**Tax Notes**

Report No.: 674

**Date:** March, 2019

# A TALE OF MISREPRESENTED MISREPRESENTATION

*- –Jacques Roberge, Wolters Kluwer Canada Limited*

Prima Properties (92) Ltd. ("Prima"), the appellant in a recent Tax Court of Canada decision,[1] was involved in real estate rental and development and had been leasing a building that operated as a hotel; this, naturally, was a taxable supply and the appellant collected and remitted the GST on the supply and claimed input tax credits ("ITCs") on its operating costs. However, in 2009 the appellant began leasing the property (the "Property") to PHS Community Housing Services Society ("PHS"), a non-profit organization that operates housing projects and support programs targeting the homeless.

Neither the appellant nor the firm that handled its accounting considered any possible tax changes in the nature of the new lease. Both the former and new leases were perceived as "commercial leases" and the appellant continued to collect and remit the GST on the lease payments from the new tenant as well as claiming ITCs on operating costs as if no change had occurred. The appellant's accountant testified that he considered that both leases offered short-term accommodation.

However, the Canada Revenue Agency ("CRA") saw the matter differently following an audit completed in 2016, almost seven years after the change in tenants. The CRA determined that the lease to PHS was the supply of residential property—an exempt supply on which GST should not have been collected and in relation to which no ITCs were allowed. More importantly, when real property previously used in commercial activities (which excludes exempt supplies) stops being used to make taxable supplies and begins to be used for exempt purposes, the law provides for a "deemed sale" of the property and the owner must declare the deemed sale in its GST return and pay the tax on the fair market value of the property.

These "change of use" provisions are outlined in section 206 of the *Excise Tax Act* ("ETA") and ensure the GST content is included in the value of the building. Since ITCs were claimed to recover the GST costs paid on the purchase or construction of the building, the change of use provisions effectively "reinclude" the GST in the value to recognize the fact that a GST registrant cannot recover as ITCs the GST embedded in an asset used to make exempt supplies.

Obviously, this was not done by Prima, and though the four-year limit to assess had passed, the CRA assessed the appellant on the basis that the deemed sale transaction was not statute-barred, not reported in the taxpayer's GST return, and the related tax was not paid. This resulted in an assessment of $892,350. Prima appealed the assessment to the Tax Court of Canada.

## STATUTE-BARRED TRANSACTIONS

It is important to remember that tax legislation does not generally follow the rules of criminal or civil legislation. As a general rule, tax assessments, including sales tax assessments, are presumed to be valid. In other words, taxpayers are presumed guilty until they demonstrate their innocence! However, this is not true in the case of statute-barred assessments. When the Minister assesses a taxpayer beyond the normal four-year period, the onus of proving the assessment reverts to the Minister. Accordingly, the CRA had to justify the assessment of Prima. Furthermore, these assessments are also conditional on the Minister proving (a) misrepresentation by the taxpayer, normally in its tax returns, and (b) that the taxpayer was negligent or careless in making the misrepresentation.

The following excerpt from the Tax Court's decision outlines the CRA's position:

> [22] The Respondent alleges that the Appellant's failure to report the deemed sale of the Property in its return for the period ending July 31, 2010 was a misrepresentation that occurred as a result of the Appellant's failure to take reasonable care. The Respondent says that Mr. Tehrani [president of Prima's parent company and the Appellant's witness] ought to have specifically pointed out to Mr. Marzbani [Prima's accountant] that PHS was going to put the Property to a different use than Sunset [the previous tenant] had under the Sunset Lease and says that Mr. Tehrani should have questioned Mr. Marzbani about possible GST consequences arising from the different use. Mr. Tehrani's failure to do so, says the Respondent, was conduct that fell short of the conduct of a wise and prudent person in similar circumstances. The Respondent argues that even where a taxpayer relies on an accountant or other professional adviser, his or her own prudence or diligence must be established.
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> [23] The Respondent's counsel asserts that Mr. Tehrani's failure to do anything other than provide the PHS Lease and related documents to Mr. Marzbani was conduct that fell short of that of a wise and prudent person in comparable circumstances, and characterized Mr. Tehrani's conduct as "lackadaisical".
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> [24] It was argued that Mr. Tehrani ought to have specifically asked Mr. Marzbani whether the difference in permitted use of the Property between the Sunset Lease and the PHS Lease would have any tax consequences. Counsel said that while this may have been an innocent mistake on Mr. Tehrani's part, even honest mistakes can lead to a finding of negligence or carelessness under subsection 298(4) of the Act.
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> [25] Finally counsel asserted that if the Court allowed this appeal, it would be encouraging "taxpayers to hire a professional and then keep silent in the hope that something will slip by their advisor's attention."

It is important to note that the CRA's position relied on the assumption that the supply of the Property under the PHS lease was exempt pursuant to section 6.11 of Part I of Schedule V to the ETA. Section 6.11 exempts a supply of property that is a residential complex to a person who uses or intends to use the property to make exempt supplies. The making of exempt supplies is excluded from the definition of "commercial activity" set out in subsection 123(1) of the ETA.

The CRA argued that section 6.11 applied because the accommodation offered to the homeless by PHS was exempt pursuant to section 6(a) of Part I of Schedule V to the Act (the "Rental Exemption"). That provision reads as follows:

> 6. A supply
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> (*a*) of a residential complex or a residential unit in a residential complex by way of lease, licence or similar arrangement for the purpose of its occupancy as a place of residence or lodging by an individual, where the period throughout which <u>continuous occupancy of the complex or unit is given to the same individual under the arrangement is at least one month</u>; [Emphasis added.]

In this respect, it is important to note that the CRA argued that:

> [21] The Respondent says that the leases or licenses (or other similar arrangements) under which PHS gave possession of the accommodation to the homeless individuals <u>can be assumed to have been for periods of at least one month</u> on the basis of the Operations Management Plan provided by PHS to the Appellant, and the reference in that document to the operation of the Property as a "supportive long-term housing project". The PHS Lease stipulated that PHS was to conduct its business and activities on the Property in accordance with that operational plan. <u>Counsel also submitted that there was no evidence that the PHS used the Property to make short-term rentals.</u> [Emphasis added.]

In retrospect, it seems that this assumption, and the lack of corroborating evidence, proved fatal to the CRA's case. Indeed, the judge noted the CRA's position and that of the appellant, who was under the impression that the facility was to be used by PHS to provide transitory housing until more permanent accommodation could be found for the occupants.

Accordingly, observing that the CRA did not call anyone from PHS to clarify the nature of PHS's operations, the judge stated it was not clear how or for what periods of occupancy the units in the Property were provided or intended to be provided by PHS to its clients. Accordingly, the Court concluded:

> [32] In the absence of such evidence, I am unable to conclude that the Respondent has shown that the supplies or intended supplies of the Property by PHS were exempt and that subsection 206(4) operated to

> deem the Appellant to have made a supply of the Property by way of sale during its reporting period ending July 31, 2010 and to have collected GST on the deemed sale. It follows that the Respondent has not shown that the Appellant made a misrepresentation on the return filed for that reporting period.

In other words, the Minister "misrepresented" its misrepresentation rationale and, on a balance of probabilities, the Minister did not prove his case as required in statute-barred assessments. While the Court's conclusion that misrepresentation had not been established was more than sufficient for the appeal to be allowed to the benefit of the appellant, the *Prima* decision contained more bad news for the CRA, which should prove interesting to tax practitioners.

## ON NEGLIGENT MISREPRESENTATION

As mentioned previously, to validate an assessment beyond the normal four-year limitation period, the Minister must not only prove misrepresentation by the taxpayer but also that the taxpayer was wilfully negligent or careless in making the misrepresentation. Interestingly, in the *Prima* case, while the fate of the appeal was sealed by the Court's conclusion that the CRA did not conclusively prove there was any misrepresentation, the Court felt compelled to add that even if it had agreed that the failure to declare the "deemed sale" constituted misrepresentation, it would have nevertheless allowed the appeal on the basis that the taxpayer was neither negligent nor careless in making such misrepresentation.

The Court pointed out firstly that the appellant or its accountant did not notice a change in the use of the property. In their minds one commercial lease was replaced by another. The judge indicated that it seemed reasonable to him that Mr. Tehrani saw no material difference between the two leases.

Secondly, and more importantly, the Court stated:

> [37] Second, the potential significance, for GST purposes, of the fact that PHS's intended use of the Property differed from that of Sunset <u>would only have been apparent to a person with extensive knowledge of Part IX of the Act, and familiarity with the change of use provisions in subsection 206(4) of the Act</u>. Here, Mr. Tehrani had neither, and <u>I do not believe it reasonable to expect a lay business person to be knowledgeable about such matters</u>. The deeming provision in subsection 206(4), as well as the relevant section of Schedule V are complex provisions containing highly technical language <u>and are a challenge for lawyers and accountants to understand, let alone someone without professional tax education and experience</u>. [Emphasis added.]
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> [38] Counsel for the Respondent was unable to explain how Mr. Tehrani should have been aware in some general way that a change in how the Property was used by its tenants would impact on its GST obligations without him having knowledge of the issue or provisions beforehand. Mr. Tehrani said he saw no difference in the Leases from the Appellant's point of view, and I accept that it was a reasonable conclusion for him to draw, since the Appellant was leasing the Property to PHS just as it had done with Sunset. Mr. Tehrani could not have been expected to draw the difference to his accountant's attention because he had no reason to believe it was significant.

While well explained by the judge, this is a somewhat surprising conclusion considering that ignorance of the law is usually not an acceptable excuse. Just as not having seen the stop sign will generally not allow a driver to escape a fine if caught, it could be argued that, as a GST registrant, the taxpayer and its accountant should not evade the consequences of failing to declare a deemed sale and pay the related tax simply because of a lack of awareness of section 206 of the ETA.

In fact, and this makes for very interesting reading, the judge explained at length how the facts of this case were not analogous to the many cases[2] in which the court found that the taxpayers knew or ought to have known that amounts or items omitted from their tax returns should have been included, or at least should have led them to question their accountants about the matter.

In addition, the judge even appreciated that it could be inferred that the taxpayer's accountant was careless or negligent in failing to appreciate the GST consequences of PHS's intended use of the Property. However, this would not be sufficient considering the decision of the Tax Court in *Aridi v. The Queen*, 2013 DTC 1189, where Hogan J. found that it was not sufficient to show negligence on the part of the taxpayer's professional advisor in making the misrepresentation, and that the taxpayer must also be shown to have acted in a negligent or careless manner.

## CONCLUSION

The tax authorities have often taken the position that any omission of sales or deemed sales is a negligent misrepresentation, resulting in costly assessments often made many years after the fact (with compounding penalties and interest). This case may offer a new line of defense where the technical issues are complex for a layman to appreciate, as there may not be misrepresentation if the knowledge required can only be that expected from a tax professional. Not being aware of the stop sign might be a valid excuse—but only if it is hidden or obscured! Naturally, it will be interesting to see if the CRA will challenge this decision. Again, only time will tell. At any rate, the *Prima* decision offers a good review of the concept of misrepresentation as applied to assessments made beyond the normal four-year period.

# CURRENT ITEMS OF INTEREST

## INDIVIDUAL TRAVEL EXPENSES UPDATE

The CRA has released the meal rates applicable to the simplified method of computing travel costs for the moving expense deduction, medical expense tax credit, and northern residents deduction. The flat rates remain at $17/meal, to a maximum of $51/day (sales tax included) per person, for the 2018 taxation year (unchanged from prior years).

## TAX RELIEF FOR LIVESTOCK PRODUCERS

Agriculture and Agri-Food Canada published its final list of designated regions in which livestock producers are eligible for the livestock tax deferral provision in 2018. New regions, which have been affected by drought, flooding, or excess moisture, have been added to the list. Livestock farmers in these regions can defer a portion of their proceeds from selling their breeding livestock in 2018 until 2019. This deduction is provided by subsection 80.3(1), and the prescribed regions will eventually be prescribed in Regulation 7305.01(1).

## 2018 TRAVEL RATES FOR INDIVIDUALS

For claiming travel costs for the purposes of the northern residents' deduction, moving expense deduction, and medical expense tax credit, a taxpayer can use the simplified method to compute these expenses. The simplified claim is computed on a per-kilometre basis, and the amount per kilometre depends on the province or territory. The rates for using the simplified method for the 2018 taxation year are provided below.

| *Province or Territory* | *Cents per kilometre for taxation year* | |
|---|---|---|
| | *2017* | *2018* |
| Alberta | 45.0 | 48.5 |
| British Columbia | 50.0 | 53.0 |
| Manitoba | 47.0 | 50.5 |
| New Brunswick | 50.5 | 53.5 |
| Newfoundland and Labrador | 54.0 | 57.5 |
| Northwest Territories | 59.5 | 63.5 |
| Nova Scotia | 50.0 | 52.5 |
| Nunavut | 58.5 | 59.0 |
| Ontario | 55.5 | 58.5 |
| Prince Edward Island | 49.0 | 52.0 |
| Quebec | 50.5 | 53.0 |
| Saskatchewan | 46.0 | 50.0 |
| Yukon | 60.5 | 65.0 |

The 2018 rates for the simplified method of claiming meal expenses are not yet available, but are expected in the coming weeks. From 2006 to 2017, the flat rates were $17 per meal to a maximum of $51 per day.

## FOCUS ON CURRENT CASES

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

### CAN A BUSINESS BE CARRIED ON "IN" A PROPERTY THAT IS A LICENSE TO EXPLOIT NATURAL RESOURCES AND THE LICENSEE HAS NOT COMMENCED EXERCISING THE LICENSED RIGHT?

***Alta Energy Luxembourg S.A.R.L. v. The Queen*, 2018 DTC 1120 (Tax Court of Canada)**

This case deals with the treatment of capital gains realized by a non-resident of Canada from the sale of shares of a Canadian corporation that principally derived their value from Canadian resource properties.

As with many of Canada's tax treaties, Canada is precluded from imposing tax on the gain arising on the sale of shares of a Canadian-resident corporation by a person who is a resident of the other treaty country unless the shares *principally* derive their value from real or immovable property in Canada. However, the taxpayer in this case was a resident of Luxembourg and, under Article 13 of the Canada-Luxembourg tax treaty, Canada is only entitled to impose tax on gains realized on these types of shares if the shares are part of a block that is a "substantial interest" in the corporation (defined in the treaty as 10% or more of any class of shares) and, for purposes of evaluating how the shares derive their value, property "in which the business of the corporation was carried on" is not to be treated as immovable property. As discussed below, the main interpretative issue raised by this case in connection with the applicable tax treaty was whether the vast majority of the Canadian corporation's resource properties—namely, licenses to exploit natural resources in Canada—were properties in which the corporation carried on its business.

The taxpayer, Alta Energy Luxembourg S.A.R.L., was a Luxembourg-resident corporation that realized a gain on the arm's length sale of its wholly-owned Canadian subsidiary, Alberta Energy Partners Ltd., for proceeds of almost $680 million in 2013. The Canadian subsidiary carried on the business of exploring and developing shale oil and gas in Alberta and was formed in 2011 as a wholly-owned subsidiary of a US limited liability corporation, Alta Energy Partners LLC. This new corporation was a co-venture between an investment vehicle in the Blackstone group of companies and a US-based energy company that had expertise in exploring and developing shale oil and gas assets in the United States.

In 2012, the co-venturers decided to change the structure of their Canadian-based investment to avoid potential adverse US income tax consequences inherent in the original structure. Under the restructuring, the co-venturers established a Canadian partnership and had the partnership create the Luxembourg-resident taxpayer for the purpose of acquiring the shares of the Canadian subsidiary from its original US parent corporation. The shares of the Canadian subsidiary were transferred to the taxpayer and no Canadian income tax was realized on the disposition by the original parent, as the parties took the position that the fair market value of the transferred shares did not exceed their adjusted cost base on the date of the transfer (which the Canada Revenue Agency appears to have accepted).

Leading up to the arm's length sale in 2013, the Canadian subsidiary's operations appear to have been focused on:

(i) acquiring licenses to develop and extract shale oil and natural gas from the Kaybob area of Northern Alberta and/or evaluating various opportunities to do so,
(ii) drilling preliminary wells to confirm the economic viability of extracting oil or natural gas pursuant to the acquired licenses, and
(iii) developing relationships and/or arrangements for the future transportation and storage of the oil and natural gas to be extracted pursuant to the licenses.

It also seems that the Canadian subsidiary earned some revenues during 2013 from the extraction of shale oil as a non-operator through its purchase of a working interest of extraction rights granted to a third party.

The shares of the Canadian subsidiary were clearly "taxable Canadian property" to the Luxembourg-resident taxpayer for purposes of the *Income Tax Act* (Canada) (the "Act"). Consequently, the taxpayer's gain on the 2013 disposition would be subject to tax under the Act unless the gain was exempt by virtue of the Canada-Luxembourg tax treaty, which (as noted above) allows Canada to tax the gain if the shares derived their value primarily from immovable property situated in Canada. Here, the value of the Canadian subsidiary was largely derived from its licenses to explore, drill, and extract oil and/or natural gas. The taxpayer relied on the special interpretative rule in Canada's tax treaty with Luxembourg concerning immovable property used in the corporation's business to argue that the value of the Canadian subsidiary's shares were not derived primarily from immovable property situated in Canada.

The Minister's position on the scope of the special interpretative rule placed emphasis on the grammar used in the relevant paragraph in Article 13 of the treaty. More specifically, the paragraph directs that immovable property "in which" the corporation's business was carried on be excluded from the value computation. In the Minister's view, the use of the phrasing "in which" means that the exclusionary language should not cover property that is not physically capable of being occupied, such as the Canadian subsidiary's licenses to exploit oil and natural gas in Alberta. However, even accepting that the licenses can be property "in which" the Canadian subsidiary carries on its business, the Minister's position was that the licenses must be examined on a license-by-license basis and a particular license can only be excluded from the value determination if the Canadian subsidiary has already begun to exercise its rights under the license and is not holding it for future exploitation.

The Tax Court (*per* Hogan J) considered the purpose of this exclusion in two ways: by considering the intentions of the treaty negotiators to promote certain types of investment, and within the context of sustainable development of resource properties.

The Court analyzed the exclusion by looking at the intentions of the treaty negotiators. One source that assisted the Court in its analysis was a government official's position paper from 1991, which provided that "immovable property (e.g., real estate) that is not used or held for use in the company's business but is held as an investment for capital gain is not excluded property". The exclusion under the immovable property definition for property where a business is conducted, which appears in approximately half of Canada's tax treaties, was presumably included purposively by the negotiators with knowledge of each other's domestic tax regimes. In this regard, the Court held that, in the case of the Canada-Luxembourg tax treaty, the exclusion was intended to encourage investment by residents of one country in immovable property of the other country to be used in a company's business.

The Court also looked at the provision in the context of resource properties, including the best practices of corporations undertaking to exploit these resources and how the exclusion was intended to promote effective risk-taking for these types of investments. To qualify for the exclusion, the corporation investing in oil and gas reserves must be actively engaged in the exploration of the reserve, and the reserve must be actively exploited or kept for future exploitation by the owner. The working interests in these types of investments cannot be developed and fully exploited simultaneously due to the time and cost of demonstrating that a certain asset will be profitable, so an interpretation that property "in which" the business is carried on must be limited to physical property, as the Minister proposed, is too narrow.

The Court also recognized that a broader interpretation of the exclusion, rather than the Minister's license-by-license approach, encourages sustainable resource development. A parallel was drawn in the decision to the forestry industry: foresters must leave some sections of timberland unharvested to allow the trees to reach their full potential, but these uncut regions of land remain a valuable asset that the company can use to finance its other operations. A sufficient number of licenses must be acquired to secure access to a larger area of the resource deposit to maximize chances of economic success. Consistent with prior leading Canadian jurisprudence on treaty interpretation, the Court held the tax treaty should be interpreted in a way that encourages industry best practices of resource development by allowing the exclusion to apply broadly. This also ensures that investors receive the benefit of the exclusion when their risk is the highest, and that a working interest can be set aside for future development if a corporation otherwise carries on a resource business.

As an alternative argument, the Minister relied on the GAAR to disallow the taxpayer from receiving the benefit of the exclusion in Article 13. The Court evaluated this position and concluded that there was no abuse or misuse of the tax treaty by the taxpayer when they restructured the entities involved in this deal. There was significant investment by the taxpayer to exploit the licenses in the Kaybob region and to de-risk their investment, and the transaction was not an abusive application of the treaty exclusion.

For these reasons, the Court held that the immovable property exclusion should apply broadly for the sale of shares in a Canadian corporation by a foreign resident where the corporation derives a substantial part of its value through investments and exploitation of resource licenses. The purposive and contextual analysis conducted by the Court that allowed them to come to this conclusion could be contrasted with the more literal approach the Court would take when interpreting provisions in the Act. If this analysis was solely being conducted within the confines of the Act, a similar provision stating that carrying on business "in" a property would not likely catch the exploitation of licenses for resource properties. Tax treaties negotiated by two parties can account for these types of interests, and this case highlights that there is a different method of approaching interpretation in the treaty context that can lead to broader application.

—*Sarah Ferguson, Articling Student*

## ECE TREATMENT FOR STOCK OPTION SURRENDER PAYMENTS MADE IN CONTEXT OF PRE-2017 TAKEOVERS

***Devon Canada Corporation v. The Queen*, 2018 DTC 1117 (Tax Court of Canada)**

In this case, the Tax Court considered the deductibility of cash payments made in a takeover context by the target corporation to individuals for the surrender of their rights under the target's employee stock option plan. The substantive issue in the case was whether the payments were eligible capital expenditures for the target, such that the expenses could be included in the target's cumulative eligible capital expenditure pool for purposes of the deduction under former paragraph 20(1)(b) of the *Income Tax Act* (Canada) (the "Act"). (As relevant transactions took place prior to 2017, the eligible capital property regime in section 14 of the Act was still in force for the taxation years that were at issue in the appeal.)

The case involved two takeovers of publicly-held Canadian corporations that occurred in 2001. The first transaction was an acquisition of Numac Energy Inc. by Anderson Exploration Limited that closed on February 12, 2001. The second transaction was an acquisition of Anderson Exploration Limited by a Canadian subsidiary of Devon Exploration Corporation that closed on October 15, 2001. As a consequence of various amalgamations, the payor corporations Numac Energy Inc. and Anderson Exploration Limited became predecessor corporations to the taxpayer that filed the appeal in the Tax Court.

The circumstances surrounding the cash surrender payments were agreed to by the parties in each transaction and reflected what one would typically expect to see with acquisitions involving Canadian public corporations:

(i) the takeover bid triggered the automatic vesting of awarded, but previously unvested, employee stock options;
(ii) the holders of the employee stock options had the choice of (A) purchasing shares of the target at the exercise price and participating in the takeover bid by tendering their shares, or (B) receiving a cash payment to surrender their rights under the option; and
(iii) the amount of the cash surrender payment was equal to the difference between the share price under the takeover bid and the exercise price under the option.

The amounts paid to option holders by the target corporations as cash surrender payments were fully deducted by the payors in computing their income (or loss) under section 9 of the Act for the taxation year that ended immediately before the acquisition. However, before the Tax Court, the taxpayer no longer argued for deduction under section 9 and instead sought to have the Tax Court rule that the payments contributed to the payor's cumulative eligible capital for the taxation year ending immediately before the acquisition, such that the payor was entitled to deduct three-quarters of the aggregate cash surrender payments in computing its income under the Act for the year as a consequence of the acquisition-of-control triggering former subsection 111(5.2).

In the result, the Tax Court (*per* Sommerfeldt J) held that the cash surrender payments did meet the definition of "eligible capital expenditure" in former subsection 14(5) of the Act, although there were several aspects of the definition that the Court was required to consider before coming to that view.

Moving sequentially through the relevant criteria in the definition of eligible capital expenditure, the Tax Court first considered whether the surrender payments were an outlay or expense made "in respect of a business". The Tax Court found that the continuing business of both target corporations post acquisition, as undertaken by the target or its successor by amalgamation, as well as the fact that the cash surrender payments were made to employees who had been granted their options while working in the business of their respective employers, and generally continued to do so after the respective acquisitions, meant that the surrender payments were indeed made by the target corporations in respect of their businesses.

The Tax Court then briefly considered whether the cash surrender payments met the criterion of being "an outlay or expense made or incurred on account of capital" and held that they did on the basis of prior jurisprudence from the Federal Court of Appeal and the Minister of National Revenue's position in the appeal.

Moving on to examine whether the expense was incurred by the taxpayer "for the purpose of gaining or producing income from the business", the Tax Court relied on legal principles established in *B.C. Electric* (58 DTC 1022 (SCC)), *Kaiser Petroleum* (90 DTC 6603 (FC)), *Imperial Tobacco* (2012 DTC 5003 (FCA)), and *ONEnergy* (2018 GTC 1011 (FCA)) to conclude that the cash surrender payments were indeed made or incurred by the target corporations in respect of their businesses for the purposes of gaining or producing income from those businesses. The Tax Court acknowledged that the cash surrender payments could have also been made for purposes of facilitating the takeover or revising the capital structure of the corporations, but held that those other purposes did not negate the fact that at least one of the purposes of the cash surrender payments was to gain or produce income from the respective businesses of the target.

The Tax Court then canvassed the express exclusions from eligible capital expenditure in paragraphs (a) to (e) of the definition and quickly concluded that none of those exclusions applied.

The final part of the Tax Court's review of the definition of eligible capital expenditure was the exclusion in paragraph (*f*), which would cover the cash surrender payments if they were determined to be an amount that represented the "cost of … [a] right to acquire … [shares]." Turning to the option surrender mechanism contemplated in each of the takeovers, as well as the target corporations' communications to shareholders in respect of the acquisitions, the Tax Court determined that, when the option holders received payment from the target in respect of their options, the legal effect of the transactions was for the corresponding options to be automatically extinguished at the moment of the surrender or sale transaction. Citing the decisions in *Grenier* (84 DTC 6073 (FCA)), *Anderson* (74 DTC 1103 (TRB); *rev'd, subnom, Huestis et al. v The Queen*, 75 DTC 5042 (FC); *aff'd*, 75 DTC 5393 (FCA); *aff'd*, 77 DTC 5044 (SCC)), and *BCN* (79 DTC 5068 (SCC)), the Tax Court noted that this treatment accorded with the legal principles central to the common law doctrine of merger, and confirmed that a target corporation cannot at the same time be both the grantor and the holder of the same stock option. Therefore, the payments made by the target corporations for the surrender or sale of the options were not the type of amount contemplated by the exclusion in paragraph (*f*) of the definition. Rather, the cash surrender payments, in addition to forming part of the employment remuneration paid to the option holders, were consideration for the termination, cancellation, or extinguishment of the options, but were not the cost of the options.

In light of all the foregoing, the Tax Court concluded that the cash surrender payments were incurred by the target corporations in respect of their businesses, on account of capital, for the purpose of gaining or producing income from those businesses, and did not come within any of the exclusions set out in the statutory definition, and thus qualified for treatment as eligible capital expenditures for the payor corporations.

Since the regime in the Act that allowed for a deduction from the taxpayer's cumulative eligible capital pool was repealed effective January 1, 2017, this case is largely only of historical significance, but it does confirm that, in the context of a corporate takeover that occurred prior to January 1, 2017, cash payments made by a target corporation to employee option holders in exchange for those holders surrendering their rights may meet the definition of “eligible capital expenditures” in former subsection 14(5) and, if so, would be deductible by the payor in part.

On a go-forward basis it will be interesting to see whether Parliament’s elimination of the former eligible capital property regime affects how companies involved in a takeover transaction treat employee option holders and, in particular, whether a cash surrender option is made available and, if so, whether it is the target or the acquiror itself that makes the cash surrender payment. As a replacement for the old eligible capital property regime, Parliament added Class 14.1 to the capital cost allowance rules in the Act. The scope of Class 14.1 property was designed to cover many of the expenses that would have been eligible capital expenditures under the old rules. However, newly enacted subsection 13(36) of the Act appears to make it clear that cash surrender payments cannot be added to a taxpayer’s Class 14.1 property. Therefore, it would seem that a cash surrender payment made by a target company post-2016 would be a capital outlay for which that target company would receive no relief for tax purposes. Conversely, if an acquiring company made the cash surrender payment, subsection 13(36) would also preclude that acquiror from including the expense in Class 14.1; however, since the acquiror is making the payment in the context of the acquisition of shares of the target, there might be a basis for recognizing the cash-out expense for tax purposes in the acquiror’s cost for the shares of the target.

Another factor for companies to consider post-2016 is the impact of subparagraph 110(1)(d)(i) of the Act, which was amended by the 2010 Federal Budget and thereafter restricted the recipient of a cash surrender payment from claiming the deduction under paragraph 110(1)(d). This paragraph reduces by one-half the amount of the employment benefit that the holder recognizes in respect of the payment if prescribed conditions are met, unless the target corporation (i.e., the employer) files an election pursuant to subsection 110(1.1), thereby agreeing that neither it nor any persons with whom it does not deal at arm’s length will deduct any amount in respect of the cash surrender payment in computing its income. If one accepts that the elimination of the eligible capital property regime means that there is non-existent or minimal tax relief under the Act for any company making the cash surrender payment, then it would seem that companies involved in a post-2016 takeover should be more receptive to allowing the target corporation to make the subsection 110(1.1) election in order to allow the recipients of cash surrender payments to claim the paragraph 110(1)(d) deduction and offset some of the corresponding employment benefit. The foregoing should also highlight that, in the absence of the employer corporation agreeing to make a subsection 110(1.1) election, employee option holders in a takeover transaction should consider exercising their option rights to acquire shares to tender into the bid to facilitate claiming the paragraph 110(1)(d) deduction, rather than opting to receive cash surrender payments and being taxed on the full amount of the employment benefit.

—*Kelleher Lynch*

## FEDERAL COURT REFUSES TO AUTHORIZE A REQUIREMENT FOR INFORMATION IN RESPECT OF UNNAMED PERSONS

***MNR v. Hydro-Québec*, 2018 DTC 5096 (Federal Court)**

In *Hydro-Québec,* the Federal Court denied the Minister of National Revenue’s request for judicial authorization for a requirement for information relating to a group of unnamed Hydro-Québec business customers pursuant to both section 231.2 of the *Income Tax Act* (the “Act”) and section 289 of the *Excise Tax Act* (the “ETA”).

Under section 231.2 of the Act, the Minister is entitled to require a person to provide documents or information for any purpose relating to the administration or enforcement of the Act. However, where the Minister seeks documents or information from a person in respect of another person or group of persons whom the Minister identifies by descriptive means and not by name (i.e., unnamed persons), subsection 231.2(2) requires the Minister to first go before the Federal Court and demonstrate to the judge that (i) the person or group is ascertainable, and (ii) the Minister is seeking the documents or information to verify compliance with any duty or obligation under the Act by the person or group. An identical regime appears in section 289 of the ETA.

In this case, the Minister was seeking authorization to issue a requirement seeking information from Hydro-Québec concerning a subset of its 4.3 million customers, in particular, a group comprised of unnamed business customers other than “large power” customers (e.g., ore mining companies or processing plants) and government agencies. Interestingly, Hydro-Québec was not represented at the hearing, having informed the Court that it was not objecting to the Minister’s application for judicial approval and that it was prepared to provide the Minister with the information that was being sought. Nonetheless, the Court felt the need to fully canvas the relevant issues to ensure that the interests of the unnamed business customers were given proper consideration.

The Minister generally was requesting information regarding the identity of these business customers (e.g., name, billing address, telephone numbers, billing start and end dates for the contracts, etc.). The Minister was seeking to use the information received to identify taxpayers who appeared to be carrying on a business but did not file corresponding income tax returns. In addition, the information was intended by the Minister to be shared among groups within the CRA in order to determine whether such persons complied with other obligations under the Act and the ETA.

The Court (*per* Roy J) noted from the outset that although the requirement was meant to target only business customers of Hydro-Québec, there was no way to identify exactly who was a business customer, aside from excluding customers who pay the residential rate; however, even that had some uncertainty in light of how Hydro-Québec’s rate structure operates.

The Court broke its analysis into three sub-issues:

(i) Was there an ascertainable group within the meaning of the Act?
(ii) Was the information to be provided and the documents to be produced required to verify whether the ascertainable group complied with the duties and obligations set out in the Act?
(iii) Even if the above conditions were met, should the Court exercise its discretion to refuse to grant the judicial authorization?

The Minister’s position was that the group was ascertainable because the group was identifiable and consisted of less than all of Hydro-Québec’s 4.3 million customers (e.g., large power users and users paying the residential rate were excluded). Furthermore, the Minister maintained that information about hydro customers paying the business rate was needed to verify compliance with duties and obligations set out in the Act, such that the second condition in subsection 231.2(3) was met. Finally, the Minister contended that once the two conditions were met, the Court had no remaining discretion and was required to grant the authorization sought.

After reviewing the legislative and jurisprudential history of section 231.2 and related provisions, the Court concluded that Parliament clearly intended to limit the scope of the Minister’s powers to issue requirements with a view to protecting unnamed persons from undue invasions of privacy by setting out conditions for the issuance of requirements targeting unnamed persons. This concern for the privacy of unnamed persons reflected in the requirements of section 231.2 is an overarching theme in the Court’s reasons for judgment.

Under the first part of its analysis, the Court concluded that the group targeted by the Minister in the requirement in question did not constitute an ascertainable group. The Court interpreted the Federal Court of Appeal’s decision in *Greater Montréal Real Estate Board* (2008 DTC 6420) as imposing a condition that, before judicial authorization is granted, the Minister must demonstrate that the documents or information being sought relate to a tax audit being undertaken in good faith with a genuine factual basis. Here, the Minister was not auditing or investigating a particular pattern of conduct that would raise a tax concern, which was in contrast with the situations in some of the earlier case law in which the Minister sought information about tax-related items such as commissions and sales, donations to charitable organizations, etc. The Court noted that the requirement in this case was being sought in the context of a preliminary phase where the CRA did not have any idea as to what type of activity it was going to target for further review. Accordingly, the Court concluded that the group of Hydro Québec customers proposed by the Minister for requirement was not an ascertainable group within the meaning of section 231.2.

The Court noted that the concept of an ascertainable group would be meaningless if the Minister could claim that any group of persons with any common element formed an ascertainable group. In the Court’s view, although section 231.2 may permit some limited “fishing expeditions”, there are intended to be limits on the Minister’s ability to go on a fishing expedition, and those limits would fall away if the Minister were permitted to require information outside the scope of the Act about a generic group with no connection to the Act.

Under the second part of its analysis, the Court found that the information sought by the Minister was outside the scope of information needed to verify compliance with the Act. According to the Court, subsection 231.2(3) should be read as requiring the documents and information to be documents or information that can shed light on compliance with the Act of an ascertainable group within the meaning of the Act. Here, the type of information sought would identify only Hydro-Québec customers subject to the business rate, and was not really part of an exercise of verifying whether those customers complied with any duty or obligation under the Act.

Finally, the Court rejected the Minister's argument that judicial authorization should be granted automatically once the Court is satisfied that the two conditions in subsection 231.2(3) have been met. The Court stated that even if the conditions of subsection 231.2(3) had been met in this case, it still would not have granted judicial authorization. The Court was troubled by the fact that it could not determine which or how many individuals would be subject to the invasion of privacy resulting from the requirement, since the determination of the members of the group would be made by Hydro-Québec on terms that were not clearly specified. Furthermore, the fact that the Minister had placed no limit on the way in which the information could be used and transferred among groups within the CRA was troubling to the Court. In the Court's opinion, judicial authorization and its inherent discretion is necessary to limit and govern any fishing expedition that the Minister is permitted to undertake as to unnamed persons, and to prevent an invasion of privacy of the unnamed persons. In this case, the Court concluded that it did not have sufficient information regarding the scope of the requested authorization to exercise its discretion in favour of the Minister.

The *Hydro-Québec* case establishes that the statutory conditions under paragraphs 231.2(3)(a) and (b) for obtaining authorization to issue a requirement for documents or information in respect of unnamed persons is not as easily satisfied as the language used in those provisions would otherwise suggest. Moreover, this case confirms that, in appropriate circumstances: (i) the Court has a residual discretion to refuse to grant the authorization even where the statutory conditions for court approval are met; and (ii) the Court will intervene to prevent the CRA from interpreting its powers under the Act in such a broad manner that it leads to a "full-fledged fishing expedition" regarding unnamed persons, which expedition could have negative consequences on the preservation of taxpayer rights.

—*Alexandra Carbone*

## WRONGLY KNOWING VS KNOWINGLY WRONG: THE MENS REA OF TAX EVASION

***R. v. Patry*, 2018 DTC 5105 (Supreme Court of British Columbia)**

In this case, the Supreme Court of British Columbia acquitted a husband and wife of various offences under the *Income Tax Act* (Canada) (the "Act") and the *Excise Tax Act* in connection with a tax return preparation business that they operated. Although some of the charges were directed at the couple's conduct in relation to the tax liabilities of their tax return preparation business, the Crown was presumably more interested in pursuing the charges flowing from the couple's role in causing their clients to claim business losses on the disposition of real property that was acquired for business purposes. With respect to the latter charges, the interesting aspect is the Court's finding that the Crown did not prove the requisite criminal intent to commit the offences in relation to the improper claiming of business losses on behalf of their clients despite the Court's finding that the underlying tax strategy the husband developed to support the claiming of the losses was clearly questionable.

The husband in this case was an individual with an accounting background who had been employed as a CRA auditor for roughly 14 years. He took unpaid leave starting in 2005 because he believed he was being unfairly targeted by the CRA in order to terminate his employment after he had suffered a head injury. He subsequently left the CRA and started a business, Accounting Professionals, aimed at helping individuals file their tax returns and providing advice on investments and financing. Most of the clients of the business were friends and neighbours of the couple and, from the evidence at trial, it appears that the business usually prepared the tax returns that the clients filed. Although the husband often included his spouse's name in documents sent out on behalf of the business and he had made representations to banks that the business operated as a partnership, the wife was otherwise uninvolved in the business.

Most, if not all, of the couple's clients had bought and sold real property in the past, and the tax returns that the husband prepared for the clients reflected a tax strategy he had developed to purportedly change, often retroactively, the use of the client's principal residence from personal use to real property held as an adventure in the nature of trade and, possibly, *vice versa*. The changes in use facilitated the creation of business losses which the husband used to offset other income of the homeowner/client and generate significant tax refunds for them.

In connection with the work that the couple did to help their clients claim business losses and/or receive tax refunds using the husband's tax strategy, the husband and wife were jointly charged under:

(i) paragraph 239(1)(d) of the Act for tax evasion through the claiming of false business losses on tax returns prepared for 32 clients, and
(ii) paragraph 239(1.1)(a) of the Act for claiming a refund to which 18 clients were not entitled by making, participating in, assenting to, or acquiescing in the making of a false or deceptive statement on the client's tax return by reporting false business losses.

In the course of investigating the tax filings for the couple's business itself, the CRA determined that the income from the business had been underreported by the couple for at least two years and that the GST remittances corresponding to the fee revenues of the business during that period had not been made. Consequently, the husband and wife were jointly charged with evading remittance of GST under paragraph 327(1)(c) of the *Excise Tax Act*, and were each individually charged with evasion of income tax under paragraph 239(1)(d) of the Act for underreporting the income from the business. The wife was also charged under paragraph 239(1.1)(a) for obtaining a tax refund by falsely underreporting income from the business for part of the period under investigation.

As with any criminal offence, tax-related or not, the Crown has to establish beyond a reasonable doubt that the accused both committed the *actus reus* (i.e., the prohibited conduct) associated with the offence and possessed the *mens rea* (i.e., criminal intent) in doing so.

With respect to the *actus reus* for the wife's charges, the Court (*per* Blok J) was satisfied that the Crown did not meet the burden of showing that she was sufficiently involved with the business to be considered to have participated in the underreporting of income, the non-remittance of GST, the filing of tax returns on behalf of clients, or the counselling of clients to use the husband's tax strategy. Consequently, she was acquitted of all the charges against her.

As to the *actus reus* for the husband's charges, the Court had little trouble finding that the Crown proved beyond a reasonable doubt that the husband committed the *actus reus* on all counts in which he was charged.

This left the disposition of the husband's case to be decided on the issue of whether the Crown could prove beyond a reasonable doubt that he had the requisite *mens rea* in relation to the prohibited conduct. The Court cited the Ontario Court of Appeal's decision in *Klundert* (2004 DTC 6609) for the proposition that, in a tax evasion case, the *mens rea* will be established if the Crown proves that the accused knew that the tax is owing under the Act and the accused intended to avoid, or intended to attempt to avoid, payment of taxes owing under the Act where that was his purpose, or where he knew that his course of conduct was virtually certain to result in the avoiding of tax owing under the Act.

The Crown sought to meet its evidentiary burden on *mens rea* by pointing to four instances of the husband's behaviour that, in the Crown's view, demonstrated an intent to avoid taxes. First, the husband did not identify himself as the "tax preparer" in the appropriate box for doing so in the returns he prepared for his clients. The Crown suggested that this was meant as a tactic to deceive the CRA by preventing them from undertaking preparer-based audits. Second, the husband knowingly misrepresented his business to be a partnership in the GST filings even though this was an obvious falsehood. Somewhat curiously, the Crown did not elaborate on how this particular misrepresentation helped to demonstrate an intention to willfully evade GST or income tax. Third, when questioned by a CRA auditor about major discrepancies between a version of a tax return schedule that he provided to the auditor in the course of the CRA's audit of the client and the version of the schedule in the filed version of the tax return, the husband attributed the discrepancies to the fact that his client "clicked the wrong key" in filing the return electronically. The Crown asserted that this showed that the husband was trying to distance himself from a return that he prepared for the client that contained information that he knew was false. Fourth, the husband used a pseudonym when he was dealing with the CRA on their audit of one of his client's returns and the Crown submitted that he was trying to conceal his true identity from the CRA. When considered together, the Crown argued that these four factors showed the husband to be intentionally engaging in conduct intended to evade taxes and detection by the CRA.

The husband attempted to rebut the Crown's allegations in his testimony. He said that he did not believe he was required by law to put his name in the "tax preparer" box on returns. He explained that the Royal Bank had advised him to characterize his business as a partnership, and tried to direct the Court to provisions of the *Bank Act* to support his explanation. Finally, he explained that he was adopted and the pseudonym he used was his birth name and he felt it was necessary to use another name in his dealing with the CRA because he believed that the CRA was biased against him as a former employee.

Interestingly, even though one assumes that the Crown's primary interest in prosecuting the couple was due to their role in counselling their clients to improperly claim business losses using a flawed tax strategy, it does not seem that the Crown attempted to link any of the husband's conduct to the *mens rea* required to convict on the corresponding offences. For example, the husband testified that he believed his tax strategy was legitimate and based on CRA interpretation bulletins, income tax folios, CRA information sheets, and his discussions with CRA officials. He maintained that his strategy was sound and that it was "crystal clear" to him that a single purchase of residential property could be "an adventure or concern in the nature of trade". He also offered flawed interpretations of the Act and the *Excise Tax Act* to try to explain why he did not think it was necessary to report more revenues from his business or comply with his GST-related obligation. However, it does not appear that the Crown tried to persuade the Court that, as a long-time CRA auditor and accountant by training, the husband's assertions that he thought his tax strategy was in accordance with the Act or that he believed his tax filings for his business were correct were neither credible nor believable.

So, while the Court found that the husband was "eccentric" and "odd" and "*deeply* suspicious" of the CRA and that his tax knowledge and analysis were deeply flawed, the Court held that there was a reasonable doubt as to whether the husband intended to avoid taxes he knew were owed and he was found not guilty on all counts for want of *mens rea*. In making these findings, the Court reaffirmed that, in the criminal context, the test for *mens rea* involves only the subjective knowledge of the accused at the time of the impugned conduct.

Given the facts of the case and, in particular, the weakness of the evidence that the Crown offered to the Court as support for *mens rea* of a criminal offence, the Crown and the CRA could perhaps be criticized in this case for choosing to prosecute under the criminal tax evasion provisions rather than assessing penalties against the couple. It would seem that this type of fact pattern is one of the exact scenarios that Parliament had in mind when it introduced third party civil penalties in section 163.2 of the Act and, more particularly, the penalty in subsection 163.2(4) of the Act for persons who make or participate in making a misrepresentation in the preparation of a tax return that the person knows to be false or would reasonably be expected to know but for culpable conduct (e.g., negligence). Under those provisions, the husband's background as a CRA auditor would have likely been enough to establish culpable conduct tantamount to intentional conduct, as his ignoring what he must have known from his previous experience showed a high degree of negligence.

—*Peter Leigh*

## RECENT CASES

### FOREIGN SOURCE PENSION BENEFITS PROPERLY ASSESSED AS TAXABLE INCOME

The taxpayer, who was a resident of Canada, received pension payments from the government of Colombia. He filed his returns for the 2014 and 2015 taxation years on the basis that such amounts were not taxable in Canada, but the Minister assessed on the basis that they constituted taxable income. The taxpayer's appeal from that assessment to the Tax Court of Canada was unsuccessful, the Tax Court holding that Canada, as the taxpayer's country of residence, was entitled to tax the Colombian pension benefits. It found that the Minister properly included those benefits in income under paragraph 56(1)(a), and that Colombia had not taxed such income in 2014 or 2015. The taxpayer appealed from that decision to the Federal Court of Appeal.

The appeal was dismissed. The Federal Court of Appeal held that the Tax Court's decision, which turned on its interpretation of Article 17(1) of the applicable Income Tax Convention, was reviewable on a standard of correctness. The appellate Court concluded that Article 17(1) was clear in entitling the taxpayer's state of residence to tax pension income arising in another state, even where such pension was on account of government service. Specifically, the use of the word "may" in Article 17(1) did not, in the appellate Court's view, suggest that the country of residence was not entitled to tax pension amounts sourced in another country: rather, it recognized that the decision whether to tax such amounts was to be made by the resident country through its taxing statute. The Federal Court of Appeal concluded that the Tax Court did not err in its interpretation of Article 17(1), and the appeal from the Tax Court decision was therefore dismissed.

*Reyes v. The Queen*

2019 DTC 5008

### DISABILITY TAX CREDITS EARNED PRIOR TO YEAR OF BANKRUPTCY AND RECEIVED AFTER DISCHARGE NOT INCLUDED IN BANKRUPT'S ESTATE

The bankrupt qualified for the disability tax credit, on a retroactive basis, for a period prior to her period of bankruptcy, but payments of such credit were made after her discharge. The trustee in bankruptcy sought direction from the Court on whether, in the circumstances, such payments fell within the definition of property set out in section 67 of the *Bankruptcy and Insolvency Act* (the "BIA") and were therefore subject to the claims of the bankrupt's creditors, and whether such payments would constitute income as defined by section 68 of the BIA.

Credits and refunds earned prior to the year of bankruptcy and received after discharge were not property or income of the bankrupt. The Registrar in Bankruptcy held that if the amounts in issue were property of the bankrupt, then they were 100% distributable among estate creditors in accordance with the priority scheme set out in the BIA. If such amounts constituted income, they were subject to contribution by the bankrupt. The Registrar reviewed the wording of section 67 of the BIA and the jurisprudence interpreting that provision before holding that the definition of "property of the bankrupt", as it applied to tax refunds, only extended to refunds owed to the bankrupt "in respect of the calendar year … in which the bankrupt became a bankrupt". In the Registrar's view, the statutory language did not support an interpretation that included refunds received for prior years in the "property of the bankrupt". Consequently, only the disability tax credit payment received in respect of the part of the calendar year that was the year of bankruptcy was "property of the bankrupt" and formed part of the bankrupt's estate. On the question of whether the payments received constituted income, the Registrar held that, on the wording of section 68 and the related jurisprudence, amounts that were excluded from the definition of income of a bankrupt included those that were accrued or earned prior to bankruptcy but not received between the date of bankruptcy and the date of discharge. Consequently, the payments received by the bankrupt subsequent to discharge were not caught by section 68 and did not constitute income of the bankrupt.

*Rafter (Re)*

2019 DTC 5005

### APPEAL FROM IMPOSITION OF PENALTIES FOR GROSS NEGLIGENCE DISMISSED

The taxpayer filed returns for the 2008 and 2009 taxation years that were prepared by Fiscal Arbitrators and included false claims for non-existent business losses. Both returns resulted in the payment of substantial refunds. The Minister reassessed to deny the business loss claims and imposed penalties under subsection 163(2) of the *Income Tax Act* (the "Act"). The taxpayer appealed from the imposition of such penalties, acknowledging that while his returns included false statements, he did not make such statements knowingly or in circumstances amounting to gross negligence, but instead had been duped.

The appeal was dismissed. The Tax Court of Canada held that, as the appellant had acknowledged that his returns for the 2008 and 2009 taxation years contained false statements, the sole issue for determination was whether the appellant had made such false statements either "knowingly or in circumstances amounting to gross negligence". The Court reviewed the circumstances in which the taxpayer's returns for the 2008 and 2009 taxation years had been prepared. It held that there were a number of suspicious circumstances that should have, but did not, lead the appellant to make further inquiry and that such failure amounted to wilful blindness. In the Court's view, the appellant should, particularly after receiving a warning letter from the Canada Revenue Agency, have asked for some form of independent verification that the filing positions taken were legitimate. The appellant did not do so and the Court characterized his conduct in signing and filing the returns as a marked and substantial departure from the expected conduct of a reasonable person in the same circumstances, with such conduct amounting to gross negligence. The Court concluded therefore that the respondent had, as required, established the existence of facts and circumstances which justified the imposition of penalties under subsection 163(2) of the Act. The appeal from the imposition of such penalties was therefore dismissed.

*Bradshaw v. The Queen*

2019 DTC 1013

**Footnotes**

[1] *Prima Properties (92) Ltd. v. The Queen*, 2019 GTC 1 (TCC).

[2] See *Robertson v. The Queen*, 2015 DTC 1207 (TCC) (affirmed 2016 DTC 5131 (FCA)), and *College Park Motors v. The Queen*, 2009 DTC 1269 (TCC).