

ate: 20050225

Docket: A-266-04

Citation: 2005 FCA 68

Ottawa, Ontario, February 25, 2005

CORAM: ROTHSTEIN J. A.

SEXTON J.A.

EVANS J. A.

BETWEEN:

CANADA CUSTOMS AND REVENUE AGENCY

Appellant

and

ARTISTIC IDEAS INC.

Respondent

Heard at Toronto, Ontario on February 14, 2005.

Judgment delivered at Ottawa, Ontario, on February 25, 2005.

REASONS FOR JUDGMENT BY:

ROTHSTEIN J.A.

CONCURRED IN BY:

SEXTON J.A.

EVANS J.A.

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REASONS FOR JUDGMENT

ROTHSTEIN J.A.

Introduction

[1] This is an appeal of a decision of Snider J. of the Federal Court reported at (2004), 251 F.T.R. 223. The issue is whether, in response to a requirement to provide information and documents under subsection 231.2(1) of the *Income Tax Act* R.S.C. 1985, c.1 (5th Supp.) as amended, a "third party" is required to provide information or documents containing the names of "unnamed persons" to the Minister of National Revenue.

Facts

[2] Artistic Ideas Inc. arranges the sale of art work to individual Canadian taxpayers who donate the art work to registered charities. The donors obtain a tax deduction for such donations from the charities based on the appraised value of the works of art. The appraised value exceeds the amount the donors pay for the art. The difference between what the donors pay and the tax deductions provides them with a net financial benefit. The transactions are sometimes referred to as "art flips".

[3] In 2001, the Minister began an audit of Artistic. In the course of the audit, a requirement to provide information and documents was served on Artistic pursuant to subsection 231.2(1) of the Act. Artistic agreed to provide the Minister with all of the required information and documents except for the names of the donors and the charities.

[4] Artistic sought an Order in the Federal Court striking that portion of the requirement that required provision of the names and addresses of the donors and charities.

Judgment of Snider J.

[5] Snider J. found that:

1. the audit of Artistic was a genuine and serious inquiry into its tax liability;
2. the names of the donors and charities were relevant to the audit of Artistic;
3. the Minister wanted to reassess the donors for engaging in art flips; and
4. there was no evidence suggesting that the Minister intended to audit the charities.

[6] She concluded that the Minister was entitled to the names of the charities but not to the names of the donors.

Relevant Statutory Provisions

[7] Subsections 231.2(1), (2) and (3) provide:

231.2. (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act, including the collection of any amount payable under this Act by any person, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in a reasonable notice,

231.2. (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application et l'exécution de la présente loi, y compris la perception d'un montant payable par une personne en vertu de la présente loi, par avis signifié à une personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis:

(a) any information or additional *a*) qu'elle fournisse tout information, including a return of renseignement ou tout income or a supplementary renseignement supplémentaire, y return; or compris une déclaration de revenu ou une déclaration supplémentaire;

(b) any document.

(2) The Minister shall not impose *b*) qu'elle produise des on any person (in this section documents.

referred to as a "third party") a

requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

(2) Le ministre ne peut exiger de quiconque -- appelé "tiers" au présent article -- la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au

(3) On ex parte application by the préalable autorisé par un juge en Minister, a judge may, subject to vertu du paragraphe (3). such conditions as the judge

considers appropriate, authorize the Minister to impose on a third party a requirement under subsection 231.2(1) relating to an unnamed person or more than one unnamed person (in this section referred to as the "group") where the judge is satisfied by information on oath that

(3) Sur requête ex parte du ministre, un juge peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une personne non désignée nommément ou plus d'une personne non désignée nommément -- appelée "groupe" au présent article --, s'il est convaincu, sur dénonciation sous serment, de ce qui suit:

(a) the person or group is ascertainable; and
(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.

a) cette personne ou ce groupe est identifiable;
b) la fourniture ou la production est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente loi;

Analysis

[8] As I understand the scheme of section 231.2, the Minister may require a third party to provide information and documents pertaining to the third party's compliance with the Act. However, the Minister may not impose a requirement on the third party to provide information or documents relating to unnamed persons whom he wishes to investigate, unless he first obtains the authorization of a judge. The judge may authorize the Minister to require such information only if the unnamed persons are ascertainable and only if satisfied that information or documents relating to them is required to verify compliance by them with the Act.

[9] The Minister says that the restriction against obtaining information or documents relating to unnamed persons only applies where the third party itself is not under investigation. Where, as here, the third party, Artistic, is under investigation, subsection 231.2(2) does not apply. The Minister relies on authorities such as *James Richardson and Sons, Ltd. v. M.M.R.*, [1984] 1 S.C.R. 614 and *Canadian Bank of Commerce v. Attorney General of Canada*, [1962] S.C.R. 729 for the proposition that the Minister's power to obtain the names of unnamed persons is very broad and the fact that the documents required to be produced may contain confidential information relating to unnamed persons is irrelevant. He argues that subsection 231.2(2) only applies to preclude him from going on a "fishing expedition" in respect of other taxpayers where the third party itself is not under investigation. These authorities pre-date subsections 231.2(2) and (3), although it is apparent that their enactment was prompted, at least in part, by the *Richardson* case. While they provide useful background, the relevant legislation is different today than at the time of those decisions.

[10] According to the evidence in the present case, the donors are intended to be the subject of investigations by the Minister. They are precisely the persons to whom subsections 231.2(2) and (3) apply. If the Minister wants to obtain the names of the donors from Artistic, he must obtain an authorization from a judge to do so. The Minister has not obtained such authorization and therefore he cannot require Artistic to provide information about the donors.

[11] However, where unnamed persons are not themselves under investigation, subsections 231.2(2) and (3) do not apply. Presumably, in such cases the names of unnamed persons are necessary solely for the Minister's investigation of the third party. In such cases a third party served with a requirement to provide information and documents under subsection 231.2(1) must provide all the relevant information and documents including the names of unnamed persons. That is because subsection 231.2(2) only pertains to those unnamed persons in respect of whom the Minister may obtain an authorization of a judge under subsection 231.2(3).

[12] There is no evidence that the Minister wishes to have the names of the charities to verify their compliance with the Act. He is therefore entitled to the names of

the charities under subsection 231.2(1) because subsections 231.2(2) and (3) do not apply to the charities.

[13] The result is that Snider J. was correct in finding that Artistic had to disclose the names of the charities but did not have to disclose the names of the donors.

[14] The Minister relies on *R. v. Van Egmond* (2002), 215 D.L.R. (4th) 697 (B.C.C.A.). *Van Egmond* was a criminal case decided by the British Columbia Court of Appeal. It does not appear that the Court in that case was referred to subsections 231.2 (2) and (3) and indeed no one appeared on behalf of the accused. I therefore do not find that decision to be of assistance.

[15] Artistic was prepared to provide the Minister the documents he required with the names of the donors redacted from those documents. However, the Minister says there is no provision in section 231.2 for redacting and therefore the documents including the names of the donors must be provided un-redacted. I am unable to agree.

[16] The only reasonable way for Artistic to comply with the requirement served on it is to redact the names of the donors. This provides the Minister with the information and documents to which he is entitled but not with the information to which he is not entitled without judicial authorization. The Minister's argument would emasculate subsection 231.2(2) merely because the information to which the Minister was not entitled was on the same documents that contained the information to which he was entitled. Redacting is always possible in appropriate circumstances and must be done in this case to be consistent with the procedure under section 231.2.

[17] In cases in which the Minister advises the third party that he has no reason to invoke subsection 231.2(3) and the third party refuses to disclose the names of unnamed persons because it is not satisfied that the unnamed persons are not under investigation, the third party may seek recourse in the Federal Court or the Minister may seek recourse under other provisions of the *Income Tax Act*.

Conclusion

[18] The appeal should be dismissed. Artistic should be entitled to costs of \$5,000 inclusive of disbursements and GST.

"Marshall
Rothstein"

J.A

"I agree

J. Edgar Sexton"

"I agree

John M. Evans"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-266-04

APPEAL FROM A JUDGMENT OR AN ORDER OF THE TRIAL DIVISION

DATED APRIL 16, 2004 TRIAL DIVISION FILE NUMBER T-1141-02.

STYLE OF CAUSE: CANADA CUSTOMS AND REVENUE

AGENCY Appellant

v.

ARTISTIC IDEAS INC. Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 14, 2005

REASONS FOR

JUDGMENT BY: ROTHSTEIN J.A.

CONSENTED TO BY: SEXTON J.A.

EVANS J.A.

DATED: FEBRUARY 25, 2005

APPEARANCES:

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