Tax Notes

November 2019
Number 682

TOSI AND EXCLUDED SHARES

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Since the revised tax on split income ("TOSI") rules were introduced in December 2017, the CRA has provided dozens of technical interpretations and administrative guidance documents in order to clarify how it might apply these rules in various circumstances. A substantial portion of these interpretations relate to the "excluded share" exception under subsection 120.4(1), so it appears to be the most popular bright-line exclusion. This is possibly because, unlike the "excluded business" exception, the "excluded share" exception does not require the specified individual to be actively engaged in the business. For example, an owner-manager can rely on this exception to split income with their spouse who owns at least 10% of the votes and value of the corporation, provided that other conditions are met.

In recent months, the CRA has released two new interpretations that relate to the excluded shares exception. This article discusses these new interpretations after a brief review of how the exception works.

Refresher on Excluded Shares

Essentially, TOSI applies to "split income" earned by a "specified individual", but it does not apply to an "excluded amount". Subparagraph (*g*)(i) of the definition "excluded amount" under subsection 120.4(1) provides that an excluded amount includes income from or a capital gain from the disposition of excluded shares, provided that the specified individual is 25 years or older.

"Excluded shares" is also defined under subsection 120.4(1) as shares of the capital stock of a corporation owned by the specified individual if:

> (*a*) the following conditions are met:
>
> > (i) less than 90% of the business income of the corporation for the last taxation year of the corporation that ends at or before that time (or, if no such taxation year exists, for the taxation year of the corporation that includes that time) was from the provision of services, and
> >
> > (ii) the corporation is not a professional corporation;
>
> (*b*) immediately before that time, the specified individual owns shares of the capital stock of the corporation that
>
> > (i) give the holders thereof 10% or more of the votes that could be cast at an annual meeting of the shareholders of the corporation, and
> >
> > (ii) have a fair market value of 10% or more of the fair market value of all of the issued and outstanding shares of the capital stock of the

corporation; and

> (*c*) all or substantially all of the income of the corporation for the relevant taxation year in subparagraph (*a*)(i) is income that is not derived, directly or indirectly, from one or more related businesses in respect of the specified individual other than a business of the corporation.

Shares of a Corporation That Holds a Partnership Interest

The CRA most recently published a technical interpretation (2019-0813021E5) that pertains to the "excluded shares" exception with respect to a holding company that owns an interest in a partnership. The interpretation is the CRA's response to a question that proposed a hypothetical scenario.

A partnership ("Partnership AB") carries on an active business in Canada. Its business income is not from the provision of services. Partnerco A and Partnerco B each own a 50% interest in the partnership, and they are not professional corporations. Other than the income arising from their interests in the partnership, Partnerco A and Partnerco B do not earn any other income from a business. Holdco A and Holdco B each own 90% of Partnerco A and Partnerco B, respectively. Mr. A owns 90% of Holdco A. Mr. B owns 90% of Holdco B. Mrs. A owns 10% of Partnerco A and 10% of Holdco A. Mrs. B owns 10% of Partnerco B and 10% of Holdco B. Mr. A and Mrs. A are spouses, and Mr. B and Mrs. B are also spouses. The two couples are not related to each other.

The CRA was asked whether the Partnerco shares would be considered excluded shares so that TOSI would not apply to income from those shares earned by Mrs. A and Mrs. B. Further, the CRA was asked if the results would differ if Mr. A and Mr. B were siblings.

In this example, conditions (*a*) and (*b*) will presumably be met, but the CRA was asked specifically whether (*c*) would be satisfied. At a glance, it would appear that since both Partnerco A and Partnerco B both do not earn any income from a business other than from Partnership AB's business, all or substantially all of their income would be derived from a related business in respect of a source individual (Mr. A and Mr. B), and condition (*c*) would not be met. As a result, the excluded share exception would not be met. However, the CRA's conclusions were favourable.

According to the CRA, Partnership AB's business constitutes a "related business" to both Mrs. A and Mrs. B since their spouses each have an indirect interest in the partnership by virtue of their ownership in their Holdcos. As such, all or substantially all of the income of the Partnercos will be income derived from a related business. However, the CRA stated:

> . . . the requirement under paragraph (*c*) of the excluded shares definition will nonetheless be satisfied since the related business (i.e. the business carried on by Partnership AB) will also constitute the business of the Partnercos. Where the jurisdictional law regarding partnerships provides that a partnership is an agreement among the partners to carry on business in common, each partner will be considered to be carrying on the business of the partnership.

Based on this conclusion, the business of a partnership is also considered to be the business of each of the partners.

Therefore, in this example, all or substantially all of Partnership AB's income earned by the Partnercos is not derived from one or more related businesses other than a business of the Partnercos. Paragraph (*c*) of the definition of excluded shares under subsection 120.4(1) would be met, and thus the shares in the Partnercos held by Mrs. A and Mrs. B would be considered excluded shares. Income from those shares would not be subject to TOSI. Furthermore, the CRA stated that their answer would not be different had Mr. A and Mr. B been siblings.

That being said, the shares of Mrs. A and Mrs. B of their respective Holdcos would unlikely meet the excluded shares exception, based on the CRA's past interpretation relating to Holdcos that own shares of an Opco that operates a business (2018-0743971C6). The CRA's reasoning for this position is that the Holdco's income (dividends from Opco, for example) would be derived from a related business other than its own business (i.e., Opco's business) and therefore it would not qualify under paragraph (*c*) of the definition of excluded shares. There are exceptions to this position that are discussed in other interpretations.

Income From the Provision of Services

Recently, the CRA added new administrative guidance pertaining to the revised TOSI rules to its website.[1] The guidance relates specifically to the "excluded shares" exception under subsection 120.4(1). This guidance relates solely to the business income test under subparagraph (*a*)(i) of the definition of excluded shares, which requires that less than 90% of the business income of the corporation be from the provision of services. In technical interpretation no.2018-0743961C6, the CRA stated that this business income test is based on the corporation's gross income (i.e., revenue or sales before deducting expenses). This new guidance provides further clarity on how the gross business income test should be applied.

The guidance first provides some general comments on the computation of gross business income. The CRA states that gross business income excludes capital gains. Where a corporation has multiple businesses, the income should be aggregated. An example is also provided that illustrates generally how to compute the amount of gross business income from the provision of services. The business in the example was a management consulting business, the gross revenue of which consisted of consulting services and the sale of computer hardware. The example provides that the determination of whether service income is less than 90% of the corporation's total income is a matter of dividing service income (income from management consulting) by the amount of the corporation's total gross income (income from sale of computer hardware + income from consulting) — a simple calculation. Also, where the business is a new business, the gross business income test will use the current year's income rather than the income for the previous year.

The guidance also includes two examples involving a cleaning business. In the first example, a corporation's cleaning business uses cleaning products as a part of the cleaning services it provides, but it does not sell the cleaning products. The cleaning products are incidental to the provision of the cleaning services. Assuming that the corporation's only income is from providing cleaning services, the CRA stated that 100% of the corporation's gross income is from the provision of services and the cost of the cleaning products is not deducted from this amount (since the amount should be gross income). As such, the shares of the corporation would not qualify as excluded shares.

In the second example, the corporation still operates a cleaning business, but it also sells cleaning supplies and equipment separately to purchasers who may or may not be customers of the cleaning services business. For the purposes of the 90% test, the CRA provided that gross income from cleaning services is service income and gross income from selling the cleaning products is considered non-service income. In the specific example, the service income made up 80% of the corporation's total income, so the shares of the corporation were excluded shares.

The final example in the guidance involves a construction business that designs, constructs, and repairs decks. With respect to deck construction and repair, the corporation bills separately for materials and labour. In computing the service and non-service income for this example, the CRA states that the income attributable to materials is non-service income and income attributable to labour is considered service income. Therefore, the excluded share exception can be met if the bill for the materials is greater than 10% of the total bill.

CURRENT ITEMS OF INTEREST

Tax Cut Tops Liberals' Agenda

Prime Minister Justin Trudeau stated on October 23, 2019, that a middle-class tax cut would be the minority government's first order of business. In its 2019 election platform, the party promised to increase the basic personal amount from $12,069 to $15,000. According to a costing estimate provided by the Parliamentary Budget Officer, the government intends to gradually phase in the increase from 2020 to 2023. Where an individual's income exceeds $150,605 (for 2020) the increase is phased out such that there is no new benefit where income exceeds $214,557 (for 2020).

[1] https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/federal-government-budgets/income-sprinkling/guidance-split-income-rules-adults/excluded-shares.html

Alberta 2019 Budget

Alberta Minister of Finance Travis Toews tabled the province's 2019 Budget on October 24, 2019. The 2019-2020 deficit is projected to be $8.7 billion. Earlier this year, the government introduced a job creation tax cut, which reduced the corporate income tax rate from 12% to 11%, effective July 1, 2019. Additional reductions of 1% are scheduled for January 1 of 2020, 2021, and 2022, which will result in a general corporate tax rate of 8%. The rate for the dividend tax credit for eligible dividends will be adjusted accordingly to reflect the change in corporate tax rates.

Contrary to these broad corporate tax reductions, the Budget is eliminating several targeted income tax credits. The SR&ED tax credit will be eliminated beginning in 2020. Also, the Alberta Investor Tax Credit, Community Economic Development Corporation Tax Credit, Capital Investment Tax Credit, and Interactive Digital Media Tax Credit will have no new approvals granted after October 24, 2019. Alberta's current grant program for the film industry will be transitioned to the new Film Industry Tax Credit beginning in spring 2020.

The government has promised to match the federal government's accelerated CCA measures.

The Budget also announced some significant personal tax developments. Most notably, the Budget announced that personal income tax credits, thresholds, and tax brackets will not be indexed for inflation for 2020 and subsequent years. Indexation will be suspended until economic and fiscal conditions allow for it. Also, the Alberta Child Benefit and Alberta Family Employment Tax Credit will be replaced with the new Alberta Child and Family Benefit beginning in July 2020.

A full analysis of the tax measures announced can be found in the Alberta 2019 Budget Dispatch.

New Comfort Letters

Two new comfort letters from the Department of Finance are available. Both promise that the Department will recommend to the Minister of Finance that the *Income Tax Act* be amended, but offer no assurances that the Minister or Parliament will agree with the recommendations.

Eligible Capital Property Transition

A taxpayer entered into an agreement to dispose of eligible capital property ("ECP") before the transition from the ECP rules to Class 14.1 was announced on March 22, 2016. The taxpayer was paid an amount at the time of disposition, but was owed an additional amount that would become payable as a part of the purchase price once certain regulatory matters were approved. The approvals were granted after 2016, which is after the ECP rules had been repealed. Under the old ECP rules, one-half of the amount would have been taxed as business income. However, under the new rules, one-half of the amount would be treated as a capital gain from the disposition of depreciable property, which will trigger a refundable tax liability to the taxpayer.

Since the sale agreement was entered into prior to the transition being announced on March 22, 2016, the Department of Finance agreed with the correspondent that the amount received ought to be subject to the old tax treatment. The Department stated that they are prepared to recommend to the Minister of Finance to amend the *Income Tax Act* to provide that in situations like the one described above, a taxpayer may elect in respect of a disposition of ECP that occurred before March 22, 2016. Where an election is made and an amount is receivable after 2016 after satisfaction of a condition of an agreement, the amount will be taxed as it would have been under the ECP regime. This would apply to amounts received before 2024. The taxpayer would need to file an election with the Minister of National Revenue no later than the filing due-date for the first taxation year that ends after September 30, 2019.

Functional Currency Tax Reporting

A correspondent wrote to the Department of Finance to request that the functional currency tax reporting rules in section 261 of the *Income Tax Act* be amended to allow a corporation resident in Canada to report its Canadian tax results using the Japanese yen. The Department agreed that it would be appropriate to allow taxpayers to elect to determine their Canadian tax results in Japanese yen, and will recommend to the Minister of Finance that the definition "qualifying currency" in subsection 261(1) be amended accordingly, effective for taxation years beginning after 2019.

FOCUS ON CURRENT CASES

This is a regular monthly 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 Rejects Minister's Attempt To Use Tax Court To Recover Amounts Refunded in Error

***984274 Alberta Inc. v. The Queen*, 2019 DTC 1062 (Tax Court of Canada)**

This case considers whether the Minister was entitled to reassess the taxpayer to recover payments that the Minister previously made representing an overpayment created by a reassessment that was later discovered to be statute-barred. The reassessment under appeal was a consequential reassessment that the Minister issued in the course of implementing a settlement with the taxpayer's parent corporation. As discussed below, the Tax Court held that the provisions of the *Income Tax Act* (Canada) (the "Act") which the Minister put forward to support the reassessment — namely, subsections 160.1(1) and (3), and 164(3.1) — did not apply in the circumstances.

The taxpayer received a parcel of land from its parent in 2002. The parties elected to transfer the property pursuant to the rollover under subsection 85(1) of the Act, and the property was later sold to an arm's length party. The taxpayer realized a taxable capital gain on the sale of approximately $4 million and associated Part I tax of approximately $1.8 million in the taxpayer's 2003 taxation year.

Following an audit of the parent, the Minister concluded that the transferred property should have been treated as inventory in the hands of the parent and, therefore, ineligible for rollover treatment on the transfer to the taxpayer. Accordingly, the Minister reassessed the parent to treat the transaction as a fair market value transfer of property held as inventory and purported to issue a relieving reassessment of the taxpayer in 2010 to reduce its taxable capital gain on the disposition of the property to the arm's length party to nil, since the taxpayer would have acquired the property from its parent at a cost equal to its fair market value (rather than the parent's historical cost). The 2010 reassessment triggered an overpayment and refund interest, which were both paid to the taxpayer.

The parent's dispute with the Minister on the character of the transferred property was appealed to the Tax Court but was settled prior to hearing. The substance of the settlement was that the Minister would accept that the property was capital property in the hands of the parent and the taxpayer, and the parent would be reassessed on the basis that the property was eligible for the section 85 rollover and acquired by the taxpayer at the parent's cost. As contemplated by the settlement, the Minister reassessed the taxpayer's 2003 taxation year in 2015 to restore the Part I tax attributable to the taxable capital gain from the sale of land, as reported in the original tax filings in 2003. The 2015 reassessment also created an obligation on the taxpayer to repay the refund and refund interest that was paid at the time of the prior reassessment (pursuant to paragraphs 160.1(1)(*a*) and 164(3.1)(*a*)) and arrears interest on both the previously refunded Part I tax and the amount of the refund interest during the period between the two reassessments (pursuant to paragraphs 160.1(1)(*b*) and 164(3.1)(*b*)).

It seems that the parent believed that the terms of the settlement did not allow for the Minister to reassess the taxpayer for arrears interest between the date of the 2010 reassessment and the 2015 reassessment on the amounts that were paid to the taxpayer at the time of the first reassessment. Consequently, the parent had the taxpayer object to and subsequently initiate a Tax Court appeal of the second reassessment, likely with the goal of having the 2015 reassessment varied to remove the arrears interest component. (Presumably, the Minister's basis for assessing the arrears interest was that, in the absence of a specific agreement between the parties as to the manner in which arrears interest is to be computed in the reassessments implementing a settlement, arrears interest arising associated with any reassessment is to be computed in accordance with the normal rules in the Act governing arrears interest.)

By the time the appeal was heard by the Tax Court, it appears that the Minister's case for supporting the reassessment

was complicated by the fact that the first reassessment (which resulted in the taxpayer receiving the refund and the refund interest) was actually statute-barred when it was issued in 2015. It is unclear from the reported decision at what point the Crown became aware of this, as the Minister had issued the 2010 reassessment on the basis of a reassessment waiver that was requested by the Minister but given by the taxpayer after the expiry of the normal reassessment period for the taxpayer's 2003 taxation year. Nonetheless, the fact that the 2010 reassessment was null and void made it problematic for the Minister to rely on the provisions of the Act that would normally apply to recover excess refunds and refund interest and arrears interest and, as discussed below, led the Tax Court to decide that the Minister did not have the statutory authority to issue the 2015 reassessment.

In its decision, the Tax Court (*per* Smith J) began by considering the legal implications of the 2010 reassessment being statute-barred. One of the Court's key observations was that, if the 2010 reassessment was null and void, the taxpayer's tax liability under the Act was the same as it was before the 2010 reassessment. Accordingly, the amount that was paid to the taxpayer in 2010 purportedly as a refund of an overpayment pursuant to subparagraph 164(1)(*a*)(iii) of the Act could not have been an overpayment (as defined in paragraph 164(7)(*b*)) because the statute-barred reassessment could not reduce the taxpayer's 2003 income tax liability from what it was before the payment. Similarly, the amount that the Minister paid to the taxpayer in 2010 purportedly as refund interest pursuant to subsection 164(3) could not have been under authority of that provision because there was no underlying obligation to make a refund of an overpayment to the taxpayer at that time under subsection 164(1).

The Tax Court then went on to consider whether, despite the Court's conclusion that the 2010 payment was not made under authority of subsections 164(1) and (3), the Minister's 2015 reassessment to recover the payment and impose arrears interest could nonetheless be supported by the provisions that would normally apply to recover and impose arrears interest on payments validly made pursuant to those provisions: subsections 160.1(1) and 164(3.1).

Subsection 160.1(1) is the provision that normally applies to require a taxpayer to pay back an excess refund and arrears interest on the excess. The obligations under subsection 160.1(1) are engaged when the taxpayer receives an amount that is in excess of the amount to which the taxpayer is entitled "as a refund under this Act". The Tax Court first concluded that the language in subsection 160.1(1) requires the original payment to have been validly paid pursuant to a provision of the Act and, since the Court previously found that the payment that the Minister made in 2010 was not made under authority of a provision of the Act, it held that subsection 160.1(1) cannot apply to any portion of that payment.

In the event that the Tax Court was incorrect in its conclusion that, for the repayment obligation under subsection 160.1(1) to apply, the original refund payment has to be one that was authorized by the Act, the Court went on to consider whether the 2010 payment was a "refund" for purposes of subsection 160.1(1) based on the ordinary meaning of that expression. Following a review of some relevant jurisprudence and dictionary definitions, the Court concluded that the basic character of a refund is that it must be the return of an overpayment, and since there was no overpayment by the taxpayer in respect of the 2003 taxation year when the Minister made the payment, the amount cannot be considered a "refund" in the ordinary sense.

Subsection 164(3.1) is the provision that applies to require the taxpayer to pay back refund interest on an excess refund and arrears interest on the excess refund interest. The Court found that, since subsection 164(3.1) only applies to refund interest that was paid under authority of subsection 164(3) and the Court previously concluded that subsection 164(3) was not a statutory basis for paying refund interest in 2010, the Minister was not entitled to rely on subsection 164(3.1) as a basis for supporting the 2015 reassessment to recover any portion of the 2010 payment or assessed arrears interest.

This case illustrates the complexity that can arise as a result of multiple reassessments, where the Minister issues a reassessment and then subsequently changes position. In this case, the fact that the 2010 relieving reassessment was statute-barred only came to the attention of the parties because the parent corporation took issue with the Minister assessing arrears interest in the reassessment of the taxpayer that implemented the settlement. Had this not been the case, the taxpayer would have presumably repaid the amounts showing as being owed pursuant to the invalid 2015 reassessment without complaint.

Despite the taxpayer's success in the appeal, it should be noted that this matter will not likely result in a windfall for the parent and the taxpayer. As noted in the Tax Court's decision, the taxpayer acknowledged to the Court that the Crown would have legal recourse against the taxpayer to recover the 2010 payment as an amount paid in error under Quebec civil law pursuant to the *Crown and Civil Liability and Proceedings Act*.

— *Nishant Jain, Summer Student*

Too Many Men on the Ice: Tax Court Finds the Allocation of Partnership Income to a Loss Company Via Several Family Trusts To Be Unreasonable Pursuant to Subsection 103(1.1) of the Act

***Aquilini Estate v. The Queen*, 2019 DTC 1096 (Tax Court of Canada)**

In this case, the Tax Court of Canada considered whether the allocation of certain partnership income and losses to partnership members on a basis that did not reflect their initial capital investment was reasonable within the meaning of subsection 103(1.1) of the *Income Tax Act* (the "Act"). That provision allows the Minister to adjust partnership allocations if the allocations are unreasonable in the circumstances.

The taxpayers consisted of: three brothers, Francesco, Roberto, and Paolo Aquilini; their mother, the late Elisa Aquilini; and a trust known as the Atrium Investment Trust. The taxpayers own a number of businesses, including a prominent real estate business and the Vancouver Canucks.

In 2001, the taxpayers carried out a reorganization of their family business holdings in order to consolidate their assets under a single master limited partnership. The reorganization was said to have been undertaken to simplify future financings, to creditor-proof family members against marital breakdowns through the use of family trusts, and to consolidate future income in the family trusts for succession planning purposes. As described in greater detail below, the master limited partnership was said to be structured to ensure that the risk of losses was to be borne by the Aquilini brothers, Francesco, Roberto, and Paolo, given their active involvement in the business, without devaluing the interest of their mother, Elisa.

Between December 31, 2001, and January 31, 2002, each of Elisa, Francesco, Roberto, and Paolo transferred the interests they held in various corporations and partnerships to the master limited partnership on a tax deferred basis under subsection 97(2) of the Act. During this period, various partnerships and trusts in the Aquilini family holding structure also transferred their assets to the master partnership such that, in aggregate, after the reorganization had been completed, the master partnership held assets having a total fair market value ("FMV"), net of assumed liabilities, of over $150.5 million. In consideration for the transfer of assets to the master partnership, the transferors received units of the master partnership, each issued at $10 per unit.

Elisa contributed assets to the master partnership having a total FMV, net of liabilities assumed by the master partnership, of $13,310,260, which approximated 8.84% of the $150.5 million FMV. In consideration for the transfer, Elisa received 1,331,026 Class B units, being all of the issued and outstanding Class B units of the master partnership.

Francesco, Roberto, and Paolo each contributed assets to the master partnership having an FMV, net of liabilities assumed by the master partnership, of $18,729,060, such that each brother contributed approximately 12.44% of the total FMV of the master partnership. In consideration for the transfer, each brother received 1,872,906 Class C units. Upon completion of the reorganization, each brother held one-third of the issued and outstanding Class C units of the master partnership.

Based on the allocation between the various master partnership units set out in the limited partnership agreement, despite having initially contributed only 8.84% of the capital to the master partnership, Elisa was entitled through her Class B units to 35% of the master partnership distributions on the first $1,000,000 of the master partnership's income (ignoring a nominal initial distribution of $100 on the Class A units).

In contrast, despite having contributed capital representing approximately 37.32% of the initial capital of the master partnership, Francesco, Roberto, and Paolo were together entitled in their Class C units to only 30% of the master partnership distributions on the first $1,000,000 of the master partnership's income.

The remaining 35% of the first $1,000,000 of the master partnership's income distributed to unitholders was allocated, *pro rata*, to the holders of Class D master partnership units, being various partnerships and trusts in the Aquilini family holding structure which, in the aggregate, had contributed approximately 53.84% of the initial capital of the master partnership.

On any residual distribution in excess of the $1,000,100 (i.e., the $1,000,000 plus the $100 distributed on the Class A units) by the master partnership, each of certain family trusts established for the respective benefit of Elisa, Francesco, Roberto, and Paolo would receive a *pro rata* allocation of the residual distribution based on the number of Class G units in the master partnership held by each such trust. Following the reorganization, the trust established for the benefit of Elisa held 40% of the Class G units based on a contribution of $400 to the master partnership (0.0003% of the total initial capital) while the trusts established for Francesco, Roberto, and Paolo each held 20% of the Class G units based on respective contributions of $200 (0.0001% of the total initial capital).

Based on the foregoing, the Tax Court concluded that there was no correlation between the initial capital contributions of the partners and the allocations set out in the limited partnership agreement governing the master partnership.

The limited partnership agreement further specified that any losses were to be allocated only to Francesco, Roberto, and Paolo as holders of the Class C units of the master partnership, which the Tax Court indicated created circumstances in which holders of other partnership units had no risk of loss.

Another partnership, the GERI Partnership, had been formed as a lower-tier partnership under the master partnership to consolidate certain farming assets held indirectly by the Aquilini family. Despite making nominal capital contributions to the GERI Partnership, Francesco, Roberto, and Paolo obtained all of the Class B units of the GERI Partnership, which partnership units entitled them to the allocation of all of the net losses of the GERI Partnership for each fiscal year of the partnership.

Between 2002 and 2007, Elisa, Francesco, Roberto, and Paolo made discretionary withdrawals of capital from the master partnership.

In 2005, through new lower-tier limited partnerships, the master partnership purchased a 50% interest in the Vancouver Canucks business, comprised of the hockey team and the arena. In 2007, the master partnership agreed to acquire the remaining 50% interest in the Vancouver Canucks business. In order to obtain the capital required for the purchase, two lower-tier partnerships, both ultimately held by the master partnership, sold properties resulting in aggregate taxable capital gains of $47,337,314. Pursuant to the allocation provisions of the lower-tier partnerships, the taxable capital gains were allocated up to the master partnership, and in turn allocated to the holders of the Class G units, being four family trusts established for the benefit of Elisa, Francesco, Roberto, and Paolo, respectively.

In order to reduce the burden of the taxable capital gains to the four family trusts, the Aquilini group entered into an arrangement with JPY Holdings Ltd., a third-party insolvent corporation with an available capital loss carryforward pool balance of $121.2 million. Pursuant to the arrangement and in accordance with the provisions of each of the four family trusts, JPY Holdings Ltd. was made a beneficiary of each of the trusts, and the Aquilini group effectively acquired control of JPY Holdings Ltd. by acquiring 19.5% of new common shares of JPY Holdings Ltd., altering its share capital to make existing common shares redeemable or retractable for $0.01 to $0.03 per common share, and arranging to have two employees of the Aquilini group of companies appointed to the three-person board of directors of JPY Holdings Ltd.

Each of the family trusts elected to distribute to JPY Holdings Ltd. the full amount of the capital gains realized on the sale of the property required to fund the purchase of the 50% interest in the Vancouver Canucks business and allocated to the family trusts. This distribution was made by the issuance of non-interest bearing promissory notes. The four family trusts deducted the full amount of the distribution pursuant to subsection 104(6), thus reducing taxes payable on the taxable capital gain to nil. As a result of the arrangement, JPY Holdings Ltd. was able to offset the capitals gains allocated to it as a beneficiary of the family trusts through the use of its capital loss carryforward balance.

In 2011, the Minister reassessed the taxpayers, under subsection 103(1.1), or in the alternative under subsection 103(1), to reallocate the taxable net income from the master partnership to the unitholders of the partnership on a *pro rata* basis in accordance with their initial capital contributions in 2001 to 2002. Similarly, the Minister reallocated the net losses from the GERI Partnership amongst all of the partners on a *pro rata* basis in accordance with the initial capital contributions of the partners.

In respect of subsection 103(1.1), where two or more members of a partnership do not deal with one another at arm's length and agree to share any income or loss of the partnership or any other amount in respect of any activity of the partnership relevant to the computation of the income of the members, subsection 103(1.1) provides that if the share of any such member is not reasonable in the circumstances (having regard to the capital invested in or work performed for the partnership by the members or such other factors as may be relevant), then the share shall be deemed to be an amount that is reasonable in the circumstances.

The taxpayers argued that although subsection 103(1.1) has no express tax reduction or postponement purpose requirement, as is the case in respect of subsection 103(1), subsection 103(1.1) should be read as requiring the taxpayers to have a tax avoidance purpose in order for the provision to be engaged. According to the taxpayers, each family trust was potentially taxable at the highest marginal rate and thus the master partnership allocation as between the unitholders had no element of tax avoidance.

The Tax Court determined that subsection 103(1.1) does not require a tax reduction or postponement purpose in order to apply. In reaching this conclusion, the Tax Court compared the plain words of subsections 103(1.1) and 103(1), and

noted that if Parliament had intended to import a purpose requirement into subsection 103(1.1), as is the case in respect of subsection 103(1), Parliament would have used express language to do so.

The Tax Court concluded that the members of the partnership were related persons, and that the relevant members for the purposes of subsection 103(1.1) were not Elisa, Francesco, Roberto, and Paolo as the ultimate indirect interest holders in the partnership, but were instead the direct partnership unit-holding entities in the Aquilini group.

The Tax Court went on to consider the meaning of the reasonableness standard in the context of subsection 103(1.1). The Tax Court first considered the ordinary meaning of the word "reasonable", then looked to the *Gabco Ltd.* (68 DTC 5210) decision concerning the predecessor provision to section 67 of the Act in which the Exchequer Court concluded that a reasonableness test does not entail the Minister or a court substituting its own judgement of what is reasonable, but instead requires the Minister or the court to determine how a reasonable businessman would have acted.

The taxpayers argued that the reasonableness test should be applied as if the hypothetical reasonable person were in the shoes of Elisa, Francesco, Roberto, or Paolo, as applicable. In the taxpayers' view, a reasonable person would therefore have been concerned with creditor-proofing against marital breakdowns through the use of complex trust structures, simplifying the organizational structure under a master limited partnership to more readily obtain bank financing, estate planning for the family, the diminished role of Elisa in the family business, and the desire to diminish Elisa's downside risk.

The Minister argued that such personal, non-business factors should not be imported into the reasonableness test unless they would have an effect on the business interests of a reasonable person; otherwise, the Minister maintained, an objective test would in effect be turned into a subjective one.

The Tax Court observed that the reasonableness standard in subsection 103(1.1) is more narrow than is the case in provisions such as section 67 or subsection 69(2), as subsection 103(1.1) enumerates particular circumstances that must be considered, namely, capital invested, work performed in the partnership, and other relevant factors.

Having regard to decisions of the Federal Court of Appeal in *Transalta Corporation* (2012 DTC 5041) and *GlaxoSmithKline Inc.* (2010 DTC 5124), the Tax Court concluded there was no merit to the argument that family circumstances and personal estate planning goals should be taken into account in determining reasonable business considerations.

The Tax Court acknowledged but declined to follow the informal procedure decision in *Paajanen* (2011 DTC 1229), in which the Tax Court had suggested that subsection 103(1.1) required a tax reduction or postponement motivation and had interpreted the words "relevant factor" to allow for the personal reasons of partnership members to be considered reasonable under subsection 103(1.1).

The Tax Court instead concluded that the words "other relevant factors" must be interpreted as part of a class of factors which share characteristics with the other items in the list (being invested capital and work performed for the partnership by the members). In *obiter dictum*, the Tax Court provided an example of subjective factors that could be relevant under the "relevant factors" prong of subsection 103(1.1), such as a case in which a particular member of a partnership brings a special skill or attribute that would affect the income earning capability of the partnership.

The Tax Court then undertook a contextual and purposive analysis of subsection 103(1.1), and traced the object and spirt of subsection 103(1.1) to the foundational principle that taxpayers should be taxed on their own income, and thus partners should include their share of partnership income, whether withdrawn or not.

The Tax Court concluded that the relevant year for considering the reasonableness of the partnership allocation was the year under reassessment and, having regard to the disproportionate returns of the partners relative to their initial capital investment, concluded that no reasonable business person standing in the shoes of the members would accept such a distorted return on the person's invested capital. In particular, the Tax Court took issue with the allocation of the approximately $47 million in capital gains to the four family trusts which had total capital contributions of $1,000 (0.0006%) through the Class G units, and could not be allocated losses, creating a scenario akin to a risk-free investment.

The Tax Court noted that Francesco and Roberto had even testified that it would be silly and would not make sense if a stranger or person over whom they could not exercise control was substituted for the family trusts and would stand to receive such a return.

The Tax Court further considered whether the allocation could be supported by work performed for the partnership by Francesco, Roberto, and Paolo, but took issue with the fact that the roles of the brothers did not change after the partnership reorganization and disagreed that the work performed by the brothers should be considered to have been provided on behalf of other members of the partnership (in which the brothers also each held an interest). The Tax

Court also looked to the fact that the brothers had guaranteed amounts owing to the vendor on the acquisition of the Vancouver Canucks business, a risk that should have been recognized in the partnership allocation. On this basis, the Tax Court concluded that the allocation of losses formula, allocating losses solely to the Class C units held by the three brothers, was unreasonable, and that the brothers should have been entitled to greater income participation in the master partnership.

The Tax Court reached a similar conclusion with respect to the exclusive allocation of partnership losses by the GERI Partnership to Francesco, Roberto, and Paolo based on the *de minimis* amount of the initial capital invested by the brothers. In reaching this conclusion, the Tax Court acknowledged that the brothers did manage the GERI Partnership and did perform work for the GERI Partnership, but stated that it was unreasonable to reward them with partnership losses rather than income.

Despite having concluded that the Minister's reassessments were supported by subsection 103(1.1), the Tax Court went on to consider the application of subsection 103(1) in the circumstances. The Tax Court's analysis in respect of subsection 103(1) turned on the requirement that the principal purpose of the partnership allocation must reasonably be considered to reduce or postpone tax.

In this regard, the taxpayers appear to have argued that there was no reduction in tax of the immediate members of the master partnership, as undistributed income in the family trusts would be taxed at the highest marginal rate. However, the Tax Court noted that the words of subsection 103(1) do not require that there be an overall reduction of taxes of any particular member of the partnership and that the purpose test would be met if there were any reduction or postponement of tax that might otherwise have been or become payable under the Act by any particular person.

The Tax Court therefore reached the conclusion that subsection 103(1) would also apply to support the Minister's reassessments.

The taxpayers have appealed the Tax Court's decision to the Federal Court of Appeal.

— Justin Shoemaker

Not Unreasonable for Minister To Reject Application for Remission Where Tax Court Found That the Facts Did Not Support the Imposition of the Tax Liability

***Internorth Ltd. v. The Minister of National Revenue*, 2019 DTC 5065 (Federal Court)**

This was an application for judicial review of a decision by the Minister's delegate to refuse to recommend to the Governor in Council the remission of the applicant corporation's liability for unremitted source deductions. The taxpayer applied to obtain remission of its assessed unremitted source deduction obligations after the Tax Court decided in the director's liability case for the same source deductions that the applicant did not have any obligation under the *Income Tax Act* (Canada) (the "Act") to withhold and remit in the first place. As with most judicial review applications, the only issue before the Court was to determine whether or not the decision of the Minister's delegate, which in this case focused on the applicant's failure to appeal the underlying assessment to the Tax Court, was reasonable. The Federal Court dismissed the application on the basis that the decision was reasonable, which outcome seems harsh to the applicant corporation having regard to the Tax Court's finding in the director's liability case that there was no statutory basis for the underlying liability against the applicant.

Marvin Marshall was the sole shareholder and director of the applicant, as well as the majority shareholder and director of a related company. The related company was in the construction business and the applicant was established to manage and administer the related company's construction projects. It appears that the related company ran into financial difficulties and ceased being fully compliant with its source deduction obligations. The Canada Revenue Agency ("CRA") audited both companies in 2004 for unremitted source deductions. It seems that there were outstanding assessments against the related company for unremitted source eductions at the time of the audit and, following the audit, the CRA cancelled those assessments. At the same time, it issued new assessments against the applicant on the basis that the applicant was the legal entity that had the source deduction obligations in respect of the employees that were involved in the construction operations. The CRA's assessments against the applicant totaled $472,610 for unremitted source deductions, penalties, and interest.

The applicant objected to the assessments in June 2004 but the CRA ultimately disposed of the objection by confirming the assessments in 2006. The applicant did not appeal the assessments to the Tax Court of Canada, as it had ceased all operations in the face of the Minister's collection actions. All limitation periods in respect of the

applicant's right to appeal the assessments lapsed by February 2007.

In April 2007, having failed to collect the amounts assessed against the applicant, the CRA issued an assessment against Mr. Marshall personally, in his capacity as director of the applicant, for $296,094.96, representing the applicant's assessed unremitted source deductions. Mr. Marshall appealed his director's liability assessment to the Tax Court of Canada and, in 2012, the Tax Court allowed his appeal and vacated the director's liability assessment (see *Marshall*, 2012 DTC 1068). The appeal in *Marshall* turned on the Tax Court's conclusions that:

(i) the applicant itself did not have employees,

(ii) the evidence brought forth by the Crown did not prove that the applicant was paying the related company's employees who were involved in the construction operations, and

(iii) even if the applicant paid salary and wages to the related company's employees, it only routed the funds as the related company's agent.

A remission order is an extraordinary measure through which the Governor in Council may, on recommendation of the Minister of National Revenue, provide full or partial relief from tax, interest, penalty, or other debt where the Governor in Council considers that the collection of the tax is unreasonable, unjust, or that it is otherwise in the public interest to remit the tax or penalty. Two years after the Tax Court's decision in the *Marshall* case, the applicant made its application to the Minister for remission of its source deduction liability. After consideration of the application, the CRA's Remission Committee recommended that the application be denied. The Minister's delegate concurred with the Remission Committee's recommendation and declined to recommend remission to the Governor in Council. The Federal Court's reasons do not detail the specific reasons that the Minister's delegate relied on to reach the decision to not recommend remission. However, from the internal CRA communications that are discussed by the Federal Court, it can be reasonably inferred that the delegate's decision revolved almost entirely around the fact that the applicant did not appeal the source deduction assessments to the Tax Court and that, in the CRA's view, there was no reason why it could not do so. In the view of the Minister's delegate, the applicant's request for remission relief was an indirect attempt to circumvent the appeals process established in the Act.

In the judicial review, the thrust of the applicant's position was that the decision of the Minster's delegate was unreasonable since, in the applicant's view, it did not adequately take into account the Tax Court's finding in the *Marshall* case that the applicant did not have the obligation to make source deductions in the circumstances.

The Federal Court (*per* Diner J) found that the decision of the Minister's delegate was reasonable.

First, the Court found that the Minister's delegate fully considered the *Marshall* decision but found it to be distinct and not dispositive of the applicant's source deduction liability. *Marshall* turned on the fact that the Minister's evidence to support the corporation's obligation to make source deductions was unsatisfactory. The Court agreed with the Minister's delegate's view that the applicant's situation "fundamentally differs" from the director's situation in his Tax Court appeal because the director appealed his assessment within the statutory timeframe. The Court stated that "it is not known what evidence and argument could have been prepared by the Applicant, or whether the TCC would have come to the same conclusion, had [the applicant] challenged its liability at the appropriate time."

Second, the Court found that it was reasonable for the Minister's delegate to base the decision on the fact that the applicant failed to initiate a Tax Court appeal of the underlying assessments and the delegate's assessment that, by recommending the remission order, the Minister would be facilitating the applicant's use of the remission process to "override or bypass" the normal appeal process and indirectly extend the taxpayer's appeal period.

With respect, there are significant gaps in the logic of the Minister's delegate's decision-making, which the Court appears to have endorsed in dismissing the application for judicial review.

First, as to the notion that the *Marshall* case should somehow not be considered dispositive on the question of the applicant's liability for source deductions owing to the quality of the Crown's evidence in that case, the Minister's delegate (and, by implication, the Federal Court), seems to have ignored the fact that the evidentiary issues in the *Marshall* case were only directed at the issue of whether the applicant paid remuneration to the employees. However, the Tax Court also held that, even if the Crown had been able to prove that the applicant paid the remuneration, the Tax Court would have held that the applicant merely "routed" the funds as agent for the related company and would still not have had liability for source deductions. Even though the Tax Court in the *Marshall* case did not (and could not) vacate an assessment for source deductions issued against the applicant, the Tax Court's conclusions on the applicant's liability would be a matter that would arguably be *res judicata* were the same question to arise in another legal proceeding, notwithstanding any frailties of the underlying evidence that led to the finding on that question in the *Marshall* case.

Second, the concern of the Minister's delegate over the applicant's failure to exercise its right to appeal the assessments in the Tax Court seems to be misplaced having regard for the fact that the context is an application for remission. Typically, in an application for a remission of tax, the operating premise is that the tax is correctly assessed and the question of whether it would be "unreasonable, unjust, or contrary to the public interest" to enforce collection of the tax shifts to evaluating the consequences from enforcing payment. Accordingly, it seems unreasonable for the Minister's delegate to have made this issue such an important factor in the decision-making of this application, particularly where there are likely perfectly legitimate reasons for the applicant to have not pursued a Tax Court appeal of its own assessments. For example, the rules of the Tax Court would likely have required the applicant to have engaged counsel to conduct an appeal in the Tax Court, in contrast to the situation of the applicant's director, who was allowed under the rules of the Tax Court to represent himself in his appeal of the director's liability assessment.

Moreover, under the circumstances, this was clearly not a situation where the applicant was seeking to use the remission process as a way to override or by-pass the regular appeal process. That may have been the case if the applicant had abandoned the Tax Court appeal process and initiated the remission application in the absence of the *Marshall* decision. However, the fact that the Tax Court issued a decision in the *Marshall* case which held that the applicant was not liable to make and remit the assessed source deductions in the circumstances changes everything. The *Marshall* decision created a situation where the applicant had been assessed by the Minister for tax that was subsequently found to be without statutory authorization in a judicial proceeding. On its face, this would seem to be clearly a situation where it would be "unreasonable, unjust, or contrary to public interest" to enforce collection of the assessed tax and, on the facts, not a situation where the applicant was seeking to circumvent the regular appeal process.

— *Pierre-Gabriel Grégoire, Summer Student*

Crown Motion To Strike a Credit Union's Judicial Review Application Over Minister's Decision on Its Tax Status Denied

***Westminster Savings Credit Union v. Canada (Attorney General)*, 2019 DTC 5047 (Federal Court)**

This was a motion by the Minister of National Revenue to strike the taxpayer's application for judicial review on the basis that the Federal Court lacked jurisdiction to decide the matter raised by the application. The application at issue was filed by Westminster Savings Credit Union ("Westminster") to have the Federal Court review the Minister's decision reflected in a letter sent by the Canada Revenue Agency following an audit of the taxpayer which stated that Westminster was not a "credit union" under section 123 of the *Excise Tax Act* (Canada) (the "Act") for the years under audit (i.e., 2013 to 2016). Such decision had the effect of disqualifying Westminster from the tax benefit of being a "credit union", namely the GST exemption for all supplies of goods and services between two credit unions pursuant to subsection 150(6) of the Act. However, for a "reason that remains a mystery", the CRA's decision was not accompanied by any reassessment for unremitted GST.

The Crown's main position on the motion, relying on *Addison & Leyen Ltd.* (2007 DTC 5365 (SCC)) and *JP Morgan Asset Management (Canada) Inc.* (2014 DTC 5001 (FCA)), was that the issue raised by the taxpayer's application was one that would be inappropriate for the Federal Court to consider since it involved the determination of a tax liability under the Act, which is a matter within the exclusive jurisdiction of the Tax Court of Canada. The Attorney General also claimed that, strictly speaking, the decision in the letter was not a "decision" that affected Westminster's legal rights or imposed any legal obligations; since it was not such a decision, there was nothing for a court to review.

Westminster's position was that, even though the decision in the letter was a determination that affected its tax liability, it was not accompanied by a reassessment that the taxpayer could appeal to the Tax Court. Therefore, a finding that the Tax Court had exclusive jurisdiction to consider the Minister's decision in the letter would mean that Westminster could only have a legal right to contest the decision when and if a formal notice of reassessment was issued in the future. Citing the decision *David Suzuki Foundation v. Canada (Health)* (2017 FC 682), Westminster argued that, since there is no certainty of an adequate alternative remedy to a judicial review of the Minister's decision in this instance, this was not an appropriate case for the Federal Court to grant the Crown's motion to strike.

The Federal Court (*per* Roy J) reviewed the threshold to allow motions to strike applications for judicial review. The Court interpreted the Federal Court of Appeal's decision in *Parmacia Inc. v. Canada (Minister of National Health & Welfare)* ([1995] 1. F.C. 588) as one that allowed motions to strike a judicial review application only in "very exceptional circumstances". In the Court's opinion, "it suffices that there be a chance that the applicant might succeed for the matter to be allowed to proceed". Using the words of Stratas JA in *JP Morgan* (para 47), the Court sets the bar

even higher: "[t]here must be a 'show stopper' or a 'knockout punch' — an obvious, fatal flaw striking at the root of this Court's power to entertain the application". In this case, the Crown did not meet this stringent test. In particular, there was no assessment issued on which the Crown could rely to establish the exclusive jurisdiction of the Tax Court of Canada. Furthermore, the content of the letter sent by the CRA notifying the decision to Westminster was not even available for review by the Court, which triggered this statement by the Court: "How can a court decide that a decision is not a decision if it does not have the decision?" In light of all these factors, the judge concluded that it was not "plain and obvious" that Westminster's application for judicial review could not succeed.

In the result, the Court held that the threshold for a motion to strike was not met by the Crown and concluded that the Federal Court was the proper forum for a decision made by the CRA in the circumstances.

The Federal Court's decision on this motion helps define the jurisdiction and role of the Federal Court over tax matters. It serves as an important reminder that this Court has a residual jurisdiction over many issues outside of assessments and tax appeals. Also, the CRA may want to consider what kind of "decisions" it issues and the implications of those decisions, including whether their release to the taxpayer could cause the decision to be the subject of an application for judicial review.

— *Anthony Sylvain and Nicolas Désy*

RECENT CASES

Appeal from assessment for shareholder benefits allowed

The taxpayer, who was one of two shareholders of a company, owned a building. She lived in part of that building and leased the remainder of the building to the company to use as its business premises for a five-year period, with an option to lease for a further five years. The taxpayer undertook significant structural renovations to the building and the company paid for the cost of those renovations. A reassessment was issued by the Minister on the basis that the taxpayer had received a shareholder benefit under subsection 15(1) of the *Income Tax Act*, and the taxpayer appealed from such reassessment.

The appeal was allowed. The Tax Court of Canada reviewed both the jurisprudence on shareholder benefits and a related technical interpretation issued by the Canada Revenue Agency. That technical interpretation indicated, with respect to shareholder benefits, that where an improvement is made by a corporation to a building which it rents from its shareholder, and such an improvement vests in the shareholder/owner of that building, a benefit is considered to have been conferred on that owner/shareholder under section 15(1). However, the amount of the benefit is considered to be the present value of the amount, if any, by which the addition or improvement increases the value of the building to the shareholder at the time the building reverts to that owner/shareholder. The Tax Court held that while such technical interpretation was not binding on the courts, it was instructive and was also consistent with the appellate jurisprudence on the question. The Tax Court concluded that the question of whether an improvement increases the value of the landlord's reversionary interest will depend on the terms and conditions of the lease and that it was possible, if such lease was a long-term lease, that no benefit would be conferred at all. The Court noted that, at the time of the hearing, the appellant's business was still in possession of the leased premises and that it was the intention of the parties that it would remain so for a much longer period of time. The Tax Court concluded that the residual value of the leasehold improvements could not be quantified until such time as they reverted back to the appellant and that there was consequently no subsection 15(1) shareholder benefit received by the appellant in connection with the leasehold improvements during the relevant taxation years. The appeal from the assessment of such benefit was therefore allowed.

Wise v. The Queen

2019 DTC 1138

Pursuit of appeals by individual members of limited partnership held not to be abuse of process

The appellants were partners of a limited partnership to whom losses were allocated for the 2000 and 2001 taxation years. In 2006, the Minister made a determination that such losses were nil and the partnership and each partnership member appealed from that determination, arguing that it was statute-barred. That appeal was subsequently discontinued by the partnership, and the Minister brought a successful motion before the Tax Court, seeking to have

the Notices of Appeal of the individual appellants struck. Those individual appellants appealed from that decision to the Federal Court of Appeal.

The appeals were allowed. The Federal Court of Appeal held first that the only issue in the appeal was whether the Notices of Appeal of the individual appellants should have been struck on the basis that they were attempting to re-litigate the issue of whether the determinations made by the Minister were statute-barred as having being made after the expiration of the statutory three-year period. The appellate Court reviewed the statutory provisions governing such determinations and appellate jurisprudence on the issue of abuse of process by re-litigation. It concluded that the Tax Court was incorrect in holding that the discontinuance of the appeal at the partnership level meant that any issues raised in the appeal of the individual appellants would be "deemed to have been adjudicated and dismissed by the Court at the partnership level". In the appellate Court's view, since such appeal had been discontinued, there had been no judicial determination of the issue of whether the determinations were statute-barred, and it was not an abuse of process for the individual appellants to raise such issue in their appeals.

Tedesco v. The Queen

2019 DTC 5117

Minister entitled to adduce in evidence documents obtained pursuant to search warrant

During the course of the taxpayers' appeals to the Tax Court of Canada, the Minister sought to adduce in evidence certain documents which had been obtained pursuant to a search warrant obtained under section 487 of the *Criminal Code* (the "Documents"). The taxpayers objected to the production of the Documents on the grounds that such production would infringe on their Charter rights under subsection 24(2), as well as their Charter rights to life, liberty, and security of the person under section 7 and to freedom from abusive seizure under section 8. The taxpayers had not objected to the original issuance of the search warrant in question, and in support of their position were relying in part on *R. v. Jarvis* [2002]3 SCR 757.

The taxpayers' objections were dismissed. *R. v. Jarvis* draws a distinction between the CRA's powers under an audit and its powers under a criminal investigation. According to the *Jarvis* case, however, a taxpayer's privacy rights are very restricted with respect to: (a) documentation required to be maintained by that taxpayer; and (b) documents required to be produced by that taxpayer during an audit. Also, the Documents in this case were relevant to the taxpayers' tax transactions, and the taxpayers did not produce any jurisprudence establishing that they had any reasonable expectation of privacy with respect to them. The Minister was therefore entitled to adduce the Documents in evidence.

SPE Valeur Assurable Inc. et al. v. The Queen

2019 DTC 1129

Court-ordered priming charges under CCAA having priority over statutory deemed trusts for source deductions

A Court order was issued under sections 11.2, 11.51, and 11.52 of the *Companies' Creditors Arrangement Act* ("CCAA"), providing for "priming charges" with respect to claims of the court-appointed Monitor, the interim lender and the directors of a company. The effect of such priming charges, under the provisions of the CCAA, was to provide those named creditors with priority over the claim of any secured creditor of the company. The Crown then applied to vary such priming charges on the grounds that they failed to recognize the Crown's legislative priority with respect to unremitted source deductions, arguing that such claims had priority over all other creditors of a debtor, notwithstanding any other federal statute. The chambers judge dismissed the Crown's application and it appealed from that decision to the Alberta Court of Appeal.

The appeal was dismissed. A majority of the appellate Court (Mr. Justice Wakeling in dissent) held that the Crown's interest was that of a secured creditor and that it did not have a proprietary interest in the debtor's property. That majority then considered whether the Crown's interest could be subordinated to the priming provisions in the CCAA and concluded that it could. In the majority's view, the position taken by the Crown undermined both the objective and the remedial purpose of the CCAA. It held that the priming charges allowed the debtor to continue to operate its business and to raise sufficient funds to satisfy both the priming charges and the Crown's claim. The majority concluded that when the two statutes were read harmoniously, as was done by the chambers judge, the objectives of both statutes could be achieved and that the relevant sections of the CCAA gave the Court the ability to grant priority

to charges necessary for restructuring ahead of the Crown's security interest arising out of statutory deemed trusts under the *Income Tax Act*.

The Queen v. Canada North Group Inc.

2019 DTC 5111

Motion by non-party to obtain access to materials and information provided on discovery dismissed

The corporate taxpayer appealed from a tax assessment issued with respect to its transfer pricing arrangements. Examinations for discovery were held, after which the appellant taxpayer and the Minister reached a settlement agreement. Seven individuals who were not parties to the tax appeal, but who had brought a class action against the corporate taxpayer in the United States, applied to the Tax Court for an order permitting them to have access to documents provided by that corporate taxpayer in the course of discovery.

The motion was dismissed. The Tax Court of Canada held that the third parties had standing to bring the motion and that the Court had jurisdiction to hear it, but that the outcome would be governed by common law, as the *Tax Court of Canada Rules* did not deal with the use of discovery evidence outside of the appeal in which it was provided. The Court reviewed the relevant jurisprudence, including Supreme Court of Canada jurisprudence, before concluding that the motion could not be allowed. The Court held that the applicants were required to demonstrate, on a balance of probabilities, the existence of a public interest of greater weight than the values, especially privacy and the efficient conduct of civil litigation, that the implied undertaking of confidentiality with respect to disclosures on discovery was designed to protect. As well, it was necessary that the applicants show that the interests of justice outweighed any prejudice that would result to the party who disclosed the evidence during discovery. The Court concluded that the applicants had not met their burden and that, in fact, the granting of the motion would defeat the objective of the implied undertaking of confidentiality and would create a disincentive to disclose documents or answer certain questions candidly. Such result would be contrary to the proper administration of justice and the objective of full disclosure on discovery. The motion was therefore dismissed, with costs to the appellant.

Silver Wheaton Corp. v. The Queen

2019 DTC 1131

Appeal denied where carryover period for charitable donation deduction expired

In June 2008, the corporate appellant granted a covenant and other legal interests with respect to a parcel of ecologically-sensitive land, with certificates documenting the fair market value of that land then issued by the federal government in 2009. In 2014, the corporate appellant claimed a deduction in respect of that donation. The deduction was denied by the Minister on the basis that, as the donation had been made in 2008, the permitted five-year carryforward period for such deduction had expired before 2014. The corporation appealed, claiming that the donation had not been effective until 2009, when the requisite certificates were issued.

The appeal was dismissed. The Tax Court held that the relevant statutory provisions governing charitable donations of ecologically-sensitive land separated the making of the gift of property, and the timing thereof, from the determination of the fair market value of that property and the issuance of the necessary certificates. In the Court's view, those provisions also indicated that gifts of ecologically sensitive land are made when such gifts are legally effected and, in the circumstances, such gift was made by the corporate appellant in June of 2008. Deduction in respect of that gift could therefore only be made in the appellant's 2008 through 2013 taxation years. The Minister's denial of such deduction for 2014 was correct, and the appeal was accordingly dismissed, with costs to the respondent Minister.

Yellow Point Lodge Ltd. v. The Queen

2019 DTC 1130

Refunds arising from disability tax credits held to be "property of the bankrupt" for purposes of section 67 of the BIA

The bankrupt, who left the workforce following a stroke in July 2015, filed an assignment in bankruptcy in June 2016. She applied for the federal disability tax credit for the 2014, 2015, and 2016 taxation years and, in September 2018, she received tax refunds representing that credit for those years, plus interest. The Trustee in Bankruptcy took the position that the tax refunds arising from that credit formed part of the bankrupt's estate. The bankrupt disagreed, and the Trustee applied to the Court for direction as to the disposition of those funds.

An order was issued providing that a portion of the amount in issue constituted property of the bankrupt. The Registrar in Bankruptcy held first that the refunds generated with respect to the 2014 and 2015 taxation years, which pre-dated the bankruptcy, were not included in the property of the bankrupt. The only amount in issue, therefore, was the tax refund received with respect to the 2016 tax year. The Registrar noted that section 67 of the *Bankruptcy and Insolvency Act* was clear in providing that post-assignment refunds generated in the calendar (or fiscal) year of bankruptcy are included in "property of the bankrupt." The amount in issue for 2016 was $945.42, but it was not clear how much of that amount pertained to the portion of the year which pre-dated the assignment in bankruptcy. The Registrar therefore ordered the Trustee to clarify that allocation, in correspondance with the Court, with copies to the bankrupt. There was no order as to costs.

Deveau (Re)

2019 DTC 5112

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