

Federal Court



Cour fédérale

**Date: 20110708**

**Docket: T-1347-10**

**Citation: 2011 FC 838**

**Ottawa, Ontario, July 8, 2011**

**PRESENT: The Honourable Madam Justice Simpson**

**BETWEEN:**

**MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**CLARIS CLARKE**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Minister of National Revenue [the Minister] seeks an order authorizing him to withhold from the respondent [the Taxpayer] a refund of \$12,407.13 due with respect to her 2009 income tax year. The application is made pursuant to subsection 164(1.2) of the *Income Tax Act*, RSC 1985, c 1 (15<sup>th</sup> Supp) [the Act] and is unopposed.

[2] For the following reasons, the application will be allowed.

### **THE TEST**

[3] Subsection 164(1.2) provides that, where a taxpayer makes a written request for a payment, the Minister may apply to the Court for authorization to withhold the payment and a judge shall grant “the order if satisfied that there are reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of the taxpayer would be jeopardized by the repayment of the amount.”

[4] *Canada (Minister of National Revenue) v Chabot*, 2010 FC 574, 369 FTR 98 appears to be the only decision dealing with this section. In that case, Mr. Justice Edmond Blanchard reached the following conclusions, which I adopt:

In my view, factors that require consideration in the circumstances of a subsection 164(1.2) application are the amount of the debt to be collected relative to the amount of the refund, the taxpayer’s ability to pay or otherwise satisfy the debt, the value of the taxpayer’s net assets and whether these are sufficient and available to satisfy the debt independently of the refund. Where it is established that the taxpayer is able to repay the debt or that his assets are of sufficient value to satisfy the debt, then releasing the amount of the refund would not jeopardize the collection of the amount. It is in the context of assessing the taxpayer’s net wealth and the taxpayer’s ability to satisfy the debt independently of the refund that the issue of jeopardy is assessed. This may include considering factors such as unorthodox behaviour of the taxpayer and any evidence regarding dissipation of assets by the taxpayer. Upon consideration of such factors, if there are reasonable grounds to believe, in all of the circumstances, that release of the refund to the taxpayer would result in that amount not being available to the Minister for collection against the debt, then

collection of the debt is jeopardized for the purposes of subsection 164(1.2) and a jeopardy order pursuant to that provision is justified.

[5] I also adopt Justice Blanchard's conclusion that the "reasonable grounds" standard of proof is something less than a balance of probabilities but nevertheless requires a judge to hold a *bona fide* belief in a serious possibility based on credible evidence.

## **THE EVIDENCE**

[6] The evidence is found in an affidavit sworn by Daniel Baker on September 13, 2010 [the Affidavit]. Mr. Baker is the Case Officer in the Toronto North Tax Services Office who has carriage of the Taxpayer's file.

[7] The Affidavit shows that in her income tax returns from 2003 to 2006, the Taxpayer took credits for charitable donations. However, in reassessments for those years, [the Reassessments] the Minister disallowed \$261,153.00 of the credits claimed. The Taxpayer has objected to the Reassessments [the Objections] and by letter dated July 13, 2010, asked the Minister to pay her the of \$12,407.13 which is due in respect of her 2009 income tax return [the Refund]. The Minister then brought the within application.

[8] When the Taxpayer requested the Refund, she did not provide any information to indicate that she was in a position to pay her outstanding tax debt if the Objections were denied. At the date of the Affidavit, she owed \$146,221.17 [the Tax Debt] with interest being compounded daily.

[9] As of this date, the Taxpayer's Objections are being considered by the Appeals Branch of the Canada Revenue Agency [CRA] and the Refund has been applied to reduce the amount found owing under the Reassessments.

[10] Since 2006, the Taxpayer has continued to claim credits for charitable donations. She claimed \$114,467.00 in 2007, \$103,322 in 2008 and \$74,773.00 on her 2010 return. CRA is currently auditing her 2007 and 2008 returns.

[11] On August 9, 2010, CRA wrote to the Taxpayer asking her to provide details about her employment income in 2010 and her equity in her RRSP, her investments and her two properties. As well, she was asked to show the extent of any other debts and to indicate how she proposed to pay her Tax Debt. The Taxpayer refused to answer CRA's questions.

[12] This application is based on the following information:

- (i) The Taxpayer is sixty-six years of age;
- (ii) The Taxpayer's income in 2008 was \$149,228.00 and almost all of it came from her employment;
- (iii) In 2009, the Taxpayer's income dropped to \$123,671.00 and only \$53,796.00 came from employment;
- (iv) In 2009, the Taxpayer took \$49,102.00 into income from her RRSP and received smaller amounts from other sources including employment, old age pension, Employment Insurance, dividends and Workers' Compensation;

- (v) Over the years the Taxpayer has contributed \$115,028.00 to her RRSP and has withdrawn a total of \$133,984.00;
- (vi) The Taxpayer has a total limit on her active credit cards and lines of credit of \$320,604.00 and has a total outstanding balance of \$242,876.00 leaving her the capacity to borrow a further \$77,728.00. However, she also owes \$31,207.00 on a loan from the Bank of Nova Scotia;
- (vii) The Taxpayer owns her personal residence and a rental property. However, both were mortgaged to the full amount of the purchase price when purchased in 2006 and 2009 respectively and the Taxpayer has refused to disclose the status of her mortgages;
- (viii) The Taxpayer owns a 2008 model vehicle and the Bank of Nova Scotia has registered a lien in the amount of \$43,895.00. The Taxpayer has refused to disclose the status of the loan.

## **DISCUSSION**

[13] The Tax Debt is \$146,221.17 and, on the information available, her income is declining and she does not appear to have assets which she could sell or use to secure loans to generate an amount sufficient to retire her Tax Debt.

[14] In these circumstances, I have a *bona fide* belief that there are reasonable grounds to believe that collection of the Tax Dept would be jeopardized if the Refund were to be paid to the Taxpayer.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the Minister is hereby authorized to withhold the Refund under subsection 164(1.2) of the Act.

“Sandra J. Simpson”

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Judge

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

**DOCKET:** T-1347-10

**STYLE OF CAUSE:** Minister of National Revenue v Claris Clark  
**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** March 14, 2011

**REASONS FOR JUDGMENT:** SIMPSON J.

**DATED:** July 8, 2011

**APPEARANCES:**

Kevin Dias

FOR THE APPLICANT

**SOLICITORS OF RECORD:**

Myles J. Kirvan  
Deputy Attorney General of Canada

FOR THE APPLICANT

Claris Clark  
Richmond Hill, Ontario

FOR THE RESPONDENT  
(ON HER OWN BEHALF)