Tax Notes

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CANADIAN TAX FOUNDATION ANNUAL CONFERENCE — CRA ROUNDTABLE QUESTIONS

Discretionary Family Trust — GAAR and 21-Year Rule Planning

The CRA confirmed that it would apply the general anti-avoidance rule ("GAAR") and refuse to give an advance income tax ruling in the following situation:

- A Canadian resident discretionary trust ("Old Trust") approaching its 21st anniversary would distribute a property with an unrealized gain to a Canadian corporate beneficiary ("Canco") wholly-owned by a newly established Canadian resident discretionary trust ("New Trust").
- The distribution would be tax-deferred in accordance with s. 107(2) of the Act.
- Canco would be a beneficiary of Old Trust under the trust agreement.
- Because of the tax-deferred distribution to Canco, Old Trust would continue to hold the property on its 21st anniversary.

The questioner confirmed that s. 104(5.8) of the Act should not apply to affect the timing of the 21st anniversary of the trust because the property was not transferred directly from Old Trust to New Trust. The CRA considered that the above tax-planning technique would circumvent: (1) the anti-avoidance rule included in s. 104(5.8) of the Act to frustrate the object, spirit, and purpose of the provision; (2) the deemed disposition rule in s. 104(4)(*b*); and (3) the whole purpose of the Act as it relates to the taxation of capital gains. The CRA's position is that the distribution of a property by an existing Canadian-resident discretionary trust to a Canadian-resident corporation wholly owned by a new Canadian resident discretionary trust is to defer the payment of the income tax otherwise payable in accordance with the 21-year deemed disposition rule. Therefore, the CRA will apply GAAR to this type of planning unless provided with substantial evidence not to apply it. If this type of planning was permitted, the taxation of capital gains could be deferred indefinitely.

— CTF Annual Conference, CRA Roundtable — Question 1, November 29, 2016, Document No. 2016-0669301C6

Calculation of Safe Income on Discretionary-Dividend Shares

The CRA was asked how to apportion the safe income on hand ("SIOH") on discretionary-dividend shares in the situation described below and if this calculation was essential. More specifically, the situation outlined below illustrates the application of the

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SIOH exception in s. 55(2.1)(*c*) of the Act. Note that all corporations below are taxable Canadian corporations.

The situation may be described as follows:

- Trust B is a discretionary personal trust having Holdco B as one of its beneficiaries.
- Holdco A deals at arm's length with Trust B and Holdco B.
- Opco is a corporation whose common share classes are voting, participating, entitled to discretionary dividends independent of other classes, and entitled to pro-rata sharing of net assets with other common share classes upon liquidation.
- In Year 1, Holdco A subscribed to 50 Class A common shares of Opco at a nominal price and Trust B did the same for 50 Class B common shares of Opco.
- At the end of Year 2, Opco had shares with an aggregate fair market value of $2 million and an SIOH of $2 million. At the same time, the corporation Holdco C, related to Holdco A, subscribed to 50 Class C common shares of Opco at a price of $1 million. At the same time, the corporation Holdco D, not related to the above entities, borrowed $500,000 from Opco and used a portion of it to purchase 25 Class B common shares from Trust B.
- During Year 3, Opco earned $3.6 million of additional SIOH and declared the following dividends at year end to reduce its FMV: (1) a $3 million dividend on Class C common shares; (2) a $1.3 million dividend on Class B common shares held by Trust B; and (3) a $1.3 million dividend on Class B common shares held by Holdco D. Trust B allocated and paid to Holdco B the full $1.3 million received from Opco. Holdco D used a portion of the $1.3 million to repay its $500,000 loan to Opco.

The CRA considered that the situation described was not commonly encountered by taxpayers since two related corporations (Holdco A and Holdco C) gave a portion of their collective value held in Opco to two unrelated persons (Trust B and Holdco D). In the absence of any apparent business common sense, the CRA would need to conduct a detailed analysis of the situation to determine if the rules in ss. 15(1), 56(2), 69(1), 246(1), or 245(2) of the Act could be applicable. The CRA noted that this situation could cause significant problems if a butterfly distribution took place, since the difficulty in determining the FMV of the Opco shares would make it nearly impossible to determine if the distribution was an eligible one under s. 55(1). The calculation of the SIOH is essential to be able to prove that a dividend is not subject to the application of s. 55(2) of the Act. An incorrect claim would be subject to the application of ss. 152(4), 163(2), and 239(1) of the Act.

— CTF Annual Conference, CRA Roundtable — Question 2, November 29, 2016, Document No. 2016-0669651C6

Non-Arm's Length Sale of Shares — *Poulin* Decision

The CRA was asked the following questions on the *Poulin* and *Turgeon* cases decided by the Tax Court of Canada (these cases dealt with unrelated shareholders trying to extract corporate surpluses tax free by treating them as capital gains and using the capital gains exemption):

- What are the differentiating factors identified by the Court?
- Is the CRA position on employee buyco arrangements affected by the Court's decisions?
- Is the CRA position altered if the holding corporation receives dividends or another form of compensation in respect of the shares purchased?

Since the question of whether the employee and the employee buyco are dealing at arm's length with each other when the shares of the corporation are sold is one of fact, the CRA confirmed that it could only provide general comments on an alteration of the situation described in the decision. The CRA would have to review all the facts and circumstances of the situation before determining its position. The facts of a situation could indicate that the employee buyco was only involved in the transaction as an accommodating party for the benefit of the shareholder-employee and to avoid the application of s. 84.1 of the Act. It is therefore important that any taxpayer carrying on a transaction possibly subject to the application of s. 84.1 obtain an advance income tax ruling.

The CRA offered as an example a situation where an employee and an employee buyco acted in concert without separate interests. In this case, the employee buyco assumed no risk associated with the acquisition of the shares of

the operating corporation, did not benefit from buying those shares, had no interest other than helping an employee realize a capital gain and claim a capital gains exemption, and had no role independent of the employee or operating corporation. In other words, the facts of the situation would support the CRA position that an employee buyco was only involved in the transaction as an accommodating party for the benefit of the employee.

The CRA noted that the fact that a shareholder-employee like Mr. Poulin or Mr. Turgeon intended to dispose of all his shares in the operating corporation to an employee buyco wanting to buy them was not sufficient to conclude that they were dealing at arm's length with each other.

— CTF Annual Conference, CRA Roundtable — Question 3, November 29, 2016, Document No. 2016-0669661C6

Eligible Capital Expenditures — Transitional Rules

The recently enacted s. 13(38)(*d*)(iii) of the Act provides that any taxpayer with no taxation year ending immediately before January 1, 2017, and with a particular amount included in his business income under s. 14(1)(*b*) of the Act for a particular year can elect to include the particular amount in the calculation of his business income for that year. However, one of the conditions is that the taxpayer must have incurred an eligible capital expenditure ("ECE") in a business before January 1, 2017. The CRA was asked if the election would be available to a taxpayer selling a business whose sole intangible asset was internally-generated goodwill with no cost and whose taxation year end straddled January 1, 2017. The CRA confirmed that no election could be made by the taxpayer because the condition that an ECE be made or incurred for the business was not met.

— CTF Annual Conference, CRA Roundtable — Question 13, November 29, 2016, Document No. 2016-0669721C6

New Small Business Deduction Provisions

Relying on draft legislation released by the Department of Finance on July 29, 2016, the questioner noted an anomaly preventing two associated corporations from claiming a full $500,000 small business deduction ("SBD"). The example provided with the question showed clearly that only $350,000 of the $500,000 annual SBD could be claimed by two associated corporations. The CRA confirmed that the anomaly was corrected in the revised draft legislation released on October 21, 2016, and enacted as Bill C-29 on December 15, 2016. The wording of s. 125(10) of the Act was amended to prevent amounts received from an associated corporation from being deducted twice to calculate the SBD allocated to the other associated corporation. When applying the new wording to the above example, the full $500,000 annual SBD could be claimed by the two associated corporations.

— CTF Annual Conference, CRA Roundtable — Question 15, November 29, 2016, Document No. 2016-0669731C6

Canadian Corporate Filing for US LLPs and LLLPs

The CRA was asked if certain US limited liability partnerships ("LLPs") or limited liability limited partnerships ("LLLPs") would be allowed to file as corporations on a go-forward basis but not on a retroactive basis. The CRA recently announced at the 2016 STEP and IFA roundtables that Florida and Delaware LLPs and LLLPs would be considered as corporations for the purpose of Canadian income tax law but that existing ones could be treated as partnerships if they could meet certain criteria. Regarding LLPs and LLLPs not meeting those criteria and willing to file as corporations on a prospective basis, the CRA suggested that they make a submission to a new internal working group studying compliance issues for LLPs and LLLPs. All submissions should be sent to the following address by February 28, 2017: DELAWAREFLG@cra-arc.gc.ca.

— CTF Annual Conference, CRA Roundtable — Question 10, November 29, 2016, Document No. 2016-0669751C6

Calculation of Earnings for US LLCs

In response to Question 9 of the 2011 International Fiscal Association Conference Roundtable, the CRA confirmed that a disregarded US limited liability company ("LLC") having one member regarded as a US corporation and viewed as a foreign affiliate of a Canadian taxpayer had to calculate its "earnings" in accordance with subparagraph (*a*)(i) of the definition of "earnings" in Regulation 5907(1). This was the case even if the LLC was not required to compute its

profits under US tax rules and that such computation was only required to calculate the tax liability of members. The CRA was asked if their position had changed after the enactment of Regulation 5907(2.03) requiring affiliates calculating their earnings under Canadian income tax law to claim all discretionary deductions to their maximum. It was also asked if disregarded US LLCs were still required to calculate their "earnings" under subparagraph (*a*)(i) of the definition of this term in Regulation 5907(1) after the enactment of Regulation 5907(2.03) and if their response would be different if one or more members were not US resident corporations. The CRA confirmed that, following the introduction of Regulation 5907(2.03), the "earnings" of disregarded US LLCs are calculated under subparagraph (*a*)(iii) of the definition of "earnings" in Regulation 5907(1). Their response would not change even if one of the LLC members was not a US resident corporation provided the LLC was treated as a disregarded one for US purposes. However, if those LLCs are treated as partnerships for US purposes, earnings must be calculated under subparagraph (*a*)(i) of the definition of "earnings" in Regulation 5907(1).

— CTF Annual Conference, CRA Roundtable — Question 11, November 29, 2016, Document No. 2016-0669761C6

Base Erosion and Profit Shifting (BEPS) — Action Item 13

The CRA confirmed that taxpayers are not required to produce "master file" and "local file" information (as required by the Base Erosion and Profit Shifting ("BEPS") Action Item 13) to satisfy their responsibility to make reasonable efforts to determine and use arm's length transfer prices in their business (as required by s. 247 of the Act). The requirements shown in BEPS Action Item 13 dealing with the implementation of country-by-country reporting were taken care of by s. 233.8 of the Act which was included in Bill C-29 enacted on December 15, 2016. Note that s. 233.8 of the Act has no direct relation with the contemporaneous documentation required under s. 247(4).

— CTF Annual Conference, CRA Roundtable — Question 9, November 29, 2016, Document No. 2016-0669801C6

Support of Canadian Foreign Tax Credit for US Income Taxes

The CRA recently confirmed, in answer to Question 9 of the 2016 STEP Conference Roundtable (see CRA Document 2016-0634941C6), that taxpayers claiming a Canadian foreign tax credit for their US income taxes and unable to provide a copy of a US notice of assessment, transcript, statement, or other document from the US tax authorities could support their claims by providing bank statements, cancelled cheques, or official receipts. The CRA was asked if they could reach out to the Internal Revenue Service ("IRS") to streamline the process of verifying credits claimed since the IRS does not issue a notice of assessment and can take a very long time (i.e., much longer than the 30-day CRA extension) to provide an account statement. The CRA was also asked if IRS Form 1040-NR showing the deduction of state tax from US federal tax could be used to support the state tax claimed as a Canadian foreign tax credit.

Regarding the first question, the CRA confirmed that the IRS had a very structured process for dealing with IRS Form 4506T used to request a tax account transcript and that taxpayers should not wait for the CRA to ask for transcripts before requesting them from the IRS or other US tax authorities. For the time being, the CRA will not communicate with the IRS on this matter.

Regarding the second question, the CRA noted that it would accept the following documents:

- Form T2209 from each country to which taxes were paid;
- federal, state, and municipal tax returns with related schedules and forms;
- federal account transcripts;
- account statements or similar documents from state or municipal authority;
- information slips like W-2, 1042-S, 1; or
- any other documents supporting the foreign tax credit claim.

The CRA indicated that it will only accept the following documentation to replace an IRS account transcript or account statement from a state or municipal authority as proof of payment:

- bank statements,
- cancelled cheques, or
- official receipts.

However, the documentation will only be accepted if the taxpayer indicates clearly:

- the amount of the payment or refund;
- the date on which it was paid or received;
- the taxation year to which it relates; and
- that it was made to or received from the applicable US tax authority.

— CTF Annual Conference, CRA Roundtable — Question 12, November 29, 2016, Document No. 2016-0669851C6

Distribution of Taxable Income by an Estate

During the administration of an estate, taxable income can be generated in the form of interest, dividends, capital gains, etc. after all debts and specific bequests have been paid. The CRA was asked if an estate could distribute the remaining taxable income to the residual beneficiaries.

The CRA confirmed that the ability of an estate to distribute the remaining taxable income to the residual beneficiaries would depend on the wording of the will. If there is nothing in the will to indicate from which assets the testamentary gifts must be paid, the executors can make the payments as they wish provided they act impartially, follow the classification of the gifts, and pay all liabilities of the deceased and the estate. In this case, the executor can pay the residue of the estate (including taxable income before tax) to the residual beneficiaries and a tax deduction can be claimed under s. 104(6) of the Act by the estate. This will not be the case if the executor is required by the will to pay the income tax liability on the income earned by the estate and pay the remaining after-tax assets to the residual beneficiaries. In this case, the estate could not distribute taxable income to the residual beneficiaries, nor could it claim a tax deduction under s. 104(6) of the Act. The income would be taxed in the estate and the residual beneficiaries would receive an after-tax capital distribution from the executor.

CTF Annual Conference, CRA Roundtable — Question 14, November 29, 2016, Document No. 2016-0669871C6

Agnico-Eagle Mines Decision — Existence of Capital Loss

The CRA was asked if the methodology proposed by the Federal Court of Appeal in the *Agnico-Eagle Mines* decision, used to determine if the issuer of foreign currency-denominated convertible debentures had realized a gain when the debentures were converted into shares, could result in a capital loss under s. 39(1) or 39(2) of the Act. The CRA confirmed that any potential loss calculated under the methodology provided by the Federal Court of Appeal could not be sustained because of the fluctuation of the value of the foreign currency in respect to Canadian currency. Therefore, there would be no loss under s. 39(2) of the Act. There would be no loss under s. 39(1) of the Act either since no property was sold. The application of s. 143.3(3) of the Act to a gain or loss realized in this situation must also be considered.

CTF Annual Conference, CRA Roundtable — Question 3, November 29, 2016, Document No. 2016-0670201C6

Tax on Investment Management Fees Paid by RRSP, RRIF, and TFSA Planholders

The CRA was asked if the payment by planholders under a Registered Retirement Savings Plan ("RRSP"), Registered Retirement Income Fund ("RRIF"), or Tax-Free Savings Account ("TFSA") of related investment management fees normally payable by the trusts of those plans would constitute an "advantage" as this term is defined in s. 207.01(1) of the Act and would be subject to a 100% tax on the value of the benefit under s. 207.05. The CRA confirmed that this would be the case and that, to avoid the payment of that 100% tax, the planholders would have to give the necessary instructions to the issuer of the plan to have those fees paid by the plans and not by them. Interestingly, the

CRA noted that there would be no adverse tax consequences if there was not enough cash in the plan to pay those fees immediately without giving rise to an overdraft. To give time to the industry to make the necessary system adjustments, the application of this policy is postponed to January 1, 2018. Fees attributable to periods before 2018 can be paid by the plan or the planholder without tax consequences. Note that planholders paying the fees themselves are prevented, by s. 18(1)(*u*) of the Act, from deducting the fees from their taxable income.

CTF Annual Conference, CRA Roundtable — Question 5, November 29, 2016, Document No. 2016-0670801C6

General Anti-Avoidance Rule (GAAR) — Assessment Process

The CRA was asked what procedures it had to follow before deciding to reassess a taxpayer under the general anti-avoidance rule ("GAAR"). Although the general understanding was that the GAAR Committee was always required to approve any GAAR reassessment, certain taxpayers had a different experience.

More specifically, the CRA was asked the following questions:

- What is the referral process to the GAAR Committee for proposed GAAR reassessments?
- Can GAAR reassessments be made without referrals to the GAAR Committee?
- Must taxpayers be informed before referrals are made to the GAAR Committee?
- What is the composition of the GAAR Committee?

The CRA offered the following comments:

Description of the GAAR process

- The audit process for GAAR issues is the same as for other issues except that the Abusive Tax Avoidance and Technical Support Division in Headquarters ("Headquarters") and the GAAR Committee must provide their input. The exact time when the Tax Services Office ("TSO") must send proposal letters to taxpayers on files involving GAAR will depend on the circumstances.
- Based on the facts of the file, the CRA will determine if there is any avoidance transaction similar to one previously considered by the GAAR Committee which resulted in a recommendation to apply GAAR. If this is the case, the TSO will first send a proposal letter to the taxpayer asking for their input. The TSO will then send both to Headquarters to get their recommendation whether or not to proceed with the reassessment. If the matter was never previously considered by the GAAR Committee, the TSO will refer the matter to Headquarters before sending the proposal letter to the taxpayer. They will only send the proposal letter to the taxpayer if they receive a recommendation from Headquarters, who would normally consult with the GAAR Committee before making such a recommendation.
- Headquarters may recommend not to proceed with the GAAR reassessment without consulting with the GAAR Committee if they believe that there are no grounds to proceed with GAAR. They would normally still submit the case to the GAAR Committee for confirmation purposes.

Referrals to the GAAR Committee

- TSO and Headquarters would not normally proceed with GAAR reassessments without referring the matter to the GAAR Committee for their consideration and recommendation.

Information of Taxpayers

- Even if the CRA is under no obligation to inform the taxpayer of its consultations with the GAAR Committee, any submission and arguments made by the taxpayer concerning the application of GAAR will be sent to Headquarters and the GAAR Committee for their consideration.

Composition of the GAAR Committee

The GAAR Committee is composed of representatives from the:

- Income Tax Rulings Directorate,
- Legislative Policy Directorate,
- Abusive Tax Avoidance and Technical Support Division of the International and Large Business Directorate,

- Department of Finance,
- Department of Justice, and
- Legal Services (group from Department of Justice).

CTF Annual Conference, CRA Roundtable — Question 7, November 29, 2016, Document No. 2016-0672091C6

Heading: Section 55(2) and Part IV Tax

The CRA was asked to consider the following situation:

- Opco and Holdco have the same taxation year, and are connected under s. 186(4) of the Act since Holdco owns all the shares of Opco.
- All the transactions below occur in a taxation year beginning after 2015.
- Opco's refundable dividend tax on hand ("RDTOH") as defined in s. 129(3) of the Act is $383,333.
- Taking its RDTOH into account, Opco would pay a taxable dividend of $1,000,000 to Holdco and receive a dividend refund of $383,333 under s. 129(1) of the Act.
- Holdco would then pay a taxable dividend of the same amount to an individual shareholder.
- Holdco would pay a Part IV Tax of $383,333 but would qualify for an offsetting dividend refund.
- Assume also that:
  - All the above transactions are part of the same series.
  - No safe income on hand ("SIOH") contributes to the gain on the Opco shares held by Holdco.
  - Paragraph 55(2.1)(*b*) of the Act applies to the $1,000,000 dividend received by Holdco.

The CRA was asked if Holdco could elect under s. 83(2) of the Act to treat a portion of the dividend paid to the individual shareholder as a capital dividend. More specifically, it was asked if Holdco could, instead of paying the $1,000,000 taxable dividend to the individual shareholder, elect under s. 83(2) of the Act to pay a capital dividend of $500,000 and a cash taxable dividend of $500,000 to the individual shareholder.

The CRA confirmed that this was not possible because the election under s. 83(2) of the Act could not be made on the dividend paid by Holdco (i.e., triggering a refund of Part IV Tax) and could only be made on a subsequent dividend. Otherwise, this would impair the application of s. 55(2) of the Act to the dividend received by Holdco. The capital gains stripping rules under s. 55(2) of the Act could only apply after the application of s. 186 and 129(1) of the Act. In this particular situation, even if s. 55(2)(*c*) of the Act would deem the dividend received by Holdco to be a capital gain, this deeming would have no effect on the application of s. 186 of the Act to the dividend received by Holdco, and of s. 129 to the dividend paid by Holdco. Any other conclusion would make redundant the Part IV tax condition for applying the s. 55(2) rule.

Note that Holdco must file an original return and also an amended one for the year in which it received a dividend from Opco. The first return is to report the Part IV Tax owing and the Part IV Tax refund resulting from Holdco's dividend payment to the individual shareholder. A taxable dividend of at least $1,000,000 must be paid to the individual shareholder to ensure the full refund of the Part IV Tax. The second return is adjusted to reflect the application of s. 55(2) of the Act to the dividend received by Holdco. However, the dividend paid by Holdco to the individual remains the same. Otherwise, the refund of Part IV Tax would be reduced and s. 55(2) of the Act would apply to a reduced amount. The $500,000 increase of Holdco's capital dividend account (CDA) resulting from the application of s. 55(2) of the Act to the $1,000,000 will only be available to Holdco for an election under s. 83(2) in respect of subsequent dividends.

CTF Annual Conference, CRA Roundtable — Question 4, November 29, 2016, Document No. 2016-0671491C6

Subsection 55(2) — Consideration of Cash as Property

The CRA was asked if "cash" was considered a "property" as this term is defined in s. 248(1) of the Act and used in s. 55(2.1)(*b*)(ii)(B). The CRA confirmed that, since the term "property" defined in s. 248(1) of the Act includes "money" and the rules in s. 55(2) consider cash as "property", cash will be considered a property for the purpose of s. 55(2.1)(*b*)(ii)(B). Note that any cash received on the payment of a dividend subject to the application of s. 55(2) of the Act may be used to acquire any other property or additional shares from the dividend payer, causing an increase of the cost of the shares held by the shareholder in the dividend payer. The purpose of s. 55(2) of the Act is to negate the effect of the dividend deduction under s. 112(1) if this deduction is not justified. A dividend paid from an income source not subject to tax in the hands of the dividend payer is not a safe income dividend (e.g., dividend from borrowed cash, from share subscription proceeds, or from untaxed income). The role of s. 55(2) is to question whether one of the purposes of the payment or receipt of a dividend is to significantly reduce the fair market value of the share or increase the property cost of the dividend recipient. If this is the case, the dividend could not be received tax-free and would be recharacterized as proceeds of disposition resulting in a capital gain. The objective of the concept of cost and the s. 55(2) rule is to prevent the duplication of capital cost and make sure that tax is paid on the amount of cash or other property received as a dividend if the dividend is not supported by income subject to tax in the hands of the payer of the dividend.

The CRA noted that there was a lack of tax integration when a corporate shareholder received a property on the payment of a dividend that was not taxable but the cost of that property exceeded the amount on which tax was paid by the payer of the dividend or the corporate shareholder.

CTF Annual Conference, CRA Roundtable — Question 8, November 29, 2016, Document No. 2016-0671501C6

CURRENT ITEMS OF INTEREST

Quebec Announces New Tax Measures

On February 21, 2017, Finance Quebec released *A Plan to Strengthen the Québec Economy as an Executive-Driven Economy*. This economic plan includes three central tax measures, which are intended to "strengthen the presence of decision-making centres, and foster the presence of executives, in Québec". The first measure extends the easing of tax rules applicable to transfers of family businesses to all sectors of activity — this expands a previously-proposed measure that would have applied only to businesses in the manufacturing and primary sectors. The second tax change will allow shareholders who own a large block of shares that provide them at least 1/3 of a corporation's voting rights to defer the tax from a deemed disposition of those shares for up to 20 years, provided that the company maintains a payroll base in Quebec. The third tax proposal would effectively harmonize the stock option deduction with respect to publicly traded shares with the equivalent federal deduction (prior to this change, only a 25% deduction was available in Quebec).

Government Responds to Committee's Recommendations Re: Tax Evasion and Avoidance

Minister of National Revenue Diane Lebouthillier, on behalf of the federal government, responded to the report and recommendations from the Standing Committee on Finance titled *The Canada Revenue Agency, Tax Avoidance and Tax Evasion: Recommended Actions*. The government supports every recommendation that was made by the Committee. A summary of these recommendations can be found in Tax Topics no. 2330.

Noteworthy CRA Publications

The CRA published the new 2016 edition of the T2 Corporation Income Tax Guide. The *What's New* section at the beginning of the guide discusses the recent revisions to the guide, most of which relate to federal/provincial budget measures or changes to tax-filing processes.

A new income tax folio, S4-F2-C1, *Business Use of Home Expenses*, was published on February 1, 2017. The folio, which replaces IT-514, discusses the criteria and limitations applicable to deducting business expenses for using a home office. Comments pertaining to the content and structure of the folio will be accepted until May 1, 2017.

Last, the CRA released the first publication of RC4649, *Country-by-Country Report*, which should be filed by entities that are obligated to report information pursuant to section 233.8 of the *Income Tax Act*.

Prescribed Interest Rates for Leasing Rules

The prescribed interest rate for leasing rules for the month of March 2017 is 3.34%. The rates for January and February were 3.06% and 3.24%, respectively.

Government Clears the Air on Taxing Health Benefits

Over past weeks, the Canadian media was speculating that the government planned on introducing a tax on employer-provided health benefit plans in the upcoming budget. However, according to news sources, the Prime Minister confirmed that such a tax will not be introduced.

FOCUS ON CURRENT CASES

This is a regular feature examining recent cases of special interest, coordinated by John C. Yuan and Christopher L.T. Falk of McCarthy Tétrault LLP. The contributors to this feature are from McCarthy Tétrault LLP, Montreal, Toronto, Calgary, and Vancouver.

Tax Court Denies Bad Debt Deduction Claimed by Mortgage-Lending Spouses

***Meilleur v. The Queen*, 2017 DTC 1002 (Tax Court of Canada)**

In this decision, the Tax Court considered whether a husband and wife were in the business of money lending for the purposes of the deduction for bad debts pursuant to subparagraph 20(1)(*p*)(ii) of the *Income Tax Act* (the "Act").

The spouses were financially sophisticated individuals with the wife being a chartered public accountant and the husband being a certified public accountant. In 2006, the wife took a leave from her job with the federal government and then decided to retire in 2007. Using employment amounts received upon her retirement and certain funds borrowed by both herself and her spouse, the wife and her husband entered into two trust agreements with a mortgage broker in order to advance some $650,000 to two real estate development projects. Under the trust agreement, the couple's advances were pooled with those of other investors with each investor acquiring a proportionate share of the aggregate placement capital.

Both spouses stated that their objective was to undertake a money-lending business based on their financial capabilities and affinity for real estate. The husband stated that their business model was to pursue higher than normal rates of return across a portfolio of loans in order to offset the risk of default on any one of the loans. Besides the costs of a home office and certain accounting, investigative, and business services undertaken by the couple for themselves, there was little evidence of an organized business. The spouses did not advertise the business and relied on a single mortgage broker to advance their funds. While one of the taxpayers did provide certain business and accounting advice to the mortgage broker, it was predominantly the mortgage brokerage itself that provided the reporting, legal, and accounting services relating to the advances against the two real estate projects. The mortgage broker also had the right to buy out any investor's advance under the provisions of the trust agreements.

The term of each advance was one year, but was subject to renewal. Unfortunately, as the 2007 global financial crisis unfolded, the loans made by the brokerage went into default and, by the time of the Tax Court hearing, the parties had suffered an almost total loss of their advances. It appears that, in the wife's 2009 tax return, she sought to classify her income and losses from the advances as those from a money-lending business and then sought to apply the 2009 net loss from that business to other tax years. After having the carry-backs denied, the wife then asserted her right to claim the losses from the loans in 2009 as either bad debts under subparagraph 20(1)(*p*)(ii) or impaired loans subject to the reserve provisions under paragraph 20(1)(*l*) of the Act. For his 2012 taxation year, the husband claimed a write-down of $50,000 under either subparagraph 20(1)(*p*)(i) or (ii) of the Act.

The Court quickly disposed of the subparagraph 20(1)(*l*)(i) portion of the appeal, since one of the required elements for a reserve for an impaired loan under that subparagraph is that an amount in respect of the loan be included in the taxpayer's income in a prior year. In this case, no evidence was before the Tax Court indicating the wife had made any such inclusion. As for the validity of a claim for a reserve under subparagraph 20(1)(*l*)(ii), the Tax Court felt it appropriate to deal with the requirement that the taxpayer be in the "ordinary business" of lending money in conjunction with the claim under paragraph 20(1)(*p*) for a bad debt deduction

In order to determine the validity of the taxpayers' deductions for bad debt, the Tax Court identified the following questions as corresponding to the elements required to claim an amount under either subparagraph 20(1)(*p*)(i) or (ii): Were the monies advanced by the couple loans or lending assets? Were the taxpayers carrying on business? Was the business one of money lending? Were the loans at issue made in the ordinary course of that money-lending business? In the year of deduction, had the taxpayers established that the debt or loan was uncollectible or impaired?

On the first question, the Tax Court concluded that based on the presence of recurring interest, specific balance-due dates, mortgage security, and fulsome enforcement rights, the couple's advances all qualified as loans or lending assets.

On the second question, the Tax Court concluded that the lending activities carried out by the couple did not qualify as being in the ordinary business of money-lending for the purposes of subparagraphs 20(1)(*p*)(i), 20(1)(*p*)(ii), or 20(1)(*l*)(ii).

In order to reach this conclusion, the Tax Court first considered the differences between an adventure or concern in the nature of trade under section 248 of the Act and mere management of an investment portfolio containing risky secured instruments. Drawing on a number of prior cases including *M.R.T. Investments Ltd.* (76 DTC 6158), *Stewart* (2004 UDTC 66), and *Langhammer* (2001 DTC 45), the Tax Court identified a number of factors which, taken cumulatively, distinguished between investment for the purposes of producing income from property and the business of purchasing securities for the purpose of turning them over for a profit.

In the couple's case, the Tax Court acknowledged that certain factors did indeed lean towards a finding that the husband and wife were carrying on a business within the meaning of section 248 of the Act. Their activities were, in part, financed using borrowed money, income from their activities was generated from the significant spread between the interest on the borrowed amounts and the higher-risk project advances, and the advances were documented by specific documentation customarily used in mortgage lending businesses.

However, lending weight to the view that the husband and wife were engaged in passive investing, the Tax Court noted that the legal documents referred to the spouses as "investors". Additionally, there was no trading or assignment of the mortgages, no right to convert the debt or qualify for an equity bonus, or other rights customarily afforded to lenders in the business of advancing high-risk capital. The Tax Court was also critical of the wife's inability to adduce a business plan for CRA inspection until some five years after the advances were made, which the Tax Court characterized as constructed and post-facto. The Tax Court found it relevant that the spouses utilized only a single mortgage broker who had intermediated between the husband and wife and the borrowers and had acquired adhesion rights against the couple. The Tax Court also accepted the position of the Minister, who argued that the actual mortgages were managed by a trustee for the investors, whose entitlement was commingled and each of whom owned an undivided, fractional interest in the *en bloc* advance. The Tax Court noted the coincidence of the wife's retirement with the need for an investment with a high rate of return, and looked through the one-year term associated with the advances to characterize the term of the advance as, in actuality, likely to last until the project owners had obtained permanent post-development financing.

The Tax Court distinguished the case at bar from the previous cases of *Langhammer* and *Singh* (2000 DTC 2031), where the taxpayers undertook a more methodical approach and had characterized their activities in their tax filings from the outset as business income earnings rather than by making post-facto filings. Finally, in terms of the taxpayers' business plan itself, the Tax Court held that the couple's stated intention of lending widely to cover the risk of default in one or two advances was just as easily characterized as an investment strategy of a retiree looking for a high rate of return on an investment.

For tax planners and business owners who engage in occasional advances of money, this case provides an example of lending activities that will not rise to the level of an ordinary business whose activities include the lending of money for the purposes of paragraphs 20(1)(*l*) and 20(1)(*p*) of the Act. Here, the Tax Court focused not as much on the frequency of the lending activities, but more on their character. Furthermore, by drawing on case law related to an adventure in the nature of trade for the purposes of determining whether there was a "business" for the ordinary business of lending money test, the Tax Court does not preclude such a business from being a singular or limited series of loans.

— *Justin Shoemaker*

Tax Court Applies a Restrictive Approach to Summary Determinations

***Aitchison Professional Corporation v. The Queen*, 2016 DTC 1211 (Tax Court of Canada)**

This case considers the scope of the Tax Court of Canada's rules that provide for a determination of questions before trial in tax appeals. In its decision, the Court held that complex and novel questions should not be resolved in the summary process and such questions should instead be determined only after a full-blown trial.

In the underlying appeal, the Minister had reassessed the appellant, a lawyer's professional corporation, on the basis that it was liable for the lawyer's tax debt because the lawyer had "transferred" the right to invoice for legal services and, because it was a transfer of property by a tax debtor to a non-arm's length person, joint liability for the lawyer's tax debts attached to the appellant by operation of section 160 of the *Income Tax Act* (the "Act"). The appellant brought an application under Rule 58 of the *Tax Court of Canada Rules (General Procedure)* for a determination prior to trial of whether the right to invoice for legal services was transferred to the appellant and, if so, whether the right constituted "property" for purposes of the Act, in particular section 160. The appellant argued that these were questions of law that could be resolved on a limited record consisting of affidavits and cross-examinations out of court. The respondent argued that the issue of transfer involved questions of mixed law and fact that would require live evidence and therefore would not be substantially shorter than a trial.

Rule 58 provides that the court may determine "a question of law, fact or mixed law and fact raised in a pleading or a question as to the admissibility of evidence" before a hearing if such a determination "may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs". There are two stages to a Rule 58 hearing. At the first stage, the court decides whether the proposed questions are suitable for determination under the rule. The second stage is the hearing on the merits.

At this first stage hearing, the Tax Court held that numerous factual questions would need to be resolved to make the legal determinations the appellant sought. In the Court's view, those questions would require oral evidence with full examinations and cross-examinations of the relevant individuals. Moreover, the Court observed that the appellant's proposed issues were "novel and complex". As a consequence, the Court dismissed the application under Rule 58.

The Court's decision is consistent with the traditional jurisprudence under Rule 58, which established that Rule 58 is only suitable where there are no material facts in dispute. However, many of the earlier cases were decided when Rule 58 only permitted determinations of questions of law. Rule 58 was amended in 2004 to allow for determinations of mixed law and fact and determinations of fact alone. Despite the amendments, the case law has remained consistent that issues requiring factual findings to resolve complex legal questions should be made at "a full-blown trial with all the benefits of trial rules and procedures": *HSBC Bank Canada v. The Queen*, 2011 DTC 1071, at para. 13.

However, there have been two developments which suggest the need for a change to the Court's approach under Rule 58. First, in January 2014, the Supreme Court of Canada released its decision in *Hryniak v. Mauldin* (2014 SCC 7). Although *Hryniak* specifically addressed summary judgment in Ontario's *Rules of Civil Procedure*, the unanimous Court endorsed a "shift in culture" away from the "conventional trial in favour of proportional procedures tailored to the needs of the particular case" as a means of ensuring access to justice through "proportionate, timely and affordable" dispute resolution: *Hryniak* at paras. 2, 27-28.

Second, one month after *Hryniak* was released, Rule 58 was amended again to add that questions of admissibility of evidence may be determined prior to trial *and* to remove an earlier restriction that made evidence presumptively inadmissible on a Rule 58 application, absent the consent of the parties or leave of the court. The latter evinces an intention to expand the record presumptively available on a Rule 58 application, which in turn indicates that issues requiring review of more extensive evidence may be suitable for determination.[1]

The Court in *Aitchison* did not discuss the 2014 amendments or *Hryniak* and addressed the appellant's argument in accordance with the earlier authorities which favour a trial as the default dispute resolution mechanism. In this way, the Tax Court's decision mirrors the Ontario courts' jurisprudence before the Supreme Court's decision in *Hryniak*. The Ontario courts formerly applied a restrictive approach to summary judgment with a view to deferring complex and novel issues to trial. The Supreme Court soundly rejected this approach in *Hryniak* as inconsistent with the overriding purpose of the court system of providing efficient access to justice. The discussion in *Hryniak* concerning the importance of applying rules of procedure in a manner that accomplishes that objective plainly applies to matters beyond the Ontario summary judgment rule, including Rule 58. The Tax Court's failure to come to grips with the impact of the "culture shift" the Supreme Court demanded is a missed opportunity. The principles under Rule 58 appear ripe for re-evaluation in an appropriate case.

— *Paul Davis*

Federal Court of Appeal Rejects Attempt To Cure Failure To File Prescribed Form on Time

***Easy Way Cattle Oilers Ltd. v. The Queen*, 2016 DTC 5130 (Federal Court of Appeal)**

In this case, the taxpayer failed to file the prescribed form for claiming investment tax credits ("ITCs") in a timely manner. The issue in the appeal before the Federal Court of Appeal was whether the taxpayer should be treated as having filed a prescribed form on time (despite not actually having done so) either on the basis that the prescribed information was contained elsewhere in the taxpayer's filings for the taxation year made before the relevant deadline, or by operation of a liberal interpretation of section 32 of the *Interpretation Act*. As discussed below, the Federal Court of Appeal rejected the taxpayer's relatively novel arguments.

Paragraph 127(9)(*m*) of the *Income Tax Act* (the "Act") mandates that a taxpayer who seeks to claim an ITC in regard to its Scientific Research and Experimental Development ("SR&ED") expenditures must file the prescribed Form TSCH31 containing the prescribed information within one year of its filing due date for the relevant taxation year.

The taxpayer failed to file Form TSCH31 containing the prescribed information by the deadline corresponding to its 2008 taxation year. The taxpayer had, however, filed a completed Form T661, which was required to support its claim for SR&ED expenditures. The Minister accepted the taxpayer's claim for the expenditures set out in its Form T661, but denied the taxpayer's ITC claim, as the required Form TSCH31 was not filed within the prescribed time period.

In support of its appeal, the taxpayer argued that all of the information required by the Minister to calculate the taxpayer's entitlement to ITCs based on its SR&ED expenditures could be found in Form T661 and its T2 corporate income tax return for the relevant taxation year (which were both filed prior to the deadline for filing Form TSCH31 for the relevant taxation year). The taxpayer asserted that the information contained in these two forms was "sufficiently clear and complete", so as to allow the Minister to calculate its ITC.

The taxpayer also asserted that it was entitled to rely on section 32 of the *Interpretation Act*, which states that, "[w]here a form is prescribed, deviations from that form, not affecting the substance or calculated to mislead, do not invalidate the form used". In essence, the taxpayer argued that the information on Form T661 and the T2 tax return represented a permissible deviation from requirements prescribed by Form TSCH31.

In rejecting the taxpayer's contentions, the Federal Court of Appeal (*per* Nadon J.A.) first held that Form TSCH31 and Form T661 serve different purposes, despite the fact that the information contained in one may nonetheless be relevant to the other. The Court noted that the purpose of Form T661 is to "provide technical information regarding [SR&ED] projects, to calculate the [SR&ED] expenditures, and to calculate those expenditures which would qualify as [SR&ED] expenditures for investment tax credits", whereas the purpose of the prescribed Form TSCH31 was to allow corporations to claim ITCs in regards to SR&ED expenditures.

[1] One Tax Court case has reconsidered the approach to Rule 58 in light of the 2014 amendments and *Hryniak*, but ultimately decided, relying on earlier jurisprudence, that an issue requiring resolution of disputed factual matters could not be resolved under Rule 58: *Paletta v. The Queen*, 2016 DTC 1145.

The Federal Court of Appeal next rejected the taxpayer's arguments relating to section 32 of the *Interpretation Act*. To support the notion that the taxpayer's reliance on section 32 was misguided, the Court pointed to the fact that section 32 applies in cases where a taxpayer has filed the prescribed information, but has not used the prescribed Form to do so. Section 32 was held to be inapplicable in the case at bar, given that the taxpayer had not filed any form setting out the prescribed information (by the relevant deadline) for the purpose of claiming an ITC in relation to its SR&ED expenditures. Furthermore, The Court held that the practical consequences of accepting the taxpayer's arguments were untenable:

> [S]hould the appellant's approach herein be approved by this Court, the Minister would have to second guess a taxpayer's intention with regard to investment tax credits when processing that taxpayer's Form T661 which, as I have already indicated, serves an entirely different purpose. In other words, the Minister, upon being apprised of the taxpayer's intention after the deadline, would then have to look back at the taxpayer's files and make the calculations which the taxpayer ought to have made when filing the prescribed form. Clearly, such an approach cannot be right.

On the basis that it is the taxpayer's responsibility to inform the Minister of whether it is claiming an ITC in relation to its SR&ED expenditures, and given that the correct way of indicating such an intention is by way of filing the prescribed Form TSCH31 prior to the relevant deadline, the taxpayer's failure to file the prescribed form by the deadline was held to be fatal to its claim for ITCs in relation to paragraph 127(9)(*m*) of the Act.

The *Easy Way Cattle Oilers* case is a clear judicial pronouncement on the importance of complying with stipulated deadlines and specific filing requirements.

— *Krupa Kotecha, Student-at-Law*

High Burden on Defendants Seeking Summary Judgment Dismissing Malicious Prosecution Action

***Samaroo et al v. CRA, Brian D. Law Corporation et al*, 2016 DTC 5111 (British Columbia Supreme Court)**

The taxpayers in the *Samaroo* case, a married couple, were prosecuted for tax evasion in relation to their activities operating a hotel and nightclub. In addition to Notices of Reassessment being issued by the Minister in respect of income that was said to be understated, criminal charges were brought against the taxpayers for offenses under the *Income Tax Act* and the *Excise Tax Act*.

The taxpayers were acquitted on all counts in the British Columbia Provincial Court *(Samaroo*, 2011 BCPC 503). Subsequent to their acquittal, the taxpayers commenced a civil action in the British Columbia Supreme Court for malicious prosecution against both the Minister and Brian Jones, the lawyer retained to lead the prosecution of the taxpayers. Jones' law firm was also named as a defendant in the action.

The matter before the Court was an application brought by Jones and his law firm, pursuant to the British Columbia *Supreme Court Civil Rules,* for summary judgment dismissing the taxpayers' action against them for malicious prosecution. The Rules empower the court to pronounce judgment or dismiss a claim in the event that the court is satisfied that there is no genuine issue for trial with respect to a claim or defense.

In considering the parties' arguments, Punnett J. noted that an order for summary judgment in favour of the defendants would be warranted if the taxpayers' action was "bound to fail". The Court drew upon the decision in *Lameman* ([2008] 1 SCR 372) in which the rationale for the Rule was explained as follows:

> It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

The Court noted that the bar on a motion for summary judgment is high. The onus of establishing the non-existence of a triable issue lies on the applicant. As stated in *4 Corners Properties Ltd. v. Boffo Developments (Smithe) Ltd.* (2013 BCSC 1926), this onus "must be carried to the point of establishing that it is manifestly clear or beyond a reasonable doubt. [. . .A]n application may only be dismissed if the plaintiff is bound to fail."

Answering the central issue therefore required the Court to consider the test for malicious prosecution which was set out in *Miazga v. Kvello Estate* (2009 SCC 51), and whether, on the basis of that test, the taxpayers' claim could not succeed. In particular, the case turned on requirements, which formed part of the test for malicious prosecution, that the applicant would need to prove both: (1) the absence of reasonable and probable cause; and (2) malice.

Punnett J. drew on the analysis in *Miazga* to assert that a party's subjective state of mind as to the existence of reasonable and probable cause was not relevant to the Court's assessment of the existence of reasonable and probable cause. As a result, an affidavit that had been provided by Jones and filed by the defendants in support of their application did not resolve the issue, as the affidavit referred only to Jones' subjective belief that the evidence would establish guilt, as opposed to whether such a belief was, objectively speaking, reasonable and probable. Moreover, the taxpayers referred to evidence from document disclosure and discoveries that raised issues respecting who was responsible for charge approval and whether there were, in fact, objective, reasonable, and probable grounds for the claims brought against the taxpayers.

In support of their claims of malice, the taxpayers provided evidence that the defendants had "intentionally subverted the role of Crown counsel by leaving the decision of whom to charge, with what charges, and in what amounts, entirely in the hands of Canada Revenue Agency investigators", thereby failing to protect the public interest in determining whether a person is to be charged with a criminal offense. Further, the taxpayers asserted that the defendants, in the course of the prosecution, inappropriately adopted the "zeal" of the Minister to obtain a conviction against them at any cost. In relation to the latter assertion, the taxpayers pointed to the failed disclosure of material evidence relating to two witnesses.

As the defendants were not able to adduce evidence to make it clear that the taxpayers' claim was "bound to fail," and because the taxpayers were able to point to evidence which could, if accepted, support their claim, the Court held that the parties' evidence required assessment and weighing, which would need to be undertaken at trial. As a result, Punnett J. dismissed the defendants' motion for summary judgment, awarding costs to the taxpayers.

Despite the infrequency with which malicious prosecution claims are brought against the Minister, the dismissal of the defendants' motion for summary judgment in the *Samaroo* proceedings provides an interesting reminder of the test of malicious prosecution and the high burden placed on those seeking summary judgment dismissing such actions.

— *Krupa Kotecha, Student-at-Law*

RECENT CASES

Canada Revenue Agency having priority with respect to rent amounts payable to tax debtor

The Canada Revenue Agency ("CRA") made an application for the payment out of court of funds representing monthly rent payments made to a tax debtor, IHI, which owed unremitted payroll source deductions to the Agency. The CRA's claim was made on the basis of both the deemed trust and enhanced garnishment provisions in the *Income Tax Act*. Its application was opposed by the respondents IHI and Garmeco, on the basis that the lease under which the rent payments were made had been assigned by IHI to Garmeco under the terms of a General Security Agreement ("GSA"). Consequently, the rent monies were actually payable to Garmeco and not IHI, and therefore could not be garnished by the CRA to recover IHI's debt to the Crown.

The CRA's application was allowed. The primary issue on the application was whether a Demand Note served on IHI by Garmeco under the terms of its GSA on the assets of IHI had the effect of assigning IHI's lease and, if so, whether Garmeco's resulting interest was subject, as a security interest, to the statutory priority and deemed trust of the Crown. The Court held that there were undisputed assessments against IHI for unremitted source deductions and that a portion of that debt was deemed to be held in trust for the Crown. In establishing their priority over the rent monies, the respondents relied on the Demand Note issued to IHI, and on the plain meaning of the text of that Demand Note. The Court noted, however, that the intention of the parties to effect an assignment was not clear on the evidence. In addition, in the Court's view, even if such intention could be discerned, the interpretation of any contract was chiefly determined by the wording of that contract. The Court held that the Demand Note did not effect an assignment of the lease in question. Rather, the text of the Note stated an intention to effect an assignment of the lease in the future. As well, the Court concluded that, regardless of its interpretation of the Demand Note, any property of IHI purportedly

obtained by Garmeco was obtained under the GSA and therefore remained subject to the deemed trust of the Crown on the basis of the wording of s. 227(4.1) of the *Income Tax Act*, as confirmed by Supreme Court of Canada jurisprudence. The Court concluded, therefore, that the rent payments did not ever become the property of Garmeco because there was no assignment of the lease and that any interest of Garmeco, as a secured creditor of IHI, was subordinate to that of the Crown's priority interest in the deemed trust. The Crown was therefore entitled to realize on the funds at issue.

CanaDream v. International Consulting et al

2017 DTC 5003

Partial summary judgment granted on issue of defendants' liability for negligence

The defendant law firm provided legal services to the plaintiffs in relation to the establishment and structuring of a family trust. It admitted that its legal services fell below the standard of care of a reasonably prudent tax lawyer, in that the legal opinion provided failed to address the issue of the 21-year deemed disposition rule applying to the trust. The plaintiffs brought an action for negligence and a motion seeking partial summary judgment limited to the issue of the defendant's liability for negligence. The defendants argued that responsibility for tracking the 21-year deemed disposition period and advising the plaintiffs on any potential tax mitigation strategies lay with the third party accounting firm. Consequently, there was a genuine issue for trial with respect to whether the defendants or the third party caused the plaintiffs' damages, and the defendants brought a cross-motion seeking an order that certain issues of causality and damages be heard by the same trial judge as the main action. In response, the plaintiffs argued that any dispute as to the apportionment of liability could follow the trial of the action, and should not prevent them from moving ahead with their action on a summary basis.

Partial summary judgment was granted to the plaintiffs, and the defendants' cross-motion was dismissed. The *Tax Court of Canada Rules* provide that summary judgment shall be granted where there is no genuine issue for trial. The Court held that the admissions made by the defendants left only the issue of causation to be determined, and it was agreed between the parties that the test for causation, as formulated by the Supreme Court of Canada, was the "but for" test. Such test requires that the plaintiff show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Applying that test to the facts before it, the Court concluded that the admissions made by the defendants and the expert evidence provided allowed it to confirm that "but for" the negligence of the defendants the tax consequences faced by the plaintiffs would not have occurred. There was therefore no genuine issue for trial in respect of the defendants' liability in negligence to the plaintiffs. On the issue of the cross motion and the apportionment of liability between the defendants and the third party, the Court held that there was no need to delay dealing with the defendants' liability to the plaintiffs in order to adjudicate the issues between the defendants and the third party. In the Court's view, the third party action relied upon a different factual scenario than the main action, as it was based on the actions of the third party. The subject matter of the main action was clearly not too closely intertwined with the facts raised in the third party action to require that they both proceed to trial together.

Ozerdinc Family Trust v. Gowling

2017 DTC 5004

Motion for order that findings of fact in prior proceedings apply to tax appeal dismissed

Some of the appellants had previously been subject to criminal proceedings for tax evasion and had also been involved in a civil action against the Canada Revenue Agency for malicious prosecution. On their appeal from tax assessments issued against them, the appellants sought an order preventing any party from adducing further evidence which sought to challenge the findings of fact made by the Court in the criminal proceedings and utilized by the Court in the civil proceedings. Such exclusion order was sought on the basis of the doctrines of issue estoppel or abuse of process.

The motion was dismissed. The Court held that the broad issue for determination was whether it should apply issue estoppel or abuse of process in respect of findings from the acquittal of the appellants in the criminal proceedings to exclude fully further evidence contradicting or challenging those findings. The Court summarized the elements of issue estoppel as requiring that there be issue symmetry, that the judicial decision which was said to create the issue

estoppel be final and that the parties to the judicial decision be the same persons as the parties to the proceedings in which estoppel is raised. It held that the sole issue for determination in the case before it was whether the requirement for issue symmetry had been met, meaning that the same question or determination existed as between the prior criminal proceedings and the current tax assessment appeal. The Court concluded that the exclusion of evidence before it on the basis of issue estoppel failed to recognize that the tax appeals were distinctly mandated legal processes evaluating and determining different legal rights and obligations than did the previous criminal proceedings. It held that, in the circumstances, to allow the appellant's motion would undermine the principle of a taxpayer's fundamental obligation in a self-reporting system of establishing the correctness of their tax filings in the face of the Minister's reassessment. Finally, the Court considered the application of the principle of abuse of process. It held that such principle should only be applied in clear cases and that the matter before it was not such a case. The Court concluded that the application of issue estoppel or abuse of process in the case before it would cause rather than cure any potential injustice, and would also be inconsistent with the spirit of judicial comity.

Samaroo v. The Queen; MGM Restaurants v. The Queen

2017 DTC 1003

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