Federal Court  Cour fédérale

**Date: 20130131**

**Docket: ITA-3466-99**

**Citation: 2013 FC 110**

**Vancouver, British Columbia, January 31, 2013**

**PRESENT: The Honourable Mr. Justice Harrington**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Applicant**

**and**

**JACK KLUNDERT**

**Respondent**

## REASONS FOR ORDER AND ORDER

[1] In virtue of a "jeopardy order" obtained *ex parte* from Madam Justice Tremblay-Lamer in April 1999, the tax authorities collected the sum of $871,291.90 between June 1999 and May 2003, and applied it to amounts owing by Dr. Klundert in virtue of assessments for the 1993 through 1996 taxation years. Liability for taxes owing in those years has not been finally determined. In virtue of criminal charges against Dr. Klundert, his Notices of Objection were put on hold. He has now been convicted and ordered in 2010 by the Ontario Superior Court of Justice to pay a fine of $522,346.73 with respect to the taxation years 1993 through 1997 and in 2011 was ordered to pay

a further $101,393.80 pursuant to a conviction for income tax evasion for the years 2000 to 2005. His case before the Tax Court has been reactivated.

[2] Dr. Klundert proposes that the monies collected under the jeopardy order be first applied to his fines arising from his criminal convictions.

[3] While he does not directly attack the jeopardy order, which had been subsequently upheld, he submits that the monies collected in virtue thereof were somehow held in trust and that he now has the right to allocate payment to the fines arising from his criminal convictions. As explained to me, the advantage to him is that if he becomes bankrupt, his civil liability for income tax goes into his estate, but his liability for payment of the fines does not.

[4] There are two aspects to this case. One is the law relating to the allocation of payments. The other is Dr. Klundert's submission that the jeopardy order was obtained in aid of a criminal investigation and that the information so gathered cannot be used in determining civil liability. He relies upon the Supreme Court's decision in *R v Jervis*, 2002 SCC 73, [2002] 3 SCR 757.

[5] As to allocation of payments, at the time the jeopardy order was issued, and at the time monies were collected in virtue thereof, there was only income tax debt assessed in the amount of $999,261.78 for the 1993 to 1996 taxation years. Further, the payment was made under compulsion of law. It was not voluntary. Thus, the principle that a debtor may allocate payment to one debt, rather than to another, has no application. As to the submission that there is no finalized debt as the assessments are now before the Tax Court of Canada, the assessment is binding on this

Court until set aside (see s. 152(8) of the *Income Tax Act*, *MNR v MacIver*, 99 DTC 5524, 172 FTR 273; *MNR v Services ML Marengère*, 2000 DTC 6032, 176 FTR 1; and *Canada (Minister of National Revenue – MNR) v Arab*, 2005 FC 264, [2005] FCJ No 333 (QL)).

[6] As I read it, *Jervis* drives home the fact that the *Income Tax Act* is a regulatory statute, with distinctions between the audit and the investigative powers granted to the Minister. If the tax officials are not engaged in the verification of tax liability, but rather in the determination of penal liability, *Charter* protections are engaged. Dr. Klundert submits that the reverse also applies. I disagree. As recently held by Madam Justice Mactavish in *Patry v Canada (AG)*, 2011 FC 1032, 396 FTR 203, a case involving both a criminal investigation and a civil audit, in light of *Jervis* Canada Revenue officials cannot use the coercive powers available in determining civil tax liability to circumvent the procedural and *Charter* protections afforded to those suspected of criminal activity. In this particular case, assessments had been made and the authorities had every reason to believe that Dr. Klundert would not voluntarily pay his taxes. Indeed, on his 1993 and 1994 tax returns he wrote "collecting income tax by the government is against the Constitution of Canada." While it is quite true that in the *ex parte* application the Court was informed that a search warrant had been obtained, that fact was hardly determinative. As in any *ex parte* application, the moving party must make a full and frank disclosure.

[7] Should at the end of the day Dr. Klundert be successful before the Tax Court of Canada, the money collected under the jeopardy order will be applied to other tax years or returned to him as the case may be.

**ORDER**

**FOR REASONS GIVEN;**

**THIS COURT ORDERS that** this motion is dismissed with costs.

"Sean Harrington"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | ITA-3466-99 |
| **STYLE OF CAUSE:** | HMQ v JACK KLUNDERT |
| **PLACE OF HEARING:** | VANCOUVER, BC |
| **DATE OF HEARING:** | JANUARY 21, 2013 |
| **REASONS FOR ORDER AND ORDER:** | HARRINGTON J. |
| **DATED:** | JANUARY 31, 2013 |

**APPEARANCES:**

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|---|---|
| Elizabeth (Lisa) McDonald | FOR THE APPLICANT |
| Douglas H. Christie<br>Jeremy Maddock | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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