

DEFENDING JEOPARDY ASSESSMENTS

This issue of the Legal Business Report provides current information on jeopardy assessments under the Income Tax Act (Canada) and possible challenges to such assessments. Alpert Law Firm is experienced in providing legal services to its clients in tax dispute resolution, tax litigation, tax and estate planning matters, corporate-commercial transactions and estate administration.

A. INTRODUCTION

The Minister has a variety of collection powers pursuant to the provisions of section 222 to 228 inclusive of the *Income Tax Act* (the “Act”). Subsection 225.1(1) of the Act provides that the Minister cannot exercise most of these collection powers against a taxpayer until the day after 90 days from the date a Notice of Assessment is mailed. Furthermore, if a Notice of Objection or Notice of Appeal has been filed by a taxpayer, the Minister is not able to undertake any collection actions on the tax debt assessed in the Notice of Assessment until the appeal is resolved.

Due to the restrictions placed on the Minister in section 225.1 of the Act, it may be several months or years until the taxpayer is forced to pay amounts which are owing as a result of a tax assessment. In certain circumstances, where a taxpayer is likely to flee the country, this delay could greatly decrease the likelihood of the Minister collecting tax debts.

Section 225.2 of the Act provides an exception to the general rule expressed in section 225.1 of the Act. Subsection 225.2(2) of the Act allows the Minister to bring an *ex parte* application before a judge in the Federal Court of Canada or a Provincial Superior Court to obtain authorization to collect an assessed amount where there are reasonable grounds to believe that the collection of all or part of an assessed amount would be jeopardized by a delay in collection (the “Jeopardy Order”).

B. CONSIDERATIONS IN GRANTING A JEOPARDY ORDER

The Minister has the onus to prove that the ability of the taxpayer to pay the amount assessed will decrease if there is a delay in collection. In other words, it is not a question of whether or not collection at the current time is in jeopardy, but, rather, whether the collection of the tax assessed will be in jeopardy due to the collection restrictions under section 225.1 of the Act. It is important to note that the inability of a taxpayer to pay the tax at the time of assessment is not, by itself, conclusive.

In determining whether or not to authorize a Jeopardy Order, a judge must be satisfied it is more likely than not that collection of assessed amounts would be jeopardized by a delay in collection. This is an objective test to determine whether there are reasonable grounds for believing that the taxpayer will waste, liquidate, or otherwise transfer property so as to make it unavailable for collection by the Minister.

Factors that may justify a decision to grant a Jeopardy Order include, but are not limited to, situations where the taxpayer has:

- (a) acted fraudulently or has been involved in illegal activities;
- (b) engaged in the liquidation or transfer of his or her assets so as to put the assets out of the Minister's reach;
- (c) engaged in unorthodox behaviour that raises a reasonable apprehension that funds may no longer be available to satisfy the tax debt (ie. keeping large amounts of cash in one's residence or safety deposit box, investing in significantly risky ventures);
- (d) engaged in tax evasion tactics, such as the failure to report income to the Canada Revenue Agency accurately;
- (e) a significant amount of debt in comparison with his or her income; or
- (f) assets that could potentially decline in value, deteriorate, or perish over the ordinary course of time.

One of the above-mentioned factors, by itself, may not be determinative. The Court will evaluate the evidence as a whole in order to arrive at a reasonable conclusion regarding the ability of a taxpayer to satisfy his debts over time.

Pursuant to the provisions of subsection 225.2(2) of the Act, the Minister is entitled to bring an application on an *ex parte* basis to a Federal Court judge to obtain a Jeopardy Order. This permits the Minister to bring an application for a Jeopardy Order, and receive such an order, without first notifying the taxpayer. Pursuant to subsection 225.2(3) of the Act, a judge may authorize a Jeopardy Order in respect of an assessed amount even prior to the issuance of a Notice of Assessment to the taxpayer. This may occur if the judge is satisfied that the receipt of the Notice of Assessment would likely further jeopardize the collection of that amount.

Pursuant to subsection 252.2(5) of the Act, once a Jeopardy Order is obtained by the Minister, it must be served on the taxpayer within 72 hours unless the order specifies service at another time. A judge will usually extend this time period if the Minister

reasonably requires more than 72 hours to arrange for a seizure of the taxpayer's assets. In the event that the Jeopardy Order is obtained prior to a Notice of Assessment being sent to the taxpayer, the Notice of Assessment is required to be served together with the Jeopardy Order.

C. JUDICIAL REVIEW OF A JEOPARDY ORDER

Under subsection 225.2(8) of the Act, a taxpayer may file an application for judicial review to set aside the Jeopardy Order upon giving at least six clear days' notice to the Deputy Attorney General of Canada. Unlike the *ex parte* application initially tendered by the Minister, the judge hearing the application for review has the benefit of considering representations submitted by the taxpayer as well.

The ultimate burden of justifying the grant of the Jeopardy Order falls on the Minister when the order is reviewed under subsection 225.2(8) of the Act. However, the initial onus will be on the taxpayer to present evidence that shows there are reasonable grounds to doubt that the requirements in subsection 225.2(2) of the Act have been met. If a taxpayer can show that the evidence submitted by the Minister on the *ex parte* application was incomplete, and that additional evidence would support the proposition that a delay would not jeopardize the collection of the assessed amounts, then the taxpayer will succeed in having the Jeopardy Order rescinded.

To determine whether or not the Jeopardy Order will be upheld, the Court will conduct the same analysis as is required under subsection 225.2(2) of the Act. The judge will consider the evidence from both parties to decide whether there are reasonable grounds to believe that the collection of all or part of the assessed amount will be jeopardized by a delay in their collection. Pursuant to subsection 225.2(11) of the Act, the judge who is hearing the application for review has the authority to confirm, set aside, or vary the Jeopardy Order initially granted.

When applying *ex parte* to the Court for a Jeopardy Order against a taxpayer, the Minister must act in good faith. This entails making frank and full disclosure with respect to all allegations that are made pertaining to the taxpayer in question. If the taxpayer is able to show, on judicial review, that the Minister made false statements or deliberately misled the judge during the application for a Jeopardy Order, the order will be set aside. Similarly, if the Minister neglected to make full disclosure of the facts during its application for a Jeopardy Order, and further evidence demonstrates that a delay would not jeopardize the collection of the tax debt, the order will also be rescinded.

Pursuant to subsection 225.2(9) of the Act, an application by the taxpayer for judicial review made under subsection 225.2(8) must be filed within thirty days from the date on which the Jeopardy Order was served on the taxpayer. The judge has the

discretion to allow an application to be filed after the 30 day time period if the judge is satisfied that the application was made by the taxpayer as soon as practicable.

Pursuant to subsection 225.2(13) of the Act, there is no right of appeal from a decision made under subsection 225.2(11). In other words, neither the taxpayer nor the Minister may appeal a decision that has already been judicially reviewed under subsection 225.2(8) and 225.2(11) of the Act.

E. CHOICE OF VENUE

MNR v. Abu-Taha, 2001 FCT 76

In this Federal Court decision, an individual accused of several drug trafficking offences (which were already being dealt with in the Superior Court of Ontario) had his assets seized by the RCMP. He applied to the Superior Court of Ontario to have some of the seized funds returned to him to pay for living expenses. The Minister of National Revenue made a separate application to the Federal Court to prevent this return of funds, on the grounds that the funds could be diminished if returned to the taxpayer for living expenses, decreasing the chances of successful collection by CRA. This preliminary matter dealt with which court would have jurisdiction to determine the issues relating to the jeopardy order.

The Federal Court held that the Superior Court of Ontario was the proper forum to decide the jeopardy motion. The federal Court determined that it would unduly fetter the Superior Court of Ontario's discretion in hearing the individual's motion, if the funds were already encumbered by a separate decision made by the Federal Court. The Federal Court reiterated that a jeopardy order could be made at either the Federal Court or at the Provincial Superior Court level, and that, where possible, all of the relevant determinations in a given case should be determined by the same level of court.

This issue of the Legal Business Report is designed to provide information of a general nature only and is not intended to provide professional legal advice. The information contained in this Legal Business Report should not be acted upon without further consultation with professional advisers.

Please contact Howard Alpert directly at (416) 923-0809 if you require assistance with tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions or estate administration.

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