Federal Court  Cour fédérale

Date: 20160727

Docket: T-1273-13

Citation: 2016 FC 791

Ottawa, Ontario, July 27, 2016

PRESENT: The Honourable Mr. Justice Phelan

IN THE MATTER OF 684761 B.C. LTD. and an application by the Minister of National Revenue under section 225.2 of the *Income Tax Act*

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

684761 B.C. LTD.

Respondent

AMENDED ORDER AND REASONS

I. Introduction

[1] This is a motion made by 684761 BC Ltd [Company] for an order setting aside or varying the Order of Justice Martineau dated July 31, 2013 [Jeopardy Order].

[2] The Minister of National Revenue [Minister] is prohibited, subject to exceptions, from taking action to collect on a tax debt (*a*) for the first 90 days after the Notice of Assessment is sent to the taxpayer or (*b*) where the taxpayer appealed the assessment, until the conclusion of the appeal (*Income Tax Act*, RSC 1985, c 1 (5th Supp) s 225.1 [ITA]).

[3] An exception to that prohibition is provided for in s 225.2 of the ITA to authorize the Minister to apply for an *ex parte* order (jeopardy order) to take collection action forthwith. The *ex parte* order will be granted where there are reasonable grounds to believe that collection of all or part of the assessed amount would be jeopardized by delay. The jeopardy order allows the Minister to take collections action usually available only upon an unsuccessful appeal (see s 225.1 (a) to (g)).

[4] The taxpayer may apply to the Court for a review of the jeopardy order (s 225.2(8)), and the reviewing judge shall determine the question of the basis for a jeopardy order summarily and shall either confirm, set aside or vary the jeopardy order.

[5] Of particular relevance in this case is ITA s 160(1):

160 (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to	**160 (1)** Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :
(a) the person's spouse or common-law partner or a person who has since become the person's spouse or	**a)** son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;

common- law partner,

(b) a person who was under 18 years of age, or

(c) a person with whom the person was not dealing at arm's length,

the following rules apply:

b) une personne qui était âgée de moins de 18 ans;

c) une personne avec laquelle elle avait un lien de dépendance,

les règles suivantes s'appliquent :

(d) the transferee and transferor are jointly and severally, or solidarily, liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted for it, and

d) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement d'une partie de l'impôt de l'auteur du transfert en vertu de la présente partie pour chaque année d'imposition égale à l'excédent de l'impôt pour l'année sur ce que cet impôt aurait été sans l'application des articles 74.1 à 75.1 de la présente loi et de l'article 74 de la *Loi de l'impôt sur le revenu*, chapitre 148 des Statuts revisés du Canada de 1952, à l'égard de tout revenu tiré des biens ainsi transférés ou des biens y substitués ou à l'égard de tout gain tiré de la disposition de tels biens;

(e) the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of

e) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds

(i) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur

the fair market value at that time of the consideration given for the property, and	marchande à ce moment de la contrepartie donnée pour le bien,
(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,	**(ii)** le total des montants représentant chacun un montant que l'auteur du transfert doit payer en vertu de la présente loi (notamment un montant ayant ou non fait l'objet d'une cotisation en application du paragraphe (2) qu'il doit payer en vertu du présent article) au cours de l'année d'imposition où les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années.
but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.	Toutefois, le présent paragraphe n'a pas pour effet de limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi ni celle du bénéficiaire du transfert quant aux intérêts dont il est redevable en vertu de la présente loi sur une cotisation établie à l'égard du montant qu'il doit payer par l'effet du présent paragraphe.

II. Background

[6] Mr. Onkar (Tony) Khunkhun is the sole director and shareholder of the Respondent Company. The Respondent was in the process of dissolution at the commencement of these proceedings, which was delayed by the Canada Revenue Agency [CRA] until October 9, 2014.

[7] The Respondent (Applicant on this motion) as well as 0725353 BC Ltd (a company owned by Mr. Khunkhun's wife) are both holding companies that appear to have been created for the purpose of facilitating a real estate transaction made by the Respondent in 2008 relating to a parcel of land located at 2040 Glenmore Road in Kelowna, BC. The other relevant company is RA Quality Homes Ltd. [RA Homes], also owned by Mr. Khunkhun—a property development company.

[8] The Respondent was indebted to the Minister in the amount of $824,735.20 as of June 2013 from a CRA assessment issued December 16, 2011. The assessment resulted from an audit of the Respondent's tax year ending June 30, 2008. The Applicant's position is that the Respondent is now indebted to the Minister in an amount exceeding $929,547.39 – although precise amounts are not in issue here.

[9] The audit revealed that the Respondent had disposed of an option to purchase a parcel of land located in Kelowna, BC, at a profit of $2.6 million. The Respondent paid $1.2 million in a finder's fee to 0725353 BC Ltd, the company wholly owned by Mr. Khunkhun's spouse for her services as the realtor and the finder of the property. The Respondent then loaned $1,220,500.00 to RA Homes, which is also owned and controlled by Mr. Khunkhun. RA Homes used the funds to purchase present and former real estate holdings as part of its ongoing business.

0725353 BC Ltd paid the tax on its $1.2 million from that transaction, but the Respondent made a charitable donation with its portion of the profit from the transaction. The Respondent then claimed the charitable donation of $936,000.00, which was subsequently disallowed and resulted in the assessment that underlies this Jeopardy Order.

[10] Mr. Khunkhun filed an objection to the assessment on behalf of the Respondent on or about May 1, 2012. This reassessment is currently before the Tax Court of Canada and has been stayed on terms by Court order.

[11] The Respondent has not filed tax returns following the period ending June 30, 2009. At that time, the Respondent's assets were: $426.00 in cash and deposits; $32,024.00 in accounts receivables; and $1,375,592.00 in loans due from related parties. These loans to related parties included the RA Homes' loan.

[12] The RA Homes' loan did not appear to be repaid at the time the Applicant made her motion. Although the Minister initially characterized this loan as a demand loan, the Respondent eventually produced a loan agreement dated April 1, 2008, which indicated that the loan was due on March 31, 2011. The Respondent also produced a Request for Extension which extended the payment date for the loan until March 31, 2016.

[13] The Applicant filed an affidavit sworn by Michael Sundstrom, a Collections Officer, to support the *ex parte* motion. This affidavit detailed the debt owed by the Respondent as well as the "unorthodox" financial conduct of the Respondent and Mr. Khunkhun, which is set out below. Two further affidavits were filed on behalf of Mr. Sundstrom for this proceeding.

[14] On or about June 30, 2006, Mr. Khunkhun purchased property from Mrs. Surjit Aujla. The CRA inquired into the transaction as the fair market value of the property was $475,000.00 but the actual amount paid was $448,750.00. Although the transaction resulted in a pre-

assessment letter being sent to Mr. Khunkhun pursuant to section 160 of the ITA and s 325 of the *Excise Tax Act* for a non-arm's length transfer made for no or inadequate consideration when the transferor is indebted to the Minister, the issue was not pursued after the CRA received Mr. Khunkhun's explanation. Mr. Khunkhun advised the CRA that the remaining balance was paid in the form of loan forgiveness relevant to a debt owed by Mr. Aujla to Mr. Khunkhun.

[15] On December 26, 2007, the Respondent acquired a call option to purchase shares in OSE Corp (later called Petro Basin Energy Corp), purportedly as a payment for undocumented real estate consultant services. The Respondent exercised this option to purchase the shares at $0.11 a share on June 10, 2008. At that time, shares were valued at $2.08 a share. On June 26, 2008, the Respondent donated 450,000 of its 600,000 shares to Skyway Foundation of Canada and received a charitable donation receipt for $936,000.00. This charitable donation was ultimately disallowed by the CRA in the assessment noted above, the tax from which is the subject of this Jeopardy Order.

[16] These and related transactions were the subject of an Investment Industry Regulatory Organization of Canada investigation. It was alleged that the trading activities were orchestrated by a third party, Thalbinder Poonian, to artificially raise the price of OSE Corp shares. The British Columbia Securities Commission has since found that Mr. Poonian engaged in conduct that contributed to a misleading appearance of trading activity in, or an artificial price for, OSE Corp shares (see *Singh Poonian (Re)*, 2014 BCSECCOM 318). However, such claims were never made against the Respondent or Mr. Khunkhun.

[17] In 2012, CRA learned that Mrs. Aujla transferred $88,500.00 to RA Homes. CRA expressed concerns that the payment for the property was returned to Mr. Khunkhun through RA Homes. Mr. Khunkhun advised the CRA that Mrs. Aujla and her husband had been indebted to him prior to the purchase of the property and the $88,500.00 was a partial payment.

[18] In October 2012, an assessment was issued against RA Homes pursuant to section 325 of the *Excise Tax Act* relating to the transactions with Mrs. Aujla, who was originally suspected by Mr. Sundstrom to be related to Mr. Khunkhun (though this suspicion was without basis). Mr. Sundstrom subsequently filed certificates against the title of several properties owned by RA Homes collectively valued at $4.3 million. The assessment was appealed and the amount owing was reduced by 80% (from $87,656.00 to $17,000.00) by the CRA Appeals Division.

[19] Between May 2012 and April 2013, the Respondent, Mr. Khunkhun, and RA Homes each made a formal complaint against Mr. Sundstrom. This was not disclosed by the Minister at the time of the initial *ex parte* motion.

[20] Since obtaining the Jeopardy Order, the Minister has issued a Requirement to Pay pursuant to s 224 of the ITA to RA Homes. No other collection action has been taken. As of September 13, 2013, RA Homes had not paid any funds pursuant to the Requirement to Pay.

[21] On July 31, 2013, Justice Martineau made an *ex parte* order pursuant to s 225.2(2) of the ITA authorizing the Minister to take the actions described in paragraphs 225.1(1)(a) through 225.1(1)(g) of the ITA with respect to the amounts assessed against the Respondent.

[22] On August 16, 2013, the Respondent filed a Notice of Motion seeking that the Order of Justice Martineau be set aside or varied. The scheduled hearing of this Motion was delayed and adjourned several times to accommodate settlement discussions between the parties and changes in the Respondent's representation. Later it was extended to permit the filing of further affidavits.

[23] The Applicant contends that the Respondent owes the Minister at least $929,547.

[24] The issues to be resolved are:

- has the Respondent established reasonable grounds to doubt that collection of the amount owing would be jeopardized by delay (Part 1 of the relevant test)?;
- has the Applicant Minister demonstrated on the balance of probabilities that it is more likely than not that the collection would be jeopardized by the delay (Part 1 of the relevant test)?; and
- should the Respondent's motion be dismissed pursuant to Rules 58 and 59?

III. Analysis

[25] The legal framework, as described in such cases as *Canada (National Revenue) v Reddy*, 2008 FC 208 at paras 6-8, 329 FTR 13 [*Reddy*] and *Danielson v Canada (Deputy Attorney General)*, [1987] 1 FC 335 at para 7 [*Danielson*], is that the reviewing judge is to address a two-part test:

1. The Respondent bears the burden of establishing that there are reasonable grounds to doubt that the collection of the amounts assessed would be jeopardized by delay; and
2. Having established Part 1, the onus shifts to the Minister to justify the Jeopardy Order by demonstrating on a balance of probabilities that it is more likely than not that collection would be jeopardized by delay.

[26] The focus of the Court's inquiry is not only on whether the taxpayer has the assets to pay the debt but whether the collection itself is at risk from the delay in collection (see *Danielson* at para 7). Mere suspicion or concern that delay may jeopardize collection is not sufficient. As noted in *Danielson* at para 8:

> Cogent evidence on the part of the Minister as to the dissipation of the taxpayer's assets or the movement of assets out of the jurisdiction beyond the reach of the Department of National Revenue and other potential creditors could be very persuasive and compelling. A more difficult borderline case might be the situation where the taxpayer's assets are of a wasting nature, or likely to decline in value with the mere passage of time.

A. *Part 1*

[27] The Applicant, in written and oral argument, put considerable stress on the transfers of property out of RA Homes. This is a matter to be addressed in the context of "unorthodox transactions" - "unorthodox behaviour" (the terms are used interchangeably).

[28] The burden on the Respondent is to raise reasonable grounds that delay (passage of time) will not jeopardize collection. It requires evidence to establish this test; however "reasonable

grounds to believe" falls short of balance of probabilities but connotes a *bona fide* belief in a serious possibility (see *Reddy* at para 11).

[29] As of October 2015, the Company owed the Minister approximately $1,166,000. RA Homes and Mr. and Mrs. Khunkhun also owed approximately $129,000 and $985,000 respectively.

The Respondent contends that all tax debts are in dispute and that neither Mrs. Khunkhun nor her company have any outstanding tax debts.

[30] The Applicant's position is that there is not enough collective equity to provide adequate security for the debts.

[31] In any event, I accept the evidence that Mr. and Mrs. Khunkhun have in excess of $2.8 million in equity in their family home alone. Further, there is no evidence that Mr. Khunkhun has attempted to evade payment of taxes or moved assets outside of the jurisdiction.

[32] Given those circumstances, the Respondent has established that there are reasonable grounds to doubt that the collection of the amounts assessed would be jeopardized by delay.

[33] Before turning to the 2nd test, it is necessary to address the allegation that the Minister did not make the requisite "full and frank disclosure" to the Court required to obtain the *ex parte* order. The core of the matter is the three complaints made by Mr. Khunkhun against the CRA official, Mr. Sundstrom. The allegation of Sundstrom's conduct is that he acted in bad faith or

had “it in for” Mr. Khunkhun in part by expressing the view (possibly to third parties) that the Respondent (and its principal) engaged in unorthodox financial behaviour and that it was possible money was being spirited away to avoid collection efforts. There was also a suggestion of securities fraud.

[34] The complaints are not relevant to whether collection will be jeopardized by delay; however, if there was a basis for the complaints, they might have been relevant to the credibility of some of the Minister’s allegations and therefore the need for the Jeopardy Order.

Given this Court’s finding in respect of the 2nd test, there is no need to make a finding on this point.

B. *Part 2*

[35] The Applicant’s position is that there are reasonable grounds to conclude that there is a serious possibility that delay will jeopardize collection efforts.

[36] More specifically, the Minister is concerned that RA Homes’ loan will be called when the Minister is subject to collection restrictions and the funds will be beyond the Minister’s reach. The Minister is also concerned that RA Homes will spirit away its assets and be unable to pay its own tax liabilities.

The concern is that RA Homes is selling its assets or transferring those assets between related companies.

[37] There is concern that Mr. Khunkhun has transferred his half interest in the family home to his wife.

[38] On a more general note, the Applicant contends that Mr. Khunkhun has engaged in "unorthodox transactions" and that he has admitted that the companies were structured to avoid creditors or potential creditors – such as creating specific purpose or project companies.

The suggestion of an "admission" is overblown and a mischaracterization. Companies are structured to limit liability against claims, one of the usual and legitimate purposes for incorporation. There is nothing nefarious about specific purpose companies *per se*.

[39] In my view, the Applicant's position is based on suspicion which is insufficient to warrant the continuation of a jeopardy order.

The sale of real estate alone does not constitute grounds for the Order. More importantly, RA Homes' sales of real estate are the ordinary course of business for a real estate development company. There is no evidence that RA Homes is depleting assets or placing funds outside of the Minister's jurisdiction. The sale of property simply changes the type of asset – real estate for cash.

[40] The Minister's position that it was unorthodox from a collections perspective for companies to be structured in a way so as to legally minimize liability is untenable. It would be suspicious if a successful business had not done so.

[41] The allegation of “unorthodox transactions” (or sometimes called “unorthodox behaviour”) and the cases relied upon by the Applicant are overblown and distinguishable on their specific facts. The phrase “unorthodox” in terms of taxpayer behaviour is not set out in the ITA.

[42] The jurisprudence does not define that term but this Court in *Canada (National Revenue) v Robarts*, 2010 FC 875, 374 FTR 87, outlined the types of situations which fall within the term. At paragraph 61, the Court said:

> [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).

[43] As noted in *Canada (National Revenue) v Grenon*, 2015 FC 1050, 256 ACWS (3d) 986, where jeopardy orders have been upheld, the factual circumstances often contain elements of criminality, and questionable or nefarious behaviour. I would add that in most of the cases there is a taint of impropriety, duplicity and/or questionable conduct.

[44] In the cases relied upon by the Applicant, one or more of these elements was present. Such is not the case here. In the cases relied on by the Minister:

- the controlling shareholder was involved in an offshore company which held the assigned asset (*Minister of National Revenue v Services ML Marengère Inc*, 1999 CarswellNat 2310 (Fed TD));
- there was a criminal overtone to the undisclosed source of the taxpayer's net worth (*Deputy Minister of National Revenue (Taxation) v Quesnel*, 2001 BCSC 267);
- the way in which the assets were held was unusable and the taxpayer's practices made spiriting away assets easy (*Rouleau (A) v Canada*, 1995 CarswellNat 426 (Fed TD));
- assets were being liquidated and transferred into other companies and trusts to hide them from the Crown (*Laquerre (Re)*, 2008 FC 459, 333 FTR 36);
- multifaceted liquidation, liquid assets, transfers out of Canada (*National Revenue) v Accredited Home Lenders Canada Inc*, 2012 FC 461, 408 FTR 151); and

- untraceable funds in third party hands (*Laframboise v R*, 1986 CarswellNat 377 (Fed TD)).

[45] In addition to RA Homes conducting business as usual, there is no evidence to suggest that the Respondent or its principal is engaged in the questionable conduct described above.

[46] With respect to the transfer of the matrimonial home to the wife, there is no meaningful challenge to the Respondent's evidence of significant equity in the home. A drive-by evaluation by CRA is no match for the opinion of a certified appraiser presented by Mr. Khunkhun.

[47] The Respondent has provided evidence in November 2015 and January 2016 that it would be able to pay the Minister. The Applicant chose not to cross-examine that evidence. It is therefore accepted as true.

[48] Lastly, the Applicant has not made out that its ability to perform a derivative assessment under ITA s 160 (non-arm's length transactions) is insufficient to offset the need for a jeopardy order.

[49] In *Minister of National Revenue v Steele*, 1995 CarswellSask 449 (SKQB), a jeopardy order was set aside because s 160 could be used to effect collection. That principle has been cited with approval recently in *Canada (National Revenue) v Park*, 2011 FC 263, 385 FTR 240.

[50] In addition to all the other factors indicating that the Jeopardy Order is unnecessary, the availability of this remedy overcomes the claimed need for such Order.

[51] In summary, the Minister has failed to justify the continued need for a jeopardy order. The emphasis on unorthodox behaviour which was a cornerstone of the claim for such an order is not supported in fact or law. On that grounds alone, the Jeopardy Order should be lifted. The availability of alternate relief via s 160 compounds the Applicant's difficulty in maintaining the Order.

C. *Rule 58/59*

[52] This technical issue of the breach of the Rules related to service of and contents of a motion record is of insufficient importance to justify the need for a remedy at this stage.

IV. Conclusion

[53] For these reasons, the Order of July 31, 2013, shall be vacated. The Respondent is entitled to costs at the usual scale.

ORDER

THIS COURT'S JUDGMENT is that the Order of July 31, 2013 is vacated. The Respondent is entitled to costs at the usual scale.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Nicole S. Johnston Loretta Chun	FOR THE APPLICANT
Gavin Laird	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE APPLICANT
Laird & Company Barristers and Solicitors Pitt Meadows, British Columbia	FOR THE RESPONDENT