Tax Notes

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WHAT IS THE DIFFERENCE BETWEEN A TAX ACCOUNTANT AND A TAX LAWYER?

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I have always considered myself a tax lawyer. This is notwithstanding that I spent more of my career as a practitioner working in an accounting firm rather than a legal office. After all, the notion of a tax lawyer conjures up exotic and sophisticated images (à la *The Firm* and Tom Cruise) in contrast to those of a dowdy bespeckled tax accountant. Admittedly, this self-image was badly shaken early on at the 1990 Deloitte Touche Tohmatsu Melbourne office Christmas party. The partners had arranged for the party to continue at the Hyatt on Collins Street nightclub where Deloittes' staff would be admitted for free. Upon presenting at the entrance, the bouncer took one look at me and said "You look like an accountant, so you can come in".

So, what is the difference between a tax accountant and a tax lawyer? Thirty-two years later this has now been considered judicially, at least in the context of legal professional privilege: *FC of T v PricewaterhouseCoopers* 2022 ATC ¶20-821; [2022] FCA 278.

BACKGROUND

During the 1980s, the Australian Tax Office ("ATO") stepped up its audit activity. Identifying an opportunity, accounting firms derived the "prudential audit" product. Better to have your accounting firm undertake a "friendly" tax audit to identify risk areas rather than wait for the ATO to arrive unannounced at your reception desk. Armed with prudential audit outcomes a taxpayer could then chart a course, which might include voluntary disclosure with low or no negotiated penalties.

However, the ATO also spied an opportunity. Allow the accounting firm to undertake the audit then slap them with a s. 264 notice (of the *Income Tax Assessment Act 1936* as it then was—now s. 353-10 of schedule 1 to the *Taxation Administration Act 1953*) relieving the ATO of the hard work in identifying tax underpayments.

Naturally this was controversial and, while it ultimately led to the Commissioner's accountants' advice concession (www.ato.gov.au/General/Gen/Guidelines-to-accessing-professional-accounting-advisers--papers/), accounting firms examined various avenues to ensure the protection of their advice from disclosure. The need for a solution intensified when it became apparent that some tax lawyers were seeking to wrestle market share back from the accounting firms by "marketing" that their advice was protected by legal professional privilege unlike those of their accounting competitors.

One strategy adopted by the accounting firms was utilising "friendly" law firms as conduits for the transmission of advice to clients. With the emergence of the multidisciplinary consulting nee accounting firm, inhouse legal practitioners might even provide these services. The non-legal practitioners might be considered under the supervision of the legal practitioners and viewed as agents of the clients in their engagement with the legal practitioners.

Recognising that increasingly tax advisers in the larger accounting firms had dual qualifications in law and accounting (some even legal practice certificates), and that their career paths took them between law and accounting practices, the argument was countenanced that their advice should be privileged, irrespective of their erstwhile employer. In a sense the privilege should follow the legally trained or qualified adviser regardless of their exact title if the advice was truly in contemplation of legal proceedings. This set the scene for the much anticipated showdown in *FC of T v PricewaterhouseCoopers* 2022 ATC ¶20-821; [2022] FCA 278.

FACTS

From the outset it needs to be appreciated that a significant amount of the reasons for the decision have been redacted to preserve confidentiality (in fact only 39 paragraphs out of 934 are available) while the Court seeks submissions over the extent to which further reasons can be published. Nevertheless, sufficient details have been made available to identify answers to the primary issues.

The case concerned the Commissioner's challenge against PricewaterhouseCoopers' (PwC) claims on behalf of its client that certain documents (around 44,000 in total) were subject to legal professional privilege (LPP), and therefore did not need to be produced pursuant to a notice issued under s. 353-10.

While the Commissioner disputed the LPP claim over approximately 15,500 documents, for the purposes of the trial a sample of 100 documents (50 selected by the Commissioner and 50 selected by PwC) were considered. (Note that this actually amounted to 116 individual documents because attachments to emails were treated as additional.) As an interesting aside, given that the Commissioner was prohibited from sighting the documents it selected, the Court appointed three barristers as *amici curiae* to assist the Court in relation to the LPP claim in respect of these documents.

The Commissioner challenged PwC's LPP claims (on behalf of its clients) on three alternative grounds:

- the *form of the engagements* between PwC and the clients did not establish a relationship of lawyer and client sufficient to ground a claim for LPP
- as a *matter of substance* the services provided by PwC pursuant to the engagements were not provided pursuant to a relationship of lawyer and client sufficient to ground a claim for LPP, and
- the documents did not record communications made for the *dominant purpose of giving or obtaining of legal advice* from one or more lawyers of PwC.

The fact that PwC was a multidisciplinary partnership comprised of accountants, tax agents, other non-legal practitioners and legal practitioners, with a variety of services provided, was said to preclude any scope to claim LPP.

DECISION

Grounds (1) and (2) of the Commissioner's challenge were rejected on the basis that a relationship of lawyer and client had come into existence. Significantly, one PwC partner was a legal practitioner acknowledged to be providing legal services to the clients.

That being the case, it became necessary to consider whether each of the sample documents was subject to LPP by virtue of having been created for the dominant purpose of giving or obtaining legal advice. From the portion of the judgment available it would seem that the role of the PwC person (e.g., lawyer, auditor, accountant) behind each communication was critical in making this assessment.

Of the 116 individual sample documents, it was decided that:

- 61 were not subject to LPP,
- 49 were subject to LPP in full, and
- 6 were subject to LPP in part.

It should be noted that PwC had withdrawn its claim of LPP over some of the documents initially selected by the Commissioner, requiring re-selections. It also conceded the LPP claim in relation to some of the final 116 documents.

The reasons in relation to each document remain to be disclosed. However, in determining the dominant purpose of the documents, the Court noted that the question is to be determined by reference to the content of the document, its context, and the evidence relating to the document. Critical parts of the context were that the services were provided by a team comprising both lawyers and non-lawyers and that the matter involved overseas offices of PwC that were not able to provide legal advice.

COMMENT

The decision makes it clear that the involvement of non-legal practitioners in an engagement on behalf of a client does not necessarily negate the availability of a claim for LPP. In assessing whether the engagement is for legal services, a substance approach is called for and any descriptor of the services in the engagement document as "legal" is not decisive. Rather the focus is on whether the communication is in the context of a lawyer-client relationship, however described.

Although PwC was successful on the preliminary questions, the case does illustrate the difficulty with blanket claims of LPP over a large number of documents. The ATO has clearly indicated a preparedness to challenge such claims. In the current matter they had significant success in this respect notwithstanding the Court's acknowledgement that LPP was theoretically available.

In September 2021, the ATO issued for consultation a draft Legal Professional Privilege Protocol (tinyurl.com/wsaf82an). The draft protocol identifies the information taxpayers and their advisors should provide to the ATO in respect of LPP claims and the process by which that claim is made, to assist the Commissioner to assess the claim. It specifically identifies with concern arrangements that route communications through lawyers merely for the purpose of obtaining privilege. Notably, the Law Council of Australia has stated that the amount of information that the ATO requires is an overreach. Both the terms of the protocol when finalised and the full judgment of the decision in the PwC case are highly anticipated.

And as for the difference between a tax accountant and a tax lawyer? Well, nothing, almost!

CURRENT ITEMS OF INTEREST

PRESCRIBED RATES FOR THIRD CALENDAR QUARTER

The CRA announced the prescribed interest rates applicable for the third calendar quarter—July 1, 2022 to September 30, 2022. For income tax purposes, the following interest rates will increase:

- The interest rate charged on overdue taxes, Canada Pension Plan contributions, and employment insurance premiums will be 6% (up from 5% in the second quarter).
- The interest rate to be paid on corporate taxpayer overpayments will be 2% (up from 1% in the second quarter).
- The interest rate to be paid on non-corporate taxpayer overpayments will be 4% (up from 3% in the second quarter).
- The interest rate used to calculate taxable benefits for employees and shareholders from interest-free and low-interest loans will be 2% (up from 1% in the second quarter).
- The interest rate for corporate taxpayers' pertinent loans or indebtedness will be 5.20% (up from 4.38% in the second quarter).

Since the rate for "prescribed rate" low-interest loans (e.g., income-splitting loans) will be increasing from 1% to 2% effective July 1, there is not much time left to lock into the lower interest rate if you or your clients are planning to implement this strategy.

TAX REFUND DELAY FOR QUÉBEC RESIDENTS

Québec taxpayers who filed their personal tax returns are experiencing delays in receiving their refunds. The expected delay is currently approximately 26 to 27 business days. The delay is due to the $500 cost of living tax credit that was announced in Québec Budget 2022.

PROGRESS OF LEGISLATION

Second Reading of Bill C-8, *Economic and Fiscal Update Implementation Act, 2021*, was completed in the Senate on May 10, 2022. Next the bill will be studied by the Standing Senate Committee on National Finance.

Second Reading of Bill C-19, *Budget Implementation Act, 2022, No. 1*, was completed in the House of Commons on May 10, 2022. Next the bill will be considered by the Standing Committee on Finance.

INCOME TAX FOLIO UPDATES

On May 10 the CRA updated the following income tax folios:

- S3-F10-C1, Qualified Investments—RRSPs, RESPs, RRIFs, RDSPs and TFSAs
- S3-F10-C3, Advantages—RRSPs, RESPs, RRIFs, RDSPs and TFSAs
- S4-F14-C1, Artists and Writers

The changes are described under the “Chapter History” page with respect to each folio.

BILL C-19 DEFERS DEADLINE TO CLAIM IMMEDIATE EXPENSING

In order to make a claim under the proposed immediate expensing capital cost allowance rules, the property must be “designated immediate expensing property” for the taxation year. In the draft legislation published February 4, 2022, this definition required the property be designated for the taxation year in a prescribed form on or before the filing-due date, or in the case of a partnership, by the day on or before which a member of the partnership must file an information return. However, the CRA is not currently processing claims for the immediate expensing measure.

Fortunately, the final legislation proposed in Bill C-19 includes a later deadline that is 12 months after the filing-due date, which provides more time to deal with these claims. Specifically, the prescribed form must be filed with the Minister on or before the day that is 12 months after the person’s filing-due date for the taxation year to which the designation relates. In the case of a partnership, the prescribed form must be filed on or before the day that is 12 months after the day by which any member of the partnership is required to file an information return for the fiscal period to which the designation relates.

Since the legislation for this measure was recently tabled in the House of Commons, the CRA is expected to begin accepting immediate expensing claims on the return soon.

ONTARIO BUDGET

On April 28, 2022, Ontario’s Finance Minister, Peter Bethlenfalvy, tabled the province’s 2022–2023 Budget, *Ontario’s Plan to Build* (“Budget 2022”). Budget 2022 projects revenue of $179.8 billion in 2022–2023 and anticipates spending of $198.6 billion. The government is projecting declining deficits (after taking into account reserves) of $19.9 billion in 2022–2023, $12.3 billion in 2023–2024, and $7.6 billion in 2024–2025. Tax and related measures announced in Budget 2022 are summarized below.

Enhancing the Low-Income Individuals and Families Tax Credit

The government is proposing an enhancement to the non-refundable Low-income Individuals and Families Tax ("LIFT") Credit.

Starting in 2022, the enhanced LIFT Credit would be calculated as the lesser of:

- $875 (up from the current $850); and
- 5.05% of employment income.

This amount would then be reduced by 5% (down from the current 10%) of the greater of:

- Adjusted individual net income in excess of $32,500 (up from the current $30,000); and
- Adjusted family net income in excess of $65,000 (up from the current $60,000).

The resulting amount would then be applied against the taxpayer's Ontario personal income tax ("PIT") otherwise payable, excluding the Ontario Health Premium.

Taxpayers who would not get tax relief from the LIFT Credit would include those who have:

- No Ontario PIT otherwise payable;
- No employment income;
- More than $50,000 in adjusted individual net income (up from the current $38,500); or
- More than $82,500 in adjusted family net income (up from the current $68,500).

New Ontario Seniors Care at Home Tax Credit

The government is proposing a new refundable personal income tax credit to help seniors with eligible medical expenses, including expenses that support aging at home. Eligible recipients of the new Ontario Seniors Care at Home Tax Credit would receive up to 25% of their claimable medical expenses up to $6,000, for a maximum credit of $1,500.

The credit amount would be reduced by 5% of family net income over $35,000 and be fully phased out at a maximum of $65,000. This family net income test is the same for singles and couples, recognizing that single seniors incur higher medical expenses on average compared to senior couples.

Starting with the 2022 tax year, the proposed credit would support a wide range of medical expenses to help low- to moderate-income senior families age at home. To make it easier to claim, the new Ontario Seniors Care at Home Tax Credit would be based on the medical expenses claimed for the existing Ontario Medical Expense Tax Credit ("METC"). The proposed credit could be claimed in addition to the non-refundable federal and Ontario medical expense tax credits for the same eligible expenses.

Tax filers would be eligible for the proposed credit if they:

- Turned 70 years of age or older in the year, or have a spouse or common-law partner who turned 70 years of age or older in the year; and
- Are resident in Ontario at the end of the tax year.

Eligible medical expenses would be the same as those claimed for the Ontario METC, which can include:

- Attendant care (certification required);
- Care of a provincially authorized medical practitioner (e.g., nurse, occupational therapist);
- Dental, vision, and hearing care (e.g., glasses, dentures, hearing aids);
- Walking aids (e.g., walkers, canes);
- Wheelchairs and electric scooters;
- Bathroom aids (e.g., grab bars, grips, rails);
- Diapers and disposable briefs;
- Hospital beds;
- Oxygen and assisted breathing devices; and

- Renovation or construction that improves a person's mobility, access, or functioning within the home because of severe and prolonged impairment.

The Ontario METC allows Ontario tax filers to claim medical expenses over a certain threshold. For low- to moderate-income seniors, the threshold for the eligible amount is three per cent of a tax filer's net income.

As with existing medical expense tax credits, expenses could be combined with those of the claimant's spouse, common-law partner, or dependants. The incomes of both spouses would also be combined for the phase-out of this credit.

Senior families would claim the Ontario Seniors Care at Home Tax Credit when filing their personal Income Tax and Benefit Returns. To claim the proposed tax credit, seniors should save receipts and other required documentation for their eligible medical expenses, as already required for existing medical expense tax credits.

Extending Film and Television Tax Credits to Online Productions

The government proposes to make regulatory amendments to the Ontario Film and Television Tax Credit and the Ontario Production Services Tax Credit to extend eligibility to professional film and television productions distributed exclusively online.

To ensure the Ontario Film and Television Tax Credit only supports professional productions, film and television productions distributed exclusively online would be subject to additional eligibility requirements for this credit. These would include, but would not be limited to, requirements that the production:

- Meet a minimum budget threshold of $250,000;
- Have an agreement in writing with an eligible exhibitor service for consideration at fair market value to have the production shown on the internet in Ontario within two years of completion; and
- Not include certain content (e.g., opinion, advice, or how-to instructions).

Further information about the proposed changes and new requirements for productions distributed exclusively online, including details on the effective date of these amendments, will be provided in the fall.

Under the proposed measure, productions distributed exclusively online that become eligible for the Ontario Film and Television Tax Credit or the Ontario Production Services Tax Credit may also become eligible for the Ontario Computer Animation and Special Effects Tax Credit if they meet all of the other eligibility requirements.

Updating the Ontario Book Publishing Tax Credit

To be eligible for the Ontario Book Publishing Tax Credit, a literary work must be published in an edition of at least 500 copies of a bound book. This requirement was temporarily removed for the 2020 and 2021 taxation years to help companies continue to qualify for tax support while experiencing printing delays due to COVID-19. The government proposes to permanently remove this requirement effective for the 2022 and subsequent taxation years, due to the recognition of the importance and growth of e-books and audiobooks, which are not printed in hard copy.

Simplifying the Ontario Computer Animation and Special Effects Tax Credit

To be eligible for the Ontario Computer Animation and Special Effects Tax Credit, a film or television production must receive either the Ontario Film and Television Tax Credit or the Ontario Production Services Tax Credit, "tethering" the tax credits together. This tethering requirement helps target tax credit support to productions with significant cultural or economic impact. However, this tethering can result in complexities and challenges with claiming and processing the tax credits since the three tax credits are claimed over different time frames and are not always claimed by the same company.

To help simplify the tax credit, the government will examine ways to untether the Ontario Computer Animation and Special Effects Tax Credit from the other film and television tax credits, while continuing to ensure support remains targeted to professional productions with significant cultural or economic impact.

Exploring Opportunities To Encourage More Film and Television Production Across Ontario

The Ontario Film and Television Tax Credit includes a 10% regional bonus on all expenditures for productions primarily filmed or produced outside of the Greater Toronto Area ("GTA"). The government has announced it will review the credit's regional bonus.

The Ontario Production Services Tax Credit is a 21.5% refundable tax credit on qualifying labour and other production expenditures for foreign and domestic film and television productions that meet minimum budget thresholds (e.g., $1 million for feature films). Fees to rent property for on-location filming (i.e., location fees) are generally not eligible expenditures for the tax credit.

To better understand the importance and contribution of on-location film production to Ontario's film and television industry, the government will review the eligibility of location fees for the Ontario Production Services Tax Credit and will work to advance solutions for the industry.

Clarifying Treatment of Work-From-Home Labour for Interactive Digital Media and Computer Animation and Special Effects

To provide clarity and certainty, the government is confirming that, under the current legislation, eligible labour expenditures for employees working remotely can be claimed under the Ontario Computer Animation and Special Effects Tax Credit and the Ontario Interactive Digital Media Tax Credit, provided the work is undertaken in Ontario by an Ontario resident who reports to and is under the direction of an eligible tax credit applicant with a permanent establishment in Ontario.

Extending the Temporary Enhancement of the Regional Opportunities Investment Tax Credit

The government temporarily doubled the Regional Opportunities Investment Tax Credit rate in the 2021 Budget from 10% to 20% for eligible expenditures on assets that become available for use in the period beginning on March 24, 2021, and ending before January 1, 2023. The government proposes to extend the temporary enhancement period by one year. As a result, the enhanced credit of 20% would be available for eligible expenditures in excess of $50,000 and up to $500,000 for property that becomes available for use in the corporation's taxation year, and in the period beginning on March 24, 2021, and ending before January 1, 2024.

NEW FEDERAL BILL WITH TAX MEASURES

On April 28, 2022, the Deputy Prime Minister and Minister of Finance Chrystia Freeland tabled Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*. The legislation proposes to enact measures related to the following:

- Canadian film or video production tax credit and film or video production services tax credit;
- Disability tax credit;
- COVID-19 additional GST payment;
- Climate Action Incentive;
- Canada Workers Benefit;
- Rate reduction for zero-emission technology manufacturers;
- Post-doctoral earnings included in "earned income" for RRSPs;
- Immediate expensing;
- Capital cost allowance for clean energy equipment;
- Labour mobility deduction;
- Home accessibility tax credit;
- Adding references to Indigenous governing body to various forms of social assistance;
- Implementing the spirit of Bill S-216, the *Effective and Accountable Charities Act;*
- GST/HST on assignment sales by individuals;
- GST/HST health care rebate changes;

- Implementing a new excise duty framework for vaping products; and
- Implementing the new Select Luxury Items Tax.

DRAFT LEGISLATIVE PROPOSALS TO ADDRESS HYBRID MISMATCHES

On April 29, 2022, the Department of Finance published draft legislative proposals with explanatory notes that would implement Action 2 Report of the Organization for Economic Cooperation and Development (OECD)/ G20 Base Erosion and Profit Shifting ("BEPS") project, on "Neutralizing the Effects of Hybrid Mismatch Arrangements". Feedback on these draft proposals should be sent by June 30, 2022 to Consultation-Legislation@fin.gc.ca.

TEACHERS' TAX RETURNS DELAYED

According to the CBC, the CRA is holding up approximately 50,000 tax returns for 2021 of teachers who claimed the Eligible Educator School Supply Tax Credit. Changes to the credit are currently proposed by Bill C-8, which has been slowly progressing through the Report Stage in the House of Commons since early March. The bill still requires Third Reading and must go through the Senate before it can receive Royal Assent. Until the bill receives Royal Assent, the CRA will not process any returns that claim the credit. However, this delay can be avoided by not claiming the credit now and adjusting the return to claim the credit after the legislation is enacted.

COVID-19 UPDATE

Given the rapidly changing information related to COVID-19 we are providing continuously updated information at blog.intelliconnect.ca/.

FEDERAL

CRA Sending CERB Repayment Letters (May 10, 2022)

The CRA has begun sending Notices of Redetermination ("NoRs") to inform Canadians of the debts that have been established on their CRA accounts with respect to COVID-19 benefit payments for which they were ineligible. Canadians who receive these letters but still believe they are eligible for these payments should contact the CRA and provide any additional information required to validate their claim.

This follows the Notices of Debt ("NoDs") that Employment and Social Development Canada ("ESDC") began sending in November 2021 to benefit recipients who received an advance payment of $2,000 in 2020 but did not remain on CERB long enough to fully reconcile that payment by applying for subsequent payment periods. ESDC will issue the last of these letters in July 2022.

The CRA and ESDC want to assure Canadians they will continue to be supported when calling in to discuss their unique situations. Call agents can work with individuals on a case-by-case basis to find solutions to their situation, including flexible payment arrangements. The Government of Canada will also work with all impacted individuals to ensure any questions they may have are answered.

Expiration of Wage, Rent, and Hiring Subsidies

May 7, 2022, was the last day of the final qualifying period for the Canada Emergency Wage Subsidy ("CEWS"), Canada Emergency Rent Subsidy ("CERS"), and Canada Recovery Hiring Program ("CRHP"). Also note that Bill C-19 proposes to enact new subsection 125.7(16), which would give the CRA the discretion to accept late filed subsidy applications on a case-by-case basis in exceptional circumstances.

FOCUS ON CURRENT CASES

This is a regular monthly feature examining recent cases of special interest, coordinated by Tony Schweitzer of Dentons Canada LLP. The contributors to this feature are from Dentons Canada LLP, Montreal, Toronto, Calgary, and Vancouver.

CANADA V. DOW CHEMICAL CANADA ULC, 2022 DTC 5050 (FEDERAL COURT OF APPEAL)—DECISION RENDERED BY THE MINISTER OF NATIONAL REVENUE UNDER SUBSECTION 247(10) IS OUTSIDE THE EXCLUSIVE JURISDICTION OF THE TAX COURT

Background

On December 14, 2011, the Minister of National Revenue (the "Minister") reassessed Dow Chemical Canada ULC ("Dow") by adding to Dow's income for its 2006 taxation year approximately $307 million in transfer pricing adjustments, pursuant to section 247 of the *Income Tax Act* (the "ITA").

Subsection 247(2) of the ITA provides that the Minster may increase or decrease amounts charged in a transaction (a "Transfer Pricing Adjustment") where the transaction includes terms or conditions that do not reflect arm's length terms or conditions and is entered into by a taxpayer and a non-resident person with whom the taxpayer does not deal at arm's length. Further, a Transfer Pricing Adjustment may be made only to adjust the terms and conditions of a transaction to reflect arm's length terms and conditions.

By a proposal letter dated March 9, 2012, the Minister proposed a downward transfer pricing adjustment by way of an increase to the interest expense claimed by Dow in its 2006 taxation year (the "2006 Interest Adjustment"). This interest expense related to amounts that Dow borrowed from Dow Europe GmbH, a Swiss operating company with whom Dow was not dealing at arm's length.

On December 11, 2012, the Minister issued another proposal letter to Dow, in which the Minister advised that the 2006 Interest Adjustment would not be made due to the application of the limitation period in the *Canada-Switzerland Income Tax Convention*. By notice of reassessment dated December 12, 2012, the Minister reassessed Dow's 2006 taxation year in accordance with the December 11, 2012 proposal letter.

Although subsection 247(2) of the ITA mandates a Transfer Pricing Adjustment automatically, regardless of whether the adjustment results in an increase or decrease in a taxpayer's income or loss, subsection 247(10) of the ITA provides that a Transfer Pricing Adjustment that decreases a taxpayer's income or increases a taxpayer's loss (a "Downward Transfer Pricing Adjustment") shall be made only if "… in the opinion of the Minister, the circumstances are such that it would be appropriate that the adjustment be made."

On January 14, 2013, Dow submitted a request to the Minister to make the 2006 Interest Adjustment. By letter dated February 11, 2013, the Minister denied this request on the basis that the 2006 Interest Adjustment was prohibited by Article 9(3) of the *Canada-Switzerland Income Tax Convention* and, if made, would not be taxed in either jurisdiction (i.e., double non-taxation). On March 11, 2013, Dow sought judicial review of this decision in the Federal Court.

The Minister subsequently reassessed Dow's 2006 taxation year two more times by notices of reassessment dated December 14, 2015 and April 13, 2017. The Minister did not make the 2006 Interest Adjustment in either of these reassessments. Dow then appealed the April 13, 2017 reassessment to the Tax Court of Canada (the "Tax Court").

Issues and Tax Court Decision

The issue before the Tax Court was whether the Minister's decision to exercise her discretion under subsection 247(10) to not allow the 2006 Interest Adjustment is reviewable in the Federal Court or appealable to the Tax Court.

Under section 12 of the *Tax Court of Canada Act*, the Tax Court has exclusive appellate jurisdiction to determine the correctness of assessments issued under the ITA. However, section 12 does not make the Tax Court a court of equity nor does it confer on the Tax Court the right to judicially review an action or decision of the Minister or of the Canada Revenue Agency.

Further, pursuant to section 18.5 of the *Federal Courts Act*, a matter that may be appealed to the Tax Court cannot be the subject of judicial review in the Federal Court. Accordingly, whenever a taxpayer challenges a tax decision made by the Minister, it must be determined whether the decision should be challenged by way of judicial review in the Federal Court or an appeal to the Tax Court.

The Tax Court interpreted subsection 247(10) as mandating the Minister to form an option as part of the assessment process where the criteria for a potential Downward Transfer Pricing Adjustment exist. As such, the Tax Court was of the view that, since the Minister cannot issue a final assessment without taking into account her decision not to allow a Downward Transfer Pricing Adjustment, the Minister's decision under subsection 247(10) is an essential component of an assessment and goes to the correctness of that assessment. Accordingly, the Tax Court held that a challenge to the Minister's exercise of discretion under subsection 247(10) falls within its appellate jurisdiction.

FCA Decision

In its decision, the Federal Court of Appeal (the "FCA") focused on the different remedies that may be granted by the Federal Court and Tax Court and held that in order for Dow to succeed, it would need remedies to be granted by both the Federal Court and the Tax Court.

Specifically, in order for Dow to succeed, it would need both an opinion from the Minister that it is appropriate to make the 2006 Interest Adjustment and a reassessment that reflects the 2006 Interest Adjustment. Accordingly, in order for Dow to succeed, it would need remedies to be granted by both the Federal Court and Tax Court because the Federal Court is the only court that may quash the Minister's opinion and, if necessary, compel the Minster to render the option that it is appropriate to make the 2006 Interest Adjustment, and the Tax Court is the only court that can vary the assessment or refer the assessment back to the Minister for reconsideration and reassessment.

As such, the FCA held that, because Dow needs remedies from both the Federal Court and the Tax Court to succeed, the option rendered by the Minister under subsection 247(10) of the ITA is outside the exclusive jurisdiction of the Tax Court.

Conclusion

The FCA held that the Minister's decision to exercise her discretion under subsection 247(10) to not allow the 2006 Interest Adjustment falls outside the exclusive jurisdiction granted to the Tax Court, as this decision is judicially reviewable in the Federal Court.

— *Francis Chang*

THE QUEEN V. THE ESTATE OF PASQUALE PALETTA, 2022 DTC 5057 (FEDERAL COURT OF APPEAL)—LOSSES ARISING FROM ACTIVITIES UNDERTAKEN WITHOUT A PURSUIT OF PROFIT ARE NOT DEDUCTIBLE UNDER SECTION 9

Background

From 2000 to 2007, Mr. Paletta ("Paletta") carried on carefully planned forward foreign exchange trading activities ("forward FX trading") designed to create losses sufficient to shelter approximately $38 million of taxable income from other sources.

Simplified, Paletta would enter into pairs of offsetting buy-sell forward FX contracts (swaps) in a taxation year, which were designed to generate offsetting gains and losses. Before the end of the year, the loss legs of the swap would be closed out so as to realize a loss sufficient to shelter Paletta's income for the year (the "target loss"). Shortly after the start of the next taxation year, the corresponding gain legs would be closed out and realized. The target loss for the next taxation year would be sufficient to shelter (a) the gains realized earlier in the taxation year and (b) the taxable income that Paletta anticipated receiving in that year from other sources. This effectively allowed Paletta to defer paying tax indefinitely.

Paletta maintained that he intended to profit from the movement in the interest rate differential between the two positions. However, the amount of this profit was negligible compared to the size of the positions he entered into, and in all but one year, the fees paid to execute the forward FX trading exceeded the economic gain or loss derived from the swap.

The Minister issued reassessments in 2014, well after the expiration of the normal reassessment period, denying the losses generated from the forward FX trading, and further assessing gross negligence penalties for all years in which trading losses were claimed.

Tax Court Decision

The Tax Court found that Paletta had no intention to make profits, whether large or minimal, from his forward FX trading, and that "the sole purpose of the trading each year was the realization of the target loss for that year" (para. 70). It further found that "no one seeking to make money would engage in the trades undertaken by Mr. Paletta" (para. 134) and that there was no commercial or economic reason for those trades (para. 128), but that "the only purpose of his trading was tax avoidance" (para. 142). Accordingly, the Tax Court concluded that Paletta had no business purpose in carrying out his forward FX trading.

However, the Tax Court found that despite having no business *purpose*, the Supreme Court of Canada decisions in *Stewart v. Canada*, 2002 DTC 6969 ("*Stewart*"), and *Walls v. Canada*, 2002 DTC 6960 ("*Walls*"), mandated the finding that the forward FX trading activities nonetheless constituted a business for purposes of the *Income Tax Act* (the "ITA") on the basis that the trading activities could at all times yield negligible gains and losses together with the fact that these activities were by their nature commercial and had no personal element.

Issues

The issues before the Federal Court of Appeal ("FCA") were:

(1) Whether the forward FX trading activities undertaken by Paletta constituted a business, and thus a source of income for purposes of the ITA.
(2) If not, whether the Minister could reassess the years in issue beyond the normal reassessment period pursuant to subparagraph 152(4)(a)(i) of the ITA.
(3) If so, whether the Minister could apply gross negligence penalties to the years in question pursuant to subsection 163(2) of the ITA.

FCA Decision

The FCA's decision serves as a tutorial on how the "pursuit of profit" has always been and still remains a necessary element for any activity to constitute a "commercial activity" and thus a source of business income:

> Pursuant to section 9 of the Act, the income derived from a business or property source is the "profit" derived therefrom …. no court has ever held that a "profit" or "loss" can arise under section 9 in the absence of an intent to profit. (para. 31)

The FCA began its tutorial explaining that while *Stewart* did away with the reasonable expectation of profit test (the "REOP test"), it did not do away with the underlying need for the pursuit of profit in a business activity. The rejection of the REOP test in *Stewart* recognized that "judges were using hindsight and often second-guessing the business acumen of the taxpayer to determine whether the taxpayer was in fact pursuing profit." However, the need for any business activity to have an underlying pursuit of profit, reasonable or not, remained an essential element of the two-step test set out in *Stewart*:

(1) Is the activity of the taxpayer undertaken in the pursuit of profit, or is it a personal endeavour?
(2) If it is not a personal endeavour, is the source of income a business or property?

The FCA stated:

> The objective of the *Stewart* test, which was to reaffirm "pursuit of profit" as the decisive consideration in ascertaining the existence of a business, precludes the possibility that this test could be construed so as to require the recognition of a business in the face of evidence that establishes that profits are not being pursued. (para. 39)

The FCA then reviewed *Walls*, noting that while tax avoidance was found to be *one* of the purposes of the partnership in that case, it was not the *sole* purpose. Rather, the court's finding in *Walls* that a partnership existed was premised on the existence of an intention to profit from the commercial dealings undertaken by the partnership: partners must have an intent to profit for a partnership to even exist.

> *Walls SCC* establishes that a commercial activity does not cease to be a business because it is pursued with an intent to profit as well as an intent to avoid tax. It does not stand for the odd proposition that an activity devoted exclusively to the avoidance of one's tax can be a business, and hence a source of income under the Act. (para. 50)

The FCA then reviewed *Friedberg v. Canada*, 93 DTC 5507 (SCC) ("*Friedberg*"), which considered whether Mr. Friedberg, who carried on a gold futures trading business, was entitled to report his gains from that source using the realization method instead of the mark-to-market method. The court noted that while Mr. Friedberg utilized a year-end straddle strategy to reduce his taxes similar to the strategy employed by Paletta, unlike Paletta, Mr. Friedberg was found to have carried on his trading activities "primarily to earn profits from his speculation".

> *Friedberg* confirms that the straddle trading strategy can legitimately be used to reduce one's tax when the trades are made in the course of a business, but it can find no application where, as here, there is no source of income to begin with. (para. 59)

The FCA then examined *Stubart Investments Ltd. v. the Queen*, 84 DTC 6305 (SCC) ("*Stubart*"), and concluded:

> *Stubart* stands for the proposition that, absent a sham or a specific provision to the contrary, transactions cannot be invalidated on the ground that they are motivated in whole or in part by tax considerations. There is, however, no authority for the proposition that an activity that is solely motivated by the avoidance of one's tax can be regarded as a source of income under the Act.

The FCA concluded that its own decision in *Moloney v. the Queen*, 92 DTC 6570 (FCA) ("*Moloney*"), was the applicable precedent in Paletta's case. Quoting the Supreme Court, the FCA noted that the activity in Moloney was no more than "a circular scheme … set up for the sole purpose of obtaining tax refunds with no intention on the part of the taxpayer to carry on the business of marketing a speed reading course …" and "a sham set up to appear as though it was commercial in nature where in fact the only activity actually engaged in was that of obtaining tax refunds" (para. 51).

Based on the Tax Court's finding that Paletta's trading activity was carried on solely for tax purposes without any pursuit of profit, the FCA concluded that Paletta's trading activity could not constitute a source of business income, and that the Minister was correct in denying his trading losses.

> Whether avoiding one's tax is viewed as a personal endeavour, a hobby or placed in a category of its own, it is not a commercial activity pursuant to the test set out in *Stewart*, and applied in *Walls SCC*. That said, where the sole purpose of an activity is the avoidance of one's tax, there is no reason to resort to the *Stewart* test because such an activity is irreconcilable with the existence of a business. (para. 53)

The court went on to consider whether Paletta made a misrepresentation "attributable to neglect, carelessness or wilful default" entitling the Minister to reassess the statute-barred taxation years under subparagraph 152(4)(a)(i), and whether Paletta made misrepresentations "knowingly, or under circumstances amounting to gross negligence" entitling the Minister to assess gross negligence penalties under subsection 163(2).

The court found that Paletta misrepresented that he was engaged in a multi-million dollar “foreign currency trading” business in filing his tax returns for the years in issue, when in fact he was not. While Paletta had obtained advice from three different lawyers that his trading plan was “legally sound” based on the jurisprudence in *Friedberg*, all of this advice was premised on the assumption that Paletta, like Mr. Friedberg, would be carrying out his trading in pursuit of profit. Further, the court noted that Paletta had been warned by his advisors that if the trading activities were carried on for primarily tax purposes they could be “problematic”. The court questioned why Paletta, being a knowledgeable business person, would not have obtained a formal opinion as to whether he was entitled to deduct the losses generated by his trading plan, and concluded that Paletta “was indifferent or wilfully blind to whether his plan complied with the law or not and was content to assume the risk” and was grossly negligent in portraying his trading losses as business losses when they were not.

Conclusion

It remains to be seen whether this case will mark a shift in jurisprudence considering whether loss generating activities constitute a source of income from a business. However, it has drawn a line in the sand: it is open for the Minister to reassess taxpayers who cannot demonstrate that their loss generating activities were undertaken in “pursuit of profit”, whether reasonable or not. Commercial-like organization of activities is not sufficient.

—*Ron Dueck*

KUFSKY V. THE QUEEN, 2022 DTC 5046 (FEDERAL COURT OF APPEAL) —PREVIOUSLY ASSESSED CHARACTERIZATION OF PAYMENTS HELD TO BE BINDING IN SUBSEQUENT SECTION 160 ASSESSMENT

Background

The Appellant, Michelle Kufsky, was the sole shareholder and principal of the Ontario corporation Mon Refuge Décor Inc. (the “Corporation”), which carried on the business of providing interior home decorating and furnishing services in Mont-Tremblant. The Corporation began experiencing financial difficulties following the 2008 crisis.

In 2012, the Appellant’s accountant filed T1 adjustment requests on behalf of the Appellant reporting a total of $85,000 of dividends paid by the Corporation to the Appellant in her 2009–2011 taxation years (the “Reported Dividends”). The Appellant testified that she had never signed any director’s resolutions authorizing the declaration or payment of the Reported Dividends. The Reported Dividends were paid by setting off corresponding amounts payable by the Appellant to the Corporation. The Corporation issued T5 slips in respect of the Reported Dividends concurrently with its preparing and filing the T1 adjustment requests. The adjustment requests were prepared, signed, and filed by the Appellant’s accountant. The CRA accepted the adjustment requests and issued valid Notices of Assessment to the Appellant for the three taxation years, following which the Appellant paid the reassessed tax on the Reported Dividends without objection.

In 2013, the CRA reassessed the Appellant under section 160 of the *Income Tax Act* (the “ITA”) for unpaid taxes of the Corporation for its 2008 and 2010 taxation years. The Appellant objected to the assessments. The Company filed revised T2 returns in 2016 for its 2008 and 2010 taxation years, following which the CRA issued revised section 160 Notices of Reassessment, assessing the Appellant for over $68,000 of taxes owing by the Corporation in respect of its 2008 and 2010 years (the “160 Assessments”). The Appellant again filed notices of objection disputing the 160 Assessments.

Tax Court Decision

At the Tax Court, the Appellant argued that the 160 Assessments were incorrect on the basis that:

(1) the Appellant gave consideration for the amounts paid as Reported Dividends,
(2) a portion of the Reported Dividends were loan repayments, and
(3) the amounts paid could not have been actual dividends under the Ontario *Business Corporation Act* (“BCA”) as they

(1) were not properly authorized by director's resolutions, and
(2) were prohibited on account of the Corporation's being insolvent at the time the Reported Dividends were allegedly declared and paid.

The Tax Court upheld the 160 Assessments, finding that no consideration had been given for the Reported Dividends, no portion of the Reported Dividends were loan repayments, and that the Reported Dividends were dividends for purposes of the ITA irrespective of whether the Corporation had complied with the BCA. In respect of the third issue, the Tax Court relied on the case *2753-1359 Québec Inc. v. Canada* (2010 DTC 5060 (FCA)) ("*Larouche*") for the proposition that "a reported dividend, even if not in compliance with the provincial statute, remains valid for tax purposes."

Issues

On appeal, the Appellant no longer pursued the argument that she had given consideration for payment of the Reported Dividends. The issues before the Federal Court of Appeal ("FCA") were:

(1) Were the Reported Dividends in fact dividends for purposes of the ITA where the Corporation failed to comply with the applicable corporate law requiring (a) director approval of the declaration and payment of the dividends, and (b) prohibiting the payment of the dividends at a time when the Corporation was insolvent?
(2) Does the fact that the Reported Dividends were "paid" by being offset against amounts owing by the shareholder to whom the dividends were payable meet the requirement under subsection 160(1) that property be "transferred"?
(3) Is the fair market value of a dividend for purposes of section 160 net of the tax liabilities arising from the payment of the dividend?
(4) If the Reported Dividends were not dividends for purposes of the ITA and were in fact paid, were they repayments of amounts owing by the Corporation to the Appellant, or remuneration or payments for services?

FCA Decision

In respect of the first issue, Justice Webb, writing for the majority, found that *Larouche* did not consider whether failure to comply with corporate law rendered a purported dividend as something other than a dividend for purposes of the ITA—and thus did not stand for the proposition cited by the Tax Court. Justice Webb instead found that the applicable principle was set out in *Wolofsky v. Canada* (2001 DTC 5316 (FCA)) ("*Wolofsky*"): "a taxpayer who has benefited from a deduction of an amount on the basis that it was properly deducted in one year is estopped from claiming that it was not properly deducted in order to avoid its inclusion in income in the following year" (para 37). While the Appellant had not made any deduction in respect of the dividends, Justice Webb found that the principle in *Wolofsky* could equally be stated as: "a taxpayer who has benefited from having an amount included in his or her income as a dividend in a particular taxation year (and who has not objected to the assessment of tax based on having received this dividend) is estopped from claiming in any subsequent appeal related to the application of section 160 of the Act, that the previous filing position was wrong" (para. 62). As the inclusion of the dividend in the Appellant's income resulted in an offset to amounts payable by the Appellant to the Corporation, the Appellant benefited from avoiding an income inclusion under subsection 15(2) of the ITA, which would have been subject to a higher rate of tax than the tax applicable on the Reported Dividends. Accordingly, Justice Webb held that the Reported Dividends were properly "dividends" for purposes of the ITA irrespective of whether they complied with or were prohibited by the applicable corporate statute.

In respect of the second issue, Justice Webb found that "By setting-off the dividends against the amount payable by the Appellant, her debt payable to the Corporation was reduced and, correspondingly, the assets of the Corporation that would have been available to pay its tax debts were reduced" (para. 77), and that this reduction of corporate assets amounted to a transfer for purposes of section 160.

In respect of the third issue, Justice Webb found that *Canada v. Gilbert* (2008 DTC 6295 (FCA)) established that the fair market value of a dividend at the time it is paid, being the relevant time under section 160, cannot take into account the tax liabilities on that dividend. The finding in respect of the first three issues rendered the fourth issue irrelevant.

Justice Monaghan, in her concurring reasons, expressed doubt as to Justice Webb's application of *Wolofsky*. In her view, "an assessment fixes liability for tax, interest and penalties under the Act; it does not establish the veracity of the facts on which it is based" (para. 84). Justice Monaghan found that this reality is implicitly recognized in subsection 152(8) of the ITA, which deems an assessment to be valid and binding "notwithstanding any error, defect or omission in the assessment." In the result, she found that the Appellant is entitled to argue that the Reported Dividends were not in fact dividends, notwithstanding that the Appellant's tax liability in those taxation years was assessed on the basis that they were dividends.

That said, Justice Monaghan found that the Appellant had not introduced sufficient evidence to demolish the Minister's assumption that there had been sufficient corporate authorization to declare and pay the Reported Dividends as dividends. Further, Justice Monaghan found that the Corporation's violation of the BCA's solvency test applicable to the payment of dividends only resulted in the Corporation committing an offense under the BCA, but did not result in the Reported Dividends being something other than dividends.

—Ron Dueck

RECENT CASES

APPEAL OF DECISION DENYING BUSINESS COSTS DEDUCTION DISMISSED ON GROUNDS OF ESSENTIAL ELEMENTS TO CARRY ON BUSINESS NOT BEING IN PLACE

The appellant sought to overturn an order of the Tax Court, which upheld the Minister's order to deny a business expense claim. These costs were incurred as a result of unsuccessful litigation against the British Columbia government and owners of an adjacent property, to obtain road access to a parcel of land he purchased in 2005 to conduct a seasonal business of selling fruits and vegetables to the public. The Minister had denied the appellant's business expense claim as he was not able to demonstrate that his business had commenced in 2014. The Tax Court upheld such decision, on the basis that the appellant had taken some preliminary steps to advance an idea and therefore had a subjective intention to conduct a business but had not actually taken the essential steps to commence that business.

The appeal was dismissed. The Federal Court of Appeal (the "Court"), in determining whether the appellant was actually carrying on his business in 2014, observed that the essential elements of a business must have been in place for a taxpayer to be carrying on business, and that mere intention or the taking of preliminary steps is not sufficient. The Court held that the property in dispute did not have electricity, that he had no business plan, that there were no documented agreements with farmers to obtain their produce, and that he still had no means to commence operations. In holding so, the Court upheld the decision of the Tax Court and the appeal was dismissed.

Vesuna v. The Queen

2022 DTC 5042

INTERIM CHARGE AGAINST PROPERTY DISCHARGED

The applicant, a financial advisor and wealth manager, sought to discharge the interim charge against the Navy Wharf property ("Property") obtained by the Department of Justice and the CRA. The applicant argued that the interim charge must be discharged because his interest in the Property was solely that of a trustee and Rule 458 of the *Federal Courts Rules* cannot be applied to a trustee's legal interest in trust property held on behalf of the beneficiaries of a trust in order to secure the trustee's personal debt. The CRA had registered with the Court a certificate against the applicant claiming a tax debt plus interest pursuant to section 223 of the *Income Tax Act*. The CRA asserted that the applicant had a legal interest in the Property as trustee and, accordingly, has an interest in the property within the meaning of Rule 458.

The application was discharged. In determining whether the interim charge should be discharged and the net proceeds of sale of the Property be paid into court pending cross-examination of the applicant, the Court observed that a person who is a trustee acts in two distinct capacities: a personal capacity and the capacity as a trustee. As a trustee, they act as a fiduciary for the benefit of the trust beneficiaries. The Court further held that the tax debt was not a debt of the Richie Rich Holdings Trust and the Property was not available to the CRA to satisfy the applicant's debt. The CRA's request that the net proceeds of sale of the impending sale of the Property must be paid into court to permit them the opportunity to cross-examine the applicant was also denied by the Court. In holding so, the Court discharged the interim charge imposed against the Property.

Canada (MNR) v. Shaker

2022 DTC 5036

COURT ORDERS DISCLOSURE OF DOCUMENT DESPITE SOLICITOR–PRIVILEGE CLAIM

In the context of a 2016 audit, the Applicant, Minister of National Revenue, sought discovery from Respondent BMO Nesbitt Burns ("BMO"). It applied pursuant to section 231.7 of the *Income Tax Act* for an order compelling the Respondent to provide an unredacted copy of its Master Summary Pricing Model ("MSPM"). The Respondent claimed solicitor-client privilege over the redacted portion; alternatively, it argued that the MSPM should not be produced because the 2016 audit had ended, the MSPM constituted protected tax accrual working papers ("TAWPs"), and production would undermine the discovery process in related proceedings in the Tax Court.

The Federal Court granted the application and ordered BMO to produce the document, holding that it had not met its burden to establish that the redactions in the MSPM revealed legal advice or were otherwise solicitor-client communications. The Court needed first to view the MSPM, which it did under seal. It held that even though privilege has a broad scope, it did not extend to the MSPM; the Court could not determine how it reflected legal advice. Contrary to BMO's suggestion, the 2016 audit had not concluded and in any case there are no time limits on a section 231.7 application; the MSPM did constitute a TAWP, but the Minister had advanced a particular justification and was not seeking information about BMO's uncertain tax positions for future audits. Finally, disclosure here would not undermine discovery in the Tax Court, and BMO could argue that it did so before the Tax Court.

Canada (MNR) v. BMO Nesbitt Burns

2022 DTC 5034

REMISSION ORDER FOR THE CERB NOT APPLICABLE TO CRB

The applicant, a self-employed corporate and event photographer based in Toronto, sought judicial review of a decision by an officer with the Canada Revenue Agency who denied his eligibility for the Canada Recovery Benefit ("CRB"). The officer found that the applicant was not eligible to receive the CRB because he did not earn at least $5,000 in net self-employment income during the qualifying period. The applicant had completed his 2020 tax return and then reapplied for the CRB, which was denied because his 2019 and 2020 tax returns did not demonstrate the requisite $5,000 in net self-employment income. On appeal, the applicant argued that it was inequitable and unjust for him to have received the Canada Emergency Relief Benefit ("CERB") but then be denied the CRB when his financial circumstances did not change. It is noteworthy that he became eligible for the CERB because of a remission order issued to clarify some confusion that existed about eligibility for this program.

The application was dismissed. In determining the standard of review and whether the officer's decision was reasonable, the Court observed that it will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility, and transparency. The Court held that the eligibility criteria established by subsection 3(2) of the *Canada Recovery Benefits Act* are statutory and non-discretionary and the officer had no choice but to apply them. The legal doctrine of legitimate expectations is limited to procedural relief and does not ensure a particular outcome. Furthermore, there can be no estoppel in the face of an express provision of a statute—the legislation is paramount. In holding so, the Court concluded that the officer's decision to deny the applicant's eligibility for the CRB was reasonable and dismissed the application.

Flock v. Canada (AG)

2022 DTC 5030

PERSONAL ASSESSMENT OF DECEASED'S TAX LIABILITIES AGAINST EXECUTOR WHO WISHED TO RENOUNCE THIS ROLE CONFIRMED

The appellant's father bequeathed the bulk of his estate to the appellant's brother James, with half the residue going to the appellant's daughter. James and the appellant were appointed co-executors of the estate. The appellant made clear in a handwritten, allegedly personally-delivered, July 1994 letter to James that he had no wish to be an executor. He wished, however, to ensure that his daughter got her share of the estate. To ensure this, in late 2010 the executors transferred an estate property to the brother's holding company and granted the daughter a $240,000 charge against it. James died in August 2016. Assessed personally for the estate's outstanding tax debts on May 4, 2017 (pursuant to subsection 159(3) of the *Income Tax Act*), the appellant argued that he had renounced his position as executor without performing any of the duties of that office.

The appeal was dismissed. The Court could find no evidence that the appellant ever renounced his executorship. The July 1994 letter to his brother, in which the appellant asserted he wanted no part of the executorship, bore a pen-and-ink notation that it was a copy of the letter delivered to James; the Court concluded (on a balance of probabilities) that the letter was not sent when it was dated since if it were a copy, James's files should have contained the original, which was not produced. As for his actions in 2010, the appellant understood that he was signing as executor in order to effect the transfer, since the documents identified him as executor. Additionally, in response to the appellant's argument that the reassessment for 2006 was time-barred, the Court noted that it was not, in fact, late, and extended the limitation period until 2027.

Mingle v. The Queen

2022 DTC 1021