T-2473-96

B E T W E E N:

MINISTER OF NATIONAL REVENUE

Applicant

- and -

159890 CANADA INC.

Respondent

REASONS FOR ORDER

GIBSON, J.:

On the 14th of November, 1996, Mr. Justice Rouleau granted a "jeopardy order" in this matter in the following terms:

> 1. IT IS ORDERED THAT the Minister of National Revenue be and he is hereby authorized to take forthwith any of the actions described in paragraphs 225.1(1)(a) to (g) of the Income Tax Act in respect to the respondent.
>
> 2. IT IS ORDERED THAT this order be served upon the respondent by sending a true copy of same by regular and registered mail on or before November 19, 1996, to 159890 Canada Inc. ...
>
> [address omitted]

The authority for Mr. Justice Rouleau's order was subsection 225.2(2) of the *Income Tax Act*[1] (the "Act"). As provided in that subsection, the order was made *ex parte*. In effect, it authorized the Applicant to take certain collection actions in respect of an amount assessed against the Respondent (the "taxpayer"), notwithstanding the fact that the taxpayer had appealed to the Tax Court of Canada from the assessment and that the appeal had not been disposed of by that Court or discontinued. The taxpayer applied to this Court for a review of the jeopardy order pursuant to subsection 225.2

[1] R.S.C. 1985, (5th Supp.), c.1 as amended.

(8). These reasons arise out of the hearing of that review application.

The evidence that was before Mr. Justice Rouleau on the application for the jeopardy order indicated that the taxpayer was, at the time, indebted to Her Majesty the Queen in right of Canada as represented by the Applicant (the "Minister") for a substantial amount. The Minister's records indicate that, shortly after the question of the taxpayer's indebtedness was appealed to the Tax Court of Canada, a "dividend refund" became due to the taxpayer from the Minister for the taxpayer's taxation year ending December 31, 1987. The amount of that refund was offset against the taxpayer's alleged indebtedness to the Crown. The taxpayer wrote to the Minister requesting a refund, pursuant to subsection 164(1.1) of the Act, in an amount equal to the dividend refund.

The evidence before Mr. Justice Rouleau regarding the potential jeopardy to the Minister's capacity to collect the debt allegedly due to the Crown was in the following terms:

> 8. On September 24, 1996, Katchen wrote to Revenue Canada addressing the issue of the collection of the Corporation's debt to the Crown. In his letter Katchen gives various reasons why collection of the Corporation's debt is not in jeopardy:
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> (a) the Corporation has a valid appeal outstanding;
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> (b) in June, 1994, the Corporation received a refund cheque from Revenue Canada. The Corporation did not keep the money, which it was entitled to do, but returned it to Revenue Canada and asked that it be applied against the disputed tax liability;
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> (c) through a holding company Katchen is the sole shareholder of the Corporation. He is a lawyer. He has lived in the same house in Toronto for 13 years. He does not have a criminal record, he is not a bankrupt and he does not owe any money to Revenue Canada. If the money is refunded to the Corporation, there is no reason to believe that he will abscond with it;
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> (d) the Corporation has no other debts and there is no reason to believe that the money in question will be paid to other creditors, thereby becoming uncollectable to Revenue Canada should it be successful in its appeal.
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> ...
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> 9. With respect to Katchen's statement as outlined in paragraph 8(b) above, Revenue Canada has no record of having issued a refund cheque to the Corporation as indicated in Katchen's letter.
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> ...
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> 10. According to the most recent tax return filed by the Corporation, for the year ending December 30, 1989, the current assets of the Corporation consisted of $739.99 cash; the current liabilities were $10,625.00. ...
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> 11. I have confirmed with Katchen that the Corporation is inactive and

currently has no assets.

With respect to "dividend refunds" subsection 129(2) of the *Income Tax Act* provides as follows:

> (2) Instead of making a refund that might otherwise be made under subsection (1), the Minister may, where the corporation is liable or about to become liable to make any payment under this Act, apply the amount that would otherwise be refundable to that other lability and notify the corporation of that action.

There is no evidence that subsection 129(2) of the Act was drawn to the attention of Mr. Justice Rouleau. On its face, it would appear to provide statutory authority for the actions of the Minister in applying the "dividend refund" against the taxpayer's liability and for denying the written request for a refund.

Subsections 164(1.1) and (1.2) of the Act read in part as follows:

> (1.1) Subject to subsection (1.2), where a taxpayer
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> (a)...
>
> (b) has appealed from an assessment to the Tax Court of Canada,
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> and has applied in writing to the Minister for a payment ..., the Minister shall, where no authorization has been granted under subsection 225.2(2) in respect of the amount assessed, with all due dispatch repay all amounts paid on account of that amount ... to the extent that
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> ...
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> (1.2) Notwithstanding subsection(1.1), where, on application by the Minister made within 45 days after the receipt by the Minister of a written request by a taxpayer for repayment of an amount ..., 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 the taxpayer would be jeopardized by the repayment of that amount ... to the taxpayer under that subsection, the judge shall order that the repayment of the amount or a part thereof not be made .... or make such other order as the judge considers reasonable in the circumstances.

Unlike a jeopardy order under subsection 225.2(2), an application for a jeopardy order under subsection 164.(1.2) is made on notice, within a specified time period and the taxpayer is, of course, entitled to attend the hearing and make representations.

For whatever reason, on the facts of this matter, the Minister chose to proceed *ex parte* under subsection 225.2, rather than within the limited time frame and on notice as provided for by subsection 164(1.2). Once again, there was no evidence before me that Mr. Justice Rouleau was aware that the Minister might have had an option of proceeding under subsection 164(1.2).

The same day that the motion under subsection 225.2(2) was filed with the Court, another application was filed seeking:

1. preliminary advice and directions from the Court as to the applicability of s. 164(1.1) of the Income Tax Act ("ITA") in circumstances where the Minister has offset a dividend refund against the debt of 159890 Canada Inc. to the Minister;

2. subject to the applicability s. 164(1.1) of the ITA, an order providing that the Minister not be required to repay the sum of $606,321.24 as demanded by 159890 Canada Inc..

That motion was served on the taxpayer. The court file indicates that the motion was adjourned *sine die*, by agreement, after Mr. Justice Rouleau's order was issued. It was subsequently withdrawn.

In summary then, Mr. Justice Rouleau was called upon to issue an *ex parte* jeopardy order, and issued such an order, in circumstances where, arguably at least, statutory authority existed to apply the "dividend refund" against the taxpayer's alleged debt and, once again arguably at least, authority existed for an alternative form of jeopardy order where the taxpayer would have been entitled to notice of the application for the order and an opportunity would have been available to speak to the appropriateness of the order sought. Finally, the evidence before Mr. Justice Rouleau was sufficient, obviously, to convince him "... 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, ..." even though the amount, being the only amount apparently available for collection to the knowledge of the Minister, was already in the hands of the Minister.

In *Her Majesty the Queen v. Robert Duncan*,[2] Associate Chief Justice Jerome wrote at page 727:

> In *Satellite Earth*, MacKay J. reviewed the factors to be considered by a court on a s. 225.2(8) review of a jeopardy collection order. After considering the case law dealing with the former version of s.225.2 he concluded ... that in a s. 225.2(8) application the Minister has the ultimate burden of justifying the decision despite the fact that s. 225.2 as amended no longer includes the former paragraph (5) that specifically stated that "[O]n the hearing of an application under paragraph 2(c), the burden of justifying the decision is on the Minister". However, the initial burden is on the taxpayer to show that there are reasonable grounds to doubt that the test has been met... .

[2] [1992] 1 F.C. 713 (F.C.T.D.)

I am satisfied that there are here "reasonable grounds to doubt" that the Minister met the burden on her or him in the application before Mr. Justice Rouleau that resulted in the jeopardy order here under review.

In the *Minister of Revenue v. Rouleau*[3], I wrote:

> Further, I find no support for the position that the Minister of National Revenue failed to make full and frank disclosure, which I am satisfied he is obliged to do, on the second *ex parte* application to Mr. Justice Dubé. Full and frank disclosure does not require the disclosure of material that is simply irrelevant to the test for issuance of an *ex parte* jeopardy collection order.

Full and frank disclosure does, I conclude, require the Minister to disclosure what might reasonably be regarded as weaknesses in the case for a jeopardy order that are known to the Minister.

I am satisfied that the Minister should only proceed by way of application for a jeopardy order under subsection 225.2(2), *ex parte*, where she or he is able to demonstrate to a judge that a jeopardy order is necessary to protect the Minister's position and that no alternative procedure that is more fair to the taxpayer than an *ex parte* procedure, is reasonably available. Neither of those conditions were here met. On the record, no evidence was placed before Mr. Justice Rouleau to demonstrate that subsection 129(2) of the Act was insufficient authority for the Minister's purposes. Further, no evidence was placed before Mr. Justice Rouleau to demonstrate that the more open procedure provided by subsection 164(1.2) could not reasonably and in accordance with law have been invoked. Finally, the evidence placed before Mr. Justice Rouleau that the opportunity to apply the "dividend refund" against the taxpayer's indebtedness would in fact be in jeopardy through delay, was marginal.

I conclude that, before me, the taxpayer discharged the initial burden on it to show that there are reasonable grounds to doubt that the Minister met the burden on her or him on the application before Mr. Justice Rouleau. I also conclude that the Minister has failed to discharge the ultimate burden of justifying the decision of Mr. Justice

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[3] 95 D.T.C. 5597 (F.C.T.D.)

Rouleau simply because the Minister failed to satisfy me that he or she made full and frank disclosure before Mr. Justice Rouleau of all of the information in the Minister's possession that was relevant to the decision Mr. Justice Rouleau was called upon to make. The fact that Mr. Justice Rouleau's decision might have been the same if full and frank disclosure had been made is of no consequence. Equally, the fact that another judge might issue a fresh jeopardy order on another application on which full and frank disclosure is made is of no consequence. I will not speculate on that possibility on the evidence that was before me and the argument made before me.

On the basis of the foregoing considerations and conclusions, this application for a review of the authorization granted by the order of Mr. Justice Rouleau dated the 14th of November, 1996 will be allowed and, as authorized by subsection 225.2(11) of the Act, that authorization will be set aside.

Judge

Ottawa, Ontario
July 30, 1997