Docket: 2015-1917(IT)G

BETWEEN:

SPE VALEUR ASSURABLE INC.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2015-1921(IT)G

AND BETWEEN:

ROBERT PLANTE,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion heard on February 11, 2019, at Québec, Quebec
Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the applicants:	Francis Fortin and Gabriel Dumais
Counsel for the respondent:	Michel Lamarre

ORDER

The applicants' motion filed on March 19, 2018, is dismissed. Costs in the cause.

Signed at Ottawa, Canada, this 27th day of August 2019.

"Johanne D'Auray"

D'Auray J.

Translation certified true
on this 7th day of February 2020.

François Brunet, Revisor

Citation: 2019 TCC 174
Date: 20190827
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REASONS FOR ORDER

D'Auray J.

I. Background

[1] At the hearing of the applicants' appeals on the merits, they objected to having the documents mentioned in Appendix 1 to these reasons filed as evidence. The Court took under advisement the applicants' objections, having been informed by the applicants that, after the hearing of the appeals, they would file an application to have these documents excluded.

[2] The documents at issue come from a search performed on January 25, 2012, under section 487 of the *Criminal Code*, at the premises of SPE, SPE Affacturage Inc. and SPEQ SPE Technologies, located in Saint-Georges-de-Beauce, and the

residence of Mr. Plante and his wife Julie Grenier, also located in Saint-Georges-de-Beauce. The Court and the parties qualified the objections as «umbrella objections.»

[3] The applicants argue that the documents at issue must be excluded from the evidence pursuant to subsection 24(2) of the *Canadian Charter of Rights and Freedoms* («Charter»). They submit that the Minister of National Revenue (the «Minister») cannot use documents obtained pursuant to a search warrant to reassess the applicants. According to the applicants, admission of these documents into evidence would contravene sections 7 and 8 of the Charter.

[4] The respondent argues that the documents must be included in the evidence. These documents were obtained under a valid search warrant pursuant to section 487 of the *Criminal Code*. The applicants did not challenge the search warrant.

[5] The respondent therefore argues that the Minister could rely on these documents to reassess the applicants. According to the respondent, filing these documents as evidence in the applicants' appeals does not contravene sections 7 and 8 of the Charter. Consequently, the documents are admissible in evidence to determine whether the reassessments that the Minister made against the applicants are correct in fact and in law.

II. Facts

[6] In February 2006, the Canada Revenue Agency («CRA») undertook a tax audit of certain individuals who had acquired licences from SPE.

[7] This tax audit was subsequently extended to Mr. Plante and SPE.

[8] Ms. Drew, an auditor at the CRA's Eastern Quebec Tax Services Office, began her audit of the applicants' files in early 2007. On April 29, 2009, Ms. Drew sent Mr. Plante and SPE a letter advising them that the audit of the tax returns for the 2004 to 2006 period was completed. Her letter also asked the applicants to send her comments on the proposed adjustments. At that time, Ms. Drew had not received the statements that the CRA's Tax Avoidance Division had requested from the relevant U.S. authorities.

[9] Ms. Morin replaced Ms. Drew as the auditor. After she had reviewed the files and received the documents from the relevant U.S. authorities in June and

August 2009, Ms. Morin prepared a T134 – Referral to Investigations form in November 2009, i.e. she transferred the SPE file and Mr. Plante's file to the Criminal Investigations Division for review.

[10] In December 2009, the applicants' files were assigned to Mr. Potvin, an investigator with the Enforcement Division (criminal investigations) at the CRA's Eastern Quebec Tax Services Office ("Criminal Investigations Division").

[11] After the files had been reviewed, the CRA had reasonable grounds to believe that Mr. Plante, SPE and other companies had, together or separately, made false or misleading statements for the purpose of evading or attempting to evade the tax payable or allow others to avoid paying their taxes. In this regard, Mr. Potvin prepared information to obtain search warrants under section 487 of the *Criminal Code*.

[12] On January 12, 2012, search warrants were obtained for Mr. Plante and SPE. The warrants authorized CRA investigators to search the premises of SPE, SPE Affacturage Inc., and SPEQ SPE Technologies, and the personal residence of Mr. Plante and his spouse Julie Grenier.

[13] The warrants were executed on January 25, 2012. The applicants never challenged the validity of the search warrants.

[14] On March 14, 2012, Mr. Longchamps of the Criminal Investigations Division wrote to SPE and to Mr. Plante and Ms. Grenier, informing them that a justice of the peace of the Court of Québec had signed an order on March 13, 2012, to detain documents under section 490 of the *Criminal Code*, which authorized the CRA to detain the things seized until April 25, 2012. Also attached to the letters dated March 14, 2012, are the appendices of the report to a justice of the peace, which contain the inventory of the things seized when the search warrant was executed. Mr. Longchamps also advised the applicants that a full investigation was under way and that the seized things could be required in court as evidence that an offence had been committed within the meaning of section 239 of the *Income Tax Act* (the "ITA").

[15] The CRA made two applications for further detention of the things seized, one in March and another in December 2012. The second application was dated December 4, 2012. On December 5, 2012, Mr. Plante consented to the further detention of the things seized by the CRA.

[16] At the end of December 2012, the CRA closed the Criminal Investigations Division of the Eastern Quebec Tax Services Office. Mr. Potvin was transferred to the Audit Division of the Eastern Quebec Tax Services Office. As an auditor, Mr. Potvin became responsible for the civil aspect of the applicants' cases.

[17] On January 21, 2013, Mr. Potvin sent Mr. Plante a letter advising him that the criminal investigation against him and SPE had been discontinued. An application for an order for the return of the things seized, pursuant to subsection 490(5) of the *Criminal Code*, was filed by the applicants on January 21, 2013, in the Court of Québec to have the things seized returned to the applicants.

[18] The decision to discontinue the criminal investigation was based on a cost/benefit analysis by Mr. Potvin's team.

[19] On October 1, 2013, Mr. Potvin advised SPE and Mr. Plante that the audit on the 2005 to 2009 tax returns was completed, reassessments would be made and a penalty would be imposed pursuant to subsection 163(2) of the ITA.

[20] In October 2013, notices of reassessment were issued by the Minister against some of SPE valeur Assurable inc.'s licensees, including Claude Lessard and Eric Gilbert, as well as Mr. Plant and SPE. When making the reassessments, the Minister relied on some of the documents obtained during the searches, which are the subject of this motion.

[21] Mr. Potvin testified that when an investigator accepts a file from the audit department, he deals with both the criminal and civil aspects of the case. The investigator sees the case through to the end. According to Mr. Potvin, this is self-evident because the investigator must calculate the amount of tax evaded in case of an offence under section 239 of the ITA.

[22] The evidence also demonstrated that during the criminal investigation, the CRA's auditors and investigators did not use the civil powers set out in sections 231.1 (Inspections) and 231.2 (Requirement to provide documents or information) of the ITA.

III. Issues

[23] Are the documents covered by the «umbrella objections» admissible as evidence in the appeals from the reassessments issued against the applicants? Does the filing of these documents as evidence contravene sections 7 and 8 of the Charter?

IV. Positions of the parties and analysis

[24] The applicants argue that the documents obtained during the search must be excluded from the evidence under subsection 24(2) of the Charter. They submit that the respondent cannot enter into evidence the documents obtained via the search because they had a reasonable expectation of privacy with respect to these documents. Filing these documents as evidence contravenes sections 7 and 8 of the Charter. The Minister could not rely on those documents to make reassessments. Accordingly, the respondent cannot file these documents as part of the applicants' reassessment appeals for the following reasons:

(i) The CRA apparently used the criminal investigation to move forward with the audit.

(ii) Documents seized during the criminal investigation could not be photocopied by the CRA and used for civilian purposes.

(iii) Merger of powers between the audit and the criminal investigation.

(iv) Documents obtained during a search conducted for the purpose of investigating criminal offences could not be used by the CRA for civil purposes, including making reassessments.

(v) During the search, the CRA seized personal documents unrelated to the transactions at issue. The documents that were seized could not have been obtained during an audit because they were emails from third parties. In addition, the applicants had a reasonable expectation of privacy with respect to these documents. The applicants' privacy was therefore violated, in contravention of section 8 of the Charter.

(i) The CRA apparently used the criminal search warrant to move forward with the audit.

[25] The applicants state that they are not challenging the search warrant. That being said, they argue that the search warrant was apparently obtained to move forward with the audit. This argument does not hold water. There is no evidence before the Court upon which I can find that the criminal investigation was a pretext for obtaining documents for the purposes of the audit. On the contrary, Mr. Potvin testified that after having reviewed the documents obtained during the audit, including the documents of the competent authorities, he had reasonable grounds to believe that Mr. Plant and SPE had contravened the ITA. However, valid search warrants were issued by a judge of the Court of Québec under section 487 of the *Criminal Code*. The applicants never challenged the search warrant.[1]

(ii) Documents seized during the criminal investigation could not be photocopied by the CRA and used for civilian purposes.

[26] The applicants argue that the circumstances indicated that the documents were photocopied for use in the civil audit. The applicants rely on the following facts: the Eastern Quebec Office closed its Criminal Investigations Division at the end of December 2012. On that date, Mr. Potvin was transferred to the Audit Division as an auditor. According to the applicants, the facts show that the criminal investigation was completed in December 2012. According to the applicants, this proves that the CRA only requested further detention of the documents on December 4, 2012, to give the Agency enough time to photocopy the documents.

[27] Although the Criminal Investigations Division closed at the end of December, the applicants were not informed until January 23, 2013, that the investigation had been discontinued. The applicants did not submit any evidence to support their contentions. They are based on assumptions and suspicions. This argument therefore has no merit.

[28] At any rate, the documents at issue all come from the seizure of computer equipment. At the hearing of the appellants' appeals on the merits, the evidence showed that, as stipulated in the search warrant, Ms. Arbour, as a CRA computer forensics investigator, was required to compile an inventory of all the electronic devices seized and describe each document or item of evidence. Ms. Arbour was the custodian of the documents from the electronic devices. As an investigator, Mr. Potvin did not have access to the seized computer contents. He had to submit specific requests for documents to Ms. Arbour; for example, he could ask for

[1] The parties did not argue the Court's jurisdiction; it is not clear that the Court has jurisdiction to answer some of the issues raised by the applicants.

documents relating to Mr. Mavrovic. Ms. Arbour ensured that the search warrant covered the requested documents before providing copies to Mr. Potvin. Therefore, with respect to the documents at issue, when Mr. Potvin required photocopies of the electronic documents, Ms. Arbour made them for him.

[29] The applicants also argue that the CRA cannot retain a copy of seized documents once the criminal investigation is completed. According to the applicants, this would allow the CRA to gather evidence for possible civil proceedings, thereby ignoring the principles that underpin the search powers and the protections set out in section 490 of the *Criminal Code*.

[30] The applicants have already argued this issue before the Federal Court of Canada[2]. Before the Federal Court, the applicants challenged the CRA's decision to send Revenu Québec ("RQ") a copy of the documents that were seized during the search of SPE's offices and the personal residence of Mr. Plante and Ms. Grenier. Before the Federal Court, they argued that once the criminal investigation was completed and the CRA decided not to lay charges, the CRA could not retain a copy of the documents, let alone send a copy of the documents to RQ. At paragraphs 26 and 31 of her reasons, Gagné J. rejected the applicants' argument, writing as follows:

> [26] First the *Criminal Code* provisions are clear: since the seizure was executed under a valid warrant, the CRA has an unequivocal right to make copies of the seized documents (*Pèse Pêche Inc v R*, 2013 NBCA 37 at paras 12-13; *Re Moyer* (1994), 95 CCC (3d) 174 at paras 15, 26 (Ont Gen Div); *Cartier*, above at paras 20, 25; *Bleet*, above at para 8; *Black*, above at para 27; *Bromley v Canada*, 2002 BCSC 149 at para 26).
>
> […]
>
> [31] It follows that the CRA could retain a copy of the documents seized during the search of SPE's offices and that therefore it is retaining them legally.
>
> [My emphasis.]

[31] I agree with Gagné J.'s comments.[3]

(iii) Merger of powers between the audit and the criminal investigation.

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[2] *SPE Valeur Assurable inc. Robert Plante, Claude Lessard v. Canada (Revenue Agency)*, 2016 FC 56.

[3] See footnote number 2 below.

[32] At the hearing of the appeals on the merits, Mr. Potvin testified that when investigators accept a case from the Criminal Investigations Division, they deal with both the civil and the criminal aspects of the case. Mr. Potvin reassessed the applicants. In this case, Mr. Potvin was an auditor when the reassessments were made in October 2013. However, Mr. Potvin testified that if he had still held the position of investigator in the Criminal Investigation Division, he would nevertheless have made the reassessments because the calculation of criminal fines under section 239 of the ITA is generally based on the tax evaded.

[33] According to the applicants, this merger of roles is inconsistent with the principles laid down by the Supreme Court in *R. v. Jarvis*[4], which required that a distinction be made between the CRA's audit and criminal investigative powers. Thus, the evidence seized pursuant to the search warrant cannot be admitted into evidence for civil purposes.

[34] I do not agree with the applicants' interpretation of *Jarvis.* That case did not decide that, in a criminal investigation, a CRA officer cannot use the civil powers set out in sections 231.1 and 231.2 of the ITA. *Jarvis* stands for the proposition that a criminal investigation and an audit may be conducted simultaneously. However, where the purpose of an inquiry or a question is the determination of a taxpayer's penal liability, the CRA must avail itself of a search warrant to obtain the documents needed for the investigation. Then, the protections guaranteed by the Charter apply. Thus, an investigator may not use civil powers such as the powers granted by subsections 231.1(1) and 231.2(1) of the ITA, including inspection and requirement powers, to advance a criminal investigation. This would run counter to the principle against self-incrimination. However, this does not mean that documents obtained pursuant to civil powers cannot be used for assessment purposes. In this regard, Iacobucci and Majors JJ. stated the following at paragraphs 97 and 98 of their reasons:

> 97 The predominant purpose test does not thereby prevent the CCRA from conducting parallel criminal investigations and administrative audits. The fact that the CCRA is investigating a taxpayer's penal liability, does not preclude the possibility of a simultaneous investigation, the predominant purpose of which is a determination of the same taxpayer's tax liability. However, if an investigation into penal liability is subsequently commenced, the investigators can avail themselves of that information obtained pursuant to the audit powers prior to the commencement of the criminal investigation, but not with respect to information obtained pursuant to such powers subsequent to the commencement of the

[4] *R. v.* Jarvis, [2002] 3 SCR 757.

> investigation into penal liability. This is no less true where the investigations into penal liability and tax liability are in respect of the same tax period. So long as the predominant purpose of the parallel investigation actually is the determination of tax liability, the auditors may continue to resort to ss. 231.1(1) and 231.2(1). It may well be that there will be circumstances in which the CCRA officials conducting the tax liability inquiry will desire to inform the taxpayer that a criminal investigation also is under way and that the taxpayer is not obliged to comply with the requirement powers of ss. 231.1(1) and 231.2(1) for the purposes of the criminal investigation. On the other hand, the authorities may wish to avail themselves of the search warrant procedures under ss. 231.3 of the ITA or 487 of the *Criminal Code* to access the documents necessary to advance the criminal investigation. Put another way, the requirement powers of ss. 231.1(1) and 231.2(1) cannot be used to compel oral statements or written production for the purpose of advancing the criminal investigation.
>
> 98 In summary, wherever the predominant purpose of an inquiry or question is the determination of penal liability, criminal investigatory techniques must be used. As a corollary, all *Charter* protections that are relevant in the criminal context must apply.

[35] Furthermore, *Bauer*[5], rendered by the Federal Court of Appeal, involved a criminal investigation that was under way. The criminal investigator used the civil power set out in subsection 231.2(1) of the ITA, i.e. the power to issue requirements for information, to obtain two documents from Mr. Bauer. Mr. Bauer argued that the same person could not conduct the criminal investigation and exercise civil powers at the same time. Mr. Bauer submitted that the documents obtained pursuant to the requirements for information that had been used to make reassessments should be excluded from the evidence.

[36] In *Bauer*, Webb J. of the Federal Court of Appeal said the CRA may continue to use its civil powers during a criminal investigation. According to Webb J., if these powers can be exercised by two different individuals at the CRA, there does not seem to be any reason why the powers cannot be exercised by the same person at CRA. What matters is how the CRA uses the documents that have been obtained. According to *Bauer*, documents obtained by the investigator pursuant to requirements for information could be used to assess Mr. Bauer, but could not be used to advance the criminal investigation. Webb J. specified that our Court should only concern itself with civil matters, not criminal matters, which come under the purview of provincial courts.

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[5] *Bauer v. Canada,* 2018 FCA 62. The translation of this decision is not yet available.

[37] In *Bauer*, Webb J. also stated that there is a common element in reassessments and any charges under section 239 of the ITA: they both require the same calculation, that is to say, the determination of the tax payable, i.e. the tax debt.

[38] The principles laid down by Webb J. in *Bauer* are found in paragraphs 12 to 14 of his reasons:

> [12] Mr. Bauer's argument is that his case can be distinguished from Romanuk on the basis that while the audit powers remain in effect following the commencement of an investigation, these powers cannot be exercised by the same person who is doing the investigation related to section 239 of the ITA. In my view this distinction is not material. If the powers can be exercised by two different individuals at CRA there does not seem to be any reason why the powers cannot be exercised by the same person at CRA. In each case the question will be whether the documents obtained are to be used for administrative purposes or for the purposes of a prosecution under section 239 of the ITA.
>
> [13] In my view, even though an investigation had commenced that could lead to charges being laid under section 239 of the ITA, this does not preclude the CRA from using requirements to obtain information or documents that could be used only in relation to the reassessments. Both the reassessments and any charges under section 239 of the ITA ultimately relate to the underlying tax liability of the taxpayer. Therefore, there is a common element in both matters the determination of the unreported income of the taxpayer for a particular year. Common facts will be needed for both the administrative reassessment and the penal charges under section 239 of the ITA.
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> [14] While using requirements under section 231.2 of the ITA to obtain information or documents after an investigation has commenced may result in that information or those documents not being admissible in a proceeding related to the prosecution of offences under section 239 of the ITA, it does not preclude that information or documents from being admissible in a Tax Court of Canada proceeding where the issue is the validity of an assessment issued under the ITA. It is the use of the information or documents that is relevant, not who at CRA issued the requirement for information or documents.
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> [My emphasis.]

[39] The same situation occurred in *Piersanti v. The Queen*[6] where the person responsible for the criminal investigation at the CRA had used the civil power set out in subsection 231.2(1) of the ITA, the requirement power, to obtain documents

[6] *Piersanti v. The Queen* , 2013 TCC 226.

from several third parties to advance the criminal investigation. Our Court decided that documents obtained through requirements for information during the criminal investigation could be used to make the reassessments. This decision was affirmed by the Federal Court of Appeal[7].

[40] In the light of these decisions, the fact that Mr. Potvin was responsible for the criminal investigation and that he reassessed the applicants is irrelevant. What matters is that the CRA did not violate the principles set out in *Jarvis*. It is clear that, in the cases before this Court, the principles set out in *Jarvis* were followed. During the criminal investigation, the CRA did not use any of the civil powers set out in sections 231.1(1) and 231.2(1) of the ITA.

[41] In any case, the evidence shows that when the reassessments were made in October 2013, Mr. Potvin had been acting as auditor in the applicants' case since the end of December 2012.

(iv) The CRA could not use the documents obtained during a search for the purpose of making assessments. As a result, these documents could not be admissible in evidence; and

(v) During the search, the CRA seized personal documents that were unrelated to the transactions at issue. In addition, the documents that the respondent seeks to enter into evidence are not records as provided for in section 231 of the ITA. The applicants' privacy was therefore violated, in contravention of section 8 of the Charter.

[42] I will analyze arguments (iv) and (v) together. The applicants argue that sections 7 and 8 of the Charter were violated.

[43] Sections 7 and 8 of the Charter provide as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.

[7] *Piersanti v. Canada*, 2014 FCA 243.

[44] In *Jarvis*[8], Iacobucci and Majors JJ. stated that, for section 7 of the Charter to apply, the court must first determine whether there exists a real or imminent deprivation of life, liberty, security of the person or a combination thereof. In the case of a trial involving tax evasion offences under section 239 of the ITA, the taxpayer faces the threat of imprisonment on conviction. As a result, when information, which is obtained by requirements in the exercise of a power conferred by the ITA, is submitted during the trial, section 7 of the Charter is engaged. The relevant principle of fundamental justice in this case is the principle against self-incrimination.

[45] However, this case does not involve criminal questions. It involve civil questions. The applicants are not facing the threat of imprisonment. The applicants are not at risk of any real or imminent deprivation of life, liberty or security of the person. Section 7 of the Charter is therefore not engaged.

[46] With respect to section 8 of the Charter, Iacobucci and Majors JJ. stated the following in *Jarvis*[9]:

> For the application of s. 8, there must first be a search or seizure. Subsequently, it must be determined whether the search or seizure was unreasonable. […] S. 8 protects a reasonable expectation of privacy. […] What is reasonable, however, is context-specific. In the application of s. 8, "an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement" […]

[47] The relevant cases here are *Klundert v. Canada*[10] and *Brown v. Canada*[11], rendered by the Federal Court of Appeal.

[48] In *Klundert*, information obtained during a criminal tax evasion investigation was used to obtain a jeopardy order under section 225.2 of the ITA. In a unanimous decision, Dawson J. of the Federal Court of Appeal stated the following at paragraph 10 of her reasons:

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[8] *Jarvis v. Canada, supra*, at paragraph 66.
[9] *Ibid*, at paragraph 69.
[10] *Klundert v. Canada*, 2014 FCA 156.
[11] *Brown v. Canada*, 2013 FCA 111.

> […] there is no reason why information obtained in a criminal investigation, such as information gathered pursuant to a lawful search warrant, should not be available for related civil purposes.

[49] In *Brown*, the Minister had made reassessments that added undeclared income and assessed penalties under subsection 163(2) of the ITA. Mr. Brown argued that the documents obtained during a search by the London Police Service, which the police then gave to the CRA, could not be used by the CRA to make civil assessments and, therefore, be filed as evidence.

[50] In *Brown*, a unanimous decision of the Federal Court of Appeal, Dawson J. ruled that the seized documents could be given to the CRA and filed as evidence. According to Dawson J., Mr. Brown had not demonstrated that he had a reasonable expectation of privacy over the documents seized by the London Police. Mr. Dawson could not expect the London Police to maintain the confidentiality of the seized documents. In this regard, Dawson J. wrote the following at paragraphs 18 to 23 of her reasons:

> [18] Section 8 of the Charter guarantees everyone "the right to be secure against unreasonable search or seizure". The Supreme Court of Canada has defined this right as one which protects a reasonable expectation of privacy (*R. v. Cole*, 2012 SCC 53, [2012] S.C.J. No. 53).
>
> [19] The search and seizure conducted by the London Police Service was authorized by warrant. At no time has the appellant challenged the validity of the search warrant. It follows that the search and the seizure were lawful. The question then becomes whether the appellant had a reasonable expectation that the London Police Service would maintain the confidentiality of the documents it seized. The existence of any such expectation depends upon "the totality of the circumstances" (*Cole*, at paragraph 39).
>
> [20] The appellant did not point to any evidence or judicial authority which supports the conclusion that he had a reasonable expectation of privacy over the documents lawfully seized by the London Police Service.
>
> [21] As to the evidence, the appellant's evidence before the Tax Court was inconsistent with any subjective expectation of privacy. In direct examination he stated that the documents seized by the police should have been returned to him, so that the Canada Revenue Agency could then ask him to deliver the documents to it (transcript of evidence given on February 28, 2012, at page 173).
>
> […]

> [23] Because the appellant failed to demonstrate that he had a reasonable expectation of privacy over the seized documents, it follows that the appellant's right to be free of any unreasonable search or seizure was not violated. It further follows that the Judge was correct to receive the documents into evidence.

[51] These two Federal Court of Appeal cases stand for the proposition that the CRA may use the documents it seized in a criminal search to make civil assessments. Paragraph 241(4)(a) of the ITA also authorizes this. A CRA official may provide to another division of the CRA documents obtained if these documents can reasonably be regarded as necessary for the administration or enforcement of the ITA. Paragraph (4)(a) reads as follows:

> (4) An official may:
>
> (a) provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act*, solely for that purpose.

[52] That being said, the principles set out in *Jarvis* will have to be followed when an audit becomes a criminal investigation. Section 8 of the Charter will also apply if a taxpayer proves that he has a reasonable expectation of privacy over the seized documents. The existence of such an expectation will depend on the totality of the circumstances and the context.

[53] The applicants argue that they had a reasonable expectation of privacy over the seized documents at issue. They submit that the documents must be kept confidential because no charges have been laid against them.

[54] The applicants relied on the same argument in their cases before Gagné J. of the Federal Court of Canada. Gagné J. wrote the following at paragraph 79 of her reasons:

> [29] Contrary to what the applicants think, the principle developed by the Federal Court of Appeal in *Piersanti* is not based on the fact that, in that case, the applicant had pleaded guilty to 35 charges. The principle that information gathered in a criminal investigation may be used to reassess without contravening the *Jarvis* rule applies, in my humble opinion, regardless of the outcome of the criminal investigation.

[55] I agree with Gagné J.'s comments. In *Brown*, Mr. Brown had not been found guilty because the charges had been withdrawn. As a result, the outcome of the criminal investigation is irrelevant.

[56] The applicants further argue that a taxpayer's right to privacy is limited only with respect to the records and books that they are required to keep pursuant to subsection 230(1) of the ITA. However, the applicants argue that seized documents other than those described in subsection 230(1) – in this case emails written by third parties – must remain confidential.

[57] The applicants also submit that during the computer search, the Criminal Investigations Division seized several new documents and a large amount of computer data. In addition, the active server that was seized allowed the CRA to obtain a copy of the data backups on the computers of SPE network users, which included the contents of Mr. Mavrovic's email box and his personal files. The applicants also submit that personal documents were seized in the bedroom of Mr. Plante and Ms. Grenier and that those documents had no connection with the tax transactions.

[58] The applicants also argue that, in this case, unlike in *Brown*, the criminal search allowed the CRA to obtain documents that it would not have obtained during the audit. The applicants therefore argue that they had an expectation of privacy and that the seized documents must be excluded from the evidence under subsection 24(2) of the Charter.

[59] First, the search warrant authorized the CRA to search the residence of Mr. Plante and his spouse Ms. Grenier as well as the premises of SPE, SPE Affacturage and SPEQ SPE Technologies. In addition, the search warrant authorized the seizure of all computer equipment[12]. The applicants cannot challenge this before our Court. I need not decide whether the seizures were unreasonable. If the applicants were of the view that the seizures were unreasonable, they had to challenge them before a provincial court. Our Court's jurisdiction is limited to determining whether the assessments are valid.

[60] In this case, I must determine whether section 8 of the Charter has been violated. I must therefore decide whether the applicants had a reasonable expectation of privacy over the documents that the respondent seeks to enter into evidence, and not over all the documents that were seized during the searches. The

[12] See Exhibit I-1, Appendix 2, Things to be seized, paragraph 4.

vast majority of documents at issue are emails from Mr. Mavrovic[13]. Mr. Mavrovic played an important role in the tax transactions at issue.

[61] In *R. v. McKinlay Transport Ltd.*[14], Wilson J. of the Supreme Court of Canada stated that a taxpayer's privacy interest is quite low with regard to documents sought through requirements for information; the documents simply need to be relevant to the filing of income tax returns, i.e. the income tax liability.

[62] In *Jarvis*[15], the Supreme Court of Canada reiterated that the expectation of privacy in the context of the ITA is very limited:

> 95 With respect to the consequences related to s. 8 of the *Charter*, *McKinlay Transport*, *supra*, makes it clear that taxpayers have very little privacy interest in the materials and records that they are obliged to keep under the ITA, and that they are obliged to produce during an audit. […] That is, there is no principle of use immunity that prevents the investigators, in the exercise of their investigative function, from making use of evidence obtained through the proper exercise of the CCRA's audit function […]
>
> [My emphasis.]

[63] Although *McKinlay* and *Jarvis* apply in civil matters, in *Brown*, Dawson J., relying on the principles set out in *Jarvis*, determined that documents seized during a criminal search could be admitted into evidence in an appeal from an assessment. With respect to the confidentiality of documents in tax matters, she wrote the following in paragraph 22 of her reasons:

> As to judicial authority, the jurisprudence does not support on an objective basis any significant expectation of privacy. As the Judge noted, in *Jarvis* (at paragraph 95) the Supreme Court observed that "taxpayers have very little privacy interest in the materials and records that they are obliged to keep under the [Act], and that they are obliged to produce during an audit."

[64] Therefore, in the light of the case law, I do not agree with the applicants that a taxpayer's reasonable expectation of privacy is limited only with respect to records and books referred to in subsection 230(1) of the ITA. As I have already indicated, *Jarvis* makes it clear that taxpayers have very little privacy interest in the records and books that they are required to keep under subsection 230(1) and

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[13] There is also an email from Ms. Gosselin.
[14] *R. v. McKinlay Transport Ltd.*, [1990] 1 SCR 627, at page 649.
[15] *Jarvis*, *supra* at paragraph 95

that they are required to produce during an audit. In addition, under *McKinlay* stated that, in the context of requirements for information, taxpayers have little expectation of privacy in relation to the determination of their tax liability.

[65] In addition, the applicants did not demonstrate at the hearing of the appeals on the merits or the hearing of the motion at issue in this case, that the CRA could not have issued requirements for information to obtain the documents at issue [16] for purposes of an audit.

[66] In any event, the documents that the respondent wishes to enter into evidence are related to the tax transactions at issue of the applicants. The applicants have not cited, in support of their position, any authority to the effect that they had a reasonable expectation of privacy. The fact that the documents were written by a third party, Mr. Mavrovic, is not a sufficient reason.[17] I fail to see how the applicants could have a reasonable expectation of privacy. The emails were seized from SPE's active server. The emails in question concern the tax transactions at issue made by the applicants. They are not personal emails from Mr. Mavrovic.

[67] Therefore, I am of the view that the rights guaranteed under section 8 of the Charter have not been violated. The documents at issue are therefore admissible as evidence in the appeals on the merits. The objections made by the applicants concerning the filing of these documents as evidence are dismissed.

[68] Costs in the cause.

Signed at Ottawa, Canada, this 27th day of August 2019.

"Johanne D'Auray"

D'Auray J.

Translation certified true
on this 7th day of February 2020.

François Brunet, Revisor

[16] Mr. Potvin referred to Mr. Mavrovic in the search warrant.
[17] Mr. Mavrovic testified at the hearing of the appeals on the merits. The documents at issue were filed as evidence, subject to certain conditions, when he testified.

APPENDIX 1

The documents filed as Exhibit I-1, tabs 66, 67, 68, 70, 71, 72, 74, 75 to 78, 80 to 91, 94, 97, 99, 102, 104, 105 to 110, 112, 114, 115, 117, 119, 120 and 122, and the documents filed as Exhibit I-6, tab 24.

CITATION:	2019 TCC 174
COURT FILE NOS.:	2015-1917(IT)G and 2015-1921(IT)G
STYLE OF CAUSE:	SPE VALEUR ASSURABLE INC. v. HER MAJESTY THE QUEEN ROBERT PLANTE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	February 11, 2019
REASONS FOR ORDER BY:	The Honourable Justice Johanne D'Auray
DATE OF ORDER:	August 27, 2019

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