredine Arif seems to be involved in cocaine trafficking, which may explain where his income came from during the years audited by Revenu Québec.

[46] N. Arif's criminal conduct must be taken into account in assessing his willingness to pay his tax debt. Furthermore, N. Arif's criminal activities seem to be the cause of his tax debt and it would be surprising if he were to decide today to pay his tax debts, while all evidence indicates otherwise.

[47] In addition, Nouredine Arif is subject to life imprisonment if convicted. Although this scenario seems unlikely, the fact remains that N. Arif may spend some time in prison, during which he will be deprived of income and will have difficulty in settling his tax debts. Without income, the fact that he is preparing to sell his house will make collection on his tax debt that much more difficult.

[48] If the residence is sold, it is unlikely that the taxpayers will seek to purchase a new residence immediately before knowing the outcome of the charges against N. Arif, since he faces possible imprisonment in the near future and that Ms. Afsahi has no source of income.

[49] Thus, once the assets are liquidated, the result will be a highly volatile asset that is likely to merely lessen in value, rather than a property whose value is unlikely to change.

[50] The sale of the house is clearly pending and it is critical in these circumstances that the CRA quickly publish a hypothec on the residence in order to guarantee payment of the debt.

V. Conclusion

[51] In conclusion, the behaviour of Nouredine Arif in past years with respect to his tax liabilities raises serious doubts as to his willingness to discharge his burden. In fact, according to the CRA's information, only the family home would remain to help him settle his debts.

[52] Although the value of the residence could fully repay the taxpayers' tax debt, the Court was informed that:

- a) N. Arif has been involved in a cocaine trafficking case, for which he is awaiting trial and for which he could serve a long prison sentence if convicted;
- b) He recently liquidated an immovable that he owned;
- c) He transferred the family home to his spouse without consideration and the residence was recently put up for sale;
- d) N. Arif's bank accounts are virtually empty;
- e) The taxpayers' reported incomes are marginal and Malika Afsahi has never reported any income;
- f) N. Arif has grossly under-reported his income for the years 2006 to 2008, despite the purchase of immovables and cars and significant disbursements from his bank accounts.

[53] With this in mind, this Court has already ruled on the factors to be considered in granting the order as sought:

[6] In other words, the Court issues an authorization on the basis of evidence demonstrating a bona fide belief based on credible evidence in a serious possibility that the granting of a delay to the taxpayer would jeopardize the collection of the debt, which is a lesser burden of proof than that of the balance of probabilities.

[7] In this regard, the case law has determined that the presence of one or more of the following factors can justify the issuance of an authorization under subsection 225.2(2) of the ITA:

- 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;
- d) the taxpayer has assets that could potentially lessen in value over time, deteriorate or perish;
- e) the amount of the debt in relation to income and expenses.

[Emphasis added.]

(*Canada (Minister of National Revenue - M.N.R.) v. Cormier-Imbeault*, 2009 FC 499, 179 A.C.W.S.

(3d) 1221 at paras. 6 and 7; also, *Services M.L. Marengère Inc.*, above.)

[54] Counsel for the Minister of National Revenue has shown at least three of the five factors listed in *Cormier-Imbeault*, above, and these three factors are more than sufficient grounds to justify this Court issuing the order sought.

[55] Thus, granting the delays provided under the ITA would seriously jeopardize the debt to the Minister of National Revenue and would very likely enable the taxpayers to liquidate their remaining assets, especially the principal residence that has already been up for sale for quite a few months.

ORDER

THE COURT grants the motion to take forthwith collection actions to collect the amounts owed by Malika Afsahi and Nouredine Arif as tax debts.

“Michel M.J. Shore”

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1321-11

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**MALIKA AFSAHI
123 DES PERCE-NEIGE STREET
OTTERBURN PARK, QUEBEC J3H 5S3**

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO
RULE 369**

**REASONS FOR ORDER
AND ORDER:**

SHORE J.

DATE OF REASONS: August 17, 2011

WRITTEN REPRESENTATIONS BY:

Alain Langlois

FOR THE APPLICANT

n/a

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Myles J. Kirvan
Deputy Attorney General of Canada
Montréal, Quebec

n/a

FOR THE APPLICANT

FOR THE RESPONDENTS