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FIGHTING FOR AN EXTENSION OF TIME

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Subsection 169(1) of the *Income Tax Act* (the "Act") provides, in part, that a taxpayer may institute an appeal in the Tax Court of Canada to dispute a (re)assessment or notice of confirmation (jointly referred to as the "Reassessment"). In order to institute a valid appeal, a taxpayer must submit a notice of appeal, along with the appropriate filing fee, to the Tax Court within 90 days of the date that the Minister of National Revenue sent the Reassessment (the "90-day Period").

If the Minister has satisfied its burden of the technical rules associated with the sending of the Reassessment and if the taxpayer has not instituted a valid appeal within the 90-day Period (assuming the discoverability rule does not apply), a taxpayer may apply for an extension of time to appeal under paragraph 167(5)(*b*) of the Act. The Tax Court will consider an application for an extension of time if the application is filed within one year after the 90-day Period i.e., within one year and 90 days from the date indicated on the Reassessment.

Subsection 167(5) of the Act provides that the Tax Court shall not grant an application for an extension of time to appeal unless the taxpayer can establish all of the following conditions: (1) the taxpayer had a genuine intention to appeal within the 90-day Period or was unable to act, or instruct another to act, within the 90-day Period; (2) it would be just and equitable to grant the application; (3) the application was filed as soon as circumstances permitted; and (4) there are reasonable grounds for the appeal (jointly referred to as the "Four Application Conditions").

The Tax Court recently considered whether a taxpayer satisfied the above-noted conditions in *M.P.N. Holdings Ltd. v. Her Majesty the Queen* ("*MPN*"), 2011 DTC 1150. For the purposes of this article, the salient facts in *MPN* were as follows. MPN objected to a Part XIII withholding tax assessment related to management fees that MPN paid to a non-resident corporation, Arden Advisors LLC ("Arden"). MPN's position at the objection stage was that Arden was a limited liability corporation that did not have a permanent establishment in Canada and, therefore, Article VII of the *Canada–U.S. Income Tax Convention* (the "Convention") precludes the Minister assessing Part XIII withholding tax on the amounts that MPN paid Arden. The Minister issued a notice of confirmation, dated February 2, 2009, denying MPN's objection on the basis that limited liability corporations were not liable to tax in the United States and, therefore, not entitled to benefits under the Convention (the "Minister's Convention Position"). MPN did not institute an appeal within the 90-day Period.

MPN was unaware that the Minister had assessed TD Securities (USA) LLC ("TD") for Part XIII withholding tax. The Minister purported to justify its assessment against TD using the same Minister's Convention Position. On October 22, 2008, TD instituted an appeal in the Tax Court to dispute the Minister's Convention Position. At that time,

CCH a Wolters Kluwer business

MPN's objection was outstanding. On April 8, 2010, the Tax Court allowed TD's appeal on the basis that the Minister's Convention Position was wrong in law (2010 DTC 1137). MPN learned of the Tax Court's *TD* decision and MPN applied for an extension of time to appeal. MPN's application was filed within the one year 90-day Period and the Tax Court considered whether MPN satisfied the Four Application Conditions. MPN argued that it satisfied condition (1) — a genuine intention to appeal within the 90-day Period because, at all material times, MPN disagreed with the Reassessment and the Minister's Convention Position. In addition, MPN argued that it was unable to act because of the cost of litigation.

Although Justice Sheridan accepted that MPN never agreed with the Minister's Convention Position within the 90-day Period, she held that this fact was not sufficient to satisfy the requirement that MPN had a *bona fide* intention to appeal within the 90-day Period. Justice Sheridan noted that MPN's directing mind acknowledged that MPN did not appeal the subject reassessment because it believed that an appeal would be cost prohibitive and challenging. In addition, MPN acknowledged that it decided to file its application for an extension of time to appeal only after it learned that TD instituted its appeal. In these circumstances, Justice Sheridan held that MPN simply chose not to appeal within the 90-day Period and, therefore, MPN did not have a genuine intention to appeal within the 90-day Period.

Second, Justice Sheridan addressed MPN's argument that the costs of litigation, like a mental or physical impairment, rendered it unable to act. Justice Sheridan observed that the Court could accept that an inability to pay litigation costs could constitute an inability to act within the 90-day Period and satisfy the first condition of the Four Application Conditions. However, that was not what prevented MPN from filing a notice of appeal within the 90-day Period. MPN simply chose not to act.

It is unfortunate, to say the least, that MPN was unable to establish all of the Four Application Conditions. If MPN instituted its appeal within the 90-day Period, it could have applied to the Court to hold MPN's appeal in abeyance pending the resolution of the *TD* appeal. This way, MPN may have benefited from the Tax Court's decision in the *TD* case without incurring significant expense. It appears that MPN's only recourse may be to seek remission under the *Financial Administration Act*. In any event, we believe that Justice Sheridan's reasons for judgment in MPN are valuable to taxpayers and practitioners applying for an extension of time to appeal. Justice Sheridan's reasons illuminate what constitutes a *bona fide* intention to appeal and confirm that financial constraints may constitute an inability to act.

REGULATIONS FOR CORPORATE INTERNET FILING

The Income Tax Regulations have been amended by P.C. 2011-1531, SOR/2011-29 ("Corporate Internet Filing"), registered on December 8, 2011 and published in the *Canada Gazette* Part II on December 21, 2011. This amendment, which was published in the *Canada Gazette* Part I on October 8, 2011, renumbers section 205.1 of the Regulations as subsection 205.1(1) and adds new subsection 205.1(2), applicable for taxation years ending after 2009. This amendment is pursuant to the enactment of subsection 150.1(2.1) of the *Income Tax Act* that requires prescribed corporations to file the T2 tax return in electronic form. As set out in new subsection 205.1(2), the prescribed corporations are those with gross revenue in excess of $1 million except for an insurance corporation, a non-resident corporation, a corporation reporting in functional currency (under section 261 of the Act), and a corporation that is exempt from tax under section 149 of the Act.

CANADA–SWITZERLAND PROTOCOL

The Department of Finance announced that the Protocol between Canada and Switzerland that was signed on October 22, 2010 entered into force on December 16, 2011. In general, for taxes withheld at source, the Protocol will have effect on or after January 1, 2012 and for other taxes, for taxation years beginning on or after January 1, 2012. The text of the Protocol, which is reproduced following the Canada–Switzerland Tax Convention on CCH online and on DVD and in Volume 6 of the print reporter, will be cut into the Convention as soon as possible.

TAX INFORMATION AGREEMENTS

The Department of Finance announced that the Tax Information Exchange Agreements ("TIEAs") with Jersey and the Isle of Man entered into force on December 19, 2011. The TIEA with Guernsey will enter into force on January 18, 2012. All three of these TIEAs were signed in January 2011. As set out in the TIEAs, for tax issues that are liable to criminal prosecution, each agreement has effect on the date it entered into force. For all other tax matters, each agreement has effect on the day it entered into force, in respect of taxable periods beginning on or after that date or tax charges arising on or after that date. These agreements are reproduced on CCH online and on DVD under Tax Treaties and Social Security Agreements/Tax Information Exchange Agreements.

2012 AUTOMOBILE RATES AND LIMITS

On December 29, 2011, the Department of Finance released the automobile rates and limits for 2012. For vehicles acquired after 2011, the limit on the capital cost of passenger vehicles for purposes of capital cost allowance remains at $30,000, plus applicable federal and provincial sales taxes (Regulation 7307(1)); the limit on deductible leasing costs remains at $800 per month, plus applicable federal and provincial sales taxes (Regulation 7307(3)); and the maximum interest deduction for amounts borrowed to purchase an automobile remains at $300 per month (Regulation 7307(2)).

For 2012, the limit on tax-exempt allowances paid to employees for business use of the employee's vehicle and that are deductible by employers is increased by one cent to 53 cents per kilometre for the first 5,000 kilometres and 46 cents for additional kilometres (Regulation 7306). For Yukon Territory, Northwest Territories and Nunavut, these figures are also increased by one cent to 57 cents and 51 cents, respectively. The rate for determining the operating expense taxable benefit for the personal portion of automobile expenses paid for by an employer is increased by 2 cents to 26 cents per kilometre (Regulation 7305.1). This rate for taxpayers employed principally in selling or leasing automobiles is also increased by two cents to 23 cents per kilometre.

REMISSION ORDERS

Several income tax remission orders were published in the *Canada Gazette* Part II, dated December 7, 2011. All but one of the orders remitted tax, interest, or penalties to individuals for reasons such as incorrect action on the part of CRA officials, extreme hardship, or circumstances beyond the taxpayer's control. The Quebec Domestic Help Charities Remission Order, P.C. 2011-1323, SI/2001-100, remits the revocation tax described in subsection 188(1.1) of the *Income Tax Act*. This charity participates in the Financial Assistance Program for Domestic Help Services established by the Quebec government and so under this program cannot also retain its status as a registered charity.

CHARITIES CONNECTION NEWSLETTER NO. 10

The Charities Directorate of the Canada Revenue Agency has released *Charities Connection* No. 10, December 2011. The newsletter notes certain things that charities should consider when issuing official donation receipts. These include the fact that the gift must be received in the year for the receipt to be for that year. A postmark on the envelope on or before December 31, 2011 is acceptable proof of when the donation was received. For cash donation, a charity may issue a cumulative receipt to the donor for the calendar year. There are different rules for receipts for cash donations and non-cash donations. The details of what information must be on a receipt is set out on the CRA's Web site. A charity cannot lend its registration number to another organization and must be responsible for all receipts issued under its name and registration number. The newsletter notes the outreach programs that the CRA runs for charities which include live information sessions in numerous locations across the country as well as information webinars. The newsletter also reminds charities with fiscal periods ending on December 31, 2011 that the form T3010-1 must be filed by June 30, 2012.

RECENT CASES

Taxpayer liable for tax on RRSP withdrawal stolen by former financial adviser

The taxpayer was a victim of fraud committed by his former financial adviser, who absconded with amounts that the taxpayer withdrew from his RRSP. The taxpayer was reassessed for 2005 for $12,500, which he withdrew from his RRSP and was included as income together with a penalty. The taxpayer argued that he believed the money that he withdrew was being reinvested with his former financial adviser, and that it was not a withdrawal that would attract tax liability.

The taxpayer's appeal was dismissed. The taxpayer withdrew the RRSP funds and received those amounts via cheque, which he could have spent as he chose, and while money was withdrawn and intended to be invested with his former financial adviser, it did not change the character of the withdrawal for tax purposes. Moreover, the taxpayer did not exercise the requisite level of due diligence to defend against penalties.

¶47,903, *Mignault*, 2011 DTC 1363

Wholly dependent person tax credit disallowed since taxpayer obligated to make child support payments

Under an order of the New Brunswick Court of Queen's Bench dated December 18, 1996, the taxpayer was ordered to pay his former spouse, B, child support payments for their son (the "Payments"). Upon resuming cohabitation with the taxpayer, B verbally renounced her entitlement to the Payments and, in a form 5 filed with the Court, withdrew her instruction to the Court to enforce collection of the Payments. Relying on s. 118(5), the Minister denied the taxpayer's claim for 2003 to 2007 for a wholly dependent person tax credit, on the ground that he was still obligated to make the Payments during those years. The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was dismissed. Only the Court had the jurisdiction to terminate the taxpayer's obligation to make the Payments. Since the Court had not done this, the taxpayer was still obligated to make the Payments, as the Minister had contended. The Minister's reassessments were affirmed accordingly

¶47,904, *Roy*, 2011 DTC 1364

Assessments and late-filing penalties upheld where taxpayer failed to file returns

The taxpayer failed to file returns for 2003 to 2008. The Minister included various amounts in the taxpayer's income and imposed late-filing penalties for those years. The taxpayer appealed to the Tax Court of Canada, contending that he did not think that he had to pay tax in those years because he had just started up a business and his expenses and losses exceeded his income. The taxpayer provided no documentation to support his position.

The taxpayer's appeals were dismissed. The Court found that the taxpayer failed to rebut the Minister's assumptions of gross income, and that the late-filing penalties were properly imposed. Considering that the taxpayer failed to disprove the Minister's assumptions used to determine the taxpayer's gross income, and did not produce any evidence that the Minister's assessments were incorrect, the Minister was under no obligation to provide information about the manner in which the taxpayer's income was computed. Due to the lack of evidence from the taxpayer, and the absence of records corroborating the claims for business expenses, the Minister's unrebutted assumptions of the taxpayer's gross income had to be accepted. The taxpayer's own estimates of his net income for each year under appeal clearly established that tax was payable, and that he was required to file an income tax return for each year. In the circumstances, the late-filing penalties were properly assessed.

¶47,906, *Ostroff*, 2011 DTC 1366

Excess contributions into taxpayer's RRSP account resulted in tax and penalties to taxpayer despite earning no taxable income in relevant years

At the Tax Court of Canada, the Minister was successful in imposing tax and penalties on excess contributions the taxpayer made into her RRSP for 2004 and 2005 (2011 DTC 1102). The taxpayer appealed to the Federal Court of Appeal, arguing that penalty amounts imposed should be vacated, as she reasonably believed that no penalty would apply because she did not have taxable income in the relevant years. The Tax Court did not consider the taxpayer to have exercised due diligence in ascertaining her tax liability.

The taxpayer's appeal was dismissed with costs. The Tax Court did not make any error in law or palpable and overriding error in dismissing the appeal to warrant its intervention.

¶47,909, *Lans*, 2011 DTC 1102

Net worth assessment and gross negligence penalties for unreported business and pension income upheld

At the Tax Court of Canada, the Minister was successful in upholding a net worth assessment against the taxpayer for 2002 and 2003, to include $287,340 and $177,380, respectively, in unreported business and pension income, together with gross negligence penalties (2010 DTC 1243). The taxpayer appealed to the Federal Court of Appeal, arguing that the unreported amounts were attributable to a trust established in Iran for his father. He also sought to introduce fresh evidence that was not before the lower court to support assertions.

The taxpayer's appeal was dismissed with costs. The test for introducing fresh evidence on an appeal of a lower court decision was not met. Moreover, the lower court did not make any error in law or palpable and overriding error as to facts. Gross negligence penalties were correctly applied, as there were ample facts to support its imposition.

¶47,910, *Korki*, 2011 DTC 5165

Taxpayer permitted to deduct 50% of pension received from Germany, and not 73% as allegedly shown in a CRA publication

The taxpayer was in receipt of a German pension under Germany's social security legislation. Under paragraph 3(*c*) of the *Canada–Germany Tax Convention*, read along with s. 110(1)(*f*)(i) of the *Income Tax Act*, he was entitled to deduct the "excluded portion" of that pension in computing taxable income for Canadian tax purposes. The excluded portion was the amount that would have escaped tax under German law had the taxpayer been a resident of Germany. For 2003 and 2004, the excluded portion was 73%, but this was reduced under German law to 50% for 2005 and subsequent years. In assessments for 2007 and 2008, the Minister used this 50% figure. In dismissing the taxpayer's appeal, the Tax Court of Canada concluded that: (a) this 50% figure was fixed by law; and (b) the taxpayer was not entitled to use the 73% figure for 2007 and 2008 based on an alleged representation in a Canada Revenue Agency publication in 2003 to 2004 to the effect that the 73% would remain unchanged over the lifetime of a pension recipient. The taxpayer appealed to the Federal Court of Appeal.

The taxpayer's appeal was dismissed. The Tax Court's decision was not wrong in law, so that there were no grounds for appellate intervention. The Minister's assessments were affirmed accordingly.

¶47,911, *Hahn*, 2011 DTC 5166

Taxpayer's appeals filed without prior notices of objection were quashed

The taxpayer's appeal to the Tax Court of Canada was from assessments for tax, interest, and late-filing penalties for 1994 and for 1998 to 2002. In allowing the taxpayer's appeal in part (2007 DTC 1695), the Tax Court concluded that: (a) the appeals for 1994 and 1998 should be quashed on jurisdictional grounds, since no notices of objection for those years had been filed and the extension application periods had expired; (b) the taxpayer's request for a review of

the Minister's refusal to waive interest and penalties under the taxpayer relief rules in s. 220(3.1) could not be heard on jurisdictional grounds; but (c) the taxpayer was entitled to an RRSP deduction for 2002, based in part on a retiring allowance rollover and on a Ministerial concession. The taxpayer appealed to the Federal Court of Appeal.

The taxpayer's appeal was dismissed. The Tax Court's jurisdictional findings were correct, and there was no ground for setting aside those findings, largely factual, concerning the taxes payable by the taxpayer for the years under appeal.

¶47,912, *Neathly*, 2011 DTC 5167

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