Tax Notes

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Wolters Kluwer

WHEN DOES A HOBBY BECOME A BUSINESS?

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Many Canadians working full-time jobs or regularly engaged in business also pursue personal endeavours on the side. For example, you may enjoy photography, painting, collecting, or gardening. At first, these activities might resemble personal hobbies, but if they produce revenue or result in expenses, the question arises of whether the revenue is income and therefore taxable, and whether the expenses are deductible in computing your income.

With the rise of the online digital economy, it's tempting and simple to make a few extra bucks from renting out a spare room, selling handmade mittens or old trading cards, or ferrying passengers around town for a couple of hours each night. Whether your activities are a hobby or business is a question of fact. There can be a very fine line between a lively hobby and a business. The distinction is further complicated by digital platforms, where brick and mortar storefronts are replaced by apps, websites, or online accounts.

A CRA publication from earlier this year outlines the different ways to earn revenue from online platforms. Summarized below, these include:

- **Sharing economy**

  Using or sharing personal assets to earn revenue. Ridesharing is an arrangement in which a driver uses a private vehicle to offer passenger transportation services for a fee, arranged through an online platform such as Lyft or Uber. Accommodation sharing is renting all or part of a property, usually for a short period. It also includes any rentals facilitated by a third-party website or application, such as AirBnB, CanadaStays, FlipKey, and VRBO.

- **Gig economy**

  The gig economy generally refers to services provided through short-term contracts, freelance work, or other temporary work. Gig workers operate as independent contractors and freelancers. Frequently, arrangements are made through an online platform or mobile application such as:

  - Fiverr;
  - Clickworker;
  - Crowdsource;
  - Uber Eats; and
  - Skip the Dishes.

  Contracted services can range from a micro-task to larger, specialized services.

- **Peer-to-peer ("P2P")**

  The P2P economy includes situations where third-party sellers connect with buyers through online platforms such as websites, applications, and marketplaces to sell their products. Commonly used platforms include:

  - Kijiji;
  - Etsy;
  - eBay; and
  - Amazon.

- **Social media influencers**

  A social media influencer is an individual who has created a significant influence or presence on a social media platform and has an audience of users who interact with the influencer's content. Influencers can work as content creators, bloggers, photographers, journalists, fitness coaches, fashion promoters, business consultants, entertainment workers, and many other occupations. Platforms an influencer may use include:

  - Facebook (Meta);
  - Instagram;
  - Twitch;
  - Twitter (X);
  - YouTube; and
  - Independent blogs.[1]

  In a news release from 2023, the CRA explains that influencers can earn income in a variety of ways, both monetary and non-monetary (barter transactions), including but not limited to:

  - subscriptions to their channel(s);
  - advertising (clickbait and brand advertisements);
  - sponsorship;
  - calls to action;
  - merchandise sales or commission on sales;
  - tips;
  - perks such as products, clothes, trips, or other gifts; and
  - referral codes.[2]

The following admonition was issued by the CRA in a 2022 news release: "As a resident of Canada, you must report your income from all sources on your income tax return. This includes any income you earn inside and outside of Canada, whether through P2P or other transactions."[3] In most situations, Airbnb, Uber, and gig revenues are clearly a source of income — these are activities undertaken in pursuit of profit with a limited to non-existent personal element. But what about receipts from activities like the sale of crafts or collectibles on eBay or Etsy? Or the revenue of a social media influencer from sponsorships?

Subsection 9(1) of the *Income Tax Act* (the "Act") provides that a taxpayer's income for a tax year from a business is the profit from that business for the year. According to the Act, a business "includes a profession, calling, trade, manufacture or undertaking of any kind whatever and . . . an adventure or concern in the nature of trade, but does not include an office or employment".

[1] CRA Publication, "Taxes and the platform economy", March 8, 2023.

[2] CRA News Release, "Are you a social media influencer? Here's what you need to know", March 8, 2023.

[3] CRA News Release, "Are you a peer-to-peer seller? Here's what you need to know", March 16, 2022.

If an activity is merely a personal hobby and not a business, the revenue from it is not income and not subject to tax, and any related expenses are personal and not deductible. This begs the question: When exactly does a hobby become a business?

In some situations, a taxpayer may prefer a hobby to be considered a business by the CRA, especially when there are significant expenses to deduct.[4] In other cases, could there be an unpleasant shock for taxpayers who are assessed on the takings from what they thought was a personal hobby? Fortunately, as the practice and jurisprudence indicate, the deliberate actions which establish that an undertaking is a business rather than a hobby make surprise unlikely.

Although an activity may have substantial personal aspects, depending on the circumstances, it could generate business income for purposes of the Act. In general, a personal endeavour like a hobby is undertaken for motives other than for profit, business, or commercial reasons. The hobbyist seeks a personal benefit rather than a financial one. Nevertheless, as Justice Bowman of the Tax Court clarifies in *Martin v. The Queen*:

> The existence of a personal element must be put in perspective. There is frequently a personal element in the carrying on of a commercial enterprise in the sense that the person derives great personal satisfaction from the activity. This does not make the activity any the less a business. Professional artists, photographers, writers, musicians (and sometimes even lawyers) no doubt derive great satisfaction from what they do but if their activity is commercial and is intended to yield a profit it is nonetheless a business. It is only where the personal element so overshadows any element of commerciality as to substantially displace it that one may conclude that the activity is merely a hobby and is not a business at all.[5]

In *Stewart v. Canada*, the Supreme Court explains the distinction between personal and business activities:

> . . . in order to determine whether a particular activity constitutes a source of income, the taxpayer must show that he or she intends to carry on that activity in pursuit of profit and support that intention with evidence. The purpose of this test is to distinguish between commercial and personal activities, and where there is no personal or hobby element to a venture undertaken with a view to a profit, the activity is commercial, and the taxpayer's pursuit of profit is established. However, where there is a suspicion that the taxpayer's activity is a hobby or personal endeavour rather than a business, the taxpayer's so-called reasonable expectation of profit is a factor, among others, which can be examined to ascertain whether the taxpayer has a commercial intent.[6]

In *The Queen v. Jack Walls and Rupert Buvyer*,[7] issued the same day as *Stewart*, the Supreme Court stated that where an endeavour is clearly commercial in nature and has no personal element (i.e., no hobby aspect), there is clearly a source of income and loss for income tax purposes. In *Walls*, a storage park operation was structured so that there were bound to be losses for tax purposes. The Supreme Court could not imagine anyone going into the storage park business as a hobby. If the activity has no personal aspect, the question of reasonable expectation of profit does not arise — the only issue to be decided is whether the activity was undertaken in pursuit of profit.

For income tax purposes in Canada, an activity that includes a personal element like a hobby may constitute a business if: (a) it is carried on with the intention — sometimes described as a "predominant intention"— of earning profit, and (b) there is a reasonable expectation of profit. Call this the "Hobby Test". Only if there is a personal or hobby element does one examine (b) in assessing whether the activity was a commercial endeavour.

Part (a) of the Hobby Test is a subjective assessment, part (b) is objective. Both are determined based on an analysis of the evidence. Intention is indicated by the taxpayer's conduct and the nature of the activity — look for "indicia of commerciality" or "badges of trade".[8] A reasonable expectation of profit is determined by the performance of the activity — has the activity been carried on in accordance with objective standards of businesslike behaviour?

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[4] The CRA may still question whether a particular expense is reasonable in the circumstances.

[5] 2003 UDTC 91 (TCC).

[6] 2002 DTC 6969 (SCC).

[7] 2002 DTC 6960 (SCC).

[8] *Nichol (G.) v. Canada*, 93 DTC 1216 (TCC).

Part (a) of the test has been restated by the Supreme Court in *Stewart* as the question: "Does the taxpayer intend to carry on an activity for profit and is there evidence to support that intention?"[9] If you pursue a hobby without the intention of earning a profit — and there must be evidence to support this — the personal activity should not be considered a business and does not result in business income, expenses, or loss.

Stewart, tracking the Supreme Court's 1977 judgment in *Moldowan v. The Queen*,[10] identified several factors to be considered when determining if there is an intention to profit:

- the profitability of prior years;
- the taxpayer's training;
- the taxpayer's intended course of action; and
- the capability of the venture to show a profit.[11]

However, the Supreme Court noted ". . . this list is not intended to be exhaustive, and . . . the factors will differ with the nature and extent of the undertaking."[12]

Turning to part (b) of the Hobby Test, the assessment of "reasonable expectation of profit", Justice Bowman in *Martin* asked:

> . . . "Would a reasonable person, looking at a particular activity and applying ordinary standards of commercial common sense, say 'yes, this is a business'?" In answering this question the hypothetical reasonable person would look at such things as capitalization, knowledge of the participant and time spent. He or she would also consider whether the person claiming to be in business has gone about it in an orderly, businesslike way and in the way that a business person would normally be expected to do.[13]

All the facts must be considered to determine whether an activity is a business or a hobby. As the *Walls* case made clear, the fact that an endeavour does not produce profits is not conclusive. Some activities will never be profitable. The Supreme Court noted in *Stewart*:

> The overall assessment to be made is whether or not the taxpayer is carrying on the activity in a commercial manner. However, this assessment should not be used to second-guess the business judgment of the taxpayer. It is the commercial nature of the taxpayer's activity which must be evaluated, not his or her business acumen.[14]

There is a dearth of jurisprudence in Canada specifically addressing the taxation of revenue earned via presumed hobby or personal endeavours pursued in the digital economy. In *Brooks v. The Queen*,[15] Brooks purchased all sorts of ephemera online (Beanie Babies, football and Royal Navy memorabilia, VHS tapes, and so on). He hoped to resell these items at a profit but never sold a single one. His claim for business losses was rejected because there was no evidence he made any concerted and serious efforts to sell his wares. Brooks' activities were merely a hobby, and he certainly did not carry out those activities under objective standards of businesslike behaviour.

Two recent Tax Court cases addressed the hobby vs. business tension in relation to "professional" poker players: *Bérubé v. The King*[16] and *D'Auteuil v. The King*.[17] The sole issue was whether gains earned by the Appellants while playing poker qualified as business income for income tax purposes.

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[9] *Stewart*, supra.

[10] 77 DTC 5213 (SCC).

[11] *Stewart*, supra.

[12] *Stewart*, supra.

[13] *Martin*, supra.

[14] 2002 DTC 6969 (SCC).

[15] 2007 DTC 1610 (TCC). *Lang v. The Queen*, 2006 DTC 3390 (TCC) (writing and sales of memorabilia), *Lakeway Truck Centre Ltd. v. The Queen*, 2007 DTC 5341 (FCA) (auto racing), *Varcoe v. The Queen*, 2007 DTC 5357 (FCA) (auto racing), and *Kelly v. The Queen*, 2005 DTC 324 (TCC) (auto racing) also failed to make the leap from a personal hobby to a business.

[16] 2023 DTC 1011 (TCC).

[17] 2023 DTC 1010 (TCC).

Bérubé had abandoned his actuarial studies to play poker. It was his only source of income during the years in issue, and the quasi-totality of his available time was spent playing or learning and studying about poker. Regardless of his unusual lifestyle, Bérubé behaved like a serious businessman. He avoided facing certain players, adapted his play to his "bankroll" (available funds) to avoid dangerous situations, and during in-person games he shared risks, costs, and profits with other persons. He played multiple tables at once to maximize his gains as quickly as possible. Bérubé's winnings allowed him to purchase a $530,000 house, paying cash. His playing was more than a hobby or playing for fun. Accordingly, the Tax Court found that, on a balance of probabilities, Bérubé had the subjective intention of earning a profit from his poker activities and he used his skills and expertise to earn a living playing poker. His poker earnings were business income.

D'Auteuil also pursued his activities as a poker player in an organized, methodical way, much like Bérubé. His gains allowed him to purchase a $525,000 house and a $37,500 car. The Tax Court determined he too had the subjective intention of earning a profit from his gambling activities and he used his skills and expertise to earn a living as a poker player. Therefore, his poker gains were business income.

Even if a hobby or personal undertaking does not constitute a business for purposes of the Act, if you sell personal-use property related to your hobby activity for more than $1,000 per sale, any gain received from the sale may be subject to income tax as a capital gain from a personal-use property.[18] Generally, personal-use property is, as the name suggests, property owned by the taxpayer that is used primarily for the personal use or enjoyment of the taxpayer and related individuals.[19]

For example, take an amateur artist who creates a painting that hangs in his house for years and which he later sells on Etsy. Any gain realized on the sale could be taxable. If the adjusted cost base ("ACB") of the painting is less than $1,000, its ACB is deemed to be $1,000. If the proceeds of disposition are less than $1,000, the proceeds of disposition are deemed to be $1,000. If both the ACB and the proceeds of disposition are $1,000 or less, you do not have a capital gain or a capital loss. This rule effectively exempts small personal property gains from taxation. However, if either the ACB or the proceeds of disposition are more than $1,000, you probably have either a capital gain or a capital loss. Capital gains must be reported on Schedule 3, *Capital Gains (or Losses)*, which is included with your T1 return. Capital losses on personal use property, on the other hand, are typically not able to be claimed, unless the property is listed personal property, which would include the painting in this example.

Applying the two-part Hobby Test to a digital enterprise will depend on the specific facts of each case. This can be incredibly difficult. Justice Bowman simplifies matters in *Martin*:

> Ultimately, it boils down to a common sense appreciation of all of the factors, in which each is assigned its appropriate weight in the overall context. One must of course not discount entrepreneurial vision and imagination, but they are hard to evaluate at the outset. *Simply put, if you want to be treated as carrying on a business, you should act like a businessman*.[20]

Detailed records are retained by most apps or online services. In the digital economy, there are hardly any cash transactions, and an electronic payment record will be produced for every sale, ride, or stay. If it turns out your hobby does constitute a business, this income must be declared and reported on Form T2125, *Statement of Business or Professional Activities*, and included with your T1 income tax return. As always, when in doubt, consult a tax professional.

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[18] *Income Tax Act*, s. 46.

[19] *Income Tax Act*, s. 54 "personal-use property".

[20] *Martin*, supra. Emphasis added.

CURRENT ITEMS OF INTEREST

Six or More Information Returns Must Be Electronically Filed Beginning in 2024

Recent legislation has amended mandatory electronic filing thresholds. Beginning January 1, 2024, businesses filing six or more information returns (slips and summaries) must file electronically. This removes the clause that allowed a filer with 50 or fewer information returns to file by paper. Businesses filing five or fewer information returns can still choose to file by paper.

Examples of information returns include the T4 payroll return (renumeration paid), T5 (investment income), T3 (trust income), and T4A (pension and other income return).

There are currently mandatory electronic filing penalties for businesses that file paper returns for over 50 slips. There will be a $125 penalty introduced starting January 1, 2024, for businesses that file paper returns in the 6–50 range.

Penalty based on the number of information returns (slips)	Penalty
6 to 50 (new for information returns filed on or after January 1, 2024)	$125
51 to 250	$250
251 to 500	$500
501 to 2,500	$1,500
2,501 or more	$2,500

CRA Flags Incoming Trusts Ownership Disclosure Requirements

The CRA has flagged new beneficial ownership information reporting obligations being introduced for trusts from next year. The CRA announced: "Reporting requirements are changing to make trusts more transparent and to reduce tax avoidance. Affected trusts will now need to report the identity of all trust beneficiaries."

Affected trusts must complete an annual T3 Trust income tax and information return (T3 return) and Schedule 15 for taxation years ending after December 30, 2023. "If you do not file an annual T3 return and you are required to, financial penalties may apply," the Agency said.

New legislation in Bill C-32 received Royal Assent on December 15, 2022. Under the legislation, all non-resident trusts that currently have to file a T3 return and all express trusts that are resident in Canada, with some exceptions, will have to provide additional information on an annual basis. An express trust is generally a trust created with the settlor's express intent, usually made in writing. For the 2023 and subsequent taxation years, certain trusts will have to file a T3 return where currently they do not have to file a T3 return.

The following types of trusts (that are either resident in Canada, or non-resident but required to file a T3 return) are not required to provide additional information:

- mutual fund trusts, segregated funds, and master trusts;
- trusts governed by registered plans;
- lawyers' general trust accounts;
- graduated rate estates and qualified disability trusts;
- trusts that qualify as non-profit organizations or registered charities;
- trusts that have been in existence for less than three months; and
- trusts that hold less than $50,000 in assets throughout the taxation year (provided that their holdings are confined to deposits, government debt obligations, and listed securities).

The new rules require the disclosure of the following information:

- the identity of all trustees;
- beneficiaries and settlors of the trust; and
- each person who has the ability (through the trust terms or a related agreement) to exert control or override trustee decisions over the appointment of income or capital of the trust (e.g., a protector).

New Tax-Free First Home Savings Account

On August 10, the Department of Finance issued a news release publicizing the new tax-free First Home Savings Account ("FHSA"), which came into effect on April 1, 2023. Any Canadian resident at least 18 years of age, and not more than 71 years of age on December 31 of the year, can open an FHSA. Currently, FHSAs are available at seven financial institutions, and more are set to offer FHSAs.

The FHSA is a registered savings account that helps Canadians save for their first home. Contributions are tax deductible on annual income tax returns, and withdrawals to purchase a first home — including any investment income — are non-taxable. Contributions cannot exceed $8,000 per year, up to a $40,000 contribution limit (within 15 years of opening the account) for the first down payment. Unused contribution room up to the $8,000 annual maximum and unclaimed contributions can be carried forward.

The CRA also released the following three forms related to the FHSA:

- RC722, *Transfer from an FHSA to an FHSA, RRSP or RRIF After the Death of the Holder*;
- RC724, *Joint Designation for a Deemed Transfer or Distribution from an FHSA after the Death of the Holder*; and
- RC727, *Designate an Excess FHSA Amount as a Withdrawal from your FHSA or as a Transfer to your RRSP or RRIF*.

Federal Government Consults on Draft Legislation

The Department of Finance published new draft legislation on Friday August 4. The legislation proposes to enact several measures announced in Federal Budget 2023, the Global Minimum Tax (Pillar Two), the Digital Services Tax, certain sales and excise tax measures, and various technical amendments.

Registered Education Savings Plan ("RESP") Bulletin No. 1R3 Updated

This bulletin was updated on August 2 to include the changes to the educational assistance payment ("EAP") limits referenced in Budget 2023 and the CRA audit requirements. It provides the following information on EAPs:

- EAP annual threshold; and
- reasonable and unreasonable expenses for EAPs.

For the updated bulletin, visit www.canada.ca/en/revenue-agency/services/tax/registered-plans-administrators/bulletins/resp-bulletin-no-1r1.html.

Enhanced Canada Workers Benefit Payments

On July 28, millions of low- and modest-income Canadian workers received their first automatic advance payments of the newly enhanced Canada Workers Benefit.

Enhancements to the Canada Workers Benefit, first announced in 2021, expanded eligibility to an additional one million workers — and now, support from the enhanced Canada Workers Benefit will be available sooner. Prior to the recent passage of Bill C-47, people needed to wait until they filed their taxes to receive this support.

The Canada Workers Benefit will provide up to $2,616 total for an eligible family, and $1,518 total for eligible single workers, split between three advance payments this fiscal year (in July 2023, October 2023, and January 2024), and a final payment after filing the 2023 tax return. Low- and modest-income Canadian workers who received the Canada Workers Benefit in 2022 will automatically receive their advance payments from the Canada Revenue Agency with no need to apply.

Charities Impacted by Wildfires and Floods

As wildfire and flood activity continues to be higher than normal across Canada, some charities may be unable to meet their filing obligations due to extraordinary circumstances, such as a fire or flood. The Canada Revenue Agency issued a reminder on July 27 that in such cases it is important to contact the Charities Directorate as soon as possible to discuss your situation and ensure your charity remains in good standing. For more information, contact the Charities Directorate's client service team at 1-800-267-2384.

Inefficient Fossil Fuel Subsidies

On July 24, the Government of Canada released the *Inefficient Fossil Fuel Subsidies Government of Canada Self-Review Assessment Framework* and the *Inefficient Fossil Fuel Subsidies Government of Canada Guidelines*. The Assessment Framework and Guidelines support the decarbonization of Canada's oil and gas sector by eliminating inefficient fossil fuel subsidies.

The Assessment Framework will be used to determine which tax and non-tax measures constitute an inefficient fossil fuel subsidy. Subsidies will be considered inefficient unless they meet one or more of the following six criteria:

(1) Enable significant net greenhouse gas emissions reductions in Canada or internationally in alignment with article 6 of the *Paris Agreement*;

(2) Support clean energy, clean technology, or renewable energy;

(3) Provide essential energy service to a remote community;

(4) Provide short-term support for emergency response;

(5) Support Indigenous economic participation in fossil fuel activities; or

(6) Support abated production processes, such as carbon capture, utilization, and storage ("CCUS"), or projects that have a credible plan to achieve net-zero emissions by 2030.

The Guidelines are effective July 24 and apply to all federal departments and agencies. The Assessment Framework and Guidelines can be found at www.canada.ca/en/services/environment/weather/climatechange/climate-plan/inefficient-fossil-fuel-subsidies/assessment-framework.html and www.canada.ca/en/services/environment/weather/climatechange/climate-plan/inefficient-fossil-fuel-subsidies/guidelines.html.

Mandatory Disclosure Rules

The following CRA publications and forms were recently updated/issued:

- Mandatory disclosure rules — Overview (www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/mandatory-disclosure-rules-overview.html);
- Mandatory disclosure rules — Guidance (www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/mandatory-disclosure-rules-overview/guidance-document.html);
- RC312 *Reportable Transaction and Notifiable Transaction Information Return (2023 and later tax years)* (www.canada.ca/content/dam/cra-arc/formspubs/pbg/rc312/rc312-23e.pdf); and
- RC3133 *Reportable Uncertain Tax Treatments Information Return (2023 and later tax years)* (www.canada.ca/content/dam/cra-arc/formspubs/pbg/rc3133/rc3133-23e.pdf).

FOCUS ON CURRENT CASES

This is a regular feature examining recent cases of special interest, coordinated by Ron Dueck of Dentons Canada LLP. The contributors to this feature are from Dentons Canada LLP, Montréal, Toronto, Calgary, Edmonton, and Vancouver.

His Majesty The King v. Margo Dianne Bowker, 2023 DTC 5049 (Federal Court of Appeal)

Introduction & Background

On June 8, 2023, the Federal Court of Appeal ("FCA") allowed the Minister of National Revenue's (the "Minister's") appeal from the Tax Court's decision *Bowker v. The Queen*,[1] setting aside said decision and returning the matter to the trial judge for a fresh determination of the costs payable to the respondent Margo Dianne Bowker (the "Taxpayer").

The Minister reassessed the Taxpayer's 2010 taxation year under the *Income Tax Act*[2] ("ITA"), disallowing losses and imposing a gross negligence penalty of $139,032.00. The Taxpayer's appeal of the penalty at the Tax Court was allowed, and the Taxpayer was awarded costs in the amount of $149,842.22.

In determining the costs, the Tax Court:

(1) found that partial indemnity costs in this case should fall in the range of 50% to 75%[3] of the Taxpayer's actual legal expenses, for consistency purposes;

(2) relied on the Taxpayer's success in persuading the Tax Court that she was not grossly negligent as a factor that could be taken into consideration which might favour an increase in the Taxpayer's costs based on Rule 147(3) of the *Tax Court of Canada Rules (General Procedure)*[4] (the "TCC Rules");

(3) concluded, after analyzing paragraph 162(7)(*b*) of the ITA and determining that the Taxpayer's offer to settle with the Minister was principled, that the Minister's failure to accept the Taxpayer's offer of settlement was a factor that justified an increase in costs; and

(4) found that the Minister's pre-litigation conduct was a factor that justified an increase in costs.

Issues

The issues before the FCA were whether the trial judge at the Tax Court erred:

(1) by fettering its discretion in deciding *a priori* that the costs should fall within a given range;

(2) in its treatment of three factors which are to be considered in the award of costs, namely the result of the proceeding, any settlement offer, and pre-litigation conduct which prolonged the proceedings; and

(3) in breaching the parties' right to procedural fairness in considering a factor that the parties had not raised in their submissions, without giving the parties the chance to make representations on that factor in coming to its conclusion.

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[1] *Bowker v. The Queen* (2022), 2022 DTC 2041 (CCI), additional reasons to *Bowker v. The Queen* (2021), 2021 DTC 2042 (CCI), rendered by the honourable Sylvain Ouimet of the Tax Court of Canada.

[2] *An Act respecting Income Taxes*, RSC, 1985, c. 1 (5th Supp.), as amended.

[3] This range was discussed in *Guibord v. R.*, 2012 DTC 5030 (FCA).

[4] SOR/90-688a.

Decision

The following findings were made by the FCA.

(1) **Range of costs:** The selection of a range of 50% to 75% for costs was made by the Tax Court in the name of consistency, but sources cited by the Tax Court showed no consistency and it was not demonstrated that the amount which it awarded was consistent with what had been done in other cases. A decision as to an appropriate award of costs must be grounded in the Tax Court's past practice and jurisprudence. A review of like cases undertaken after the Tax Court had addressed the various factors may have pointed to the possibility of a lower range, and the fact that the possibility of a lower range was precluded by the approach taken by the Tax Court is an indicator that the Tax Court had fettered its discretion and, in doing so, erred in law.

(2) **Result of the proceeding:** After establishing that the range of partial indemnity was 50% to 75% of a party's solicitor-client costs, the Tax Court reviewed the factors listed in Rule 147(3) of the TCC Rules, beginning with the factor found at Rule 147(3)(*a*) of the TCC Rules: the result of the proceeding. The FCA found that the Tax Court erred in awarding costs on the basis of the result of the proceeding and then enhancing those costs on the same basis. The FCA considered it to be double counting the same factor, and that the Tax Court therefore erred in law in defining the scope of said factors.

(3) **Settlement offer:** The Taxpayer's settlement offer was not a principled offer in the sense that it was not one which the Minister could accept, because notwithstanding the broad words of paragraph 162(7)(*b*) of the ITA, the operation of the paragraph is limited to obligations to file returns and provide information as and when it is required. This means that it would not apply to the situation where returns were filed when required but were negligently prepared. That being the case, the Taxpayer's settlement proposal was not one which the Minister could have accepted under paragraph 162(7)(*b*) of the ITA. As a result, failure to accept the offer of settlement was a neutral factor in the determination of the appropriate award of costs (and could not be considered a factor in supporting the increase in costs under Rule 147(3)(*d*) of the TCC Rules). The Tax Court's conclusion that the failure of the Minister to accept the offer of settlement of the Taxpayer justified an increase in costs contained an extricable error of law, namely the scope of section 162(7)(*b*) of the ITA, and was therefore reviewable on the standard of correctness.

(4) **Right to procedural fairness:** The Tax Court breached the parties' right to procedural fairness in not giving them notice of its intention to address pre-litigation conduct as a factor in awarding costs under Rule 147(3)(*g*) of the TCC Rules, which deprived the Minister of the opportunity to bring relevant facts to the Tax Court's attention. The FCA also noted that pre-litigation conduct is not a stage *in* the "proceeding," a defined term at Rule 2 of the TCC Rules, which means "an appeal or reference." While the issue of pre-litigation conduct was but one of several factors which the Tax Court considered in awarding costs, it was one of a smaller number of factors weighing heavily in favour of increased costs.

Conclusion

Amongst other considerations, such as the Tax court's use of discretion under Rule 147 of the TCC Rules, the FCA found that the trial judge had breached the parties' right to procedural fairness in failing to give them notice of its intention to address pre-litigation conduct as a factor in awarding costs.

In addition, the FCA found that the Tax Court also erred in law in fettering its discretion as to the range of partial indemnity costs, the effect of success at trial, and its conclusion that the Taxpayer's offer to settle was principled. The Minister's appeal was allowed with costs, the Tax Court's judgment was set aside, and the FCA returned the matter to the trial judge for a fresh determination of the costs payable to the Taxpayer.

— *Victor Qian and Marc Lesage*

Chen v. Canada, 2023 GTC 1008 (Federal Court of Appeal) — A Bare Trustee Purchaser of Newly Built Residential Property Without Beneficial Interest Constitutes a "Particular Individual" Within the Meaning of Subsection 254(2) of the *Excise Tax Act*

Background

When Ms. Chen was trying to purchase a newly-built residential property to live in, she was not able to get financing for the balance of the purchase price owed on the home. The financial institutions she contacted required that more people be added to the title of the new home. Ms. Chen asked her godparents to be added to the title and when they agreed, Ms. Chen was able to obtain financing. When Ms. Chen purchased the newly-built home, she applied for a $24,000 GST/HST rebate in relation to her purchase. The Minister of National Revenue (the "Minister") dismissed the application on the ground that the conditions set out in subsection 254(2) of the *Excise Tax Act* (the "ETA") for the new housing rebate were not met. Specifically, the Minister argued that Ms. Chen's godparents formed, with Ms. Chen, the "particular individual" referred to in paragraphs 254(2)(*a*), (*b*), and (*g*) of the ETA and were required to meet the preconditions set out in the provisions. The Minister held that Ms. Chen was not eligible for the new housing rebate since the godparents were not related to Ms. Chen, had no intention of occupying the newly-acquired house as their primary residence, and never occupied it when possession was granted.

Tax Court Decision

Ms. Chen appealed the Minister's reassessment to the Tax Court of Canada. She argued that her godparents should be excluded from the definition of "particular individual" such that she was the only "particular individual" within the meaning of subsection 254(2). In particular, Ms. Chen contended that a bare trust was created when she and her godparents signed a declaration of trust prior to the closing of the purchase agreement in relation to the new home. She claimed that her godparents held their interest in the property solely in their capacity as bare trustees for her. Ms. Chen argued that the bare trust agreement excluded her godparents from qualifying as "particular individuals" in relation to the property.

The Tax Court dismissed Ms. Chen's appeal. The Court held that it was bound by the decision of the Federal Court of Appeal in *Canada v. Cheema* (2018 GTC 1008).

Canada v. Cheema

In *Cheema*, Mr. Cheema and his friend signed an agreement of purchase and sale of a newly-built property. The friend of Mr. Cheema signed the purchase and sale agreement solely to assist Mr. Cheema in obtaining mortgage financing. Mr. Cheema acquired a 99% interest in the property and the friend acquired a 1% interest. A bare trust agreement was signed which stated that the 1% interest was held in trust for Mr. Cheema. Mr. Cheema applied for the new housing rebate, but the Minister reassessed him to deny the application. The Minister held that the application failed to meet the preconditions for the new housing rebate. One precondition at issue was paragraph 254(2)(*b*), which states that the "particular individual" must acquire the property for use as the primary place of residence of the particular person. The Minister claimed that the friend was also a "particular individual" with Mr. Cheema within the meaning of subsection 254(2), and because the friend did not intend to occupy the purchased property as his primary place of residence, the precondition of the rebate was not met.

In the Tax Court of Canada in *Cheema*, the trial judge found that the friend was an agent of Mr. Cheema as evidenced by the bare trust agreement. The Court found that the friend was a bare trustee and had no interest *per se* in the property itself. As such, the Court held that the friend was not a "particular individual" for the purposes of subsection 254(2). Because Mr. Cheema had satisfied the preconditions in subsection 254(2), the Court held that he should be qualified for the new housing rebate.

The Federal Court of Appeal in *Cheema* was a 2-1 split decision. The majority disagreed with the Tax Court and held that the rebate should be denied. The majority noted that section 254 sets out preconditions, written in very precise wording, for any taxpayer to claim the new housing rebate. Paragraph 254(2)(*b*) states that the "particular individual" must acquire the property for use as the primary place of residence of the particular person. The majority stated that when a supply of property is made to two or more individuals, the refence to "a particular individual" in section 254 must be read as references to all the individuals. Since the agreement of purchase and sale indicated that the supply of property was made to both Mr. Cheema and his friend, the preconditions in section 254 must be satisfied by both of them. Because the friend failed to use the property as his primary place of residence, the majority held that paragraph 254(2)(*b*) was not satisfied, thereby disqualifying Mr. Cheema from the rebate.

Mr. Cheema contended that the Court should have regard to the bare trust agreement which evidenced that the friend held his ownership interest in trust for the taxpayer. However, the majority stated that paragraph 254(2)(*b*) was written in a way that makes the bare trust relationship between the taxpayer and the friend irrelevant. In the majority's view, what was relevant for rebate purposes was the relationship between the purchaser and the builder of the new home, not the relationship between co-purchasers. As such, the majority held that the bare trust agreement was irrelevant for subsection 254(2) purposes.

On the other hand, the dissenting opinion held that the bare trustee factor should not be ignored for the purposes of subsection 254(2). The dissent stated that a "particular individual" for the purposes of subsection 254(2) should be an individual that actually receives the beneficial ownership or possession from the builder of the residential unit. The dissent stated that a co-purchaser of the newly-built home who does not acquire a beneficial interest in the home should not be a "particular individual" for the purposes of subsection 254(2). Because the friend of the taxpayer was merely a bare trustee who held the interest of the property for Mr. Cheema, the dissent held that the friend should not be a "particular individual". As such, the dissent held that Mr. Cheema should be entitled to the rebate as he met all the preconditions in subsection 254(2).

Back to *Chen v. Canada*

Although the Tax Court of Canada in *Chen* found Ms. Chen's circumstances regrettable and unfortunate, it felt bound by the majority's decision in *Cheema*. The Court held that Ms. Chen's godparents were "particular individuals" for the purposes of subsection 254(2) and that they failed to meet the requirements of paragraph 254(2)(*b*) as they did not acquire the property with the intention of using it for their primary place of residence. As such, the Court dismissed Ms. Chen's appeal.

Federal Court of Appeal Decision

Ms. Chen appealed to the Federal Court of Appeal. Ms. Chen claimed that the Tax Court erred in concluding her godparents were "particular individuals" for subsection 254(2) purposes. She also argued that the Tax Court committed a reviewable error by dismissing her appeal while acknowledging that the intent of section 254 was to help persons like her.

The Federal Court of Appeal held that Ms. Chen's appeal should be dismissed as the decision made by the majority in *Cheema* was conclusive regarding the issues she raised. The Court held that as a result of the principle of horizontal *stare decisis*, which states that future panels of an appellate court are bound by prior decisions of a panel of that court, the Court must follow the majority decision in *Cheema*. The Court noted that a panel may overrule a prior decision of another panel only when the previous decision is "manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed." It was up to Ms. Chen to persuade the Court that the majority decision in *Cheema* was manifestly wrong.

However, the Federal Court of Appeal found that Ms. Chen failed to demonstrate that the majority decision in *Cheema* was manifestly wrong. Ms. Chen argued that the majority's decision in *Cheema* was undermined by the amendments that were made in the ETA in 2021. The Court held that the majority's reasons in *Cheema* were not undermined by those amendments because *Cheema* was decided in light of the law as it applied at the time of the decision. Moreover, the Court did not find any error in the majority's interpretation of subsection 254(2) that would justify the Court in overruling the decision.

The Federal Court of Appeal in *Chen* also held that the Tax Court did not commit a reviewable error in dismissing the appeal while acknowledging that Ms. Chen was someone who the legislation was intended to benefit. While the Tax Court expressed sympathy to Ms. Chen, it was fully aware that it cannot allow the rebate to extend beyond the meaning and wording of the section. The Federal Court of Appeal held that it was not an error for the Tax Court to express sympathy to Ms. Chen in the judgment. In the end, the Federal Court of Appeal dismissed Ms. Chen's appeal.

Conclusion

The Tax Court of Canada and Federal Court of Appeal both held that a bare trustee who purchases a newly-built residential property in his or her capacity as a bare trustee with no beneficial interest in the property may constitute a "particular individual" for the purposes of subsection 254(2) of the ETA. Unless all particular individuals, including any bare trustee purchasers, can satisfy the preconditions in subsection 254(2), the new housing rebate application will be dismissed.

— *Shinjin Kang*

Royal Bank of Canada v. Commissioners for His Majesty's Revenue and Customs [2023] EWCA Civ 695 (England and Wales Court of Appeal) — An Interpretation of What Constitutes Income From "Immovable Property" for the Purposes of the UK/Canada Double Tax Convention

Background

Royal Bank of Canada ("RBC"), acting through its head office in Canada, lent monies to a Canadian oil company, Sulpetro Ltd. ("Sulpetro"), which, through its UK subsidiary, extracted oil from the Buchan Field in the UK pursuant to a licence granted to the UK subsidiary by the Crown.

Sulpetro subsequently went into receivership, and by virtue of the liquidation of its assets, BP Petroleum Development Ltd. (and subsequently Talisman Energy Inc.) were required to make certain contractual payments to Sulpetro in respect of oil produced and sold by them that was extracted from the Buchan Field (the "Royalties"). The right to receive the Royalties was eventually assigned to RBC as Sulpetro's creditor by a court order. On receipt of the Royalties, the Respondents (His Majesty's Revenue & Customs) contended that RBC was taxable in the UK as the recipient of income from "immovable property" in the UK.

Issue and Decision

RBC made a number of submissions through the various levels of courts that presided over this matter, but the primary issue that was required to be addressed was the proper interpretation of Article 6 of the UK/Canada Double Tax Convention (the "Treaty") with respect to the Royalties.

More precisely, the England and Wales Court of Appeal (the "Court") had to decide whether the Royalties constituted income from "immovable property" as that term is defined in Article 6(2) of the Treaty.

The Court relied on the Vienna Convention to guide its interpretation of the Treaty, which generally requires that Article 6 of the Treaty be examined in the context of:

(1) the purpose of the Article,

(2) the text of both operative languages,

(3) the Treaty as a whole, and

(4) international tax principles.

In accordance with the forgoing, the Court considered Article 13 of the Treaty, which deals with the taxation of capital gains. Article 13 differentiates between two types of gains — paragraph 13(1) applies to the taxation of gains from the alienation of immovable property, and paragraph 13(4) applies separately to the taxation of gains from the alienation of rights and licences to drill for oil, or the right to assets produced by such activities. Therefore, it should, according to the Court, follow that all or at least some of the assets listed in paragraph 13(4) would not otherwise fall within the definition of immovable property in paragraph 13(1). This differentiation was crucial to the decision because the Court found that the source of the Royalties was more closely aligned with those assets described in paragraph 13(4), so to include that source in the definition of immovable property for the purposes of Article 6 would render Article 13(4) meaningless (a result that should be avoided when interpreting the Treaty).

In addition to Article 13, the Court also focused on the French version of the Treaty, and found that the choice of language in that version of the Treaty (although not given any greater weight than the English version) did not support the narrow construction of Article 6 that the Respondent was attempting to impose, but instead was more aligned with RBC's interpretation.

Conclusion

In conclusion, applying the above interpretation to the facts, the Court held that RBC never held an interest in the Buchan Field, and therefore the Royalties could not be taxable under Article 6 of the Treaty. RBC only held a contractual right to receive payments calculated by reference to the sale proceeds derived from sales of oil, and that does not meet the definition of income from immovable property for the purposes of the Treaty.

— *Keaton Buchberger*

Amex Bank of Canada v. The King, 2023 GTC 14 (Tax Court of Canada) — Financial Institution Not Entitled To Claim Input Tax Credits on Expenses Incurred in Connection With Loyalty Program

On June 27, 2023, the Tax Court of Canada ("TCC") ruled[1] that Amex Bank of Canada ("Amex") was not entitled to claim back the goods and services tax/harmonized sales tax ("GST/HST") it paid on its expenses arising in connection with the administration and operation of its Membership Rewards Program as input tax credits ("ITCs"), including expenses incurred for providing rewards to its members upon the redemption of points ("MRP Expenses").

Issue

The key issue in this decision was whether the MRP Expenses, including the payment for travel certificates, had been incurred by Amex in the course of a commercial activity.

Indeed, under subsection 169(1) of the *Excise Tax Act* ("ETA"), a registrant is entitled to claim ITCs only to the extent that the expenses are incurred for consumption, use, or supply in the course of a commercial activity, which excludes the making of exempt supplies of financial services. Similarly, one of the conditions that must be met for a registrant to be able to claim ITCs under subsection 181(5) of the ETA is that the payment must have been made in the course of a commercial activity.

Factual Background[2]

Amex operated a Membership Rewards Program ("MRP") during its 2002 to 2012 annual reporting periods (the "Relevant Periods"). Amex was registered for GST/HST purposes during the Relevant Periods.

Amex issued American Express charge cards and credits cards (collectively, "Cards") to members of the public ("Cardholders"). Under the MRP, Cardholders accrued points for eligible purchases made with their Cards.

The MRP was exclusively available to Cardholders, offering various benefits and rewards to members of the MRP ("Members"). Some Cards automatically enrolled Cardholders into the MRP without any additional fee ("MRP-Inclusive Cards"), while others ("MRP-Extra Cards") provided the option to join the program by paying an enrollment fee ("MRP Enrollment Fee") (the MRP-Inclusive Cards and the MRP-Extra Cards are collectively referred to as "MRP Cards"). Amex charged GST/HST on the MRP Enrollment Fee. Furthermore, the Members had the option to pay an extra points accelerator fee allowing members to earn points at an accelerated rate ("Points Accelerator Fee"). Amex also charged Members GST/HST on the Points Accelerator Fee.

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[1] *Amex Bank of Canada v. The King*, 2023 GTC 14.

[2] Amex and the Minister of National Revenue filed a Partial Agreed Statement of Facts, which was reproduced by The Honourable Justice Robert J. Hogan in his reasons.

Members could redeem their accumulated points for various rewards, such as airline tickets, hotel stays, restaurant meals, gift cards, and tangible items (“Rewards”). Amex determined the number of points required for each Reward, and Members could purchase additional points for a fee (“Points Fee”) if they didn’t have enough for a specific Reward. Amex charged GST/HST on the Points Fee.

Amex entered into Participation Agreements with suppliers of various Rewards (“Participants”). Amex paid negotiated amounts to the Participants for the Rewards offered, and the Participants charged Amex GST/HST on their supplies used as Rewards (“Participant Costs”).

Amex also entered into Participation Agreements (“ACI Participation Agreements”) with Amex Canada Inc. (“ACI”). Under the ACI Agreements, Members could exchange their accumulated points for travel certificates of fixed face values (e.g., $100, $500). Members could use these travel certificates with ACI or ACI-franchised travel agencies to pay for travel products or services, with Amex paying ACI for the redeemed certificates (“Travel Certificate Payments”). Throughout the Relevant Periods, Amex and ACI were member of a “closely-related group” (as that term is defined in the ETA) and were parties to an election under section 150 of the ETA.

Amex earned substantial revenue, primarily from credit card and charge card operations, with interest income, transaction charges, and discount revenue being the largest revenue sources.[3] The redemption of MRP points was recorded as an expense on Amex’s income statement, and reserves were set aside on Amex’s balance sheet to cover the estimated cost of future MRP points redemption.

In its GST/HST returns for the Relevant Periods, Amex claimed ITCs on the GST/HST paid on its overhead costs and Participant Costs based on the percentage of the MRP-Extra Cards to the total of all MRP Cards issued. In addition, Amex claimed ITCs under subsection 181(5) in respect of GST/HST (“NITCs”) that it was deemed to have paid in respect of the Travel Certificate Payments.

Parties’ Positions

Amex argued that it provided multiple supplies, some taxable and others exempt, and all the GST/HST paid on the MRP Expenses was incurred in the course of making taxable supplies, distinct from the exempt supplies made to its Cardholders.

On the other hand, the Minister of National Revenue argued that the MRP Expenses, including those related to purchasing Rewards, formed a single composite supply, the predominant element of which was an exempt “financial service”.

Decision and Analysis

The first consideration of the TCC was whether Amex incurred the MRP Expenses in the course of a single composite supply made to its Members or in the course of distinct taxable supplies. If, indeed, the MRP Expenses were incurred in the course of making a single composite supply, the second consideration was to determine the predominant element of such single composite supply.

The TCC agreed that that the determination of whether a recipient receives a single supply or multiple supplies must be determined from the standpoint of the recipient of the supply.

Single Supply versus Multiple Supplies

In order to determine whether Amex made a “single composite supply” or multiple supplies, the TCC applied the “composite supply test” which examines whether an alleged separate supply is an integral part of the overall supply by assessing the degree of interconnection and interdependence between the elements or components of the supply.

The TCC closely examined the MRP terms and conditions to ascertain the relationship between the MRP and Amex’s credit card business. It noted that while someone can be a Cardholder without MRP membership, the reverse is not possible. Indeed, becoming a Member is directly linked to holding an MRP Card and the MRP and points are intended

[3] Revenue from MRP fees accounted for less than 0.75% of Amex’s total revenue in 2009 and 2010.

exclusively for a Cardholder's benefit and use. Points are earned based on the MRP Card's usage, and Amex generates significant merchant discount revenue from these transactions.

The TCC stated that the multiple components of the supply made by Amex to a Member, notably extending credit to Cardholders, which is an exempt "financial service", and the accumulation of points were closely intertwined and linked.

The TCC also concluded that it was clear that Amex incurred the MRP Expenses to increase the volume of credit card transactions. Where a Cardholder spends more money by using an MRP Card, the Cardholder will earn more points and Amex will earn a greater amount of merchant discount revenue, which should be the commercial efficacy of the arrangement.

Addressing Amex's claims about other elements (e.g., MRP Enrollment Fee, Points Accelerator Fee) constituting separate taxable supplies, the Court rejected them, stating that they are closely tied to the obtaining of Rewards by Members.

The TCC also reviewed the accounting treatment of the MRP Expenses by Amex, as it is based on the commercial reality of the components or elements of a single composite supply. It concluded that all the elements and components of the MRP were inherently intertwined and connected with the exempt supply of financial services made by Amex to its Members and merchants, notably because the MRP fees (i.e., the MRP Enrollment Fee and Points Accelerator Fee) represented less than 0.4% of Amex's total revenue.

Determination of the Predominant Element of the Single Composite Supply

Having concluded that the supply made by Amex to the Cardholders was a single composite supply, the TCC now had to determine what the predominant element was. By applying the two-prong test established by the Federal Court of Appeal ("FCA") in *Global Cash Access (Canada) Inc.*,[4] the TCC concluded that the predominant element of the single composite supply made by Amex was the extension of credit by Amex to a Member. Indeed, the commercial efficacy of the supply, from the Cardholder's perspective, is credit which is interest-free (provided the full amount of the monthly bill is paid on time) that allows the MRP Cardholders to procure goods and services without using cash savings or borrowing funds from a different source.

As the MRP Expenses were not incurred in the course of a commercial activity but rather in the course of making exempt supplies of financial services, subsection 169(1) of the ETA could not find application and therefore, Amex was not entitled to claim back the GST/HST it paid on the MRP Expenses as ITCs.

NITCs

With respect to the NITCs provided in subsection 181(5) of the ETA, the TCC concluded that, as the Travel Certificate Payments were incurred in respect of a liability that arose because of the single composite supply of an exempt financial service, Amex was not entitled to claim any NITCs.

Alternative Arguments of Amex

Lastly, the TCC rejected the alternative arguments of Amex that exclusionary paragraph (*r*.5) of the definition of "financial service", sections 138 and 139 of the ETA should apply.

Free Supplies of Rewards

Amex also argued that the "free supply rule" under subsection 141.01(4) of the ETA should find application with respect to the supply of Rewards in the MRP. Amex claimed that the Rewards are provided for no consideration, making it a free supply, and thus, they were entitled to ITCs for the related MRP Expenses.

The TCC concluded that Amex's claim of a free supply was not valid and emphasized that the nature of the supply must be determined based on the overall financial service supplies made by Amex. Whereas Amex claimed that the purpose of the free supply was to promote the activities of Participants, the TCC found that the promotional and marketing efforts of the Rewards primarily served Amex's own purposes rather than the promotion of Participants' activities.

[4] 2013 GTC 1030.

The TCC also noted that even if the free supply rule were to apply, Amex did not provide sufficient evidence to demonstrate how the MRP Expenses should be allocated between the alleged promotion of the Participants' activities and the predominant purpose of providing a financial service.

Final Observations

Lastly, the TCC expressed its skepticism about Amex's position, stating that it is "akin to the task of swimming against a significant riptide", as if it was to agree with Amex's position, this would lead to a result which is contrary to the outcome of a number of decisions involving taxpayers that sought to grow the revenue from their credit card business by offering rewards to members of their loyalty programs calculated based on their card spending.

Justice Hogan, who also presided over *President's Choice Bank*[5] ("*PC Bank*"), highlighted that he concluded in *PC Bank* that redemption payments were linked to the provision of exempt financial services and, therefore, were not eligible for NITCs.

Finally, the TCC noted that both the TCC and FCA commented in other cases that under the general scheme of the ETA, financial institutions cannot claim ITCs for GST/HST related to loyalty programs used in the course of their financial services business.

— *Dragann Mallette*

RECENT CASES

A Transfer Did Take Place, and Respondents and Third Party Were Not Dealing at Arm's Length

Five respondents were holding corporations that indirectly owned — each through a 99.99% interest in five respective partnerships — a parcel of farmland in Brampton, Ontario. The respondents each had agreed to dispose of their undivided interest in the farmland to an arm's length purchaser ("WTC"). The Minister, relying on s. 160(1), assessed the respondents for the totality of the subsidiaries' unpaid tax debt. The Tax Court had concluded that the respondents and WTC were in fact dealing at arm's length since they each acted in the pursuit of their own separate and independent interests when the deal was struck. The general anti-avoidance rule ("GAAR") was also invoked by the Crown before the Tax Court as an alternative basis for confirming the validity of the assessments.

The appeals were partly allowed. The issue was whether the participation by the respondents in transactions with a third party aimed at relieving them from a tax liability that ultimately went unpaid gave rise to a transfer for purposes of s. 160(1), and if so, whether they were dealing at arm's length with this other party at the time of the transfer. The Appeals Court held that a transfer did occur, and that the respondents and the third party were not dealing at arm's length when it took place, with the result that the respondents were liable for the outstanding tax debt pursuant to s. 160(1), but only up to the monetary advantage they derived from the transfer. The disproportionate share of the payout and the respondents' willingness to blindly abide by WTC's every term in order to obtain it led the Appeals Court to conclude the respondents were not in fact dealing at arm's length with WTC at the time of the transfer. The Appeals Court further held that the GAAR did not apply to allow for the collection of the remainder. The Court allowed the appeals in part and referred the assessments back to the Minister for reconsideration and reassessment.

The King v. Microbjo Properties Inc. et al.

2023 DTC 5062

[5] *President's Choice Bank v. The Queen*, 2022 TCC 844.

Request for Judicial Stay of Prior Decision Dismissed

In this case, the Minister of Canadian Heritage (“the Minister”) requested a judicial stay of a decision rendered by the Federal Court with respect to the entitlement of the Respondents to the Canadian video or film production tax credit. To obtain the credit, the producers must first obtain a Canadian film or video production certificate. The Minister had denied the issuance of these certificates on the basis that the video productions were not admissible due to their advertising content. The producers appealed to the Federal Court, which overturned the decision and sent the matter back to the Minister for redetermination. This decision is also being appealed, but in the meantime, the Minister is requesting a judicial stay of the decision. The parties agreed about the applicable test in such cases. To obtain the judicial stay, the Minister must convince the Court that there is a serious issue to resolve, that it will face irreparable harm if the stay is not granted, and that the preponderance of inconveniences favours the granting of the stay.

The stay request was dismissed with costs. With respect to the matter of a serious issue needing to be resolved, the threshold for ruling on this is low. While the Respondents stated that the issues raised by the Appellants were not serious, the Federal Court of Appeal (“FCA”) disagreed. Indeed, the FCA only had to decide if the issues were frivolous and vexatious; the Court could not find them as such. Therefore, the first criteria was met. With respect to the “irreparable harm” issue, the FCA generally agreed with the Respondent’s arguments. Also, the FCA noted the Federal Court did not order that the certificates be issued but returned the file for a new determination; the Court did not see how this process constituted “harm”, and even more so, “irreparable harm”. Accordingly, the Federal Court of Appeal concluded that the Minister did not succeed in proving it would suffer irreparable harm if the stay was denied. Consequently, the stay request was dismissed with costs.

Minister of Canadian Heritage v. 9616934

2023 DTC 5054

Expense Claims with Respect to “Special Work Site” Rejected

The Appellant was reassessed in 2019 to add $36,000 in taxable income to his 2013 taxation year. This amount represented reimbursement for transportation, lodging, and board expenses that the Appellant claimed were exempt under s. 6(6) of the *Income Tax Act* because they were incurred at “special work sites”. The Appellant lived in Saskatoon and worked near Lloydminster, Alberta, about a three-hour drive away. There was also a limitations issue under s. 152(4)(*a*)(i), since the reassessment was outside of the normal three-year period.

The Tax Court dismissed the appeal. Subsection 6(6) defines “special work site” as one at which the duties performed by the taxpayer were of a temporary nature, the taxpayer’s principal place of residence was beyond commuting distance, the site was sufficiently remote that there was no established community where it would be reasonable to set up a second residence, and the stay required at the special work site, plus travel time, was not less than 36 hours. The Court determined that the Appellant’s role as marketing manager was not “of a temporary nature”, nor was his employer’s headquarters, where he discharged this role, a special work site. The Appellant’s alternative argument that each of the locations he visited was a special work site proved too much, because on this reasoning any salesperson could claim the same. As for the s. 152(4)(*a*)(i) issue, the Court found the Appellant’s failure to report the $36,000 was a misrepresentation, and that he failed to “thoughtfully, deliberately and carefully assess the situation”: he omitted to report the $36,000 in his 2013 return through neglect, carelessness, or wilful default, and so the reassessment was not time-barred.

Gessner v. The King

2023 DTC 1055

Conclusion That Applicant Was Not Working for Reasons Unrelated to COVID-19 Was Unreasonable

The Applicant applied for the Canada Recovery Benefit ("CRB") for 27 two-week periods from September 2020 to October 2021. The CRA determined he was not eligible as he had not earned at least $5,000 (before taxes) of employment or net self-employment income in 2019, 2020, or in the 12 months before the date of his first application. The Applicant requested a second review, which determined he was not eligible for the CRB because he was not working for reasons unrelated to COVID-19 and did not have a 50% reduction in his average weekly income compared to the previous year due to COVID-19. The Applicant sought judicial review of that decision.

The application was granted. The determinative issue is the reasonableness of the decision per *Vavilov*: A reasonable decision is one based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker. The onus is on the Applicant. According to the interview notes, when the officer asked how the Applicant's work was affected from September 2020 until October 2021, the Applicant stated that at the start of the pandemic he was applying for new jobs at the airport and other hospitality jobs. The Applicant explained that, while he stopped working in 2019, he would have worked again but for COVID-19. Just before the pandemic began, he was applying for a position at the airport, but then everything shut down and he did not get the job. In light of this explanation, the officer's conclusion that the Applicant was not working for reasons unrelated to COVID-19 was unintelligible. The officer came to this conclusion on the basis that the Applicant stopped working in 2019 and did not return to work until August 2021, and that this was before the pandemic started in March 2020 and therefore did not have to do with COVID-19. The Applicant may have stopped working in 2019 for reasons unrelated to COVID-19. However, the officer erred by making an unjustifiable leap when determining that the Applicant's entire unemployed period from 2019 to August 2021 was for reasons unrelated to COVID-19. This conclusion did not take into account the explanation and information provided by the Applicant. The officer may have reasons to support the conclusion the Applicant did not meet the income eligibility criteria for CRB periods 25 to 27, but the error in finding the Applicant was not working for reasons unrelated to COVID-19 rendered the decision as a whole unreasonable. The application for judicial review was allowed and the matter referred back for redetermination by a different decision maker.

Fentum v. Canada (AG)

2023 DTC 5052

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