

e-document		T-368-19
F I L E D	FEDERAL COURT COUR FÉDÉRALE	
	Feb 22, 2019	
Jacqueline Smith		D É P O S É
Toronto, ONT		

FEDERAL COURT

BETWEEN:

BAHMAN GHERMEZIAN

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at the Federal Court in Toronto.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

FEB 22 2019

Date

JACQUELINE SMITH
REGISTRY OFFICER
AGENT DU GREFFE

Issued
by:

(Registry Officer)

Address of local
office:

180 Queen Street West 180, rue Queen Ouest
Suite 200 bureau 200
Toronto, Ontario Toronto, Ontario
M5V 3L6 M5V 3L6

TO:

1. Deputy Attorney General of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8
2. Minister of National Revenue
7th Floor
555 MacKenzie Avenue
Ottawa, ON K1A 0L5

Application
(For a Judicial Review)

This is an application for judicial review in respect of:

The act, matter, or decision of John Harasymchuk, CRA Audit Manager to issue a requirement for information ("RFI") dated January 23, 2019 purporting to require the Applicant, under ss. 231.2(1) of the Income Tax Act ("ITA"), to provide extensive foreign-based information and documents relating to non-resident persons or entities for a period of time spanning approximately 18 years, all within 30 days.

The matter was communicated to the Applicant on: January 24, 2019.

The Applicant makes application for:

3. A writ of certiorari.
4. An order quashing the RFI dated January 23, 2019.
5. A declaration that the information and documents referenced in the RFI are not available or located within Canada.
6. A declaration that the information and documents referenced in the RFI are not relevant to the administration or enforcement of the ITA in relation to any person or entity subject to tax under the ITA.
7. A writ of prohibition and an order of injunction prohibiting the Minister of National Revenue (the "**Minister**") from subsequently making any similar demands against the Applicant relating to the information and documents referenced in the RFI.
8. If necessary, an interim order pursuant to section 18.2 of the Federal Courts Act staying the RFI and prohibiting and restraining the Minister from taking any steps to enforce the RFI until 120 days following final disposition of this application for judicial review.
9. Costs of this application.

10. Such further or other relief as this Court may permit.

The grounds for the application are:

11. On January 23, 2019 Mr. John Harasymchuk, Audit Manager, Canada Revenue Agency ("CRA") issued the RFI requiring the Applicant to provide extensive foreign-based information and documents relating to non-resident persons or entities for a period of time dating back to 2000. The Minister has not established that the RFI was initiated, issued and signed by a person with proper delegated authority.
12. Among other things, the RFI demanded the Applicant to provide the following information and documents:
 - (i) All income tax returns that were filed for each of the Bahman Trusts for each of the relevant taxation years [i.e., from 2000 to 2018]. The returns requested include:
 - a. all original and amended US tax returns, both federal and state level.
 - (ii) The following documents in respect of each of the Bahman Trusts are requested:
 - a. all books and records that were used in the preparation of the aforementioned returns; and
 - b. all Schedule K-1 forms received by the Bahman Trusts for the relevant taxation years.
13. It is evident that the RFI seeks information and documents that is available or located outside Canada and is thus "foreign-based information or documents" within the meaning of subsection 231.6(1) of the ITA. The Minister has not refuted this.
14. Further, the Applicant is not the target of the RFI; in this regard, the Applicant is merely a third-party.
15. The Minister required that the foregoing requested information and documents be delivered within 30 days from January 23, 2019. The Minister has not discharged her burden of proving that the deadline reflects a reasonable amount of time for compliance

with the RFI. Among other things, the Minister failed to consider the volume of materials demanded, their extra-territorial location, the breadth of the request, the age of the information, and the other complexities of the matter.

16. The RFI warned that failure to comply could lead to legal proceedings being initiated by the Department of Justice against the Applicant for a compliance order under section 231.7 of the ITA. It further notified that "failure to comply with such an order could lead to a finding of contempt of court"; thereby improperly intimidating the Applicant by threatening penal consequences.
17. By letter dated February 20, 2019 to John Harasymchuk and Andrew Bowe, CRA, the Applicant requested clarification (and further information and documents) relating to the RFI in order for the Applicant to better understand the RFI. Further, the Applicant requested that the deadline for responding to the RFI be extended to a date that is at least 30 days after CRA's disclosure of the information and documents requested. The Minister failed or refused to provide the clarifications or to extend the deadline for complying with the RFI.
18. The Minister has not established that the target of the RFI is a Canadian taxpayer, or else otherwise within the Minister's jurisdiction.
19. The Minister issued the RFI notwithstanding that she was aware that:
 - (a) the target of the RFI was incorporated, established and/or resident outside Canada;
 - (b) the information and documents referenced in the RFI were not available or located within Canada (and thus constituted "foreign-based information or documents" under ss. 231.6(1) of the ITA); and
 - (c) the information and documents referenced in the RFI were not in the power, possession or control of the Applicant.
20. The Minister failed to satisfy the statutory conditions under ss. 231.6(2) of the ITA governing a requirement for foreign-based information or documents.
21. In breach of her administrative policies, the Minister did not attempt to collect the requested information directly from the targets of the RFI. Indeed, the Minister did not

give any notice to the persons or entities who will be affected by the RFI, and they are not represented in this proceeding. From their perspective, the Minister's action or decision was made *ex parte*. The Minister disregards that the targets of the RFI are entitled to have their privacy protected to the extent provided by law.

22. The Minister has not established that she is engaged in a tax audit conducted in good faith on a genuine factual basis. Further, she has not particularized any non-compliance by the targets of the RFI. Indeed, the Minister has failed to demonstrate that the requested information is relevant for purposes related to the "administration or enforcement" of the ITA.
23. For a RFI to be upheld as valid, the Minister must establish that it has been issued for a purpose related to the administration or enforcement of the ITA. This is an objective test; the subjective opinion of the auditor is not determinative. The purpose of the RFI must be discerned from an objective consideration of the entire evidence.
24. In her administrative policies regarding third-party requirements, the Minister recognizes the need to demonstrate that she actually requires the information sought and that the RFI must relate to specific compliance matters. The Minister candidly acknowledges that if such precautions are not taken, then the RFI may be challenged on this basis.
25. The action or decision to issue the RFI also violates the Minister's policy against the issuance of broad and indiscriminate requests on taxpayers.
26. Notably, section 230 of the ITA imposes a specified limitation period for keeping tax records. It would defeat the purpose of the statutory limitation period if the CRA could require a taxpayer to undertake an expensive, time-consuming and labour-intensive process to retrieve and produce records that were no longer required to be retained.
27. The Minister is using the RFI to engage in an impermissible "fishing expedition". The Minister issued a very broad requirement for information and documents in the hope that something relevant might be found, which might enable her to develop a case that was unknown to her at the outset.
28. Mr. Harasymchuk acted without jurisdiction or acted beyond his jurisdiction because his act or decision failed to comply with the ITA requirements and also contravened the

Minister's established administrative policies. He erred in law in making his decision and also acted contrary to law. Thus, the RFI is *ultra vires* and invalid *ab initio*.

29. The act or decision to issue the RFI was made in a perverse or capricious manner without regard for the facts or the law, and made with the knowledge and/or understanding that it would result in prejudice to the Applicant. Further the action or decision was not reasonable because, among other things, it lacked justification, transparency and intelligibility.
30. The RFI seeks information and documents relating to one or more unnamed persons without obtaining prior judicial authorization, as required by ss. 231.2(2) of the ITA.
31. To safeguard the Applicant from any further potential prejudice in the future, the Minister ought to be prohibited from subsequently making any similar demands in relation to the information and documents referenced in the RFI.
32. If necessary, the Applicant requests an interim order pursuant to section 18.2 of the Federal Courts Act staying the RFI and prohibiting and restraining the Minister from taking any steps to enforce the RFI until 120 days following final disposition of this application for judicial review.
33. The Applicant relies upon sections 18, 18.1 and 18.2 of the Federal Courts Act, and sections 230, 231.2, 231.6, and 231.7 of the ITA.

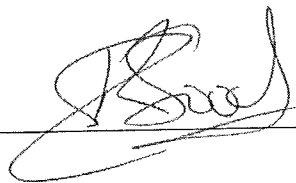
This application will be supported by the following material:

34. An affidavit to be sworn or affirmed.
35. With leave of the Court, the viva voce testimonies of Mr. John Harasymchuk and Mr. Andrew Bowe at the hearing of the application (as per Rule 316 of the Federal Court Rules).
36. Such further and other evidence as counsel may advise and this Court may permit.

The Applicant requests the Minister to send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Minister and/or the CRA to the Applicant and to the Registry:

37. All records and information of every kind relating in any manner whatsoever to the decision or act of John Harasymchuk, CRA Audit Manager to issue the RFI dated January 23, 2019, including copies of all notes (both hand-written and typed), all correspondence (including printed copies of all emails and other electronic records), and all other facts and documents considered by Mr. Harasymchuk, Mr. Andrew Bowe and the Minister.
38. All records and information of every kind relating in any manner whatsoever to the Minister's allegation that the RFI was issued "for purposes related to the administration or enforcement of the Income Tax Act".
39. All records and information of every kind relating in any manner whatsoever to the availability and the location of the information and documents referenced in the RFI.
40. All records and information of every kind relating in any manner whatsoever to the Minister's policies, pronouncements and revisions relating to the CRA's audit and/or requirement powers and procedures to request only the information that is required (for example, as announced in the CRA news release on May 31, 2017, at the 2017 Canadian Tax Foundation conference (panel on administration issues), and at the 2018 Canadian Tax Foundation conference held May 24, 2018 (panel on Preventing, Navigating and Resolving Tax Disputes).

Dated at Toronto this 22nd day of February, 2019.



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