Federal Court Cour fédérale

Date: 20160120

Docket: T-2080-14

Citation: 2016 FC 56

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 20, 2016

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

SPE VALEUR ASSURABLE INC
ROBERT PLANTE
CLAUDE LESSARD

Applicants

and

CANADA REVENUE AGENCY
ATTORNEY GENERAL OF CANADA

Respondents

and

L'AGENCE DU REVENU DU QUÉBEC

Intervener

JUDGMENT AND REASONS

I. Nature of the case

[1] The applicants are challenging the decision by the Canada Revenue Agency [CRA] to provide the Agence du revenu du Québec [ARQ] with a copy of numerous documents that were seized at the premises of the applicant SPE Valeur Assurable inc [SPE] as part of a criminal investigation and that were used to reassess SPE and its principal officer, the applicant Robert Plante. The applicants submit that, once the criminal investigation was completed and the CRA decided not to lay charges, the CRA could not retain a copy of these documents, let alone provide them to the ARQ.

[2] The CRA argues that its civil and penal functions are not mutually exclusive and that it has the authority to use the documents that were seized legally in a criminal investigation to assess a taxpayer, that it could retain a copy of the documents for that purpose and that, under subparagraph 241(4)(*d*)(iii) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], it could provide them to its provincial counterpart for taxation purposes.

[3] The ARQ, which was granted leave to intervene in this case, adds that the applicants cannot use an application for judicial review to challenge the validity of a search warrant issued in January 2012 by the Court of Québec and that the relevant tax provisions permit the transfer of information between federal and provincial tax agencies.

II. Facts

[4] SPE is a company that works in the area of developing and marketing software for capital asset and preventive maintenance management. Robert Plante is its president and princpal officer while Claude Lessard, like a number of other investors, acquired a licence to use the software developed by SPE.

[5] In 2007, the CRA began a tax audit of the affairs of SPE and a number of licence holders. During the audit, the CRA had reasons to believe that SPE had committed an offence under the ITA and therefore submitted an information to obtain a search warrant under section 487 of the *Criminal Code*, RSC 1985, c C-46. SPE did not challenge the validity of the warrant, and the search was executed at its offices on January 25, 2012.

[6] A seizure report pursuant to section 489.1 of the *Criminal Code* was filed, and the CRA was designated guardian of the items seized for a three-month period, which was extended twice with Mr. Plante's consent. The criminal investigation was completed in December 2012, and no charges were laid against SPE or Mr. Plante. The originals of the seized documents were returned to Mr. Plante, and the CRA retained a copy.

[7] While the CRA's investigation was underway, a number of investors, including the applicant Claude Lessard, received notices of reassessment from the two tax agencies in connection with their licence to use SPE's software. They appealed from those assessments to the Tax Court of Canada and the Court of Québec. Mr. Lessard's case was designated as a test case by the Court of Québec.

[8] When its investigation was completed, the CRA reassessed SPE and Mr. Plante relying, *inter alia*, on the seized documents. Informed of this fact, counsel for the ARQ sought an adjournment of Mr. Lessard's hearing before the Court of Québec so that the ARQ could obtain from the CRA the seized documents that were used to reassess SPE and Mr. Plante.

[9] First, the CRA sent the ARQ its audit report (T-20) and its penalty report for the 2003 to 2010 taxation years.

[10] In November 2013, the ARQ sent a new request for informtion to the CRA, this time to obtain the information for the search warrant, the inventory of the seized property, the complete audit record and the correspondence exchanged with the appeals division. The CRA replied that no charges had been laid but that civil assessments had been issued. Consequently, if the ARQ wished to obtain the requested documents, it would have to file a motion under subsection 490(15) of the *Criminal Code*, which it did in March 2014.

[11] However, the CRA subsequently reversed its position and advised the ARQ that the motion was no longer necessary. On May 13, 2014, it provided the following documents to the ARQ:

- summary of adjustments for SPE prepared by the auditor;
- summary of adjustments for Robert Plante prepared by the auditor;
- the auditor's reconciliation worksheets (deposits and withdrawals for American accounts, expenditure reconciliation, various supporting documents);

- invoices, agency agreement, audited balance sheets for Services préventifs d'évaluation inc and bank transfer documents; and
- auditor's redacted worksheets summarizing emails including explanatory notes.

These documents supported the notice of reassessment issued on October 7, 2013, against SPE and the one issued on October 18, 2013, against Mr. Plante.

[12] On June 3, 2014, the ARQ informed the applicants that the Attorney General of Canada [AGC] had changed its opinion regarding the need for the ARQ to bring a motion under subsection 490(15) of the *Criminal Code* to obtain the desired documentation. The same day, the applicants indicated their opposition to the disclosure of the documents, and a few weeks later, their counsel set out the reasons for their opposition in a letter.

[13] On July 31, 2014, the ARQ withdrew its motion under subsection 490(15) of the *Criminal Code*, and the AGC sent a letter to the applicants stating that their [TRANSLATION] "reasons for disputing the said request were no longer relevant," given the ARQ's withdrawal. With respect to disclosure of the documents, the AGC reassured the applicants that the disclosure would be carried out in accordance with subparagraph 241(4)(*d*)(iii) of the ITA and that if the applicants were not satisfied with this response, their remedy was set out in section 18 of the *Federal Courts Rules*, SOR/98-106. Lastly, the applicants were invited to contact counsel for the ARQ [TRANSLATION] "to obtain a copy of the list of documents that were disclosed". It is that decision, confirmed by an email from the AGC on September 9, 2014, that is the subject of this judicial review.

[14] At the hearing of this application, it was difficult to know exactly what documents had been disclosed as of that date: counsel for the CRA suggested that all the documents had been disclosed and that therefore the application had become moot. Counsel for the ARQ firmly denied receiving all the documents requested; according to him, the documents received represented only a small part of the documents that had been used to reassess SPE and Mr. Plante.

[15] One thing is certain, the applicants who are seeking, *inter alia*, an order directing the CRA to [TRANSLATION] "provide to them, within five days after the judgment is issued . . . a complete list of documents, things or information concerning the applicants that they retained after the tax audit and criminal investigation conducted with respect to them" already know about this list because the originals of these documents were returned to them.

III. Issues

[16] This application for judicial review raises the following issues:

A. *Does this Court have jurisdiction to determine the legality of retaining a copy of the documents seized by the CRA? If so, did the CRA retain those documents legally?*

B. *Can the CRA provide a copy of the seized documents to the ARQ?*

C. *Does this Court have jurisdiction to to determine the admissibility of the seized documents? If so, are these documents admissible before the Court of Québec?*

D. *Can this Court make an order in the nature of an injunction or prohibition?*

IV. Analysis

A. *Does this Court have jurisdiction to to determine the legality of retaining a copy of the documents seized by the CRA? If so, did the CRA retain those documents legally?*

[17] The intervener submits that this application is nothing more than a dispute about the search warrant issued by the Court of Québec and that therefore this Court does not have jurisdiction to determine whether the CRA legally retained the documents.

[18] I do not agree with the intervener. The applicants' application is directed at the fact that the CRA retained a copy of the documents it seized once the criminal investigation was completed, used this information to make an assessment and shared this information with the provincial tax authorities for taxation purposes. This has nothing to do with the validity of the warrant issued by the Court of Québec or the legality of the search executed in the SPE's offices or even respect for the applicants' fundamental rights.

[19] Clearly, the other side of this coin is that the applicants cannot now question the legality of the search or the protection of their fundamental rights in the context of the criminal investigation against SPE and Mr. Plante.

[20] The applicants seek orders directing the CRA to (i) provide them with a list of the documents it has in its possession; (ii) send them the list of documents that it is intending to provide to the ARQ; (iii) destroy all the documents; and (iv) prohibiting the respondents from providing these documents to the ARQ. The first three remedies sought fall under paragraph 18.1(3)(*a*) of the *Federal Courts Act*, RSC 1985, c F-7, while the last one is covered by paragraph 18.1(3)(*b*) of the Act.

[21] Accordingly, I will turn to the issue of whether the CRA is legally retaining a copy of the seized documents, now that the criminal investigation has been completed.

[22] The applicants admit that they have recovered the originals of the seized documents but maintain that, under subsections 490(1) to (9.1) of the *Criminal Code*, the CRA could not retain a copy of them once the criminal investigation was completed, much less give a copy of them to a third party. The applicants cite the following decisions to support their position: *R v Cartier* (1997), 197 AR 70 at paras 16 and 18 (ABQB) [*Cartier*]; *Alberta (AG) v Black*, 2001 ABQB 216 at paras 9, 17 and 19 [*Black*]; *Bleet v Canada (AG)*, [1997] BCJ No 3195 at para 8 (Sup Ct) (QL) [*Bleet*].

[23] The applicants add that since the Supreme Court of Canada decision in *R v Jarvis*, 2002 SCC 73 at paras 84 and 88 [*Jarvis*], a clear distinction must be drawn between the civil and penal functions of tax authorities. In the applicants' view, the principle established by that decision, that audit powers cannot be used for the purposes of a criminal investigation, also applies inversely: the CRA's criminal investigative powers cannot be used for auditing purposes.

[24] First, I do not believe that the jurisprudence cited by the applicants actually supports their position. In *Cartier*, the Crown had not charged the applicant with an offence, but the police were continuing their investigation. The Alberta Court of Queen's Bench expressed the opinion that the purpose of subsection 490(13) of the *Criminal Code* was to permit tax debtors to recover their documents within a reasonable time period without adversely affecting an ongoing investigation. Subsection 490(14) of the *Criminal Code* provides that a copy of these documents,

certified as a true copy by the AGC, is admissible in evidence and has the same probative force as the originals. I do not believe that it must be understood from the principles established by that decision that copies of the seized documents have to be destroyed once the criminal investigation is completed. The same comment can be made about the decisions of the Alberta Court of Queen's Bench in *Black* and the British Columbia Supreme Court in *Bleet* where the courts were simply dealing with the purpose of section 490 of the *Criminal Code.*

[25] The question raised by this application is answered in the decisions of the Federal Court of Appeal in *Brown v Canada*, 2013 FCA 111 at para 19 [*Brown*]; *Blunder v Canada*, 2014 FCA 156 at paras 9-16 [*Klundert*]; *Piersanti v Canada*, 2014 FCA 243 [*Piersanti*]; and *Romanuk v Canada*, 2013 FCA 133 at paras 6-8 [*Romanuk*].

[26] First, the *Criminal Code* provisions are clear: since the seizure was executed under a valid warrant, the CRA has an unequivocal right to make copies of the seized documents (*Pèse Pêche Inc v R*, 2013 NBCA 37 at paras 12-13; *Re Moyer* (1994), 95 CCC (3d) 174 at paras 15, 26 (Ont Gen Div); *Cartier*, above, at paras 20, 25; *Bleet*, above, at para 8; *Black*, above, at para 27; *Bromley v Canada*, 2002 BSCC 149 at para 26).

[27] Moreover, in *Klundert*, above, at para 10, the Federal Court of Appeal noted that the applicant, like the applicants in this case, was trying to use the *Jarvis* principle out of context and that there was "no reason why information obtained in a criminal investigation, such as information gathered pursuant to a lawful search warrant, should not be available for related civil purposes." Because the CRA obtained a search warrant against SPE, there is every reason to

believe that its investigation was legitimate and that it had grounds to believe that an offence under the ITA had been committed. In these circumstances, it cannot be said "that the Canada Revenue Agency used its criminal powers to enforce a civil debt" (*Klundert*, above, at para 13).

[28] I believe that the decision in *Piersanti* also applies. Paragraph 9 thereof states the following:

> The Judge did not err in law when concluding that the appellant's rights under sections 7 and 8 of the Charter were not violated by the CRA when it used the information gathered in the course of the criminal investigation to reassess the appellant's income tax liability for the years in question. The Judge's legal finding accords with *Jarvis* and with the self-assessment and the self-reporting nature of the income tax regime.

[29] Contrary to what the applicants think, the principle developed by the Federal Court of Appeal in *Piersanti* is not based on the fact that, in that case, the applicant had pleaded guilty to 35 charges. The principle that information gathered in a criminal investigation may be used to reassess without contravening the *Jarvis* rule applies, in my humble opinion, regardless of the outcome of the criminal investigation.

[30] Moreover, in *Romanuk*, above, at paras 6-8, it does not appear that criminal charges were laid against the appellant. The Federal Court of Appeal nonetheless confirmed that the CRA may continue to use audit powers even after an investigation has been commenced and that the results of the audit may be used in relation to an administrative matter, such as issuing a notice of reassessment. The Court also found that the use of such information to reassess did not violate the appellant's rights under sections 7 or 8 of the *Canadian Charter of Rights and Freedoms,*

Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[31] It follows that the CRA could retain a copy of the documents seized during the search of SPE's offices and that therefore it is retaining them legally.

B. *Can the CRA provide copies of the seized documents to the ARQ?*

[32] The applicants submit that as long as the seized documents are not filed in support of a penal or criminal prosecution, they remain confidential and the CRA cannot provide a copy of them to the provincial tax authorities. Such a disclosure by the CRA would violate their reasonable expectation of privacy.

[33] The applicants did not point to any judicial authority to support this reasonable expectation of privacy whereas the respondents referred us to *Jarvis* at para 95 where the Supreme Court of Canada characterized this expectation in a regulatory context as very weak:

> …[T]axpayers have very little privacy interest in the materials and records that they are obliged to keep … and ... produce during an audit.… That is, there is no principle of use immunity that prevents the investigators, in the exercise of their investigative function, from making use of evidence obtained through the proper exercise of the CCRA's audit function.

[34] It is true that the documents referred to here were obtained as part of an audit. However, a combined reading of this case and the Federal Court of Appeal decisions cited above leads us to conclude that the applicants' expectation in the circumstances of the case at bar was rather weak. In particular, in *Brown*, above, at paras 19-20, the Court noted, as in this case, that the applicant

did not point to any judicial authority that supported any expectation of privacy over the documents seized by the police and given to the CRA.

[35] That said, once the seized documents were used to complete the audit of the applicants' income tax returns, they remained confidential and could only be disclosed in the narrow circumstances listed in section 241 of the ITA. Subparagraph 241(4)(*d*)(iii) expressly allows the CRA to provide confidential information "to an official solely for the purposes of the administration or enforcement of a law of a province that provides for the imposition and collection of a tax or duty".

[36] As the intervener clearly explains, it wishes to use the documents seized and used by the CRA to reassess SPE and Mr. Plante in its administration of the ITA; the *Act Respecting the Québec Sales Tax*, CQLR, c T-0.1; Part IX of the *Excise Tax Act*, RSC 1985, c E-15; and the *Tax Administration Act*, RSQ, c A-6.002. This use by the ARQ will not prejudice the applicants because these provincial statutes ensure the confidentiality of information.

[37] Accordingly, I am of the opinion that, pursuant to section 241 of the ITA, the CRA can provide the ARQ with a copy of the documents seized during the search executed in SPE's offices and used as the basis for reassessing SPE and Mr. Plante.

C. *Does this Court have jurisdiction to determine the admissibility of the seized documents? If so, are these documents admissible in the Court of Québec?*

[38] It seems to me that the answer is obvious.

[39] First, this Court does not have jurisdiction to determine the validity of a tax assessment. The Tax Court of Canada, and the Court of Québec for the application of Quebec tax laws, have exclusive jurisdiction in this regard (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 82).

[40] Second, the admissibility of evidence and the probative value to assign to it fall within the ambit of the court that has jurisdiction over the matter and that is called upon to manage this evidence. Accordingly, the applicants will be able to present all their arguments on the admissibility of the seized documents before the courts that have jurisdiction (*Redeemer Foundation v Canada (National Revenue)*, [2008] 2 SCR 643 at para 28).

D. *Can this Court make an order in the nature of an injunction or prohibition?*

[41] Since I have concluded that the CRA legally retained a copy of the seized documents and that it could provide a copy of them to the ARQ pursuant to paragraph 241(4)(*d*)(iii) of the ITA, it is not necessary to answer this question.

[42] With respect to the first remedy the applicants are seeking, namely that the respondents be directed to provide them with a complete list of the documents they have in their possession, I repeat that they know about this list because the CRA returned the originals to them.

V. Conclusions

[43] For all these reasons, the application for judicial review will be dismissed with costs in favour of the respondents and the intervener.

JUDGMENT

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed;

2. Costs are awarded in favour of the respondents and the intervener.

"Jocelyne Gagné"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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