Federal Court Cour fédérale

Date: 20240325

T-252-19
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T-261-19
T-262-19

Citation: 2024 FC 463

Ottawa, Ontario, March 25, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

Docket: T-252-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

NADER GHERMEZIAN

Respondent

AND BETWEEN:

Docket: T-254-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

MARC VATURI

Respondent

AND BETWEEN:

Docket: T-258-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

GHERFAM EQUITIES INC

Respondent

AND BETWEEN:

Docket: T-259-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

PAUL GHERMEZIAN

Respondent

AND BETWEEN:

Docket: T-261-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

RAPHAEL GHERMEZIAN

Respondent

AND BETWEEN:

Docket: T-262-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

JOSHUA GHERMEZIAN

Respondent

REASONS FOR RE-DETERMINED COMPLIANCE ORDERS

I. Overview and Background

[1] These proceedings involve six applications by the Minister of National Revenue [the Minister], seeking compliance orders under s 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th

Supp) [the Act]. The Respondents are five individuals, all members of the Ghermezian extended family, and a related corporation, Gherfam Equities Inc. Each of the Minister's applications seeks to compel the relevant Respondent to provide documents and/or information previously sought by the Minister under section 231.1 and/or section 231.2 of the Act.

[2] On February 23, 2022, the Court released its Judgment and Reasons [the Judgment] in these applications (see *Canada (National Revenue) v Ghermezian*, 2022 FC 236). The Judgment granted the Minister's applications, subject to certain remaining steps outlined therein for applying the Court's conclusions, surrounding the Respondents' success in some of their defence arguments, to the development of the form of compliance order in each application. Those conclusions included the finding that section 231.1(1) of the Act did not entitle the Minister to compel a taxpayer to respond to requests for undocumented information (Judgment at paras 83, 111).

[3] Following completion of the procedural steps outlined in the Judgment, the Court issued the compliance orders on July 8, 2022 [Compliance Orders]. The Compliance Orders were accompanied by Supplementary Reasons of the same date (see *Canada (National Revenue) v Ghermezian*, 2022 FC 1010), explaining the Court's conclusions on the principal outstanding disputes between the parties, related to the form of the compliance orders in the six applications, as identified in written submissions provided by the parties following the issuance of the Judgment [Supplementary Reasons].

[4] The Respondents appealed the Judgment, and the Minister cross-appealed. The Respondents also appealed the Compliance Orders, once issued. On July 20, 2022, upon consent of the parties, the Federal Court of Appeal [FCA] issued an Order consolidating the appeals and staying the Compliance Orders pending the hearing and disposition of the appeals [Stay Order].

[5] On September 1, 2023, the FCA issued its decision in *Ghermezian v Canada (National Revenue)*, 2023 FCA 183 [*Ghermezian FCA*], dismissing the Respondents' appeals but allowing the Minister's cross-appeals. In allowing the cross-appeals, *Ghermezian FCA* held that, pursuant to requests issued under section 231.1(1) of the Act, the Minister is authorized not only to compel the provision of documents but also to compel the provision of undocumented information (at para 42). The FCA remitted these applications to this Court, so that the parties would have an opportunity to seek revised compliance orders reflecting the point that had been determined on the cross-appeals (at para 68).

[6] On October 6, 2023, the Court conducted its first Case Management Conference [CMC] following the release of *Ghermezian FCA*, to canvas with the parties their positions on the process the Court should adopt to complete these proceedings and re-determine the Compliance Orders in accordance with the FCA's reasons. The Respondents advised the Court that they intended to seek leave to appeal *Ghermezian FCA* to the Supreme Court of Canada [SCC] and took the position either that the Stay Order served to stay these proceedings pending the outcome of their leave application (and any resulting appeal) and/or that this Court should implement such a stay. The Minister opposed the Respondents' position. The parties also identified that they had

diverging positions on the process the Court should adopt to complete these proceedings by re-determining the Compliance Orders and performing the adjudication of costs.

[7] The Court subsequently issued directions obliging the parties to provide written submissions on the procedural issues identified at the October 6, 2023 CMC, to be followed by oral argument on those issues at another CMC to be held on November 6, 2023. The Court heard the parties' arguments at that CMC, and on November 8, 2023, issued its Order and Reasons, denying the Respondents' request for a stay and prescribing steps and timelines for the completion of these proceedings, culminating with the adjudication of costs [CMC Order]. Pursuant to those steps, the parties have provided their respective written submissions (by the Minister dated February 8, 2024 and by the Respondents dated February 26, 2024) on the proposed form of each re-determined Compliance Orders. The parties' submissions also include drafts of their respective proposed forms.

[8] Following the filing of those submissions, the Minister filed a brief letter dated February 29, 2024, intended to reply to the Respondents' submissions, and the Respondents filed a brief letter on the same date, intended as a sur-reply. Those letters raise a question as to whether, in relation to the issue that was the subject of the cross-appeal to the FCA, there is any difference in the meaning of the phrase "previously undocumented information" (as used in the Judgment at para 112 and the CMC Order at paras 6 and 31) the phrase "undocumented information" (as used in *Ghermezian FCA* at para 42). While the procedural steps identified in the CMC Order did not contemplate these reply and sur-reply submissions, I will take them into account in order to address the question raised therein.

[9] The Court is issuing the re-determined Compliance Orders [Re-determined Orders] on the same date as these Reasons. These Reasons are intended to explain my adjudication of the principal disputes identified in the parties' written submissions.

II. **Issues**

[10] Based on my review of the parties' written submissions, the following issues represent the principal areas of disagreement on the form of the re-determined Compliance Orders:

A. Whether the re-determination is limited to "previously undocumented information";

B. Timeframe for the Respondents' compliance with the Re-determined Orders;

C. Whether the Minister is seeking to resurrect demand for items that she previously conceded need not be included in the Compliance Orders; and

D. Whether the Re-determined Orders should include any qualifying language.

III. **Analysis**

A. *Whether the re-determination is limited to "previously undocumented information"*

[11] The principal substantive disagreement between the parties surrounding the re-determination of the Compliance Orders relates to whether those orders should compel the Respondents to provide information that has already been documented.

[12] Consistent with the language employed in the Judgment at para 112 and the CMC Order at paras 6 and 31, the Minister's written submissions express that the required re-determination includes only the relatively narrow point that the Minister is authorized not only to compel the provision of documents but also to compel the provision of previously undocumented information. The Respondents take the position that, consistent with the FCA's finding that this Court had erred in concluding that section 231.1(1) of the Act did not commit the Minister to compel undocumented information (*Ghermezian FCA* at para 42), the re-determination of the Compliance Orders should include only information that was not previously documented (e.g., information for personal memory). In other words, the Respondents take the position that any information that can be found in the Respondents' books and records falls outside the parameters of *Ghermezian FCA* and is beyond the scope of this re-determination proceeding.

[13] The Respondents therefore argue that the vast majority of the Minister's proposed additions to the Compliance Orders must be rejected, as they relate to previously documented information that can be found in the Respondents' books and records.

[14] In her reply letter, the Minister notes that *Ghermezian FCA* does not employ the term "previously undocumented information", that term being found only in the previous decisions of this Court. Rather, the FCA refers to "undocumented information." In their sur-reply letter, the Respondents submit that there is no meaningful distinction between those two terms.

[15] In that respect, *i.e.*, the distinction between those two terms, I agree with the Respondents. The legal point on which the Respondents had prevailed in the Judgment, and

which was reversed in *Ghermezian FCA*, was whether the Minister was entitled to rely on section 231.1(1) of the Act to compel the Respondents to provide written responses to questions that sought information rather than pre-existing documentation. The written responses would of course document the requested information. Hence the references to that information having been "previously undocumented." However, there is no meaningful distinction between this Court's use of that language and the FCA's references to "undocumented information."

[16] Notwithstanding that conclusion, I find no merit to the Respondents' position that, if the requested information does exist in the Respondents' books and records, that information should not be included in the Re-determined Orders. The Respondents' position before this Court, at the time of the hearing leading to the Judgment, was that it was not possible to interpret the language of section 231.1(1) as authorizing compulsion of information other than information that was contained in a document (see Judgment at para 8). As the Respondents prevailed in that position, the effect of the Judgment was to exclude from the Compliance Orders requests that sought information rather than particular documents.

[17] Indeed, the principal purpose of the post-Judgment process that led to issuance of the Supplementary Reasons and the Compliance Orders was to identify which of the Minister's requests should be excluded from the Compliance Orders because they sought to compel the provision of written answers to questions rather than the provision of documents (Supplementary Reasons at paras 4-5). Therefore, when the FCA allowed the cross-appeal on this point, finding that this Court erred in holding that the Minister could only compel documented information

(*Ghermezian FCA* at para 61), it was necessary to remit these applications to this Court to re-determine the Compliance Orders in accordance with its reasons (*Ghermezian FCA* at para 70).

[18] As such, the Court's mandate following the successful cross-appeal is to determine which of the Minister's requests under section 231.1 of the Act were excluded from the original Compliance Orders, because they sought information rather than documentation, and to include those requests in the Re-determined Orders. Such information was not excluded from the Compliance Orders on the basis that it was already documented somewhere in the Respondents' books and records, but rather on the basis that the Minister's request sought information rather than specific documents. Therefore, the fact that much or all of the requested information may already be documented in the books and records of the Respondents does not represent a basis to exclude that information from the Re-determined Orders.

[19] Indeed, *Ghermezian FCA* noted at paragraph 22 (referencing *Canada (National Revenue) v Miller*, 2021 FC 851; affirmed *Miller v Canada (National Revenue)*, 2022 FCA 183 [*Miller*]), that section 231.1(1) refers to "information that is or should be in the books and records of the taxpayer." If anything, the existence of the requested information in the Respondents' books and records supports the Minister's position that such information should now be added to the Compliance Orders.

[20] Before leaving this issue, I note the Respondents' submission that their written representations filed with this Court on January 5, 2022, in advance of the hearing that led to the Judgment, raised an issue as to whether the documents and/or information required by the

Minister “is or should be” in their books and records. The Respondents reference as an example the written submissions filed by the Respondent, Raphael Ghermezian, arguing that the Minister had failed to prove that certain demanded information (for example, banking information of various non-resident entities) is or should be in his own books and records.

[21] However, the Respondents make this submission only in asserting that the Minister’s written submissions arguably contain inaccurate representations, as the Minister submitted that the Respondents had not argued that the information required by the Minister should not be contained in their books and records. The Respondents do not otherwise expand upon their submission or reference any supporting evidence that was before the Court when it issued the Judgment and the Compliance Orders. In addressing arguments by the Respondents attempting to distinguish *Miller*, the FCA inferred from the Judgment that the issue of whether or not the requested information should have been in the Respondent’s books and records was not central to their arguments before this Court (*Ghermezian FCA* at para 38). Consistent with that conclusion, the Respondents have not raised in this re-determination any substantive or compelling argument that the requested information is not or should not be in their books and records.

[22] Indeed, the Respondents’ submission canvassed above, that the vast majority of the Minister’s proposed additions to the Compliance Orders must be rejected as they relate to previously documented information that can be found in the Respondents’ books and records, is inconsistent with any such argument. In contrast, the Minister makes compelling submissions that the proposed additions to the Compliance Order represent information that should be

contained in the books and records of the Respondents, if not in the documents already required to be produced under the original Compliance Orders.

[23] In conclusion on this first issue, I do not find the Respondents' argument surrounding the previous documentation of the information requested by the Minister to represent a basis to reject any of the Minister's proposed changes to the Compliance Orders.

B. *Timeframe for the Respondents' compliance with the Re-determined Orders*

[24] The Respondents note that on October 31, 2023, they filed a notice of application for leave to appeal *Ghermezian FCA* to the SCC. The Minister filed a response to the application for leave on December 13, 2023, and the Respondents filed their reply on January 4, 2024. The Respondent submits that the SCC generally renders its decision in respect of a leave application between one and three months after the application is perfected, such that the Respondents anticipate receiving a decision in or around April 2024.

[25] As the Respondents' leave application seeks to overturn the decision of the FCA, they submit that, if leave and ultimately the appeal are granted, there is a real possibility that the Minister will not be permitted to compel the production of some or all of the documents and information demanded from the Respondents. Therefore, they submit that if the Re-determined Orders are required to be satisfied before the leave decision, then the Respondents will have been compelled to provide the Minister with the material that is at issue in the appeal, thereby rendering the appeal moot.

[26] On this basis, the Respondents resist the Minister's request that they be required to satisfy the Re-determined Orders within 30 days of their issuance. The Respondents take the position that the 30-day clock should begin from the date of the SCC's decision on the leave application. They emphasize that they are not requesting a stay of these re-determination proceedings, but rather seek to give effect to the principles in Rule 3 of the *Federal Courts Rules*, SOR/98-106 [Rules], *i.e.*, the application of the Rules so as to secure the just, most expeditious and least expensive outcome of every proceeding, as well as the principle of proportionality.

[27] The Minister maintains that, consistent with the time afforded in the original Compliance Orders, 30 days is a reasonable and sufficient time for the Respondents to provide the documents and information required by the Re-determined Orders.

[28] The time for the Respondents to comply with the Compliance Orders was the subject of dispute at the time of the Supplementary Reasons, and the Court concluded that 30 days from issuance represented a reasonable time for compliance (at para 19). The Respondents present request for additional time is not premised on the time to complete compliance, but rather on the potential effect of its leave application and possible appeal to the SCC. However, the Respondents raised that argument, and the Court rejected it, in the process that led to the CMC Order (at paras 10-25). Consistent with the reasoning in the CMC Order, I decline to depart from the timing that was adopted when the original Compliance Orders were issued. The Re-determined Orders will therefore afford the Respondents 30 days following their issuance to comply.

C. *Whether the Minister is seeking to resurrect demand for items that she previously conceded need not be included in the Compliance Orders*

[29] The Respondents submit that the Minister's proposed Re-determined Orders demonstrate efforts to resurrect demand for certain items that were previously abandoned by her in these applications. The Respondents have not particularized that position, other than arguing that the Minister's proposed drafts should be read with care, because there are many instances where additions have been made to the original Compliance Orders without blacklining to draw attention to those additions. The Respondents' written submissions refer to several examples of this but state that those examples are not intended to be an exhaustive list.

[30] I agree with the Respondents' position that the Minister appears to have proposed Re-determined Orders containing some changes that have not been expressly flagged for the Respondents' or the Court's scrutiny. I also agree that this shortcoming is unfortunate, as it creates extra work for the Respondents and for the Court. However, this shortcoming is not material to the substantive determination that the Court must make in re-determining the Compliance Orders pursuant to the mandate in *Ghermezian FCA*. I have examined the examples raised by the Respondents and find no basis to conclude that those proposed changes are not appropriate.

[31] The Respondents assert, in submissions in relation to individual Re-determined Orders, that the Minister is now seeking to improperly reintroduce the scope of items that were removed when the original Compliance Orders were issued. However, the Respondents have provided no particular support for those submissions. The Respondents also argue that certain of the

information, that the Minister seeks to reintroduce in individual Re-determined Orders, would arguably not be in the possession of the relevant Respondent, or that no purpose would be served by requiring the Respondents to incur the effort required to provide information that is already captured by other documents. However, the adjudication of those arguments does not form part of the narrow mandate afforded to this Court by *Ghermezian FCA.*

D. *Whether the Re-determined Orders should include any qualifying language*

[32] Among the changes to the Compliance Orders proposed by the Minister is the removal of the language "if they exist," which the Supplementary Reasons (at paras 10 and 23) concluded to be an appropriate request (by the Respondents) for inclusion in the original Compliance Orders, in keeping with the conclusion in the Judgment that section 231.1(1) did not entitle the Minister to compel creation of a document.

[33] The Minister now argues that this language should be removed in the Re-determined Orders, because the language was included only on the basis of the Court's finding (subsequently overturned on appeal) that section 231.1 does not permit the compulsion of undocumented information. However, the Respondents appear to resist this change on the basis of an argument that *Ghermezian FCA* rejected such a change (at paras 63-66).

[34] In my view, the Respondents' position misinterprets *Ghermezian FCA.* I do not read the FCA's decision as suggesting that the deletion of the words "if they exist" was inappropriate, only that the removal of this language would not necessarily alone be sufficient to effect the changes to the Compliance Orders required by the allowance of the cross-appeal. The FCA noted

in particular that, in the process leading to issuance of the Compliance Orders, the Minister submitted her proposed forms based on her understanding of the Judgment and therefore may have excluded items from the drafts on the basis that they constituted requests for undocumented information (*Ghermezian FCA* at para 67).

[35] I consider the removal of the "if they exist" language to be appropriate but, consistent with the above point noted by the FCA, the Minister has also included in her proposed Re-determined Orders additional items from her earlier demands that had been removed in keeping with the Judgment. Other than the general arguments canvassed above in these Reasons, and the arguments I have rejected in paragraph 31 hereof, the Respondents have raised no particular arguments as to why those items should not now be included. I find their inclusion consistent with the result of the successful cross-appeal.

IV. **Conclusion**

[36] Having considered the parties' respective submissions, I find that the Re-determined Orders should be issued in the forms proposed by the Minister.

V. **Costs**

[37] The Re-determined Orders will not adjudicate costs of the applications or prescribe a process for doing so. Rather, the CMC Order provided that, following the Court's issuance of the Re-determined Order in each of these applications, the Minister would have 14 days to serve and file submissions on costs, limited to 3 pages plus any bill of costs or other supporting material.

The Respondent will then have 14 days from service of the Minister's costs submissions to serve and file submissions on costs, again limited to 3 pages plus any bill of costs or other supporting material. The Minister will have 5 days from service of the Respondent's costs submissions to serve and file a reply, limited to 2 pages.

[38] The Court's expectation is that the parties' submissions will speak to both entitlement to costs and their quantification. The parties are encouraged to propose, and provide jurisprudential support for, lump-sum amounts for any costs that are ultimately awarded. Following receipt of the parties' submissions, the Court will adjudicate costs.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-252-19, T-254-19, T-258-19, T-259-19, T-261-19, AND T-262-19
STYLE OF CAUSE:	MINISTER OF NATIONAL REVENUE V NADER GHERMEZIAN; MINISTER OF NATIONAL REVENUE V MARC VATURI; MINISTER OF NATIONAL REVENUE V GHERFAM EQUITIES INC; MINISTER OF NATIONAL REVENUE V PAUL GHERMEZIAN; MINISTER OF NATIONAL REVENUE V RAPHAEL GHERMEZIAN; MINISTER OF NATIONAL REVENUE V JOSHUA GHERMEZIAN

PURSUANT TO WRITTEN SUBMISSIONS

REASONS FOR RE-DETERMINED COMPLIANCE ORDERS:	SOUTHCOTT J.
DATED:	MARCH 25, 2024

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