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Highlights

WHEN IS THE EQUITABLE REMEDY OF RESCISSION AVAILABLE? IMPLICATIONS OF THE BRITISH COLUMBIA COURT OF APPEAL'S DECISION IN COLLINS FAMILY TRUST

Robert A. Neilson and Ashvin R. Singh, *Felesky Flynn LLP*

The companion decisions of the Supreme Court of Canada in *Canada (AG) v Fairmont Hotels Inc.* and *Jean Coutu Group (PJC) v Canada (Attorney General)* vastly narrowed the equitable remedy of rectification, raising concerns with respect to whether the equitable remedy of rescission was similarly curtailed in scope. In Collins Family Trust, the British Columbia Court of Appeal confirms that rescission remains available to rescind a transaction in certain circumstances where the parties entered into it based on a mistake as to the tax consequences of the transaction. The authors discuss the Court's reasoning and its meaning for equitable remediation of errors.

NIL ASSESSMENTS ARE NOT A "NOTHING"

Joanne Vandale & Daniel Downie, *Osler, Hoskin & Harcourt LLP*

Are nil assessments devoid of legal effect? The Federal Court of Appeal recently provided clarity on this question in *Canada v. 984274 Alberta Inc.* The authors discuss this decision and shed light on its implications.

DIRECTOR'S LIABILITY ARISES UPON A CORPORATION'S FAILURE TO REMIT, STRENGTHENING THE MINISTER OF NATIONAL REVENUE'S POWER TO ISSUE "CASCADING" ASSESSMENTS UNDER SECTION 160

Vanessa Zuchetto, *Felesky Flynn LLP*

Vanessa Zuchetto provides an overview of the Federal Court of Appeal's decision in *Canada v. Colitto* that a director's personal liability for a corporation's tax debt may arise at the moment a corporation fails to remit an amount to the Canada Revenue Agency, and not once the corporation's tax debt has been registered in the Federal Court and returned unsatisfied. The Supreme Court of Canada recently dismissed an application for leave to appeal from the Federal Court of Appeal's decision, bolstering the Minister of National Revenue's ability to issue a cascading assessment under section 160 in a director liability context.

JUNIOR COUNSEL SERIES – PART I

Amit Ummat, *Ummat Tax Law*

We are introducing a series of articles geared toward more junior tax litigation counsel. In this first installment, Amit Ummat (Ummat Tax Law) reviews various methods to prove a case in the absence of viva voce testimony. The writer examines the use of affidavits, read-ins, judicial notice, requests to admit, and other ways to introduce evidence without a witness.

WHEN IS THE EQUITABLE REMEDY OF RESCISSION AVAILABLE? IMPLICATIONS OF THE BRITISH COLUMBIA COURT OF APPEAL'S DECISION IN COLLINS FAMILY TRUST

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I. INTRODUCTION

In 2016, the companion decisions of the Supreme Court of Canada ("**SCC**") in *Fairmont* ("***Fairmont***")[1] and *Jean Coutu* ("***PJC***")[2] vastly narrowed the scope of the equitable remedy of rectification, which previously had been available to remedy errors in transaction planning that inadvertently gave rise to adverse tax results. As the Court famously wrote in *Fairmont*, "[r]ectification is not equity's version of a mulligan",[3] meaning, in essence, that the remedy would no longer be available where unforeseen tax consequences arose as a result of transactions that were carried out correctly. There has been some uncertainty since these decisions as to whether they also narrowed the availability of the equitable remedy of rescission in circumstances where an unforeseen and adverse tax result arises from the actions of taxpayers.

The decision of the British Columbia Court of Appeal ("**BCCA**") in *Collins Family Trust*[4] considered the jurisprudence since these SCC decisions and found that the availability of equitable rescission to remedy unanticipated adverse tax consequences remains largely unchanged by *Fairmont* and *PJC*. This article will discuss the issues at play in the BCCA's decision and ultimately concludes that the BCCA's decision is well-reasoned and should be followed throughout Canada.

II. THE DECISIONS OF THE SUPREME COURT IN *FAIRMONT* AND *PJC*

By way of background, rectification is an equitable remedy permitting a court to modify a legal instrument where the instrument does not reflect the parties' true intentions. In a seminal decision, Lord Denning described the test for rectification which still applies today in Canada, namely that "in order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly".[5] In the early 2000s, Canadian cases gradually broadened the scope of rectification to include situations where the tax result of the legal instruments prepared by parties did not accord with their intentions or expectations, even though the instruments were correctly written down and did otherwise reflect the parties' intentions at the time they were drafted.[6] Thereafter, rectification became an important "tool in the tax litigator's toolbox" in an effort to remedy situations where poor tax results flowed from deficient planning. The facts at issue in *Fairmont* and *PJC* are illustrative of the kinds of scenarios where rectification previously would have been sought to remedy an adverse tax result.

In *Fairmont*, for example, the taxpayer and its subsidiaries petitioned the Court to rectify a share redemption undertaken by its subsidiaries which resulted in a significant, unintended tax liability. The lower courts allowed rectification on the basis that the relevant parties intended that the arrangement be "tax-neutral" in effect, and their intention was frustrated by the unintended tax consequences of the transactions adopted.

The SCC overturned the lower courts and held that rectification was not available in the circumstances. In reaching this conclusion, the SCC reasoned that only two types of errors would give rise to the remedy of rectification. The first is where the applicant could show "the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement".[7] The second is where a mistake is unilateral, in that the instrument formalizes a unilateral act (such as the settlement of a trust), or the parties disagree with respect to whether the legal instrument in question memorialized their agreement. The SCC focused on the need for symmetry in the application of the principle set out in *Shell Canada*,[8] that tax consequences flow from what a taxpayer legally did, not what it could have done. The corollary of this proposition is a taxpayer cannot rely on judicial erasure of what it did based on what it could have done.

Fundamentally, the SCC in *Fairmont* and *PJC* narrowed the availability of rectification to those circumstances described above by Lord Denning, namely to where parties erred in writing down the terms of their agreements. In the tax context, it is clear that an application for rectification must be supported by evidence of a definite and ascertainable tax plan that was carried out improperly, and not merely a general intention to minimize or eliminate tax. As a result, rectification no longer could assist parties who correctly wrote down and carried out their agreements but later discovered an unexpected adverse tax consequence.

The SCC did not directly comment on whether the rationale for its decisions here would also affect the availability of rescission in a tax context.

III. *COLLINS FAMILY TRUST* – SUPREME COURT OF BRITISH COLUMBIA DECISION

The rescission application in *Collins Family Trust*[9] concerned a plan devised by the accountants of Todd Collins, a principal of Rite-Way Metals Ltd. ("**RWML**"), to shield its assets from its creditors. As part of the plan, a holding corporation, Engage Holdings Ltd. ("**EHL**"), was incorporated and a family trust ("**CFT**") settled. EHL then loaned money to the CFT to acquire shares of RWML, and subsequently dividends were paid to the CFT to either be invested or loaned to EHL. The plan relied on subsection 75(2) of the *Income Tax Act* ("**Act**")[10] to attribute the dividend income received by the CFT to EHL, which would be deductible pursuant to subsection 112(1). Significant dividends were paid in 2008 and 2009.

Later, the Canada Revenue Agency ("**CRA**") commenced a tax audit of the relevant taxation years and concluded that the dividends should have been included in the income of the CFT pursuant to paragraphs 82(1)(a) and 12(1)(j). The CRA's position relied on the decision of the Federal Court of Appeal ("**FCA**") in *Sommerer*, [11] in this regard, which in basic terms found that subsection 75(2) does not apply to an acquirer of trust property for fair market value. The alternative reassessing position advanced by CRA was that the general anti-avoidance rule in section 245 ("**GAAR**") applied to create the same result as under paragraphs 82(1)(a) and 12(1)(j).

Of note is that, prior to the petition in *Collins Family Trust*, and prior to the SCC's decisions in *Fairmont* and *PJC*, the BCCA had rendered a decision in *Re Pallen Trust* ("**Pallen Trust**"),[12] an appeal from a rescission petition that dealt with a substantially similar tax plan. Rescission in that case was granted, in significant part because the decision in *Sommerer* ran contrary to the common understanding of subsection 75(2) among tax professionals and the CRA. The fact that the taxpayers, or more accurately their advisors, were mistaken as to the effect of subsection 75(2) in these circumstances is important since the equitable remedy of rescission only will be available where parties make "a causative mistake of sufficient gravity" and the mistake goes to "the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction."[13]

Ultimately, the chambers judge in *Pallen Trust* concluded, and the BCCA agreed, that the mistake involving subsection 75(2) was of sufficient gravity in that circumstance that the dividends should be rescinded.

Returning to *Collins Family Trust*, the chambers judge, Justice Giaschi, concluded that the appellate decision in *Pallen Trust* was binding for the purposes of the rescission application before the Court, and rescission was granted on that basis. Nevertheless, Justice Giaschi also undertook a review of several decisions subsequent to *Pallen Trust* to determine whether the availability of rescission in Canada had changed since *Pallen Trust* was decided.

In his decision, Justice Giaschi reviewed a number of cases including the decision of the Ontario Court of Appeal ("**OCA**") in *Canada Life*, which concerned a rectification application in relation to ineffective transactions designed to realize a capital loss to offset certain capital gains.[14] In *Canada Life*, the parties agreed on appeal that rectification was not available following *Fairmont* and *PJC*, but the applicants instead brought a cross-application seeking rescission that would also, in their opinion, remedy the unintended tax result. In reaching the conclusion that the application for rescission should fail, the OCA opined that the requirements for rescission were not met: namely, that the parties could not show that "(a) the parties were under a common misapprehension as to the facts or their respective rights; (b) the misapprehension was fundamental; (c) the party seeking to set the contract aside was not itself at fault; and (d) one party will be unjustly enriched at the expense of the other if equitable relief is not granted".[15] The OCA was careful not to comment on whether *Pallen Trust* still was good law following *Fairmont* and *PJC*, distinguishing it on the basis that it involved settlement of property by a trustee and not rescission of a contract.[16]

Justice Giaschi also reviewed the *Harvest Operations*[17] case, which was a decision from the Alberta Court of Appeal ("**ACA**") dealing with a series of "buy-bump-sell" transactions intended to be undertaken on a tax neutral basis. The application at issue sought rectification before the Alberta Court of Queen's Bench, which was ultimately denied in part on the basis that the applicant only had led evidence of a general intention to minimize the tax consequences of the transactions. In other words, the applicant did not deny that the transactions intended were undertaken; it instead was arguing that its intention to also pay no tax as part of the transactions was foiled by an error. Before the ACA, the applicant further argued that, even if the equitable remedy of rectification is not available, the Court should exercise some kind of general equitable jurisdiction to rectify the errors made.[18] The ACA was unconvinced by these arguments and concluded that no equitable relief was available in the circumstances.

The unreported decision in *BC Trust* also was considered.[19] In that instance, the petitioner was a trustee who sought to retroactively allocate income to a beneficiary in a particular taxation year. Both rectification and a remedy based in the equitable jurisdiction of the court were sought as the trustee in that year knew that the beneficiary was in a tax dispute with the CRA and believed that adverse consequences would arise from the allocation. The chambers judge in *BC Trust* reached the conclusion that relief was not available under either equitable doctrine.

In summary, Giaschi J concluded that *Fairmont* and *PJC* stood for two principles: (1) taxpayers should be taxed based on what they actually did, not what they intended to do, and (2) it is not permissible to retroactively alter a transaction solely to achieve an intended tax objective. In the Court's view, the fact that rectification and rescission were different equitable doctrines did not justify why they should give rise to dramatically different results or be governed by different principles. In *obiter*, the Court opined that *Fairmont* and *PJC* were intended to be cases of general application to all taxation cases, a view that the Court believed was supported by the outcomes in *Canada Life*, *Harvest Operations* and *BC Trust*.[20] Notwithstanding that the Court considered itself bound by *Pallen Trust*, it was apparent from the decision that the Court otherwise would not have granted rescission, and considered the proper remedy to be a claim against the accountants who devised the plan. In delivering this decision with substantial *obiter*, the Court expressly set the stage for the appeal.

In closing, the Court briefly noted that the ability to seek a remission order pursuant to section 23 of the *Financial Administration Act*[21] was merely a factor to be considered in determining whether to grant an equitable remedy, and in circumstances of this nature the weight to be given to that factor is minimal.

IV. *COLLINS FAMILY TRUST* – APPELLATE DECISION

The central issue on appeal to the BCCA was whether the *Fairmont* and *PJC* decisions overruled the BCCA's decision in *Pallen Trust* regarding the availability of the equitable remedy of rescission. The BCCA unanimously upheld the chambers judge's decision to grant rescission and, in doing so, rejected the view that the validity of *Pallen Trust* had been undermined by subsequent jurisprudence.

In reaching its conclusion, the Court confirmed that rescission and rectification are separate equitable remedies, each with its own legal test that applies in tax and non-tax contexts. The BCCA's view was that *Fairmont* and *PJC* did not establish general principles surrounding the pursuit of equitable remedies in the tax context, and there was no principled reason why different equitable remedies could not yield different outcomes. Following the decision of the U.K. Supreme Court in *Pitt v. Holt*,[22] as well as the BCCA's earlier decision in *Pallen Trust*, the BCCA affirmed that the equitable remedy of rescission requires a "causative mistake of sufficient gravity", which is "a mistake as to (1) the legal character or nature of a transaction, or (2) some matter of fact or law which is basic to the transaction".[23] Although it is true that *Fairmont* and *PJC* limited the availability of rectification to circumstances involving an improper recording of an agreement, rescission instead can apply where parties make a grave mistake as to the consequences of a transaction, including the tax consequences.[24]

The BCCA went on to find that the *Canada Life* decision was distinguishable as the applicant in that case basically was seeking to rescind only select transactions within a complex series. This remedy was impermissible under the doctrine of rescission, which the BCCA found was an "all or nothing" remedy.[25]

Both *Harvest Operations* and *BC Trust* were rectification cases, and the BCCA found they did not analyze the impact of *Fairmont* or *PJC* on a claim for rescission. Taken together, those cases "simply demonstrate that an equitable remedy such as rescission will not be available where the parties are not seeking to be restored to their original position but rather to alter their transaction in order to achieve their intended tax objective".[26]

The Crown submitted that the potential application of the GAAR in *Collins Family Trust* distinguished it from *Pallen Trust* and somehow deprived the Court of jurisdiction over the matter, which should be left to the Tax Court of Canada or the FCA. Reference was made to the decision of the FCA in *Satoma*,[27] where the GAAR applied to a tax plan involving gifted property and the combined application of subsections 75(2) and 112(1). The BCCA also dispensed with this ground of appeal on the basis the availability of rescission involved an entirely separate legal test from the application of the GAAR, and therefore there was no obligation on the chambers judge to conduct a GAAR analysis as urged by the Crown.[28]

Finally, the BCCA considered the Crown's assertion that the ability to apply for a remission order under the *Financial Administration Act* or to commence an action in negligence was an adequate alternative remedy for the applicant. This line of argument was based on the principle that equitable remedies should only be granted where no other adequate remedy is available. However, in rejecting the Crown's submissions, the BCCA noted that neither of these remedies was practical or appropriate, particularly as the Minister was unlikely to recommend a remission of tax, and the advice of the applicant's accountants was correct at the time it was given.[29]

V. CONCLUDING COMMENTS

The decision of the BCCA is a welcome clarification of the law surrounding the availability of the equitable remedy of rescission in a tax context. Tax practitioners can take comfort in the fact that rescission remains available to a taxpayer who, in designing or implementing commercial transactions, commits a causative mistake of sufficient gravity regarding the tax implications of the transactions. Unlike the equitable remedy of rectification, which is focused on whether agreements were properly recorded and transactions correctly implemented, the availability of rescission instead does take into account the actual unintended tax consequences of the underlying transactions in assessing whether the gravity of the mistake is sufficient to warrant the remedy.

A cautionary observation to bear in mind is that in many circumstances where unintended tax consequences ultimately arise, there may be business or other considerations which dictate that rescission of an entire series of related transactions is not a viable or practical outcome. The *Canada Life* case in particular is an excellent example of the limitations of rescission, insofar as the applicant attempted to solve its tax problem using rescission but the transactions at issue ultimately were too complex, and the other implications of those transactions too numerous, to be simply unwound without more.[30]

In the writers' view, the BCCA's analysis in *Collins Family Trust* also has the benefit of being well-reasoned, and it is consistent with the decisions in *Fairmont* and *PJC* as well as the underlying nature and purposes of rectification and rescission. *Fairmont* and *PJC* essentially say that rectification is not available where parties have made a mistake as to the consequences of a transaction. Rescission, on the other hand, is fundamentally about providing a remedy for parties who have made a grave, causative mistake about some material aspect of a transaction, including about the tax consequences of a transaction. When one considers this purpose of rescission, it is apparent it should be available on the facts of *Collins Family Trust*, and the Crown could not convince the BCCA there is a compelling argument to treat mistakes as to tax consequences more harshly than other mistakes as to the consequences of a particular transaction or transactions.

It should be further noted that the decision of the BCCA in *Collins Family Trust*, while compelling, does not bind courts outside of British Columbia and, accordingly, it is possible courts in other provinces could reach a different conclusion regarding the availability of rescission in a tax context. However, it is hoped other appellate courts across Canada ultimately will adopt the BCCA's reasoning and conclusion on this issue.

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[1] *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 (S.C.C.) [*Fairmont*].
[2] *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55 (S.C.C.).
[3] *Fairmont*, *supra* note 1 at para 39.
[4] *Collins Family Trust v. Canada (Attorney General)*, 2020 BCCA 196 (B.C. C.A.) [*Collins BCCA*].
[5] *Fairmont*, *supra* note 1 at para 29.
[6] See for example, *Juliar v. Canada (Attorney General)* (1999), 46 O.R. (3d) 104 (Ont. S.C.J. [Commercial List]), affirmed (2000), 50 O.R. (3d) 728 (Ont. C.A.).
[7] *Fairmont*, *supra* note 1 at para 14.
[8] *Shell Canada Ltd. v. R., (sub nom.* Shell Canada Ltd. v. Canada*)* [1999] 3 S.C.R. 622 (S.C.C.); *ibid* at para 24.
[9] *Collins Family Trust v. Canada (Attorney General)*, 2019 BCSC 1030 (B.C. S.C.) [*Collins BCSC*].
[10] *Income Tax Act*, RSC 1985, c 1 (5th Supp). All statutory references herein are to the Act unless otherwise stated.
[11] *R. v. Sommerer*, 2012 FCA 207 (F.C.A.).
[12] *Re Pallen Trust*, 2015 BCCA 222 (B.C. C.A.).
[13] *Ibid* at para 2.

[14] *Canada Life Insurance Company of Canada v. Canada (Attorney General)*, 2018 ONCA 562 (Ont. C.A.) [*Canada Life*].
[15] *Canada Life*, *supra* note 14 at para 89.
[16] *Ibid* at para 88.
[17] *Harvest Operations Corp. v. Attorney General of Canada*, 2017 ABCA 393 (Alta. C.A.) [*Harvest Operations*].
[18] *Ibid* at paras 9, 73-75.
[19] The facts of this case are set out in *Collins BCSC*, *supra* note 9 at para 90.
[20] *Collins BCSC*, *supra* note 9 at para 98.
[21] *Financial Administration Act*, RSBC 1996, c 138.
[22] *Pitt v. Holt*, 2013 UKSC 26 (U.K. S.C.).
[23] *Collins BCCA*, *supra* note 4 at para 55.
[24] *Ibid* at para 56.
[25] *Collins BCCA*, *supra* note 4 at para 59.
[26] *Ibid* at para 62.
[27] *Fiducie financière Satoma c. Canada*, 2018 FCA 74 (F.C.A.).
[28] *Collins BCCA*, *supra* note 4 at para 76.
[29] *Ibid* at paras 87, 90.
[30] Pre-*Fairmont* and *PJC*, rectification often was able to provide the "more" needed to maintain the goals of transactions and at the same time eliminate the element or elements responsible for the adverse tax outcome.

NIL ASSESSMENTS ARE NOT A "NOTHING"

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It has been over half a century since the Supreme Court of Canada held in *Okalta Oils*[1] that there is no right of appeal from a "nil assessment". Although the *Okalta Oils* decision is often cited as authority for the proposition that a nil assessment is not an "assessment" for purposes of the *Income Tax Act* (Canada) (the "**Act**"), the Federal Court of Appeal (the"**FCA**") recently confirmed in *984274 Alberta*[2] that such an interpretation is overly broad, and that a nil assessment is still an assessment for certain purposes of the Act. The FCA also held that its earlier decision in *Freitas*[3] was wrong in holding that a reassessment issued out of time is voidable rather than void.

The issue in *984274 Alberta* was whether an income tax reassessment issued by the Minister of National Revenue (the "**Minister**") was validly issued, thereby allowing the Minister to recover an excessive tax refund paid to the taxpayer. The context of the dispute was the taxpayer attempting to repudiate a settlement agreement entered into among the taxpayer, its parent, and the Minister.

The Facts

The taxpayer, 984274 Alberta Inc. ("**984**"), was a wholly owned subsidiary of Henro Holdings Corporation ("**Henro**"). In 2002, Henro transferred land to 984, which the parties considered to be capital property. The parties filed a joint election for the transfer to occur on a tax-deferred basis pursuant to subsection 85(1).[4] The same day, 984 sold the land to an arm's length party. In computing its income for its taxation year ending March 31, 2003, 984 reported a taxable capital gain of approximately $4 million. The Minister issued an original assessment on June 23, 2003 levying Part I income tax in the amount of $1,809,598 (the "**2003 Assessment**") based on the taxable capital gain as reported. Therefore, the taxpayer's normal reassessment period, within the meaning assigned in subsection 152(3.1) ended on June 23, 2006.

In 2007, the Canada Revenue Agency ("CRA") proposed to reassess Henro on the basis that the land transferred to 984 was inventory, not capital property, and therefore was ineligible for the subsection 85(1) rollover. On June 8, 2009, well after the expiration of the three year normal reassessment period in respect of 9841's taxation year ending March 31, 2003, the CRA requested that 984 file a waiver in order to allow it to refund the taxes paid on the capital gain reported in the 2003 taxation year. Notwithstanding the fact that the time for filing a waiver for the 2003 taxation year had expired, 984 filed a waiver for the purpose of receiving the refund.

The CRA reassessed Henro as proposed. Henro objected, and in April 2012, CRA Appeals confirmed the reassessments. Henro appealed to the Tax Court of Canada.

As a result of the reassessments of Henro, the land transferred to 984 was deemed to have been acquired by 984 at its fair market value pursuant to section 69 thus, no income gain was realized by 984 when it sold the land to the arm's length party. The Minister accordingly issued a notice of reassessment to 984 in 2010 (the "**2010 Nil Reassessment**"), reducing the taxable capital gain for 984's 2003 taxation year to nil and refunding the tax paid on the taxable capital gain, plus refund interest, for a total refund of $2,577,231 (the "**2010 Payment**").

Henro's appeal to the Tax Court was settled in July 2014 pursuant to the terms of an out-of-court settlement agreement (the "**Settlement Agreement**"). Though not a party to Henro's Tax Court appeal, 984 was a party to the Settlement Agreement, pursuant to which Henro and 984 would be reassessed on the basis that the land transferred by Henro to 984 was capital property, and therefore, 984's 2003 taxation year would be reassessed to add to its income a capital gain of $7,904,475 ($3,952,238 taxable capital gain) arising from the sale of the land to the third party.

On March 23, 2015, in accordance with the Settlement Agreement, the Minister issued a reassessment in respect of 984's 2003 taxation year (the "**2015 Reassessment**"), which claimed back the excess refund of the 2010 Payment, plus arrears interest since 2010. Notwithstanding the terms of the Settlement Agreement, 984 objected to the 2015 Reassessment, and then appealed to the Tax Court. The taxpayer acknowledged that the Minister could pursue a contractual claim in the Superior Court of Quebec to recover the erroneously reimbursed tax and interest.

Tax Court Decision

The Tax Court allowed 984's appeal. Justice Smith held that subsection 169(3), which permits tax appeals to be settled on consent, did not apply to 984 as it was not a party to Henro's Tax Court appeal, and therefore, 984 was not barred from objecting to the 2015 Reassessment.

The Tax Court also concluded that that the 2010 Nil Reassessment was void because it was issued outside the normal reassessment period, and neither the waiver (which was invalid) nor subsection 152(8) (which deems assessments to be valid notwithstanding an error or defect), could save the 2010 Nil Reassessment. Therefore, the 2003 Assessment remained in effect. However, because the 2010 Nil Reassessment was void, the Tax Court concluded that the 2010 Payment could not be reclaimed as an authorized refund under subsections 160.1(3) or 164(3.1).

Federal Court of Appeal Decision

In support of its appeal, the Crown argued that 984 was bound by the Settlement Agreement, and that subsection 169(3) applied for purposes of the appeal. The Crown's argued that the expression "the taxpayer" in that provision refers to any taxpayer who has consented to being reassessed.

The Crown also argued that an out-of-time reassessment is voidable rather than void, relying on the recent Federal Court of Appeal decision in *Freitas.* Therefore, the Crown argued that the 2010 Nil Reassessment was validly issued and reduced 984's income to nil, giving rise to an overpayment.

The taxpayer asserted that the Tax Court correctly held that subsection 169(3) did not apply because the taxpayer was not a party to the appeal being settled. The taxpayer also argued that the decision in *Freitas* could not be relied upon, as it did not consider any prior case law which had held that a reassessment issued out of time is void.

The taxpayer also argued that because the 2010 Nil Reassessment was a nil assessment, it was devoid of any legal consequences, including having no impact on the 984's tax payable for the 2003 taxation year.

The FCA concluded that it was not required to determine whether subsections 169(3) and 165(1.2) applied because the taxpayer had the right to challenge the 2015 Reassessment on the basis that it was not issued in conformity with the Act.[5]

The FCA approached the decision by first analyzing whether the 2010 Nil Reassessment was void. Chief Justice Noël addressed the FCA's decision in *Freitas*, a decision that was released after the Tax Court hearing in the case at bar, in which it was held that an assessment issued after the normal reassessment period was voidable but not void, relying on subsection 152(8). Chief Justice Noël righted the ship in holding that that *Frietas* was not authoritative as it "manifestly overlooked" the long line of cases establishing that an out-of-time reassessment is void from the outset.

The FCA then considered the impact of the 2010 Nil Reassessment being a notice that no tax is payable (*i.e.*, a nil assessment), an issue not considered by the Tax Court. Although a nil assessment assesses no tax, it operates as an assessment in other respects and can impact a taxpayer's tax liability and tax payable in respect of a given taxation year. The FCA observed that a nil assessment may be issued at any time because the time limitation provided in subsection 152(4) does not apply to a notification that no tax is payable. Therefore, the 2010 Nil Reassessment was validly issued, regardless of the ineffective waiver or the expiry of the normal reassessment period in respect of the 2003 taxation year.

Although a nil assessment cannot be appealed because it assesses no tax, it can impact a taxpayer's "tax liability" as contemplated by section 2. A nil assessment initiates the computation of the normal reassessment period in the same way an original assessment does and establishes that no tax is payable for the year. Where taxes have previously have been paid on account of a tax liability, a subsequently issued nil assessment can give rise to an "overpayment" within the meaning of paragraph 164(7)(b).

As the 2010 Nil Reassessment was issued after the 2003 Assessment, it reduced 984's tax payable to nil for the 2003 taxation year. It necessarily followed that, since 984 already had paid tax in respect of the taxable capital gain reported in its tax return for the 2003 taxation year, an "overpayment" did arise.

The FCA then considered whether the "refund" of the overpayment was properly authorized by subparagraph 164(1)(a)(iii), which allows refunds to be paid "on or after sending the notice of assessment for the year". The issue was whether a nil assessment comes within the meaning of the word "assessment" as it is used in subparagraph 164(1)(a)(iii). The Court undertook a textual, contextual, and purposive analysis to conclude that a nil assessment came within the meaning of the word "assessment" in that provision. In so doing, the Court noted that notwithstanding that a nil assessment cannot be appealed, it has the same legal effect as one that levies tax, in that it both can start the limitation period when issued as the original notice, replace a prior assessment when issued as the last notice, and fix the tax payable for the year. The FCA held that that Parliament's objective in requiring that an assessment be issued before a refund can be paid was to establish an "overpayment" within the meaning of subsection 164(7), which can be achieved by both an assessment levying tax and a nil assessment.

The FCA held that the Supreme Court's decision of in *Okalta Oils*, which confirmed that a taxpayer cannot appeal from a nil assessment, does not preclude a refund from being made as a result of a nil assessment. As the state of the law before *Okalta* allowed a refund to be made from a nil assessment and the Supreme Court's reasoning therein did not impact a taxpayer's entitlement to a refund, subsection 164(1) was to be read in the same way as its predecessors; thus, the 2010 Payment was properly authorized under subparagraph 164(1)(a)(iii). It followed that the refund interest paid by the Minister in connection with the 2010 Payment could also be recovered pursuant to subsection 164(3.1).

Since the refund was authorized under subparagraph 164(1)(a)(iii), it was made pursuant to a specific provision of the Act. As a result, the 2015 Reassessment was validly issued under subsections 160.1(1) and (3). The taxpayer argued that if the refund was validly issued, no part of it was "excessive" since no reassessment was issued to bring the 2003 tax payable back from zero to the amount initially assessed. However, citing the Supreme Court decision in *Markevich*,[6] the FCA held that the Minister may determine that a taxpayer has received an excessive refund even where no prior reassessment is issued, including where the time to issue a reassessment under subsection 152(4) has expired. The FCA agreed with the Tax Court's finding that requiring a prior reassessment would run counter to the plain language of subsections 160.1(1) and (3), which entitle the Minister to recover an excessive refund by issuing an assessment "at any time". In order to give effect these words in accordance with their plain meaning, the Minister did not need to do anything more than determine that 984 generated a taxable capital gain where the tax paid on that account was refunded, with interest, five years earlier. The statutory language of subsections 160.1(1) and (3) gave the Minister the power to determine outside the normal reassessment period, that an excessive refund of Part I tax was made but only for the purposes of recovering tax owed and improperly refunded.

The FCA also agreed with the Tax Court in rejecting 984's argument that a refund must be claimed in order for the excess to be recovered, finding that nothing in the statutory language imposed such a requirement. As a result, the FCA confirmed the validity of the 2015 Reassessment and allowed the Crown's appeal.

Comments

Although it is unfortunate that the FCA did not weigh in on the issue of whether subsection 169(3) applied to preclude the appeal, this decision provides helpful clarification with respect to the effect of a nil assessment. Although taxpayers often view nil assessments as a "nothing", the FCA has clarified that nil assessments are not devoid of legal effect. This is fully supported by the Supreme Court's decision in *Okalta Oils*, which undertook a contextual analysis of the relevant provisions when it determined that there was no right of appeal to an assessment if there was no tax at issue. *984274 Alberta* demonstrates we cannot assume that all references in the Act to an "assessment" exclude a nil assessment, and a textual, contextual and purposive analysis is required in all cases.

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[1] *Okalta Oils Ltd. v. Minister of National Revenue*, [1955] S.C.R. 824, [1955] S.C.J. No. 77 (S.C.C.).
[2] *Canada v. 984274 Alberta Inc.*, 2020 FCA 125 (F.C.A.).
[3] *Freitas v. Canada*, 2018 FCA 110 (F.C.A.).
[4] All statutory references are to the *Income Tax Act* (Canada), unless otherwise indicated.
[5] The Court cited to, *inter alia*, *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600, 74 D.T.C. 6355 (Fed. C.A.).
[6] *Markevich v. Canada*, 2003 SCC 9 (S.C.C.).

DIRECTOR'S LIABILITY ARISES UPON A CORPORATION'S FAILURE TO REMIT, STRENGTHENING THE MINISTER OF NATIONAL REVENUE'S POWER TO ISSUE "CASCADING" ASSESSMENTS UNDER SECTION 160

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Overview

The Supreme Court of Canada recently dismissed an application by the taxpayer for leave to appeal a decision of the Federal Court of Appeal ("**FCA**") in *Canada v. Colitto*,[1] wherein the FCA considered the interaction between sections 227.1 and 160 of the *Income Tax Act* (Canada) ("**Act**")[2] in the context of a so-called "cascading" assessment. Reversing the Tax Court of Canada's ("**Tax Court**") trial decision in *Colitto v. The Queen*,[3] the FCA held that a director's liability under subsection 227.1(1) arises at the moment a corporation fails to remit an amount to the Canada Revenue Agency ("**CRA**"), and not once all conditions specified in subsection 227.1(2) have been fulfilled. In short, such director's liability may crystallize before the corporation's tax debt has been registered in the Federal Court and returned unsatisfied.

Facts

Mr. Colitto was a director of Core Precision Technologies Ltd. ("**Corporation**"). Between February and August 2008, the Corporation failed to remit employee source deductions to the CRA. In May 2008, Mr. Colitto transferred his 50% interest in two real properties to his wife, Mrs. Colitto, for nominal consideration. In 2009, a certificate for the Corporation's unpaid tax debt was registered in the Federal Court under section 223 of the Act and the tax debt was executed and returned unsatisfied in 2011. Also, in 2011, the Minister of National Revenue ("**Minister**") issued a director's liability assessment to Mr. Colitto under section 227.1. In 2016, the Minister issued section 160 assessments to Mrs. Colitto as a non-arm's length transferee of property received from a tax debtor for consideration less than the fair market value ("**FMV**") of the transferred property.

Cascading Assessments Under the ITA

Where a corporation fails to deduct, withhold or remit an amount or to pay an amount as required under certain provisions of the Act, under subsection 227.1(1) persons who are directors of the corporation at the time the corporation was required to deduct, withhold or remit the amount will be jointly and severally, or solidarily, liable with the corporation to pay the amount. However, subsection 227.1(2) provides that a director is not liable under subsection 227.1(1) unless a certificate for the amount of the corporation's liability has been registered in the Federal Court under section 223, and execution for that amount has been returned unsatisfied in whole or in part.

The Minister may seek to apply subsection 160(1) in circumstances where a tax debtor transfers property to a spouse or common-law partner, a minor, or a person with whom the tax debtor is not dealing at arm's length for less than FMV consideration. When subsection 160(1) applies, the transferee will be jointly and severally, or solidarily, liable with the tax debtor to pay the lesser of (i) the amount by which the FMV of the property at the time of transfer exceeds the FMV of the consideration given by the transferee for the property, and (ii) the amount that the tax debtor is liable to pay under the Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year.

Whether Mrs. Colitto was liable under section 160 for Mr. Colitto's section 227.1 tax debt therefore was dependent on whether Mr. Colitto's liability under section 227.1 as a director of the Corporation arose "in or in respect of" his 2008 taxation year, which was the year in which he transferred the real property interests to Mrs. Colitto.

Previous Case Law

In *Worrell v. R.*,[4] the FCA held that subsection 227.1(2) qualifies subsection 227.1(1) by providing that a director is liable only after all efforts to collect from the corporation have been exhausted and that, as a matter of law, a director's liability for unremitted source deductions and goods and services tax does not crystallize until the conditions prescribed in subsection 227.1(2) are met. However, at issue in *Worrell* was whether the directors exercised the care, diligence and skill of a reasonably prudent person in circumstances where a bank exercised *de facto* control over the corporation's finances. As such, neither subsection 227.1(2) nor the interaction between subsections 160(1) and 227.1(1) were directly in issue.

The Tax Court in *White v. R.*[5] described a director as having a "matching liability" in or in respect of the taxation year in which a corporation fails to remit.[6] The Court determined that a director's spouse was liable for the corporation's tax debt under section 160, notwithstanding that the requirements of subsection 227.1(2) were met approximately three years after the corporation's liability arose and the property in question was transferred. Similarly, the Tax Court in *Filippazzo v. R.*[7] and *Pliskow v. R.*[8] held that a director's liability arose on the date of the corporation's failure to remit source deductions and not on the date the certificate was registered in the Federal Court.[9]

In a goods and services tax context in *Scheck v. The Queen*,[10] the Tax Court considered subsection 323(2) of the *Excise Tax Act* (Canada), a provision analogous to subsection 227.1(2). The Tax Court determined, citing *Filippazzo* and *Pliskow*, that if Parliament had intended that a director's liability would take effect only from the date the writ was returned unsatisfied, the wording of subsection 323(1) would not have provided for joint and several liability of the directors arising at the time the corporation was required to remit.[11]

The Tax Court Decision

At trial in *Colitto*, the Tax Court determined that Mr. Colitto's personal liability under section 227.1 arose in 2011, when the Corporation's tax debt was executed and returned unsatisfied, and not in 2008 when the Corporation failed to remit. On the strength of that conclusion, because Mr. Colitto's personal liability for the Corporation's tax debt was not "in or in respect of" his 2008 taxation year, the taxation year in which the properties were transferred to Mrs. Colitto, Mrs. Colitto was not jointly and severally liable under subsection 160(1).

Visser J. justified his departure from prior decisions in *White*, *Filippazzo*, *Pliskow* and *Scheck* on the basis the Court in each of those decisions had not engaged in a textual, contextual and purposive interpretation of how sections 160 and 227.1 should interact. He instead preferred to follow the FCA's remarks in *Worrell* according to Visser J., Parliament did not intend director liability under section 227.1 to be absolute the moment a corporation fails to meet its remittance obligations. Rather, subsection 227.1(2) is a precondition to establishing liability under section 227.1, as evidenced by Parliament's use of the words "A director is not liable under subsection (1), unless…". In drafting section 227.1, Parliament sought to strike a balance by both imposing director liability and by providing limits on that liability. A cascading assessment under sections 227.1 and 160 is an extraordinary remedy for the Crown which can be unjust or draconian in certain circumstances. As such, in Visser J.'s view, it only should be available if expressly permitted under the Act.

Visser J. considered the text of subsection 227.1(2) to be "very clear and unambiguous", strongly suggesting that a director's liability for unremitted source deductions and other amounts does not arise "unless and until" the relevant preconditions set out in subsection 227.1(2) are met.[12] These preconditions were not met until 2011.

The FCA Decision

On appeal, the FCA agreed with the Tax Court that section 227.1 must be interpreted using a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. However, the FCA did not consider subsection 227.1(1) to be silent as to when a director's liability arises. While the English version of subsection 227.1(1) could, at the least, be considered ambiguous, any ambiguity is eliminated when the context and purpose of subsection 227.1(1) are considered.

The purpose of subsection 227.1(1) is to strengthen the Crown's ability to enforce corporations' statutory obligation to remit source deductions, as the decision to default on such remittance obligations usually will originate with the directors. In contrast, the purpose of subsection 227.1(2) is to prevent double taxation, as the Minister is not permitted to recover unremitted source deductions from a director if the corporation already has paid the tax liability in full.

Subsection 227.1(2) does not state that a director is not liable for the corporation's default "unless and until" the specified actions take place. Rather, in the FCA's view, the Tax Court's interpretation would render subsection 227.1(1) "nugatory and pointless",[13] as it would provide a director with significant time following a corporate failure to remit to reorganize his or her financial affairs and avoid personal liability.

On the basis of the FCA's interpretation of subsection 227.1(2), once the preconditions set out in subsection 227.1(2) of the Act were satisfied in 2011, Mr. Colitto's liability for the Corporation's failure to remit could be considered to arise "in or in respect of" his 2008 taxation year. Consequently, Mrs. Colitto was properly assessed under subsection 160(1).

As the Supreme Court of Canada has dismissed Mrs. Colitto's application for leave to appeal, the FCA's decision is the final word on the interaction between sections 227.1 and 160. The FCA's interpretation has strengthened the Minister's ability to issue a cascading assessment under section 160 in a director liability context, expanding the breadth of what already has been described as a harsh tax collection tool.

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1 2020 FCA 70 [*Colitto FCA*].

2 All statutory references herein are to the Act.

3 2019 TCC 88 [*Colitto TCC*].

[4] 2000 D.T.C. 6593 (F.C.A.).
[5] (1995] 1 C.T.C. 2538 (T.C.C.).
[6] *Ibid*. at paragraph 21.
[7] 2000 D.T.C. 2326 (T.C.C.) [*Filippazzo*].
[8] 2013 TCC 283 [Informal Procedure] [*Pliskow*].
[9] *Filippazzo* at paragraph 14; *Pliskow* at paragraph 14.
[10] 2018 TCC 125 [Informal Procedure].
[11] *Ibid*. at paragraph 13.
[12] *Colitto TCC* at paragraphs 48 and 68.
[13] *Colitto FCA* at paragraph 26.

JUNIOR COUNSEL SERIES – PART I

By Amit Ummat, *Ummat Tax Law*

No Witnesses? No Problem!

A regular trial ordinarily will necessitate some witness testimony. It would be an uncommon situation where no witness is called. However, there are alternative methods to introduce the evidence to establish the facts necessary to support your case, while limiting the number of witnesses a party intends to call at trial. These methods include, but are not limited to:

- affidavits;
- read-ins;
- judicial notice;
- taking evidence before the hearing;
- request to admit; and
- *Canada Evidence Act*[1]exemptions.

Affidavits

Generally speaking, an affidavit on its own is inadmissible. An affidavit adduced at an appeal hearing generally would be considered hearsay evidence if tendered in lieu of a witness. If a party can prove that the affidavit is both necessary and reliable, then it may be entered into evidence. A party might utilize an affidavit in an informal procedure appeal in a situation where the facts are non-contentious. Any contentious fact contained in an affidavit usually will lead to part of or all of the affidavit being excluded. The opposing party likely would object to the affidavit evidence on the basis that party does not have the opportunity to cross-examine on the contents.

Read-ins

Subsection 100(1) of the *Tax Court of Canada Rules (General Procedure)*[2] allows for portions of the discovery transcript to be read into evidence at the hearing.

Use of Examination for Discovery at Hearing

100(1) At the hearing, a party may read into evidence as part of that party's own case, after that party has adduced all of that party's other evidence in chief, any part of the evidence given on the examination for discovery of

(a) the adverse party, or

(b) a person examined for discovery on behalf of or in place of, or in addition to the adverse party, unless the judge directs otherwise,

if the evidence is otherwise admissible, whether the party or person has already given evidence or not.

(1.1) The judge may, on request, allow the part of evidence referred to in subsection (1) to be read into evidence at a time other than that specified in that subsection.

(2) Subject to the provisions of the *Canada Evidence Act*, the evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness.

(3) Where only part of the evidence given on an examination for discovery is read into or used in evidence, at the request of an adverse party the judge may direct the introduction of any other part of the evidence that qualifies or explains the part first introduced.

(3.1) A party who seeks to read into evidence under subsection (1) or who requests the judge to direct the introduction of evidence under subsection (3) may, with leave of the judge, instead of reading into evidence, file with the court a photocopy or other copy of the relevant extracts from the transcripts of the examination for discovery, and when the copy is filed such extracts shall form part of the record.

…

In some cases, a party will read into evidence the discovery testimony of a person who is not called to testify at the hearing. There have been situations where a party strategically decides not to call the actual appellant to testify and the other party is entitled to read in portions of the appellant's discovery transcript.[3] Counsel should be aware that, pursuant to subsection 100(1) above, the read in evidence must be "otherwise admissible". Thus, for example, a party would not ordinarily be permitted to read in lay witness opinion evidence, or hearsay. Importantly, if a discovery nominee ends up testifying at the hearing, the other party could not read in any discovery evidence that the deponent has given as testimony, since this would amount to affirming a prior consistent statement (which in most cases is inadmissible).[4]

It should be noted that the Tax Court of Canada's Practice Note No. 8[5] addresses the deadlines the parties must meet in serving the other side notice of intention to read-in evidence, and the receiving party's notice to read-in qualifying evidence.

Judicial Notice

Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, of the truth of a particular fact or state of affairs without the requirement of proof.[6] You could ask the Court to take judicial notice of a fact that is so commonly accepted that it is not the subject of dispute.[7] This method has limited use, but may be appropriate if you are attempting to lay some general groundwork for your case. Tax Court of Canada ("**TCC**') judgments are replete with examples of the Justices taking judicial notice of very common facts, including the following:

- the fact the global financial crisis reached its peak in March 2009;[8]
- any surplus of a pension plan is determined in whole or part on an actuarial basis;[9]
- the fact that food represents one of the largest expenditures in the average family budget;[10] and
- the fact that most pre-incorporation contracts are negotiated by the planned shareholders or directors of a corporation.[11]

Judicial notice also is addressed in a limited way in section 17 of the *Canada Evidence Act* (CEA) but only relates to Canadian federal and provincial legislation and ordinances, such as Acts of Parliament and provincial governments.

Taking Evidence Before Hearing

Sections 119 to 122 of the *Tax Court Rules* permit a party, in certain circumstances, to examine a witness out of court. The witness may be inside or outside Canada, and must be subject to cross-examination. Importantly, these of rules allow a party to file the transcript and a videotape or other recording of the testimony and need not be read or played at the hearing unless a party or the judge requires it. This is an important method if you would prefer to call a witness but cannot do so due possibly to the witness's health or his/her location. Out-of-court examinations have been directed by the TCC in situations where the witness was located outside of Canada[12] or quite elderly.[13]

Request to Admit

Subsection 130(1) of the *Tax Court Rules* permits a party to serve a request to admit on the other party for the purposes of having admitted the truth of a fact or authenticity of a document. The request to admit procedure is intended to expedite the resolution of disputes by dispensing with the need for formal proof at trial of a particular fact or of documentary authenticity where there is agreement between the parties on the particular matter.

Requests to admit provide a simplified format for admissions to assist parties in entering their cases, thereby reducing the length and costs of litigation. It is inappropriate to use the request to admit procedure as a "weapon" to harass or badger the opposing party, and unduly repetitious requests, requests that are irrelevant, and requests that do not expedite the gathering of facts or save costs may be struck as an abuse of process.[14]

Requests to admit are a useful tool to consider at any time during the course of the litigation, be it prior to or following discoveries. However, an extensive request to admit served following the completion of discoveries could be considered an abuse of process and struck on that basis.[15] If a party fails to respond to a request to admit, that party is deemed to admit the facts or the authenticity of the documents set out in the request to admit.[16] A party may withdraw an admission made in response to a request to admit only on consent or with leave of the Court.[17]

***Canada Evidence Act* Exemptions**

A comprehensive review of relevant CEA provisions is beyond the scope of this article. It is important to take note and be aware of the provisions in sections 23 to 30 of the CEA. These sections apply to federal matters, including the TCC and the Federal Court of Appeal. IN general terms, the referenced provisions permit the tendering of documentary evidence without the need for a witness.

This article reviewed some alternative methods which may allow a party, in place of calling a witness, to prove some of the facts to establish your case. An understanding of the aforementioned rules and procedures, along with each and every exception and carve-out, will assist junior counsel in effectively and efficiently adducing the appropriate evidence to establish the necessary facts to advance your client's position in a Tax Court trial.

[1] R.S., c. E-10, s. 1. ("CEA").
[2] SOR/90-688a, ("*Tax Court Rules*").
[3] Please see *De Gennaro v. R.*, 2016 TCC 108 (T.C.C. [General Procedure]), where the appellant chose not to testify, but the respondent was permitted to read in extensive portions of the appellant's examination for discovery.
[4] R. v. Campbell (1978) 17 O.R. (2d) 673
[5] Originally issued on April 30, 1996, amended on July 19, 2001 and amended again on September 3, 2020.
[6] Lederman, Sopinka & Bryant, *The Law of Evidence in Canada*, 4th ed. (LexisNexis Canada) 2014 at 1138.
[7] For a succinct description of judicial notice of a Tax Court of Canada decision, please see *Blackmore v. R.*, 2013 TCC 264 (T.C.C. [General Procedure])
[8] *Tozer v. The Queen*, 2018 TCC 56 (T.C.C. [General Procedure]), at para. 92.
[9] *Mangal v. The Queen*, 2018 TCC 8 (T.C.C. [Informal Procedure]) at para. 24.
[10] *R. v. Kim*, 2016 TCC 150 (T.C.C. [Informal Procedure]) at para. 35
[11] *Edison Transportation, LLV v. R.*, 2016 TCC 80 (T.C.C. [General Procedure]) at para. 63.
[12] *Sackman v. R.*, 2011 D.T.C. 1349 (Eng.) (T.C.C. [General Procedure]).
[13] *Gould v. HMQ*, 2009 TCC 305 (T.C.C. [General Procedure])
[14] *1679753 Ontario Ltd. v. Muskoka Lakes (Township)*, 2011 CarswellOnt 3973, 106 O.R. (3d) 540 (Ont. Div. Ct.).
[15] *Gualtieri v. Canada (Attorney General)*, 2008 CarswellOnt 1008 (Ont. S.C.J.).
[16] See subsection 131(2) of the *Tax Court Rules*.
[17] Section 132 of the *Tax Court Rules*.

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