

Canada (National Revenue) v Patry, 2012 FC 977

Review of Jeopardy Order - Factors to Consider

Canada (National Revenue) v Patry, [2012 FC 977](#)

At issue was the question of whether an *ex parte* jeopardy order granted by the FC should be set aside.

The Court set aside the jeopardy order on the basis that the Respondent had managed to seriously challenge a good portion of the evidence relied on by the MNR to support the Order, and the MNR has not satisfied the Court that if the order is lifted, the equity would be dissipated to such an extent that amounts owed would be lost.

FACTS

The CRA reassessed the respondents for the 2006 and 2007 tax years, and imposed civil penalties in relation to returns prepared by Mr. Patry for his clients from the 2004-2007 tax years. A notice of objection has been filed and litigation is being pursued in the TCC.

The Parties are also charged with certain offences under the ITA and the *Excise Tax Act*.

The CRA obtained a Jeopardy order by satisfying the court that there were reasonable grounds to believe that the collection of the amounts assessed for tax would be jeopardized by delay in collection. The amount is \$900,000, of this \$160,000 is tax owing, and the rest are penalties and interest. The CRA was able to obtain certificates and to have them registered against titles of the respondents' principal residences.

LEGAL FRAMEWORK

Subsection 225.2(2) permits the MNR to bring an *ex parte* motion for a Jeopardy Order to a judge of the FCTD. The order can be granted if the Judge is satisfied that there are reasonable grounds to believe that the collection of all or any part of the amount assessed in respect of the taxpayer would be jeopardized by a delay in the collection of that amount. The order gives the MNR authorization to take forthwith any of the actions described in paragraphs 225.1(1)(a) to 225.1(1)(g).

The taxpayers may apply for a review of the order granted pursuant to subsection 225.2(8). A review judge must determine the question summarily to either confirm, set aside, vary, or make such other order as appropriate. Relevant factors for review of a Jeopardy order are set out in [Canada \(Minister of National Revenue – MNR\) v Services ML Marengère Inc \(1999\), 176 FTR 1](#) at para 63.

The test involved has two parts (see [Canada \(Minister of National Revenue – MNR\) v Reddy, 2008 FC 208](#), [Canada \(Minister of National Revenue – MNR\) v Accredited Home Lenders](#)

[Canada Inc. 2012 FC 461](#), at paras 8-9):

- (1) Respondents bear the burden of establishing that there are reasonable grounds to doubt that the collection of all or any part of the amount assessed against them would be jeopardized by a delay in the collection of that amount;
- If so established, then (2) the burdens shifts to the Minister to justify the Jeopardy Order by demonstrating that, on a balance of probabilities, it is more likely than not that the collection would be jeopardized by delay.

ANALYSIS

The Respondents argued that the original order was made in the absence of reasonable and probable grounds, and without the benefit of complete information. They argue that the evidence fails to establish that their affairs were conducted in a manner so as to "waste, transfer, dissipate or liquidate assets and place them beyond the reach of the Minister (*Canada v Goldbeck* (1990), 90 DTC 6575). The MNR argued that there was no evidence of material change in the facts underlying the original order, and that the evidence taken as a whole reinforces the need for a jeopardy order.

(1) Reasonable Grounds to Doubt Collection in Jeopardy

This part of the test requires the respondents "to muster evidence, whether by affidavits, by cross-examination of the Affiants on behalf of the Crown, or both, that there are reasonable grounds to doubt that the test required by paragraph 225.2(2) has been met" (para 12).

The Court held that this part of the test was met on the basis of various factual inconsistencies apparent in the grounds offered to support the original order.

The MNR had primarily supported the original order on the basis that the Patry home was up for sale, and if sold the proceeds would be placed beyond the reach of the Minister or used to pay other creditors. The Court, however, noted:

- The house was never sold, was removed from listing, and has not been relisted for sale.
- The original order was made on the basis that the home was not an appreciating asset and the wrong appraisal value was used - the correct appraisal value was 600-900,000 higher, and the evidence was that the property was an appreciating asset showing that the equity available to satisfy the debt to the minister is higher than initially implied
- Where a taxpayer sells real estate that is the only asset to satisfy a cash debt, and the cash received is still available to satisfy the debt, the sale does not constitute grounds for a jeopardy order - *Canada (Minister of National Revenue – MNR) v Landru*, [1993] 1 CTC 93, [1992] SJ no 519; [Deputy Minister of National Revenue, Taxation v Quesnel, 2001 DTC 5602](#)
- Mere suspicion or concern that the funds would be used to pay other creditors or put out of reach of the minister is not sufficient to establish reasonable grounds (*Danielson v Minister of National Revenue* (1986), 86 DTC 6495; *Her Majesty the Queen v Satellite Earth Station Technology Inc* (1989), 89 DTC 5506).

- There is no clear indication that the Respondents have engaged in unorthodox behaviour “which raises a reasonable apprehension that it would be difficult to trace funds or recover them for the tax debt” (*Laframboise v Her Majesty the Queen* (1986), 86 DTC 6396; *Canada (Minister of National Revenue) v Rouleau* (1995), 95 DTC 5597)
- Unorthodox behaviour includes:
 - (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. 5024 \(Eng.\)](#) at para. 11).

In this case, the ” suspicious deposits to an unidentified third party initially flagged by the Minister have since been explained by the Respondents as being traceable to transfers between Mr. Patry’s business and personal bank accounts”.

(2) Minister's Justification Insufficient to Satisfy Subsection 225.2(2)?

The Minister argued that there remained ample evidence to support the need for the order, including:

- It was unclear how the Respondent would maintain their standard of living;
- The house would simply be listed for sale again;
- If sold, the proceeds would be used as living expenses and legal counsel

The court recognised that the home may be sold in the future, but the evidence does not satisfy the court that the proceeds would be used in a way to dissipate the assets to the extent making the satisfaction of the MNR's debt unrecoverable.

The Court considered it necessary to look behind the assessment to consider the type of behaviour the taxpayer was engaged in (to determine unorthodox behaviour), and to recognize the nature of the debt owing (apportionment of tax owing vs administrative penalties). The Court stated:

[27] ... While Justice Martineau acknowledged that assessments should be assumed valid in *Robarts*, above at para 68, he also confirmed that if the record shows that the

good portion of the evidence used by the Minister to justify the jeopardy order is seriously challenged by the taxpayer, the Court cannot simply ignore these submissions when determining whether the jeopardy order should stand. The Minister's assertion must necessarily be called in to question (see also [Canada \(Minister of National Revenue – MNR\) v Douville, 2009 FC 986, \[2009\] FCJ no 1218](#) at paras 16, 20).

[28] Given that the vast majority of the amounts assessed as owing in this case consist of administrative penalties and interest, in my view, it would be unfair to allow the Jeopardy Order to have the effect of preventing the Respondents from utilizing any equity in their house whatsoever for living expenses or counsel. While one can speculate that the Respondents may use funds for this purpose if the house is sold, there is absolutely no evidence before that suggests the amounts would be so high as to deplete the \$800,000 to \$1,000,000 in equity such that the Minister would not be able to realize upon whatever debt may remain at the conclusion of this dispute.

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