

Federal Court



Cour fédérale

**Date: 20190513**

**Dockets: T-15-18  
T-16-18  
T-17-18**

**Citation: 2019 FC 646**

**Ottawa, Ontario, May 13, 2019**

**PRESENT: Mr. Justice Boswell**

**Docket: T-15-18**

**BETWEEN:**

**MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**XUE LIN**

**Docket: T-16-18**

**AND BETWEEN:**

**MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**MIN WANG**

**Respondent**

**AND BETWEEN:**

**MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**LIN LIN**

**Respondent**

**ORDER AND REASONS**

[1] The Applicant seeks an order under section 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*], compelling the Respondent in each of these three separate summary applications to provide the Minister of National Revenue with the books, records and information specified in the requirement to provide documents or information issued to each Respondent by letter dated September 16, 2016.

I. Background

[2] Mr. Xue Lin and Ms. Min Wang are husband and wife. Ms. Lin Lin is their daughter.

[3] Mr. Lin states he ordinarily resides in China. Ms. Wang and Ms. Lin do not dispute that they are residents of Canada for purposes of the *ITA*.

[4] Mr. Lin came from China to Canada as a landed immigrant in May 2005 with his wife and daughter. Shortly after his arrival in Canada, Mr. Lin returned to China where he continued on with his life, working for the same employer, living at his residence, attending the same community events, and maintaining the same bank accounts, social relationships, health insurance, and driver's license. As a Chinese resident, he pays taxes to the Chinese government.

[5] Between 2005 and 2015, Mr. Lin stayed in Canada for about 488 days. In some years, he did not travel to Canada at all. Although he filed T1 tax returns in Canada for these years, his accountant informed the Canada Revenue Agency [CRA] in December 2017 he had done so because he did not realize he was a non-resident for Canadian income tax purposes.

[6] In September 2016, each Respondent received a personally addressed letter dated September 16, 2016 [the Letter]. These letters were identical, except for the names and addresses. The Letter stated, in relevant part, as follows:

Re: Audit of your Income Tax Returns for the Period from  
January 1, 2006, to December 31, 2015.

Your personal income tax returns and any other related or associated entities have been selected for audit for the above noted period. The Canada Revenue Agency (CRA) is in possession of information that has led us to determine that you may have offshore holdings that you have failed to disclose as required by the Income Tax Act. All individuals, corporations, trusts or partnerships are required to complete and file form T1135 with their tax return (or, if a partnership, with their partnership information return) if at any time in the year the total cost amount of all specified foreign property owned or held a beneficial interest in was more than \$100,000.

In order to expedite and facilitate our audit, we will require a clear understanding of all entities with which you had a connection or affiliation during the taxation years noted above. We ask that you please prepare the necessary information as outlined in the

attached questionnaire, in writing, and provide it to the undersigned auditor at the International and Ottawa Tax Services Office no later than October 21, 2016. A preliminary interview to discuss the information provided will be arranged.

....

[7] Following receipt of the Letter, each Respondent authorized Sean Hu [the Representative] to represent them with respect to the audit. In the letter enclosing the authorization forms, the Representative advised CRA on October 21, 2016, that he had written to the Minister. He claimed the Respondents were being treated differently simply because they had funds coming from China and challenged the legality of the audit. The Representative requested the audit be put on hold until the Minister provided a response.

[8] An exchange of correspondence and telephone calls between the Representative and CRA ensued after CRA received the authorization forms. This exchange involved various requests for information by both the Representative and CRA and the imposition of deadlines by CRA for the Respondents to supply information. Eventually, the Representative and two CRA representatives had a meeting in early June 2017, at which the questionnaires for Ms. Wang and Ms. Lin were provided. These questionnaires were incomplete to the extent they did not include copies of bank and investment account statements for each of the years under audit. No questionnaire was provided for Mr. Lin.

[9] Following this meeting, a further exchange of correspondence occurred during which both the Representative and CRA made additional requests for information and CRA imposed further deadlines for the Respondents to supply information. When CRA had not received the

information requested in the Letter, it decided to pursue a compliance order pursuant to section 231.7 of the *ITA*. In early December 2017, the Minister's counsel sent the Representative a letter informing him that if the information and documentation requested in the Letters was not provided by December 20, 2017, a compliance order application would be initiated to enforce the Letters.

## II. The Applicant's Submissions

[10] The Applicant says there is only one issue; that is, whether the conditions for the issuance of compliance orders under subsection 231.7(1) of the *ITA* are met in the present case.

[11] The Applicant points out that, under subsection 231.1(1) of the *ITA*, the Minister may, for any purpose related to the administration or enforcement of the *ITA*, inspect, audit, or examine the books and records of a taxpayer and any document of the taxpayer, or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by a taxpayer under the *ITA*. The Applicant also points out that, pursuant to subsection 231.7(1), a Federal Court judge may order a person to provide any access, information, assistance, or documents sought by the Minister if the judge is satisfied that the person was required to do so under section 231.1 and did not do so, and the information or document is not protected from disclosure by solicitor-client privilege as defined in subsection 232(1).

[12] The Applicant claims each Letter was duly issued under subsection 231.1(1) of the *ITA*. The Applicant says, despite being granted additional time, the Respondents have continuously

failed to comply with the Letters and have yet to produce all of the information, documents, and records requested.

[13] According to the Applicant, the expectation of privacy when responding to an audit is relatively low. The Applicant says the Minister has no way of knowing whether certain records are relevant until she has an opportunity to examine them. The Applicant further says there is no time limitation constraining CRA from requesting production of records for periods exceeding the document retention periods set out in subsection 230(4) of the *ITA* or for taxation years beyond the normal reassessment period. The Applicant also notes that solicitor-client privilege is not an issue in this matter.

### III. The Respondents' Submissions

[14] Aside from the principal issue raised by the Applicant, the Respondents say the Court must also determine whether issuance of the Letters enclosing the questionnaire was within the parameters of subsection 231.1(1) of the *ITA*.

[15] According to Mr. Lin, he is a non-resident for purposes of the *ITA* and contends that CRA cannot use its audit powers under section 231.1 prior to determining his tax status in Canada.

[16] The Respondents argue that the conditions for the issuance of compliance orders under section 231.7 of *ITA* are not met. They contend that the taxation years under audit cover statute-barred years and under subsection 152(4) CRA can only assess or reassess a return prior to the

statute-barred date if it has some evidence of misrepresentation attributable to negligence, carelessness, or willful default.

[17] In the Respondents' view, the language used in the Letter is vague. The Respondents say they should not be required to provide various books, records and documents because the auditor asked for information in the form of answering questions in the questionnaires and for documents to support the answers. According to the Respondents, no books and records were requested for inspection and, therefore, subsection 231.1(1) of the *ITA* does not apply.

[18] The Respondents assert that the information requested was for a purpose other than a tax audit conducted in good faith, and that the purpose of the Letters was to allow CRA to engage in a fishing expedition in an attempt to obtain information. According to the Respondents, the requests for information in this case were not delivered in accordance with subsection 244(5) of the *ITA*, since there are no sworn affidavits proving service of the Letters. In the Respondents' view, the Letter is not a "demand letter" because it only asks for information, makes no statement that a response is required, and fails to set out the consequences for non-compliance. The Respondents say the numerous extensions given to provide the requested information supports their view that the Letter was not a demand letter.

[19] The Respondents note that, while the Letter was addressed to them in their personal capacity, it asked for documentation concerning related or associated entities. In the Respondents' view, it is not clear whether this request was directed to them personally or to related or associated entities. The words "whether or not registered in your name" raise a

question of whether the Respondents were being asked to list personal assets or to include documentation about corporate assets to which they would only have access as a director or officer of a corporation. In light of the uncertainty as to whether the request for information was addressed to the Respondents personally or any other related or associated entities, they maintain that the first condition of section 231.1 of the *ITA* has not been satisfied.

[20] The Respondents agree with the Applicant that solicitor-client privilege is not at issue in this matter.

#### IV. Analysis

[21] Before addressing whether compliance orders should be issued in this matter, it is helpful to review some of the case law concerning subsection 231.7(1).

##### A. *Subsection 231.7(1)*

[22] The test for when the Court can issue a compliance order under subsection 231.7(1) of the *ITA* has been summarised in *Canada (National Revenue) v Chamandy*, 2014 FC 354

[*Chamandy*], as follows:

[27] First, the Court must be satisfied that the person against whom the order is sought “was required under section 231.1 or 231.2 to provide the access, assistance, information or document” sought by the Minister: paragraph 231.7(1)(a).

[28] Second, the Court must be satisfied that although the person was required to provide the information or documents sought by the Minister, he or she did not do so: paragraph 231.7(1)(a).



[29] Finally, the Court must be satisfied that the information or document sought “is not protected from disclosure by solicitor-client privilege” (as defined in the Act): paragraph 231.7(1)(b).

[23] The Respondents claim CRA has to prove why they are being audited and that the audit is not a “fishing expedition”. This claim lacks merit. As noted in *Canada (Minister of National Revenue) v Plachcinski*, 2016 CarswellNat 10234, any valid reason, such as a suspicion of offshore holdings, meets the low threshold for the reasonableness of an audit:

13 ... in *Minister of National Revenue v. Lee*, 2016 FCA 53 [Lee], the Federal Court of Appeal overturned a Judgment of this Court declining to grant a compliance Order under section 231.7 of the Act on the ground that the request for information, made under section 231.2 of the Act, was “overly expansive in breadth and in depth” (Lee, at para 4). The Federal Court of Appeal held that section 231.2 conferred “broad and general powers on the Minister to require any person to produce any information or any document for any purpose related to the administration of the Act” (Lee, at para 5) and that the scope or breath of such requests was “a matter for the Minister, so long as the information requested is required for any purpose related to the administration or enforcement of the Act” (Lee, at para 7). ... It did not refer to any need for the Minister to show that the request for information was part of a genuine and serious inquiry into the taxpayer’s liability.

[24] The scope of what can be requested for purposes of an audit is broad. As the Court stated in *Canada (Minister of National Revenue) v Amdocs Canadian Managed Services Inc.*, 2015 FC 1234 [Amdocs]:

[67] In effect, ACMS is asking the Court to decide that the Minister already has what is required to complete the TPA. However, as the Minister indicates, and as Justice Campbell recently pointed out in *Canada (National Revenue) v BP Canada Energy Company*, 2015 FC 714 at para 23, it is for the Minister to determine both the scope of the audit and the documentation required to complete the audit. It is not for ACMS to determine what the Minister needs to conduct an audit.

...

[69] Further, the Supreme Court of Canada makes clear ...in *Western Minerals Ltd v Minister of National Revenue*, [1962] SCR 592 at p 596 that:

... it is not for the Court or anyone else to prescribe what the intensity of the examination of a taxpayer's return in any given case should be. That is exclusively a matter for the Minister, acting through his appropriate officers, to decide.

... there is no standard in the Act or elsewhere, either express or implied, fixing the essential requirements of an assessment. It is exclusively for the Minister to decide how he should, in any given case, ascertain and fix the liability of a taxpayer. The extent of the investigation he should make, if any, is for him to decide.

... the Minister may properly decide to accept a taxpayer's income tax return as a correct statement of his taxable income and merely check the computations of tax in it and without any further examination or investigation fix his tax liability accordingly. If he does so it cannot be said that he has not made an assessment.

[25] There is no statutory time limit within which to make a request for information under subsection 231.1(1) of the *ITA*. As the Court stated in *Canada (Minister of National Revenue) v Stankovic*, 2018 FC 462 at para 34:

[34] The Applicant says that there is no limit that prevents the CRA from requesting records for periods beyond the document retention periods set out in s 230(4) of the Act. Records and books that are still available must be provided to the Minister if they are requested under s 231.1(1) of the Act. ... Considering the requirements to provide information issued pursuant to s 231.2(1) of the Act, the Federal Court of Appeal was clear that "there is no statutory time limit for requirements" [citations omitted].

[26] The *ITA* only requires reasonable efforts to acquire requested documentation. If a document has been destroyed or is not available because it is not in a taxpayer's possession, then an order for disclosure should not be made (*Amdocs* at paras 75 and 76).

[27] The fact that the Letter does not specify the documents, books, or records to be produced is not fatal to the requests for information because subsection 231.1(1) provides:

### **Inspections**

**231.1 (1)** An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

(a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, ...

### **Enquêtes**

**231.1 (1)** Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois :

a) inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi;

B. *Is a Non-Resident required to respond to a Request for Information under section 231.1 of the ITA?*

[28] Resident status under the *ITA* (i.e., ordinary resident, a factual resident, a deemed resident, a deemed non-resident, and a non-resident) affects the obligations of individuals to pay taxes. Not all non-residents are exempt from paying taxes, however, as subsection 2(3) of the

*ITA* specifies circumstances when a non-resident may be liable to pay tax on income earned in Canada.

[29] Mr. Lin filed tax returns for the period of the audit. However, by virtue of section 18.5 of the *Federal Courts Act*, RSC 1983, c F-7, determining his residency status for purposes of the *ITA* during the tax years in question is an issue beyond this Court's jurisdiction. That issue lies within the jurisdiction of the Tax Court of Canada because it involves determining his liability to pay tax under the *ITA* as a non-resident (*Johnson v The Queen*, 2007 TCC 288).

C. *Is it clear to whom the Letter is addressed?*

[30] The Respondents say it is not clear to whom the Letter is directed - the individual Respondents or their connected entities, and if so, which entities. The Letter is addressed to each respective Respondent, but it goes on to state that: "Your personal income tax returns and other related or associated entities have been selected for audit... The word "entities" in this letter refers to companies, trusts, partnerships, limited partnerships ...".

[31] In my view, the Letters are addressed to both the individuals and their connected entities. The entities are not specified, and it is not clear who is being audited - the individual Respondents or unnamed entities.

[32] The Court must be satisfied that the person against whom a compliance order is sought is one who was required under section 231.1 or 231.2 to provide the access, assistance, information or document sought by the Minister. Because it is not at all clear whether the Letter was directed

to the Respondents individually or their connected entities, the first requirement of section 231.7 (as noted above) for obtaining a compliance order has not been satisfied by the Minister (*Chamandy* at para 30, and *Canada (Minister of National Revenue) v SML Operations (Canada) Ltd*, 2003 FC 868 at para 16).

V. Conclusion

[33] The Applicant's application for a compliance order in each of these applications is dismissed.

[34] The Respondents are entitled to their costs. At the hearing of this matter the parties agreed that costs in the fixed sum of \$1,000 per application would be appropriate. The Applicant shall, therefore, pay costs to the Respondents in the total amount of \$3,000 within 30 days of the date of this judgment.

**ORDER in T-15-18, T-16-18 and T-17-18**

**THIS COURT ORDERS that:**

1. The summary application by the Minister of National Revenue for an order pursuant to section 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), is dismissed.
2. The Applicant shall pay costs to the Respondents in the total amount of \$3,000 within 30 days of the date of this judgment.
3. A copy of this Order and Reasons shall be placed in each of Court Files T-15-18, T-16-18 and T-17-18 and shall serve as the Order and Reasons in these files.

"Keith M. Boswell"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-15-18

**STYLE OF CAUSE:** MINISTER OF NATIONAL REVENUE v XUE LIN

**AND DOCKET:** T-16-18

**STYLE OF CAUSE:** MINISTER OF NATIONAL REVENUE v MIN WANG

**AND DOCKET:** T-17-18

**STYLE OF CAUSE:** MINISTER OF NATIONAL REVENUE v LIN LIN

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 13, 2019

**ORDER AND REASONS:** BOSWELL J.

**DATED:** MAY 13, 2019

**APPEARANCES:**

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