

Federal Court



Cour fédérale

**Date: 20100526**

**Docket: T-620-10**

**Citation: 2010 FC 574**

**Vancouver, British Columbia, May 26, 2010**

**PRESENT: The Honourable Mr. Justice Blanchard**

**BETWEEN:**

**THE MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**LAURIER DOLLARD CHABOT**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] By notice of application dated April 21, 2010, the Applicant seeks an order under subsection 164(1.2) of the *Income Tax Act*, R.S.C. 1985, Chapter 1 (5<sup>th</sup> Supp.) (the Act) as amended, authorizing the retention and application of a goods and services tax refund to the Respondent's tax debt until the objection or appeal process relating to the tax debt is concluded.

[2] Subsection 164(1.2) provides for such an order where there are reasonable grounds to believe that the collection of the amount assessed by the Canada Revenue Agency (CRA) in respect to the respondent would be jeopardized by the repayment.

[3] The Respondent, Laurier Dollard Chabot, is in the business of online internet sales. Income tax returns he filed for 2003 and 2004 reported a net income of \$11,283 and \$320 respectively. An internal audit conducted by the CRA found that the Respondent failed to accurately report significant business income with respect to the period under audit.

[4] CRA assessed the Respondent for taxes owing in the amount of approximately \$587,725.90 for the 2003 and 2004 taxation years. Notices of Reassessment were issued and mailed on November 12, 2009. The Respondent has filed Notices of Objection to the Reassessments which are pending.

[5] An investigation into the Respondent's assets and liabilities revealed that the Respondent is entitled to a GST refund in the amount of \$87,617.75. This refund, in the Applicant's submission, is the only known significant asset sufficient to pay all or part of the tax debt.

[6] The evidence indicates that the Respondent's net worth would be insufficient to satisfy the debt should the assessments be upheld.

#### I. The Position of the Parties

[7] The Applicant relies on the jurisprudence developed under subsection 225.2(2) of the Act and submits the following grounds in support of the jeopardy order:

- a) The GST Refund is the only significant asset of the Respondent that is sufficient to pay all or part of the tax debt.

- b) The Respondent has significantly under-reported his income in respect to his tax matters in the past.
- c) The Respondent has filed Notices of Objections to the Reassessments. The Minister would be unable to take any collection action against the Tax Debt until the conclusion of any objection or appeal period.
- d) The Respondent appears to be dissipating his assets as shown by the sale of the Radloff and 9<sup>th</sup> Avenue Properties as well as the sale of the Hummer.
- e) It is reasonable to assume that, if this Honourable Court does not grant a Jeopardy Order, the Respondent will dissipate the GST Refund and place it beyond the reach of the Minister.

[8] The Respondent contends that none of the grounds relied on by the Applicant, nor the evidence pertaining thereto, support the jeopardy order sought.

[9] With regard to the first ground, the Respondent contends that his present inability to pay the amount assessed is not a sufficient basis for the order. It is argued that actual jeopardy arising from the delay in the collection as a result of the Respondent wasting, liquidating or otherwise transferring his assets is required.

[10] The Respondent argues that the fact he is alleged to have significantly under-reported his income in respect of his tax matters cannot be a proper ground for the order since it is the very matter under appeal, yet to be determined.

[11] The Respondent also argues that the fact he filed a Notice of Objection to the Reassessments cannot be a meaningful ground for a jeopardy order. This is the ordinary course of circumstances contemplated by Parliament in enacting the collection restrictions under the Act.

[12] The Respondent contends that the evidence does not support the fourth ground advanced by the Minister that the Respondent appears to be dissipating his assets as shown by the sale of his Radloff and 9<sup>th</sup> Avenue Properties as well as the sale of his Hummer vehicle. The Respondent in his evidence explains that the circumstances surrounding the sale of his Radloff and 9<sup>th</sup> Avenue Properties are related to business decisions and for family reasons and not to spirit the properties away from the reach of the tax authorities. Further, his evidence is that the Hummer vehicle was traded against another vehicle that he still owns. In submissions, counsel for the Respondent indicated that he believed the vehicle not to be encumbered, but there is no evidence of the net value of this asset.

[13] The Respondent argues that the Applicant has not demonstrated reasonable grounds for believing the taxpayer would waste, liquidate or otherwise transfer his assets so as to become less able to pay the amount assessed, thereby jeopardizing the collection of the debt owed to the Minister.

[14] I accept the Respondent's submission. The evidence does not support that the Respondent's assets have been transferred, wasted or dissipated for the purposes of affecting the collection of the debt. The Respondent's uncontested evidence essentially explains away the Applicant's allegations

of questionable transfers of assets. However, under subsection 164(1.2), the test is not whether the Respondent is left less able to pay the amount assessed as a result of wasting, liquidating or otherwise transferring property, but rather whether collection of all or part the assessments would be jeopardized by the repayment of the GST refund.

## II. The Law

[15] Subsections 164(1.2) and (1.3) of the Act provide as follows:

(1.2) Notwithstanding subsection 164(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 or surrender of a security, 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 the amount or the surrender of the security to the taxpayer under that subsection, the judge shall order that the repayment of the amount or a part thereof not be made or that the security or part thereof not be surrendered or make such other order as the judge considers reasonable in the circumstances.

(1.3) The Minister shall give 6 clear days notice of an application under subsection 164(1.2) to the taxpayer in respect of whom the application is made.

(1.2) Malgré le paragraphe (1.1), le juge saisi peut, sur requête du ministre faite dans les 45 jours suivant la réception de la demande écrite d'un contribuable visant le remboursement d'une somme ou la remise d'une garantie, soit ordonner que tout ou partie de la somme ne soit pas remboursée au contribuable ou que tout ou partie de la garantie ne lui soit pas remise, soit rendre toute ordonnance qu'il estime raisonnable dans les circonstances, s'il est convaincu qu'il existe des motifs raisonnables de croire que le fait de lui rembourser la somme ou de lui remettre la garantie conformément à ce paragraphe compromettrait le recouvrement de tout ou partie du montant d'une cotisation établie à son égard.

(1.3) Le ministre donne au contribuable intéressé un avis de six jours francs d'une requête visée au paragraphe (1.2).

[16] Subsection 225.1(1) and subsection 225.2(2) of the Act provide as follows:

225.1 (1) If a taxpayer is liable for the payment of an amount assessed under this Act, other than an amount assessed under subsection 152(4.2), 169(3) or 220(3.1), the Minister shall not, until after the collection-commencement day in respect of the amount, do any of the following for the purpose of collecting the amount:

- (a) commence legal proceedings in a court,
- (b) certify the amount under section 223,
- (c) require a person to make a payment under subsection 224(1),
- (d) require an institution or a person to make a payment under subsection 224(1.1),
- (e) [Repealed, 2006, c. 4, s. 166]
- (f) require a person to turn over moneys under subsection 224.3(1), or
- (g) give a notice, issue a certificate or make a direction under subsection 225(1).

225.2(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 the judge considers reasonable in the circumstances, authorize the Minister to take

225.1 (1) Si un contribuable est redevable du montant d'une cotisation établie en vertu des dispositions de la présente loi, exception faite des paragraphes 152(4.2), 169(3) et 220(3.1), le ministre, pour recouvrer le montant impayé, ne peut, avant le lendemain du jour du début du recouvrement du montant, prendre les mesures suivantes :

- a) entamer une poursuite devant un tribunal;
- b) attester le montant, conformément à l'article 223;
- c) obliger une personne à faire un paiement, conformément au paragraphe 224(1);
- d) obliger une institution ou une personne visée au paragraphe 224(1.1) à faire un paiement, conformément à ce paragraphe;
- e) [Abrogé, 2006, ch. 4, art. 166]
- f) obliger une personne à remettre des fonds, conformément au paragraphe 224.3(1);
- g) donner un avis, délivrer un certificat ou donner un ordre, conformément au paragraphe 225(1).

225.2(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 l'égard du montant d'une cotisation établie relativement à un contribuable, aux conditions qu'il estime

forthwith any of the actions described in paragraphs 225.1(1)(a) to 225.1(1)(g) with respect to the amount.

raisonnables dans les circonstances, s'il est convaincu qu'il existe des 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.

### III. Analysis

[17] Both the Minister and the Respondent are of the view that the principles articulated in the jurisprudence relating to applications for jeopardy orders pursuant to subsection 225.2(2) of the Act are applicable here. In support of this joint position the parties point to the similarity of wording in the two provisions.

[18] I agree that the two provisions are similar in terms of the standard of proof required of the Minister in discharging the burden of establishing that collection of the debt is jeopardized. I also agree with and adopt the following interpretation of the standard of proof articulated by Justice Lemieux in *Canada (Minister of National Revenue) v. 514659 B.C. Ltd.*, [2003] F.C.J. No. 207. The learned judge interpreted the “reasonable grounds” standard of proof as follows: “while falling short of a balance of probabilities, nevertheless connotes a *bona fide* belief in a serious possibility based on credible evidence.”

[19] Except for the reasonable grounds standard discussed above, in other respects the two provisions are quite different in terms of what must be established for an order to issue. Subsection 225.2(2) requires that there be reasonable grounds to believe that the collection of a tax debt would be jeopardized by delay. Subsection 164(1.2) requires that reasonable grounds

be established that collection of all or any part of an amount assessed would be jeopardized by the repayment of the amount of a refund owed to the taxpayer. The provisions are designed to address two different circumstances relating to the collection of a taxpayer's debt.

[20] Under subsection 225.2(2), the issue is whether the collection of the amount would be jeopardized by delay. The delay at issue is the delay prescribed by subsection 225.1(1) of the Act, which restricts collection activities by the Minister while assessments are under objection or appeal. Subsection 225.2(2) allows the Minister, on an *ex parte* basis, to apply for authorization to take action where there is concern the taxpayer's assets will be dissipated, wasted or otherwise transferred beyond the reach of Minister during the delay, thereby jeopardizing collection of the debt. This is recognized in the jurisprudence of this Court. In *Danielson v. Minister of National Revenue* (1986), 86 DTC 6495 (F.C.T.D.), Justice McNair held that collection had to be jeopardized by delay. He stated at page 4 of his reasons, "... In my opinion, the issue is not whether the collection *per se* is in jeopardy but rather whether the actual jeopardy arises from the likely delay in the collection thereof."

[21] Subsection 164(1.2) concerns refunds owing to the taxpayer that may now be withheld by collection officers and applied as a set-off against amounts that are under objection or appeal. Unlike subsection 225.2(2), delay is not an issue because the funds are held by the government and are not at risk of being dissipated. There is therefore no need for the application to be made on an *ex parte* basis. Subsection 164(1.3) expressly provides for six (6) clear days notice to the taxpayer when an application is made under subsection 164(1.2). The jeopardy that is contemplated under



subsection 164(1.2) is different than that under subsection 225.2(2). It is the jeopardy to the tax debt that might arise from the repayment of the refund owed to the taxpayer.

[22] Given the differences between the two provisions, except for the applicable standard of proof, I find the jurisprudence developed under subsection 225.2(2) to have little bearing on applications under subsection 164(1.2).

[23] In interpreting subsection 164(1.2) of the Act, I will apply the so-called “modern rule” of statutory interpretation mandated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. The rule provides that:

The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[24] The clear language of subsection 164(1.2) provides that the jeopardy to the collection of the taxpayer’s debt that needs to be established by the Ministers is the jeopardy that would be caused by the “repayment” of the amount of the refund.

[25] Further, by inserting the provision in that part of the Act dealing with refunds, Parliament intended to provide for measures to be available on application by the Minister, where jeopardy is established, to ensure that such refunds be retained and applied as a set-off against amounts that are under objection or appeal.

[26] In my view, factors that require consideration in the circumstances of a subsection 164(1.2) application are the amount of the debt to be collected relative to the amount of the refund, the taxpayer's ability to pay or otherwise satisfy the debt, the value of the taxpayer's net assets and whether these are sufficient and available to satisfy the debt independently of the refund. Where it is established that the taxpayer is able to repay the debt or that his assets are of sufficient value to satisfy the debt, then releasing the amount of the refund would not jeopardize the collection of the amount. It is in the context of assessing the taxpayer's net wealth and the taxpayer's ability to satisfy the debt independently of the refund that the issue of jeopardy is assessed. This may include considering factors such as unorthodox behaviour of the taxpayer and any evidence regarding dissipation of assets by the taxpayer. Upon consideration of such factors, if there are reasonable grounds to believe, in all of the circumstances, that release of the refund to the taxpayer would result in that amount not being available to the Minister for collection against the debt, then collection of the debt is jeopardized for the purposes of subsection 164(1.2) and a jeopardy order pursuant to that provision is justified.

#### IV. Conclusion

[27] On the evidence before me, it is clear that repayment of the refund would jeopardize collection of part of the amount assessed. The refund is slated to be paid to the Respondent's counsel as a retainer for legal fees. The amount represents an amount which would then no longer be available to the Minister for collection against the assessments. The evidence also establishes that the Respondent's remaining net assets are insufficient to cover the amount of the assessments even if his equity in the marital home, registered in his wife's name, was considered. Further, in the

context of his current financial difficulties, I am satisfied the Respondent would not have the means or the capacity to pay or otherwise satisfy that part of the assessments at issue. It follows that collection of part of the amounts assessed is jeopardized by the repayment of the refund.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. The application is allowed.
2. Pursuant to subsection 164(1.2) of the *Income Tax Act*, R.S.C. 1985, Chapter 1 (5<sup>th</sup> Supp.) the Minister is hereby authorized to retain the GST refund owing to the Respondent in the amount of \$87,617.75. The repayment is not to be made to the Respondent and the amount is to be retained by the Minister and applied against the Respondent's tax debt until the objection or appeal process relating to the tax debt is concluded.

“Edmond P. Blanchard”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-620-10

**STYLE OF CAUSE:** MINISTER OF NATIONAL REVENUE  
v. LAURIER DOLLARD CHABOT

**PLACE OF HEARING:** Vancouver, BC

**DATE OF HEARING:** May 17, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT:** BLANCHARD J.

**DATED:** May 26, 2010

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