

Court affirms onus of proof on taxpayer

By DONALEE MOULTON

The Federal Court of Appeal has reaffirmed that the onus of proof lies with taxpayers and not the government when they pick a legal fight with the Canada Revenue Agency.

The decision in *McMillan v. Canada* [2012] F.C.J. No. 713 "reinforces that where a taxpayer appeals expense deductions to the tax court, they must support their claims. They have the onus of proving that the expenses were incurred," said Paula Creighan, spokesperson for the Department of Justice Canada in Toronto.

Previously, a 2010 ruling by the B.C. Court of Appeal — *Northland Properties Corporation v. British Columbia* [2010]

B.C.J. No. 627 — seemed to open a door for taxpayers by casting doubt on whether it was their responsibility to prove the CRA's assumptions invalid.

However, in this case, appellant Donna McMillan had been assessed for the 2002-2004 taxation years by the CRA, which concluded she had not incurred expenses claimed in running her Dominican Republic-based concessions business. McMillan appealed the assessments to the Tax Court of Canada, which allowed the appeal in part but determined that there was insufficient evidence to prove she had incurred all the expenses claimed.

The Federal Appeal Court upheld the earlier decision and in

the process raised the issue of onus of proof, which has a long history in the Canadian judicial system. Over time the courts have developed an approach rooted in the contention that the minister of national revenue cannot be expected to know if individual taxpayers are compliant. "They carry on the business activities, so they should, in part, be responsible for proving their expenses," said Bill Innes, counsel with the law firm Fraser Milner Casgrain in Toronto.

"The minister's questioning [of a taxpayer] is called an assumption," he added. "In the absence of proof, the minister's assumption is going to be seen to be correct."

The B.C. appeal court threw a wrench into that thinking when it handed down *Northland*, questioning the accepted approach for determining onus of proof. "People were confused by that," noted Innes.

The British Columbia court made it clear the minister's power to make an assumption is not "unbounded", but the federal appeal court reaffirmed that the approach traditionally used by the judiciary to determine onus of proof in a taxpayer's case is still the gold standard. There is no nuance. **The taxpayer's onus of proof is to "demolish" the CRA's assumptions by making out a prima facie case - one that is self-evident, said Peter Aprile,**

principal of ATX Law in Toronto. "If the taxpayer makes out a prima facie case, the CRA bears the burden to prove, on a balance of probabilities, that [its] assumptions were correct." he added.

The Federal Court of Appeal did not need to specifically address the issue of onus of proof in *McMillan*, but by doing so it may have sought to clarify the legal landscape for accountants and lawyers. "It could be they were aware there was a level of confusion in the tax community and they wanted subtly to address that," said Innes.

Women: hear them sigh

According to the *2011 Catalyst Census: Fortune 500 Women Board Directors, Executive Officers and Top Earners*, women in the top U.S. companies have made no significant gains in the last year and are no further along the corporate ladder than they were six years ago:

Women held 16.1 per cent of board seats in 2011 compared to 15.7 per cent in 2010

Less than one-fifth of companies had 25 per cent or more women on their board of directors;

About one in 10 companies had no women serving on their boards at all;

Women of colour still held only three per cent of corporate board seats;

Women held 14.1 per cent of executive officer positions in 2011 compared to 14.4 per cent in 2010;

Less than one in five companies had 25 per cent or more women executive officers and more than one-quarter had none at all.

• Donalee Moulton

Sponsoring is replacing mentoring

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related to 'schemas' — stereotypes. Beliefs about men and women are held by both men and women. These gender beliefs lead people to react in certain ways."

One study published in the *Journals of Applied Psychology*, for example, shows that if a professional woman is seen as competent, she is generally perceived as not likeable. If she's considered likeable, she's not seen as competent. The same is not true for men.

"It's a conundrum," Carvin said.

That puzzle may be more pronounced in the States than Canada, she added. "There might be more stereotyping in the U.S. It has become more divided recently."

Certainly there is work under way in Canadian accounting firms to welcome women and minorities into the upper echelons. In 2006, KPMG created a full-time job focused on diversity. Today, there is a team of three, with concrete goals.

"In 2007, we became the first professional services firm to set targets for the promotion of women and visible minorities into the partnership. Since that target was set, at least 40 per cent of every partner class has been made up of women and visible minorities — and at times the number was higher than 50 per cent," said Michael Bach, KPMG's director of diversity, equity and inclusion in Toronto.

At Deloitte and Touche, diversity is also under the spotlight. Four years ago, the accounting firm established a national diversity council made up of professionals from all different backgrounds that acts as an advisory group. This and other initiatives are bearing results, said Jane Allen, a partner and chief diversity officer in Toronto. "The demographics are changing around us. The population is much more diverse."



BACH

A desire for equity aside, there are strong business reasons why diversity pays off. A report prepared by Catalyst Inc., *Linking Performance and Gender Balance on the Board*, found that Fortune 500 companies with three or more women on the board of directors have a significant performance advantage over their more-male counterparts. The company with more women on board has a greater than 73 per cent return on sales, more than an 83 per cent return on equity, and in excess of 112 per cent return on invested capital.

There is also greater innovation. "Research shows diverse teams bring different perspectives," noted Allen. "[Diversity] avoids group think and brings creativity to the organization."

It also enhances the bottom line, Bach pointed out. "We are a service business. More importantly, we are a people business. If our people aren't happy, our service suffers."

"Studies have shown that if people are able to bring their 'whole self' to work with them, they will be more engaged in their work," he added. "Engagement leads to better productivity. If people have to leave something at

the door because the environment isn't inclusive, they can't and won't be as engaged or productive."

The greater emphasis on diversity may also reflect two additional realities: client expectations and getting the right people for the job. "It's all about the talent pool and the clients who are hiring us. Clients expect we will serve them with diverse teams," said Allen.

Expectations aside, there is stiff competition to fill positions. "We are always in a war for good talent," Bach said. "We want to attract and retain the best and brightest. And the best and brightest come in all different shapes and sizes. We are not in a position to exclude anyone."

And yet women are noticeably absent from the top tier. There are options to reverse this. A study co-authored by Harvard University sociologist Frank Dobbin found that mentoring programs produced among the most significant and positive results. Such programs, said DiFlorio, "allow diverse groups access to senior leaders, and they really get to see the work culture from a completely different perspective. They become better leaders."

Attention will have to be paid to the type of mentoring program. Interestingly, research shows that men mentoring women is preferable on at least two levels. "In terms of increases in compensation and advancement, women being mentored by men has a greater impact. It goes back to the stereotypes," noted Carvin.

At Deloitte, mentoring programs are moving out to make way for sponsorship programs that ensure every woman has someone to specifically help her career. "Mentoring is more passive," noted Allen.

While sponsorship and mentoring programs go a long way to

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