

ITA-1660-95

MONTRÉAL, QUEBEC, THIS 29th DAY OF JANUARY 1997

PRESENT: RICHARD MORNEAU, PROTHONOTARY

In the matter of the *Income Tax Act*,

- and -

In the matter of an assessment or assessments made by the Minister of National Revenue under one or more of the following statutes: the *Income Tax Act*, the *Canada Pension Plan* and the *Unemployment Insurance Act*,

AGAINST:

COMTAX COMMODITY TAX SPECIALISTS INC.,

Judgment debtor,

AND

COMTAX COMMODITY TAX CONSULTANTS INC.,

Garnishee.

ORDER

The motion is denied.

Richard Morneau
Prothonotary

Certified true translation

C. Delon, LL.L.

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REASONS FOR ORDER

RICHARD MORNEAU,
PROTHONOTARY:

This is an *ex parte* motion by the judgment creditor (the creditor) for an order of this Court that this matter proceed in accordance with the rules governing actions.

This motion is based on subsection 2300(8) of the *Federal Court Rules* (the Rules), which reads as follows:

2300(8) Where the garnishee disputes liability to pay the debt claimed to be due or accruing due from him to the judgment debtor, the Court may summarily determine the question at issue or order that any question necessary for determining the liability of the garnishee be tried in any manner in which any question or issue in an action may be tried.

The facts

On February 21, 1995, the creditor obtained certification of the debt owing by the judgment debtor.

On May 6, 1996, I authorized the creditor under Rule 2200 to conduct an examination of the president of this debtor. That examination was held on June 21, 1996, and the transcript of the examination was filed in the record of the Court.

On September 16, 1996, an interim attachment order was made by this Court. More specifically, \$70,850 allegedly owing by the garnishee to the debtor as an advance was attached.

On October 16, 1996, the garnishee filed a negative declaration in the record of the Court.

Analysis

As I pointed out to counsel for the creditor, I see no circumstances in the Court record that would justify the instant motion being made on an *ex parte* basis. This first reason is sufficient for denying the creditor's motion. While subsection 2300(1) of the Rules does provide for obtaining an interim attachment order on an *ex parte* basis, in my view the same is not true once the moneys have been placed under interim attachment and a party to the proceedings applies to the Court by motion. Such a motion must then be served on the adverse party, in this case the garnishee. I do not see how the order that I made on December 20, 1996 — which specifically dispenses with service — can be seen as valid notice of the instant motion.

Apart from this first factor, it appears to me that the affidavit filed by the creditor in support of her motion does not present a fact situation that is such as would enable this Court to exercise its discretion under subsection 2300(8) of the Rules and now order that this matter proceed as an action.

Rather, we must refer to the creditor's notice of motion in order to understand her reasons for requesting that the matter proceed in this manner. On the second page of that notice, we find the following:

[TRANSLATION]

Further to that examination [the one held on June 21, 1996] and to the filing of that negative declaration [the one filed by the garnishee on October 16, 1996], counsel for Her Majesty the Queen intends to contest the said negative declaration, on the basis that the matters set out therein cannot be set up against Her Majesty.

Accordingly, this type of dispute will require that witnesses be called and it is therefore appropriate for the matter to be heard in accordance with the rules governing ordinary actions brought in the Court.

It is understandable that the creditor would want to dispute the negative declaration by the garnishee. However, it must be recalled that the creditor has not sought to examine the representative of the garnishee who filed the negative declaration or any other person representing the interests of the garnishee (for example, that entity's accountant). While the present representative of the garnishee was examined on June 21, 1996, he was examined as the representative of the debtor, and that examination was therefore held before the interim attachment order was made and before that person filed a declaration in this proceeding. At that examination, counsel for the creditor was not allowed to focus the discussion on the garnishee's debts.

No doubt that avenue could now be pursued, with undertakings by the representative who is examined if any aspects warranted clarification. This approach might be supplemented by filing affidavits in rebuttal.

Assuming that all of the parties will comply with and participate in this type of exercise and cooperate to the extent necessary, the merits of the matter — that is, whether the cancellation of the debt to which the interim attachment order applies can or cannot be set up against the creditor — may then, in my opinion, be disposed of without the need to go outside the summary procedure normally followed in order to obtain a final attachment order.

In my opinion, calling witnesses under subsection 2300(8) of the Rules — and that is precisely the purpose for which the creditor has made this application — should be ordered only if, generally speaking, the Court is essentially dealing with a situation in which it is appropriate to call witnesses under subsection 319(4) of the Rules. The cases decided under that subsection of the Rules are well known to the creditor. (See *Her Majesty the Queen v. Line Grenier*, decision dated November 6, 1996, file no. T-1845-96; *Her Majesty the Queen v. 89071 Canada Ltd. and 3088-7723 Québec Inc.*, decision dated July 2, 1996, file no. GST-498-95, and the decision of this Court in

Her Majesty the Queen v. Jean-Guy Vennes and Paul Vennes, dated October 16, 1996, in file no. ITA-4041-96.)

Accordingly, this motion is denied.

Richard Morneau
Prothonotary

Montréal, Quebec
January 29, 1997

Certified true translation

C. Delon, LL.L.

Federal Court of Canada

Court file No. ITA-1660-95

BETWEEN

In the matter of the *Income Tax Act*,

- and -

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REASONS FOR ORDER

FEDERAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO: ITA-1660-95

STYLE OF CAUSE:In the matter of the *Income Tax Act*,
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PLACE OF HEARING:

Montréal,
Quebec

DATE OF HEARING:

January 27,
1997

REASONS FOR ORDER BY:

Richard
Morneau, prothonotary

DATE OF REASONS FOR ORDER:

January 29,
1997

APPEARANCE:

Daniel Beauchamp
the Queen
for Her Majesty

SOLICITORS OF RECORD:

George Thomson

for Her Majesty

the Queen
Deputy Attorney General of Canada
Montréal, Quebec

Howard Diamond

for the judgment

debtor and the
Westmount, Quebec

garnishee