WESTWARD ADVISORS

CRA LOSES APPEAL TO GET 10/8 NAMES

ISSUE

In November 2008, the CRA launched an audit program[1] against 10/8[2] policy-holders, despite a September 2008 memo from the CRA Rulings Directorate to the CRA GAAR Committee opining that the 10/8 program complies with the Act and should not be subject to the general anti-avoidance rule **("GAAR")**.[3]

As part of the audit program, the Minister of National Revenue obtained *ex parte* Federal Court **("FC")** orders from October 2009 through June 2010 authorizing it to obtain 10/8 client lists from RBC Insurance, BMO Insurance, and Industrial Alliance Insurance **(the "Insurers")**.

The Insurers successfully challenged the *ex parte* orders, all of which were cancelled in a FC decision on November 1, 2011.[4]

On February 21, 2013, the Federal Court of Appeal **("FCA")** dismissed the Minister's appeal of that decision.[5]

This Viewpoint reviews the FCA's reasons for judgment.

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OUR VIEWPOINT

The Minister used subsection 231.2(3) of the *Income Tax Act* **(the "Act")** to obtain the *ex parte* court orders against the Insurers, which the court may authorize if it is satisfied that *"(a) the person or group* [of unnamed persons] *is ascertainable, and (b) the requirement is made to verify compliance by the person or persons with ... the Act."*

The Insurers exercised their rights under subsection 231.2(5) to have the FC review its orders. The FC used subsection 231.2(6) to cancel the orders, which provides that *"a judge may cancel the authorization previously granted if the judge is not then satisfied that the conditions of 231.2(3) have been met, and the judge may confirm or vary the authorization if the judge is satisfied that those conditions have been met."*

The Minister appealed, arguing:

1. **No Discretion:** The court has no discretion to cancel a previous order if the two statutory pre-conditions of 231.2(3) are met.
2. **Disclosure:** It made full and frank disclosure of relevant information to the court when seeking the *ex parte* court orders.
3. **Valid Audit Purpose:** The court has no discretion to cancel a previous order if a valid audit purpose existed.

No Discretion

The FCA rejected this argument, stating *"The plain wording of 231.2(6) shows that the judge is free to go beyond the two statutory preconditions and exercise a discretion regarding whether the authorization should be left in place."* [6]

The FCA concluded that the FC *"had the power to cancel the authorizations it granted on the ground that, in its view, the Minister had not made full and frank disclosure to it on the ex parte application."* [7]

Full and Frank Disclosure

The Minister argued that the following information that it did not disclose to the FC was irrelevant to granting the orders:

1. *The Department of Finance's refusal to amend the Act to address outdated provisions;*
2. *Information contained in an advance income tax ruling request, information that was relevant to determining whether there was compliance with the Act;*
3. *The Canada Revenue Agency's decision to "send a message to the industry" by refusing to answer the advance income ruling request and to take measures to chill the 10/8 plan business, in part, by undertaking an audit "blitz"; and*

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CRA LOSES APPLEAL TO GET 10/8 NAMES, cont'd

4. *The Canada Revenue Agency's GAAR Committee had determined that the 10/8 plans likely complied with the letter of the Act, if not the spirit.*[8]

The FCA confirmed the FC's finding that the Minister's failure to disclose this information was indeed relevant to the court's discretion in determining whether to grant the orders.[9]

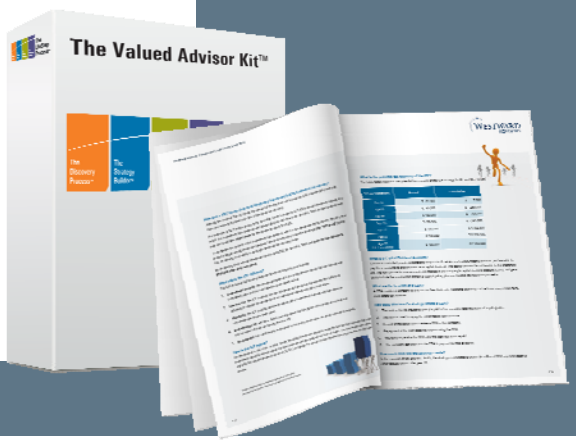
Valid Audit Purpose

The Minister argued that as long as a valid audit purpose supported the issuance of the orders, they should have been upheld. The FCA disagreed, concluding that even if a valid audit purpose existed, the FC could exercise discretion to cancel the orders *"because of the Minister's non-disclosure of relevant information."* [10] Furthermore, the FCA refused to interfere with the FC's finding that the primary purpose of the Minister was not an audit purpose, but a purpose to chill the 10/8 business.[11]

Summary

The decision makes it clear that the Minister's power to obtain *ex parte* orders from the court forcing the disclosure of information about unnamed persons from third parties under subsection 231.2(3) is subject to the discretion of the court both at the time of application and upon review, and that discretion will be affected by a failure on the part of the Minister to make full and frank disclosure of relevant information upon application to the court.

The FCA refused to interfere with the FC's finding that the primary purpose of the Minister was not an audit purpose, but a purpose to chill the 10/8 business.

References

1. See November 4, 2008 internal CRA memo, "10-8 Program Audit Strategy," document 1723 of FC Docket T-1619-09.
2. "10/8" refers to a leveraged life insurance program where policy cash value earns 2.0% less than the interest rate charged by the insurer on a policy loan or on a collateral loan secured by the policy.
3. See September 22, 2008 internal CRA memo, "Proposed Product Offering – 10/8 Policies," document 2800 of FC Docket T-1619-09.
4. See 2011 FC 1249 and Westward Advisors Viewpoint, *"Court Refuses CRA Demand for 10/8 Client Lists,"* November 9, 2011.
5. 2013 FCA 50.
6. Ibid., paragraph 19.
7. Ibid., paragraph 38.
8. Ibid., paragraph 8.
9. Ibid., paragraphs 8 and 39-41.
10. Ibid., paragraph 46.
11. Ibid., paragraphs 43 and 44.