

Date: 20080606

Docket: T-1122-07

Citation:2008 FC 715

Ottawa, Ontario, June 6, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

893134 ONTARIO INC. O/A MEGA DISTRIBUTORS

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Assistant Director, Revenue Collection and Client Services of the Windsor Tax Services Offices (Assistant Director) dated May 17, 2007 (Decision), refusing to vacate a lien registered with the Sheriff of the County of Essex and held by Canada Revenue Agency (CRA) against the Applicant's equity in a warehouse property.

BACKGROUND

[2] The Applicant, 893134 Ontario Inc. (Applicant), is a wholesaler to convenience stores and carries on business under the name “Mega Distributors” in Windsor, Ontario. Mr. François Francis is the President and sole director of the Applicant.

[3] The Applicant says that in 1999 and 2000 it purchased cigarettes for resale to a status Indian on the Six Nations Reserve and so did not collect Goods and Services Tax (GST) on those sales. In 2000, CRA together with the RCMP and Ontario Tobacco Tax Investigators (collectively the Joint Forces Operation or JFO) conducted a criminal investigation which included more than 50 days of surveillance of the Applicant in relation to its tobacco purchases and deliveries. As a result of the investigation, the JFO became aware that one employee of the Applicant was not making cigarette deliveries to a status Indian on a reserve but rather to local convenience stores. During this time, CRA continued to process the monthly GST returns filed by mega distributors, issuing refund cheques in respect of the Input Tax credits paid on cigarettes purchased in Mega Distributor’s name.

[4] In December 2000, CRA commenced an audit of the Applicant for the period July 1, 1998 to November 30, 2000. In February 2001, the Applicant was assessed for uncollected and unremitted GST due under the *Excise Tax Act*, R.S.C. 1985, c. E-15, for a total of \$767,354.52, together with penalties and interest. The assessment represents unremitted GST on the tobacco sales purportedly delivered to the reserve.

[5] After the referral of the Applicant's assessment for collection, a number of meetings took place between CRA and the Applicant's representative. Due to the Applicant's expressed intention to object to the assessment, collection action was placed on hold until the objection was dealt with. On February 6, 2002, the Applicant was informed that, as a result of information from the Appeals Division of the Windsor Tax Services office, the assessment would be confirmed and collection action would be taken. On February 12, 2002, the Applicant's indebtedness was certified and the certificate registered in this Court. The Applicant has initiated proceedings in the Tax Court of Canada with respect to the assessment and collection action by CRA. The matter has been set down for five days of hearings in September 2008.

[6] The local office agreed to place collections on hold because of the Applicant's stated intention to object to the assessment, but the Appeals Division of the Windsor Tax Service Office had the authority to overrule this decision/agreement. After certifying the lien on February 12, 2002, the collection officials were informed that the final decision regarding the objection was to be made by Head Office Appeals, since the assessment involved an alleged sale to a status Indian.

[7] The Head Office upheld the assessment and a request was sent to Ms. Yvonne Brown, the Applicant's representative, to make arrangements for payment of the debt, failing which collection action would be taken.

[8] Meetings between Mr. Bruck Easton (who replaced Ms. Brown as the Applicant's representative) and the collection officials and the Assistant Director were held in February and

March 2003. The Assistant Director decided not to proceed with the collection action after being advised at these meetings by Mr. Easton that the Applicant intended to appeal the assessment to the Tax Court.

[9] The Assistant Director informed Mr. Easton that, in order to protect the Crown's position, and since the Applicant was not prepared to provide security for its indebtedness, the memorial issued by this Court upon the registration of the certificate would be acted upon. The memorial was registered in the land titles office on June 16, 2003.

[10] In a letter dated May 8, 2007, counsel representing the Applicant in the appeal before the Tax Court requested, on behalf of the Applicant, that CRA's lien be lifted so the Applicant could seek refinancing of its business premises. The Applicant wishes to take a second mortgage on the warehouse property so that it can obtain money needed to fund its legal dispute with CRA in the Tax Court, as well as for separate legal counsel in other proceedings the Applicant wishes to initiate concerning the conduct of CRA officials, namely "CRA's entrapment technique of paying out GST refunds they knew were not owed to [the Applicant] so as to maintain their unsuccessful criminal investigation" and the CRA officials' "refusal to disclose for several years the true basis of their ReAssessment."

[11] By letter dated May 17, 2007, the Assistant Director refused the Applicant's request. The Assistant Director stated in his reasons that he had reviewed the materials filed with the Tax Court relating to the appeal, including the Notice of Appeal, the Further Amended Reply to the Notice of

Appeal, and the pre-hearing conference briefs. He explained that the lien was filed in order to protect CRA's interest in collecting the GST owed by the Applicant. The Assistant Director also noted that he had discussed the file with other CRA officials, including the Team Leader of Appeals and the Section Manager of Revenue Collections, who were in agreement that CRA was not in a position to lift the lien as requested given their understanding of the file and their obligation to ensure the Crown's position was protected. It is the Assistant Director's refusal to lift the lien that is the Decision under judicial review in the present application.

ISSUES

[12] The Applicant raises the following issues in this application:

- 1) Did the Assistant Director breach the duty of fairness by failing to consider relevant factors when making his decision?
- 2) Did the refusal of the Applicant's request by the Assistant Director effectively deprive the Applicant of the right to counsel and, consequently, the right to a fair hearing?

STANDARD OF REVIEW

[13] The standard of review analysis does not apply to issues involving the duty of fairness and principles of natural justice (*Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29) which are questions of law, and the applicable standard of

review is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9). Where a breach of the duty of fairness is found the decision must be set aside (*Sketchley v. Canada (Attorney General)*, (2005), [2006] 3 F.C.R. 392, 2005 FCA 404). Consequently, in my view, the applicable standard of review for both issues raised in this application is correctness.

ANALYSIS

1. Did the Assistant Director breach the duty of fairness by failing to consider relevant factors when making his Decision or by failing to request further information from the Applicant?

[14] The Applicant submits that, in making his Decision, the Assistant Director failed to consider a number of relevant factors, including: (1) the conduct of CRA officials, namely, that CRA continued to send the Applicant GST refund cheques that it knew were not warranted and that CRA did not inform the Applicant earlier of its surveillance and the actions of the Applicant's employee; (2) the merits of the litigation proposed to be brought by the Applicant in respect of that conduct; and, (3) the merits of the Applicant's appeal to the Tax Court. The Applicant also argues that the Assistant Director owed a duty to the Applicant to allow further or rebuttal evidence to be tendered before making his Decision.

[15] First, it is clear from the Decision that the Assistant Director did consider the Applicant's appeal to the Tax Court. The Assistant Director specifically noted that he had reviewed "the Tax Court Notice of Appeal, the Further Amended Reply to the Notice of Appeal, and the pre-hearing

conference briefs, filed with the Tax Court.” For reasons I will give, I do not believe that other factors raised by the Applicant were relevant to the matter before the Assistant Director. CRA’s conduct with respect to the continued issuance of GST refund cheques, the Agency’s failure to inform the Applicant that it was being investigated, or of any information acquired through that investigation, are not, in my view, relevant to the question of whether the lien against the Applicant’s property was necessary to ensure the Crown’s interest remained secure. Likewise, not only were the merits of the proposed litigation regarding this conduct not relevant to the issue before the decision-maker, but such litigation was entirely speculative.

[16] Further, it is my view that the Assistant Director was under no obligation to seek further information or rebuttal evidence from the Applicant in the present case. The Applicant cites this Court’s decision in *Edison v. R* (2001), 208 F.T.R. 58, 2001 FCT 734, wherein Justice Blanchard discussed the doctrine of legitimate expectations and noted that this doctrine can create procedural rights. Under the circumstances of this case, however, I do not agree that the Applicant had a legitimate expectation that the decision-maker would request further information or comment regarding the contemplated litigation. Although it is open to a decision-maker to request further information when necessary, there exists no general obligation. I recognize that, in some instances, fairness may require that further evidence or information be sought. Whether such an obligation exists is to be determined on a case-by-case basis. I find no such obligation in the case before me.

Knowledge of Financial Situation

[17] The Applicant argues that the Assistant Director knew fully the Applicant's financial situation and that there were no other financial resources available to the Applicant to fund its litigation against CRA. Hence, the Applicant argues, it was unreasonable for the Assistant Director to deny the request to lift the lien.

[18] In my view, this is not really an argument based upon procedural unfairness. It amounts to saying that the Minister should remove the lien in order to allow the Applicant to finance its legal proceedings against the Minister. The Applicant offers no real authority or justification for such a position. It is merely an assertion that it was unreasonable for the Minister to retain security in the warehouse property in a situation where the Applicant claimed it needed the equity in question to use as security for the money its lawyers asked for before they would act. The relevant statutory scheme allows the Minister to register a lien against property in order to secure the deemed debt. It does not require the Minister to vacate that security because the tax debtor needs the equity in question to finance legal action and provide security to its own lawyers. In my view, the Minister's refusal to comply with the Applicant's request in this regard was neither unreasonable nor unfair.

Failure to Consider Serious Misconduct of CRA Officials

[19] The Applicant also argues that the decision was unfair because the Assistant Director failed to consider the serious misconduct of CRA officials and their breaches of the CRA's own Taxpayer

Bill of Rights:

His letter indicates no consideration of the merits of the litigation proposed to be brought by the Applicant in respect of that conduct. A decision maker must consider all relevant facts.

[20] There is no evidence to support this argument. The Decision sets out what the Assistant Director reviewed regarding the Applicant's position, and he indicates that he also consulted with the Tax officials involved and came to the conclusion that the Crown was not in a position to lift the lien at that time. The Decision focuses upon the Applicant's tax appeal because the Assistant Director took the position that what is relevant to the statutory scheme requires that he consider the lien only from the perspective of "the CRA's interest to ensure the collection of the Goods and Services Tax due under the Excise Tax Act." There is nothing in the statutory scheme or the materials before me to suggest that the Assistant Director was wrong in this approach. He stated what he regarded as relevant to the issue before him. The Applicant may have wanted the Assistant Director to go beyond the statutory scheme and consider lifting or postponing the lien in order to assist the Applicant in financing the tax appeal and the other litigation. But there is nothing in the statutory scheme or in any authority produced by the Applicant to suggest that the Minister was obliged to do this or that the Assistant Director was obliged to consider relinquishing or postponing the Minister's security in order to accommodate the Applicant's litigation plans.

[21] The Applicant seems to assume that, even before the appeal and the further litigation have been heard, it was unfair of the Minister not to accept, or at least consider the merits of, the Applicant's position. There is no authority or justification to support such a position.

Offer to Supply Further Information/Refusal to Allow Rebuttal Evidence

[22] The Applicant appears to assume once again that the Minister is under an obligation to conduct a pre-hearing assessment of the merits and then make a decision on whether to remove the lien in order to accommodate the Applicant's litigation plans.

[23] In my view, under the statutory scheme, the Minister is under no such obligation. The Applicant's request and reasons were considered and the response of the officials was obtained. The Minister's obligation was to consider whether the lien could be removed without jeopardizing his security position. The Minister was not, in my view, required to conduct a pre-hearing assessment on the merits of the tax appeal or possible future litigation regarding misconduct of CRA officials.

[24] The Applicant was given a full opportunity to state the case for lifting the lien. The Assistant Director was not required to conduct a pre-hearing on the merits. Nor was he in a position to do so. It is obvious that, if Applicant's counsel has indicated an unwillingness to act without a retainer and the security of knowing that his fees will be paid, and the Applicant has no other means of providing that security other than the equity in the warehouse property, then there is good reason for the Minister to assume that he will not be able to enforce the tax debt without the security he has taken.

This is also supported by the figures regarding the value of the remaining equity in the warehouse property. The Assistant Director's Decision is both procedurally fair and reasonable given the Applicant's own evidence regarding its financial position.

Erred in Consideration of the Merits

[25] The Applicant also argues that the Assistant Director was unfair because he "erred in his consideration of the merits of the Applicant's Appeal to the Tax Court of Canada relying solely on CRA's view of the evidence ... The decision maker must consider all relevant facts."

[26] There is no evidence that the Assistant Director did not consider the merits of the Applicant's argument or that he relied solely on the CRA's view of the evidence, or that he did not consider relevant facts.

[27] Once again, the Applicant assumes that the Assistant Director was obliged to conduct some kind of pre-hearing assessment of the merits of matters to be decided on an appeal or as a consequence of some future litigation concerning the conduct of CRA officials. In my view, however, under the statutory scheme, the Assistant Director merely had to consider whether the lien could be lifted without jeopardizing the Crown's security. The lien, under the statutory scheme, is intended to protect amounts owing until such time as they become payable. The Assistant Director obviously considered both sides of the argument on this issue and, given the Applicant's own evidence concerning its financial situation, his Decision seems reasonable.

2. ***Did the refusal of the Applicant's request by the Assistant Director effectively deprive the Applicant of the right to counsel and, consequently, the right to a fair hearing?***

[28] The Applicant argues that the Assistant Director's Decision to deny the Applicant's request to vacate the lien against the Applicant's property denied the Applicant the opportunity to access the equity in that property, and effectively deprived the Applicant of the right to counsel both in the ongoing Tax Court appeal and in the litigation the Applicant wishes to commence against CRA for the alleged misconduct of its officials. The Applicant says that, as a result of the lien against its property, it will not be able to pay for legal representation for the appeal before the Tax Court and, as a result, its counsel in that matter will seek to be removed from the record. In addition, the Applicant states that it cannot afford the retainer necessary to institute its claim against CRA for the misconduct of its officials. The Applicant further argues that, given the complex and lengthy nature of the proceedings before the Tax Court, this denial of the right to counsel constitutes a denial of the Applicant's right to a fair hearing and contravenes the protections provided for in the *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

[29] In *British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21 at paragraphs 23-27, the Supreme Court of Canada held that, although there exists a constitutional right to legal services in some limited contexts, the rule of law does not include general access to legal services where rights and obligations are at stake. The Court further recognized that, historically, the rule of law has not "been understood to encompass a general right to have a lawyer in court or tribunal proceedings affecting rights and obligations."

[30] In my view, the Applicant has failed to establish that there exists a right to counsel in the circumstances of the present case. Although it is unfortunate that the Applicant may not have the financial resources to pay for legal counsel in the proceedings before the Tax Court (which may indeed be complex in nature) or in the proceedings it wishes to commence against the CRA, the rule of law does not require the assistance of, or representation by, legal counsel even where rights and obligations are at stake. Further, I do not agree that it necessarily follows that, because the Applicant may not be represented by counsel, it has been denied a right to a fair hearing. Self-represented litigants in proceedings before the Tax Court in similar matters are common and the mere fact that a litigant is not represented by legal counsel does not, for that reason, amount to an unfair hearing.

[31] Quite apart from whether the Applicant has a right to be represented by legal counsel in these circumstances, the Applicant is really arguing that the Minister has some kind of obligation to vacate or postpone his security to assist the Applicant to secure and pay legal counsel.

[32] In my view, no right to counsel is denied on these facts. If legal counsel will not act for the Applicant then that is a function of counsel's perception of the Applicant's financial position and common legal practice. The Applicant's own evidence is that there is a range of factors that have contributed to its present financial situation. Whether or not the Minister has caused the Applicant any unlawful financial difficulties is a matter for some future Court to decide in any action that the Applicant decides to take. There is no obligation on the Minister to vacate or postpone security for a tax debt to enable the tax debtor to finance tax appeals or future action regarding the misconduct of CRA officials, the outcome of which at this point is entirely speculative.

[33] Mr. Francis has opined that if he cannot secure legal counsel for the Applicant he will conduct the appeal himself. The Applicant is simply in the same position as any litigant who has to consider whether or not they can afford to secure the services of legal counsel, or whether they should be self-represented. There is no denial of legal counsel by the Minister in these circumstances. The legal authorities brought to the Court's attention on this issue do not support a right to counsel in these circumstances where the action involved is a tax appeal and/or a civil claim for damages.

General

[34] The Applicant's general position appears to be that the Minister should have vacated the lien because the Applicant needs the equity in the property to retain legal counsel. In order to justify this position the Applicant has alleged procedural unfairness. But there is no evidence of procedural unfairness in these circumstances. The Assistant Director considered the request and the reasons advanced by the Applicant. He also considered the Minister's own position (which was that enforcement proceedings were held in abeyance but the debt was secured by a lien against property owned by the Applicant) and concluded that the Minister's position could not be protected if the lien was removed. He did not make a decision concerning the merits of the dispute. Nor was he required to. The merits are for some future court to decide. Given that both sides are still required to prove their respective positions in future court action, the Assistant Director could hardly assess the merits at this time.

[35] There is no evidence that the Assistant Director did not consider the merits and procedural issues raised in the Applicant's request. His response simply makes clear that, as far as the Minister is concerned, the statutory scheme and the ability to file a lien is simply to "ensure the collection of the Goods and Services Tax due under the Excise Tax Act" and this means that his obligation is to ensure that "the Crown's position is protected" in this regard.

[36] In my view, there is nothing in the statutory scheme to suggest that the Assistant Director could not take this approach or that the Minister is obligated to accommodate the Applicant, or others in a similar position, who wish to finance appeals or civil actions they may wish to bring against CRA officials.

[37] In the present circumstances, the Minister has already agreed to hold enforcement measures in abeyance pending the outcome of the appeal. But this was done on the assumption that the Minister would create and register the lien to provide security for whatever might be payable by the Applicant at some time in the future.

[38] Consequently, the Assistant Director merely set out in his Decision what he regarded as relevant to the decision he had to make.

[39] Despite the extremely able arguments of counsel for the Applicant, and notwithstanding the unfortunate financial situation that the Applicant alleges it now faces, I cannot find that there has been either a breach of natural justice in this case, or that the Assistant Director's Decision was

unreasonable giving the statutory scheme and the arrangements already struck whereby enforcement has been held in abeyance and security taken pending the outcome of the tax appeal.

[40] The Applicant says that the end result is that it cannot now access the equity in the warehouse building to finance the legal costs of the appeal and future action it is planning against CRA. But this is a function of the general financial situation in which the Applicant now finds itself. There is no evidence to suggest that the Minister has encumbered the property for any other purpose than the one contemplated by the statutory scheme, and certainly no evidence that he has done so in order to thwart any legal action that the Applicant may wish to take against CRA. It just so happens that, as a result of various factors referred to in the Applicant's materials, the Applicant is now having difficulties in financing the legal representation it would like for the appeal and possible further action against CRA. But this is not an uncommon situation, and there is nothing in the statutory scheme, or in any authority brought to my attention in this application, to support the position that, in these circumstances, the Minister should consider lifting or postponing his security in order to accommodate the Applicant's litigation plans and expectations. The Applicant has suggested no other means by which the Minister's interest can be protected in these circumstances. The request is simply that the Minister forfeit his security to assist the Applicant to pay and retain legal counsel. Given the statutory scheme and the Applicant's general financial situation, it is difficult to see how or why the Minister should do this, particularly where the merits of the tax appeal and any future legal action remain unassessed and speculative.

[41] Tax enforcement measures often appear unfair and draconian to people in the Applicant's position. But the governing legislation suggests that Parliament intended the Minister to have the powers and the security that has been taken in this case, even when the taxpayer objects to the conduct of the CRA and its officials.

[42] For these reasons, I conclude that the Applicant's application for judicial review must be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

- 1. The application for judicial review is dismissed with costs to the Respondent.**

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1122-07

STYLE OF CAUSE: 893134 ONTARIO INC. O/A MEGA
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MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: May 27, 2008

**REASONS FOR
JUDGMENT AND
JUDGMENT** June 6, 2008

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