Federal Court  Cour fédérale

Date: 20090508

Docket: T-178-08

Citation: 2009 FC 483

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 8, 2009

PRESENT: The Honourable Mr. Justice Harrington

IN THE MATTER OF THE *INCOME TAX ACT*

AND

IN THE MATTER OF ASSESSMENTS AND REASSESSMENTS BY THE MINISTER OF NATIONAL REVENUE UNDER THE INCOME TAX ACT

AGAINST:

RAYNALD DOUVILLE

REASONS FOR ORDER AND ORDER

[1] Like any taxpayer owing a debt due to an assessment issued under the *Income Tax Act*, Mr. Douville has a period of 90 days before the Minister of National Revenue can take action to collect the unpaid amount (subsection 225.1(1)). However, when a judge hearing an *ex parte* motion under

subsection 225.2(2) is of the opinion that granting the taxpayer a time frame to pay the amount would jeopardize collection of all or part of this amount, he or she may authorize the Minister to immediately take the actions described in paragraphs 225.1(1)(a) to (g).

[2] That is precisely what happened in this case. In support of his *ex parte* motion for authorization to proceed forthwith, the Minister filed two statutory declarations with exhibits. The first was signed by Yvon Talbot, Auditor with the Enforcement Division, Montréal Tax Services Office, Canada Revenue Agency, and the second by Minoufa Jeannot, Collections Officer with the Montréal Tax Services Office, Canada Revenue Agency. This motion was granted by Mr. Justice Blanchard.

[3] On March 4, 2008, Mr. Douville exercised his right to file an application for review of the jeopardy order. In support of this application, he tabled several affidavits signed by Mr. Douville himself, his lawyer, his accountant, and a real estate agent. In response, the Minister filed a second statutory declaration signed by Mr. Talbot on August 26, 2008.

[4] Mr. Douville's application was supposed to be heard on March 24, 2009.

[5] At the March 24 hearing, Mr. Douville's lawyer made an oral motion to:

a) strike exhibits A, B, and C from Minoufa Jeannot's statutory declaration dated January 29, 2008, because they were identified by the commissioner

of oaths as attachments to Minoufa Talbot's statutory declaration and not Minoufa Jeannot's;

b) strike out the references to Ms. Jeannot's affidavit in Yvon Talbot's affidavit dated January 29, 2008;

c) strike out exhibit B, identified as notes for the file, as well, since it seems the notes were prepared by one France Boivin and not Yvon Talbot; and

d) allow the motion on merit, because without these documents, and the references to them, the Minister has no arguments.

[6] In conclusion, he argued that, without these exhibits, the jeopardy order is without merit and should be set aside.

[7] Mr. Douville's lawyer explained, in response to my question, that he noticed these imperfections only the afternoon before the hearing and that is why this argument was not raised in his written submissions. I accepted his explanation without reservation. I myself did not notice these imperfections, and the Minister's lawyer said the same.

[8] I pointed out that the situation is comparable to the rule established in *Browne v. Dunn* (1893) 6 R 67, from the House of Lords, that a lawyer intending to cast doubt on a person's testimony must give this person the opportunity to provide any explanations they are able to present. However, Mr. Douville's lawyer did not ask for the case to be shelved so he could cross-examine Ms. Jeannot. Instead, he was of the opinion that the contradiction between the affidavit signed by Ms. Jeannot and the jurat describing the exhibits in the affidavit of one Ms. Talbot is a fatal defect

rendering the proceedings invalid *ex parte*. For these reasons, the jeopardy order cannot remain valid.

[9] The situation of Mr. Talbot's second statutory declaration is very different. This declaration was not part of the case on which Blanchard J.'s decision is based. It was filed in support of the Minister's response to Mr. Douville's application for review of the jeopardy order.

[10] Consequently, I ordered that the hearing on the substance of the application be adjourned and that the Minister file a written response to Mr. Douville's oral motion by March 31, 2009. Mr. Douville had until April 9, 2009, to file his reply to the Minister's response.

[11] The Minister filed his written submissions and Mr. Talbot's affidavit on March 31, 2009. Mr. Talbot was never cross-examined about his statutory declaration or his affidavit. At the same time, the Minister filed a new motion, *de bene esse*, to correct, if necessary, the irregularities in the exhibits of Ms. Jeannot's statutory declaration. A supporting affidavit from the commissioner of oaths who certified Ms. Jeannot was also filed. The commissioner was not cross-examined.

ANALYSIS

[12] To start, the jeopardy order is *ex parte*. Obtaining an *ex parte* order requires the applicant to provide full and true disclosure.

[13] I am not inclined to correct a case on which an *ex parte* order is based. If the case contains a fatal error, the jeopardy order cannot remain valid. If the error is not fatal, there is no reason to correct the order.

[14] Johanne Audet, commissioner of oaths, took an oath from Minoufa Jeannot on January 29, 2008. Ms. Jeannot referred to three documents attached to her statutory declaration, exhibits A, B, and C. The exhibits were identified by Ms. Audet as follows: [translation] "This is exhibit [blank] mentioned in Ms. Minoufa Talbot's statutory declaration."

[15] In paragraph 13 of her statutory declaration, Ms. Jeannot wrote that, as it appears on a bill of sale, a copy of which is attached to her declaration as exhibit A, Mr. Douville sold a residential building to Fiducie Douville. This is precisely what the document described as exhibit A indicates.

[16] In paragraph 17, she refers to a website that states that a specific condominium was for sale for a specific price with a specific municipal assessment. She described the printout of this page as exhibit B of her declaration, and this is, in fact, what exhibit B states.

[17] In paragraph 18, she describes exhibit C of her declaration as another printout from the above-mentioned website on another residential building for sale for a specific price with a specific municipal assessment. Exhibit C attached to her statutory declaration is exactly as described in paragraph 18.

[18] Subsection 225.2(2) allows for a seizure before judgment that is similar in substance to section 733 of the Quebec *Code of Civil Procedure* and the Mareva injunction. Section 733 states:

733. The plaintiff may, with the authorization of a judge, seize before judgment the property of the defendant, when there is reason to fear that without this remedy the recovery of his debt may be put in jeopardy.	733. Le demandeur peut, avec l'autorisation d'un juge, faire saisir avant jugement les biens du défendeur, lorsqu'il est à craindre que sans cette mesure le recouvrement de sa créance ne soit mis en péril.

[19] The party subject to such a seizure before judgment has a remedy similar to that exercised by Mr. Douville in this case:

738. The defendant may, within five days of service of the writ, demand that the seizure be quashed because of the insufficiency or the falsity of the allegations of the affidavit on the strength of which the writ was issued.	738. Dans les cinq jours de la signification du bref, le défendeur peut demander l'annulation de la saisie en raison de l'insuffisance ou de la fausseté des allégations de l'affidavit sur la foi duquel le bref a été délivré.
…	[…]

[20] Decisions in which courts examined the "sufficiency" of an affidavit seem to suggest that a writing error does not meet the criteria to set aside the seizure. For example, in *Excavation Georges Charette & Fils inc. v. Caisse populaire de Labelle*, No.: 500-09-001148-766, [1978] Q.J. No. 123 (QL), in an appeal of a Superior Court judgment denying an application to set aside a seizure before judgment, the Court of Appeal of Quebec stated the following

> **8** Against this judgment Excavation Charette invokes three grounds of appeal.-
>
> 1. - The affidavit supporting the requisition for a writ of seizure before judgment is null because the place where it was sworn is not inserted in the jurat as required by Article 91 C.P. This omission caused no

> prejudice and in my opinion this ground of appeal is unfounded and is too technical to merit further discussion.
>
> [Emphasis added.]

[21] Regardless, Rule 80 of the *Federal Courts Rules* requires that, where an affidavit refers to an exhibit, the exhibit shall be identified by an endorsement signed by the person before whom the affidavit is sworn. Here, the commissioner of oaths correctly described the exhibit. The only error was the deponent's identity.

[22] This error caused no prejudice. In my opinion, this reason is unfounded and too technical to merit further discussion.

[23] Even if the exhibits were not trivial, subsection 225.2(4) of the Act states that:

(4) Statements contained in an affidavit filed in the context of an application under this section may be based on belief with the grounds therefor.	(4) Les déclarations contenues dans un affidavit produit dans le cadre de la requête visée au présent article peuvent être fondées sur une opinion si des motifs à l'appui de celle-ci y sont indiqués.

This passage seems to say that applications under subsection 225.2(2) are often made in a rushed situation, which does not always allow for the best evidence to be obtained.

[24] Lastly, even if these exhibits are said to be hearsay, this is allowed in an interlocutory application. I fail to see how the error in the deponent's identity in the identification of the exhibits in her affidavit is fatal. Moreover, Mr. Douville's lawyer chose not to cross-examine Ms. Jeannot.

Consequently, and considering *Browne v. Dunn*, supra, the exhibits in Ms. Jeannot's affidavit will not be struck out. For these reasons, the Minister's motion *de bene esse* is not applicable.

[25] Yvon Talbot's second statutory declaration is completely different, since it was in response to Mr. Douville's initial application. Once again, Mr. Douville chose not to cross-examine Mr. Talbot, and I accept Mr. Talbot's explanations for the notes in exhibit B. Each entry in these notes refers to [translation] "us." For example, the note dated February 1, 2006, describes a letter sent to Mr. Douville's lawyer. This letter is exhibit E attached to Mr. Talbot's statutory declaration, and it is signed by him, not by the person identified at the bottom of each page of notes in exhibit B.

[26] In closing, the references to Ms. Jeannot's statutory declaration in Mr. Talbot's January 29, 2008, statutory declaration, and exhibit B of his August 26, 2008, declaration, will not be struck.

[27] These motions are the result of the Minister's negligence at the time of writing. For this reason, no costs will be awarded.

[28] It is important to note that this order does not address in any way the material filed by Mr. Douville or his witnesses in support of his application for review of the jeopardy order; this material was not submitted to Blanchard J. for review. For this reason, the case will be referred back to the office of the Chief Justice so a new date can be set for the hearing of the substance of this application.

ORDER

THE COURT ORDERS that:

1. Mr. Douville's oral motion is dismissed.
2. The Minister's motion *de bene esse* is dismissed because it is not applicable.
3. The case is referred back to the office of the Chief Justice so a new date can be set for the hearing of the substance of this application for review of the jeopardy order.
4. The whole without costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-178-08
STYLE OF CAUSE:	IN THE MATTER OF ASSESSMENTS AND REASSESSMENTS BY THE MINISTER OF NATIONAL REVENUE UNDER THE INCOME TAX ACT AGAINST: RAYNALD DOUVILLE
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 24, 2009
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	May 8, 2009

APPEARANCES:

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