Date: 20060322

Docket: T-60-06

Citation: 2006 FC 374

Toronto, Ontario, March 22, 2006

PRESENT: The Honourable Mr. Justice von Finckenstein

BETWEEN:

ALL SAINTS GREEK ORTHODOX CHURCH

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER AND ORDER

[1] This application was brought pursuant to section 231.2(5) and (6) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA) and Rule 399(1)(a) of the *Federal Courts Rules*, SOR/98-106. The Applicant ("All Saints") is requesting the court review and set aside the order issued on January 16, 2006 authorizing the Respondent ("CRA" or the "Minister") to impose on All Saints a requirement to furnish within 30 days a list of all names or persons who made donations to it of Comic books, Trading Cards and /or crayons in 2002.

Background

[2] The CRA desires information regarding All Saint's charitable donors. One of CRA's tax avoidance auditors investigating a donation arrangement involving comic books and trading cards in which All Saints participated requested on March 21, 2002 that All Saints furnish CRA with a list of its donors. This request was refused.

[3] Upon All Saint's request that CRA confirm it exercised due diligence with respect to donations received, a charity audit was performed by the charity directorate of the CRA. As part of the audit, a list of donors for the taxation years 2001 and 2002 was obtained (the "Donors List"). The charity division of CRA then passed this list on to the tax avoidance section of CRA.

[4] On October 4, 2005 Justice Hughes rendered a decision in *Redeemer Foundation v. Minister of National Revenue*, 2005 FC 1361 where he held at paragraph 14:

Taking a functional and pragmatic approach to this legislation, it is clear that Parliament intended to protect third parties from having information relating to their activities obtained from other persons audited by the Minister, who then will use it for taxation purposes. While section 231.2 provides for a request by the Minister in writing and a refusal the requirement for a prior Order cannot be limited to a situation where only that occurs. To do otherwise would encourage the Minister's officials and agents to attempt by other means to secure the information whether by friendly means, subterfuge or guile and prey upon the innocence, inadvertence or mistake of one taxpayer in order to secure otherwise unavailable information about another. Parliament would not have provided for a Court Order to be obtained, first before securing such information if that provision could be so easily circumvented.

The *Redeeemer* decision is under appeal. However, CRA wanted to ensure that should the Federal Court of Appeal uphold the *Redeemer* decision, it could still assert that it had properly obtained the information contained in the Donor List. Consequently, on January 16, 2006 the Minister brought an *ex parte* application before me requesting that All Saints be ordered to provide a list of all persons who made donations in 2002.

[5] At the *ex parte* hearing, CRA's counsel advised the Court they wanted to obtain the list again in order to then issue reassessments. The order was granted pursuant to sections 231.2 of the ITA.

Relevant Statutory Provisions

[6] Section 231.2 of the ITA establishes the process by which the Minister can obtain information on unnamed taxpayers from third parties:

(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 the notice,

(a) any information or additional information, including a return of income or a supplementary return; or

(b) any document.

(2) The Minister shall not impose on any person (in this section 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).

(3) On ex parte application by the Minister, a judge may, subject to 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

(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.

(4) Where an authorization is granted under subsection 231.2(3), it shall be served together with the notice referred to in subsection 231.2(1).

(5) Where an authorization is granted under subsection 231.2(3), a third party on whom a notice is served under subsection 231.2(1) may, within 15 days after the service of the notice, apply to the judge who granted the authorization or, where the judge is unable to act, to another judge of the same court for a review of the authorization.

(6) On hearing an application under subsection 231.2(5), a judge may cancel the authorization previously granted if the judge is not then satisfied that the conditions in paragraphs 231.2(3)(a) and 231.2(3)(b) have been met and the judge may confirm or vary the authorization if the judge is satisfied that those conditions have been met.

Issues

[7] All Saints is now seeking review of that order alleging that:

a. it could not have been granted as s. 231.2 of the ITA refers to unnamed persons; yet in this case the identity of the donors was known; and

b. CRA failed to make full and frank disclosure to the court, and therefore it is not entitled to an *ex parte* order.

Analysis: Issue a)

[8] All Saints argues that the Minister already has the Donors List and thus the donors are known to him. Section 231.2 (3) refers to unnamed persons. That section can have no application here as the persons are known to CRA. I cannot accede to this reasoning. If *Redeemer*, above is good law, and as far as I am concerned it is unless reversed by the Court of Appeal, CRA had no right to turn over to the tax avoidance section the list of donors obtained as part of a charity audit. The Donor List was given to CRA as part of All Saints' audit and was to be used only to verify the tax liability of All Saints. If anything that is revealed in the audit of one taxpayer could be used to investigate another taxpayer, there would be no need for section 231.2. As Justice Rothstein stated in *Artistic Ideas Inc v. Canada(Customs and Revenue Agency)*, [2005] 2 C.T.C. 25, 2005 FCA 68 at paragraph 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] Assuming *Redeemer* is good law, the Minister was not entitled to obtain the Donors List insofar as it was pertinent to the donor's tax liability. The only legitimate way to obtain it is under s. 231.2 of the ITA. Effectively, the Minister in this case is asking for unnamed persons as he does not legitimately know who the donors are. Accordingly, s. 231.2(3) applies.

Analysis: Issue b)

[10] All Saints alleges that CRA did not provide full and frank disclosure of relevant information. Particularly, it did not:

a) reveal that the Donors List was not obtained in compliance with CRA's pre-*Redeemer* practice. Until the *Redeemer* decision was issued, it had been CRA's practice to ask for third party information and use s. 231.2(3) only if the information was not provided voluntarily. In this case, there was an explicit refusal. Thus, the procedures under s. 231.2(3) should have been used rather than employing the route of a charity audit to obtain the information, and

b) disclose that investigations of donors and reassessments were proceeding on the basis of the Donors List received as a result of the charity audit.

[11] It is well established that in all *ex parte* applications, it is incumbent on the applicant to make full and frank disclosure of all material and relevant information. As Justice Rothstein said in *M.N.R. v. Sand Exploration Ltd,* [1995] 3 F.C. 44 at paragraph 16:

Further I think the fact that the Minister may obtain a court authorization ex parte places an obligation on the Minister to act in the utmost good faith and ensure full and frank disclosure of information. See for example, *Canada v. Duncan*, [1992] 1 F.C. 713 (T.D.), at page 730. For all these reasons, the standard to be met by the Minister in making an application for court authorization under subsection 231.2(3) is high.

[12] The affidavit of Bethany Spencer that was furnished with the application of January 16, 2006 set out in paragraph 17 how the Donors List was obtained and it also set out in paragraph 18 the pre-*Redeemer* practice of CRA. It does not set out that the way the Donors List was obtained was inconsistent with CRA's pre-*Redeemer* practice. However, as it accurately describes how the list was actually obtained, I do not see how this amounts to a failure to give full and frank disclosure.

[13] As far as the ongoing CRA audits are concerned, this is another matter. Counsel for CRA at the January 16, 2006 application made the following representation:

THE COURT: But you have the information already, if I understand.

MS. SHIRTLIFF-HINDS: Yes. But, given the *Redeemer* decision, we don't wish to use the information we have right now; we wish to apply to the Court out of an abundance of caution, and trying the keep within the Redeemer decision. We will then get the information again from the parties and issue a notice of reassessment. (underlining added)

(page 16 of the Application Record)

[14] However, the affidavit of Anthony Colangelo sworn February 9, 2006 states:

3. I am informed and do verily believe that the Minister represented to the court, through its submissions on the ex-parte application, that although it had the list, it did not wish to use the list and was seeking prior judicial authorization out of an abundance of caution and because of the decision in the *Redeemer* case.

4. I am aware that the Minister has sent at least 1300 letters to the donors of All Saints before it brought its ex-parte application. Most, if not all, of these letters were dated in mid November and sent to donors about a month after the decision in the *Redeemer* case. I understand these letters will be provided to the Court under seal at the hearing in order to maintain the privacy of the individuals.(underlining added)

[15] The affidavit of Salvatore Tringali sworn February 24, 2006 also attests to the following:

Questionnaire Letters to donors

16. From August to early 2006, CRA officers across the country contacted the donors on the 2002 donors' list by letter to advise that the CRA was reviewing their claims in respect of their donations to the charity. The donors were also requested at that time to provide certain information and documentation pursuant to s. 231.1 of the *Income Tax Act*. Attached hereto as Exhibit "B" is an example of the letter and questionnaire sent by the CRA to the donors.

[...]

Reassessment of 2002 donors

21. I was advised on February 17, 2006 that of the 2,747 donors under audit, at least 22 have already been reassessed on various dates throughout 2004 and 2005.

a) With respect to the remaining donors, the CRA will postpone issuing reassessments until the earlier of: the disposition of this application (assuming the court's order is upheld); and

b) the imminent expiry of a donor's normal reassessment period.

22. Of the 2, 747 donors, the CRA has identified approximately 1000 donors by internal means independent from use of reference to the original 2002 donors list obtained from the charity. (underlining added)

[16] It is thus clear, from CRA's own evidence, that the Donors List (obtained as a result of the charity audit and improperly passed on to the tax avoidance section) was already being used when the *ex parte* application was heard by me on January 16, 2006. Essentially, CRA was seeking court authority to continue using the list it had already obtained rather than seeking a new list to be used in lieu of the one improperly obtained.

[17] The true situation was not explained to the Court and thus there was not full and frank disclosure. The reason for this action is quite clear. As CRA itself pointed out, some of the possible reassessments of donors become statute barred in March 2006.

[18] In my mind it also raises the question whether under s. 231.2(3) the court has the authority to authorize the use of a list previously obtained in an improper manner. However, as the case was not presented to me in that light I do not need to decide the issue. I understand that counsel for the applicant will bring separate judicial review proceedings to attack the hand over of the Donors List from the charity auditor to the tax avoidance auditor.

[19] On review, the authorizing judge under s. 231.2(6) of the ITA may cancel or vary the order previously made.

[20] There is no question here that CRA has met the conditions of s. 231.2(3) (a) and (b). Cancelling the order by reason of a lack of full disclosure could sanction donations that are not compliant with the ITA and could potentially deprive the Consolidated Revenue Fund of up to $107 Million in revenue. This seems to be punishing the general public for the misdeeds of CRA and potentially rewarding persons who made improper donation deductions.

[21] On the other hand, CRA should not be rewarded for having obtained an order without full and frank disclosure, merely because large amounts of tax dollars are involved. It strikes me as far more appropriate to vary my original order, penalize CRA by way of costs, and insist that it proceed to reassess taxpayers on the basis of the list I ordered to be produced on January 16, 2006. If that list had been furnished as directed, it would have been received by CRA on March 16, 2006. Due to the intervening review motion, that date is now gone. I can however, and will, abbreviate the time for furnishing the list of donors. Any loss of re-assessments due to limitation periods is the price CRA has to pay for failing to make full and frank disclosure.

[22] Accordingly, I will order All Saints to furnish CRA with a new list of donors by March 27, 2006. CRA may then use, as of that date, the list to reassess donors. CRA shall in addition pay All Saints its costs on a solicitor and client basis.

ORDER

THIS COURT ORDERS that

This application be allowed and the order of January 16, 2006 is varied as follows:

1. The Applicant shall provide to the Respondent a list of its donors for the 2002 taxation year by March 27, 2006; and

2. The Respondent shall pay the Applicant its costs on a solicitor and his own client basis.

"K. von Finckenstein"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-60-06

STYLE OF CAUSE: ALL SAINTS GREEK ORTHODOX CHURCH

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 20, 2006

REASONS FOR ORDER

AND ORDER BY: von Finckenstein J.

DATED: March 22, 2006

APPEARANCES:

Jacqueline King,	FOR THE APPLICANT
Megan Mackey Carol Shirtliff-Hinds,	FOR THE RESPONDENT
Kelly Smith Wayland	

SOLICITORS OF RECORD:

Miller Thomson LLP, Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT