

Federal Court of Appeal



Cour d'appel fédérale

Date: 20150206

Docket: A-428-13

Citation: 2015 FCA 40

**CORAM: NOËL C.J.
DAWSON J.A.
TRUDEL J.A.**

BETWEEN:

DAVID GRAMIAK

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on January 27, 2015.

Judgment delivered at Ottawa, Ontario, on February 6, 2015.

REASONS FOR JUDGMENT BY:

NOËL C.J.

CONCURRED IN BY:

**DAWSON J.A.
TRUDEL J.A.**

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal from a decision (neutral citation 2013 TCC 383) rendered by Associate Chief Justice Rossiter (as he then was) of the Tax Court of Canada (the Tax Court judge) wherein he dismissed the motion brought by David Gramiak (the appellant) to strike portions of the Reply to the Notice of Appeal filed by Her Majesty the Queen (the respondent) and granted the respondent leave to amend her Reply.

[2] At issue is whether the Tax Court judge committed various legal and factual errors in dismissing the appellant's Motion to Strike and allowing the respondent's Motion to Amend. For the reasons which follow, I have come to the view that no such errors were committed and that the appeal should accordingly be dismissed.

[3] The provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) and the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (the Rules) which are relevant to the analysis are reproduced in the Annex to these reasons.

BACKGROUND

[4] The reassessments which form the subject matter of the underlying proceedings were issued with respect to the appellant's 2002 and 2003 taxation years. At issue throughout the audit which led to their issuance was whether debentures issued by PI Ventures Inc. (the debentures) were qualified investments for purposes of the appellant's self-directed registered retirement savings plan (RRSP) and whether they were acquired for an amount in excess of their fair market value.

[5] During the course of the audit, by letter dated January 12, 2006, waivers were sought by the Canada Revenue Agency (CRA). The text as proposed by the CRA waived the normal reassessment period with respect to (Appeal Book, Vol. I at pp. 130 and 132):

Income inclusion relating to the acquisition of non-qualified investment for a registered plan and/or income inclusion relating to the acquisition of investment for a registered plan for an amount in excess of fair market value with respect to PI Ventures Inc. in the amount of \$130,500 [amount for 2002 taxation year, for 2003, the amount was \$8,500] plus related penalties.

[6] The authorized representative of the appellant asked and obtained that the waivers be modified so as to read (*ibidem*):

Income inclusion of \$130,500 [for the 2002 taxation year, \$8,500 for the 2003 taxation year] relating to the acquisition of non-qualified investments (PI Ventures Corporation convertible debentures) for a RRSP subject to s. 146(9) and/or s. 146(10).

Waivers bearing this language were signed by the appellant on or about March 14, 2006.

[7] The waivers were subsequently revoked by the appellant on October 4, 2006, with effect six months thereafter thereby provoking the issuance of reassessments.

[8] These were issued on January 4, 2007. The effect of the reassessments was to add the above amounts to the appellant's income for the 2002 and 2003 taxation years pursuant to subsections 146(9), 146(10) and paragraph 56(1)(h) of the Act on the basis that the debentures were non-qualified investments (subsection 146(10)) and were acquired by the appellant's self-directed RRSP for an amount in excess of their value (subsection 146(9)). Penalties were levied pursuant to subsection 163(2) on the amounts assessed on the basis that the appellant had knowingly made a false statement in filing his tax returns for those years.

[9] The normal reassessment period (3 years from the date of the initial assessment) ended on June 5, 2006 with respect to the appellant's 2002 taxation year and May 13, 2007 with respect to his 2003 taxation year so that the latter was reassessed within this period and the former was not.

[10] Up to January 12, 2012, when he filed his Notice of Appeal, the appellant maintained that the debentures had been acquired by his RRSP (Appeal Book, Vol. 1 at pp. 140, 141 and 200). In his Notice of Appeal, the appellant took the position, for the first time, that the debentures were not acquired and that as a result no amount could be included in his income pursuant to subsections 146(9) and 146(10) of the Act.

[11] In her initial Reply to the Notice of Appeal filed on March 6, 2012, the respondent raised the alternative argument that if the debentures were not acquired by the appellant, he nevertheless was in constructive receipt of a taxable benefit in the same amounts as those reassessed, pursuant to subsection 146(8).

[12] On February 28, 2013, the appellant brought a motion to strike the paragraphs setting out this alternative argument and related additions.

[13] Before the motion could be heard, the respondent brought a motion of her own seeking to amend her Reply so as to add the following two paragraphs:

19A. During the years 2004 to 2007, the Appellant received the following funds from foreign source as shown on the statements issued by Syndicated Gold Depository and provided by the Appellant to the CRA:

2004:	US\$ 5,950.00
2005:	US\$ 32,351.86
2006:	US\$ 40,000.00
2007:	US\$ 40,000.00
TOTAL:	US\$ 118,301.86 (CND\$135,297.60)

19B. These amounts represent a return of capital from the Appellant's RRSP investment in PI ventures Inc. as stated by the Appellant in a declaration dated June 20, 2008.

[14] On the same occasion, the respondent proposed to complement the contested plea as follows:

28. Alternatively, if this Court concludes that the Appellants' RRSP did not acquire the debenture units and/or did not acquire any property during the 2002 and 2003 taxation years, the Respondent submits that by directing Olympia Trust to transfer funds from his RRSP account into Singh Walters Bindal Trust Account, the Appellant constructively received the total amount of the funds transferred.

29. As a consequence, the amounts of \$130,500 and \$8,500 received by the Appellant as constituted a benefit out of or under a RRSP and as such this amount should be properly included in his income for the 2002 and 2003 taxation years pursuant to subsection 146(8) and paragraph 56(1)(h) of the Act.

[15] The Motion to Strike and the Motion to Amend were heard together. During the hearing, the appellant took the position that the Minister of National Revenue (the Minister) could not rely on subsection 152(9) to advance the alternative argument as it rests on a transaction that is different from the one on which the reassessments are premised. He further argued that insofar as the 2002 taxation year is concerned, the alternative argument falls outside the scope of the waiver and therefore outside of the exception to the normal reassessment period created by subparagraph 152(4.01)(a)(ii).

[16] By decision rendered on December 10, 2013, the Tax Court judge dismissed the appellant's Motion to Strike and granted the respondent's Motion to Amend her Reply. This is the decision now under appeal.

DECISION UNDER APPEAL

[17] The Tax Court judge first addressed the Motion to Strike. He referred to section 53 of the Rules and then enunciated the “plain and obvious” test for striking out pleadings (*Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 at p. 455; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42). Although he stated that this test, by reason of its wording, must be ascertained without the need for lengthy deliberation – a proposition that has become a source of contention in the present appeal (appellant’s memorandum at paras. 34 and 35) – he went on to write more than thirty paragraphs before concluding at paragraph 38 that the appellant had failed to demonstrate that this test had been met.

[18] In the course of his analysis, the Tax Court judge considered two questions. First, do the impugned paragraphs of the Reply raise an argument that is permitted by subsection 152(9) of the Act? Second, does the allegation made in those paragraphs, more particularly the reference to subsection 146(8), reasonably relate to the matters specified in the waivers as contemplated by subparagraph 152(4.01)(a)(ii) of the Act?

[19] After considering the relevant case law, the Tax Court judge answered both of these questions in the affirmative. As to the first, the Tax Court judge found that the transactions underpinning the alternative argument were not substantially different from those underlying the reassessments at issue (reasons at paras. 43 to 47).

[20] He went on to find that although the text of the waiver was restrictive, this wording was not a bar to the alternative argument raised by the respondent (reasons at paras. 53 to 67). In the course of his reasons, he found that (reasons at para. 66):

... [i]t would be absurd to disallow the Respondent's alternative argument when one considers that the Appellant drafted the waiver attempting to limit the scope of the reassessment, then advanced a new argument in the Notice of Appeal that contradicts the information provided to the CRA during the audit, and now claims the Respondent cannot respond to their new position since it is outside the scope of the carefully crafted waiver.

[21] Having refused to strike the impugned paragraphs, the Tax Court judge went on to allow the respondent's proposed amendment to her Reply. The Tax Court judge noted that an amendment will be allowed if it assists in determining the real question in controversy between the parties (reasons at para. 75). The two paragraphs sought to be added achieve this result as they trace the funds which form the subject matter of the reassessments from the appellant's self-directed RRSP back to him (reasons at para. 76).

[22] Moreover, the CRA was not made aware of these facts until 2008, well after the reassessments were issued (reasons at para. 78). Finally, no prejudice results as the appellant was aware from the beginning that the CRA was investigating what they believed was an RRSP stripping scheme (reasons at para. 77).

ALLEGED ERRORS

[23] The appellant first contends, citing *Canadian Imperial Bank of Commerce v. The Queen*, 2011 TCC 568 at paragraphs 7 to 81 [*CIBC*], that the Tax Court judge made an error in principle when he held that the "plain and obvious" test was to be ascertained quickly without

deliberation. According to the appellant, “[t]he ‘plain and obvious’ test does not mean that a careful analysis of the issues is not required on a motion brought under section 53 of the Rules” (appellant’s memorandum at para. 35).

[24] The appellant further argues that the language of the waiver as crafted by his authorized representative is air-tight and cannot be reasonably linked to the transaction underlying the alternative argument. In particular, the specificity of the words “PI Ventures Corporation Debentures” to describe the investment and the phrase “subject to subsection 146(9) and/or subsection 146(10)” are such that the waiver cannot be reasonably construed as extending to anything other than the imposition of tax under these two provisions as a result of the debenture transaction.

[25] The appellant adds that the impugned paragraphs are not saved by subsection 152(9) of the Act since the alternative argument rests on a legal and factual basis that is different from that which underlies the reassessments.

[26] Furthermore, it is well established that an alternative argument pursuant to this provision cannot be permitted if it allows the Minister to reassess outside the normal reassessment period. According to the appellant, this is the effect of the alternative argument which the respondent seeks to raise.

[27] Finally, the appellant submits that if the respondent's alternative argument is struck, it would necessarily follow that paragraphs 19A and 19B cannot be added to the respondent's Reply as the facts which they state would have no bearing on the outcome of the appeal.

ANALYSIS AND DECISION

Standard of Review

[28] The decision of a Tax Court judge disposing of a Motion to Strike or a Motion to Amend pleadings is discretionary in nature. This Court will therefore defer to such decision in the absence of an error of law, or a misapprehension of the facts (*CIBC* at para. 5).

[29] Whether the Tax Court judge properly directed himself in applying subsections 152(9) and 152(4.01) gives rise to a question of mixed fact and law to be reviewed for palpable and overriding error absent an extricable question of law (*Housen v. Nikolaisen*, 2002 SCC 33).

The test on a motion to strike

[30] The appellant first asserts that although the Tax Court judge cited the leading cases in setting out the test for striking pleadings, he erred in law in holding that the "plain and obvious" test is inconsistent with the need to conduct a careful analysis of the issues before a conclusion can be reached.

[31] As noted earlier, although paragraph 31 of the Tax Court judge's reasons, if read in isolation, does suggest that he misunderstood the applicable test, the lengthy reasons that he gave

demonstrate unequivocally that his conclusion is based on a full analysis of the issues. It is therefore apparent that although an error could be apprehended, none was in fact committed.

Is the alternative argument authorized by subsection 152(9)?

[32] At issue is whether assessing a tax on the amounts in issue as “benefits” pursuant to subsection 146(8) rather than by reason of acquiring a non-qualified investment and/or property below fair market value pursuant to subsection 146(9) and (10) amounts to an alternative argument that is prohibited by subsection 152(9). This provision allows the Minister to support an assessment on the basis of an alternative argument subject to certain terms and conditions aimed at ensuring that a taxpayer is not prejudiced by a late argument from an evidentiary viewpoint.

[33] A further restriction is that an alternative argument cannot be advanced when it would result in a reassessment being made outside the normal reassessment period set out in subsection 152(4) (*Walsh v. Canada*, 2007 FCA 222 at para. 18). This restriction which is central to the present appeal acknowledges the fact that allowing the Minister to raise an argument based on a legal and factual basis that is different from the one underlying the assessment after the normal reassessment period has expired would in effect do away with the limitation period.

[34] The appellant does not challenge the Tax Court judge’s understanding of the legal principles applicable in ascertaining the scope of subsection 152(9) (reasons at paras. 39 to 42). Rather, he takes issue with the application of those principles to the facts of this case. Specifically, the appellant maintains that the Tax Court judge drew an unreasonable conclusion

or made a palpable and overriding error in holding that the alternative argument rests on transactions which formed the basis of the reassessments (appellant's memorandum at paras. 50 to 62 relying on *Pedwell v. Canada (C.A.)*, [2000] 4 F.C.R. 616 and *St. Arnaud v. Canada*, 2013 FCA 88).

[35] The question turns on whether the alternative argument is within or outside the legal and factual basis underlying the reassessments. As to the legal basis for the reassessments, the appellant insists on the fact that the Minister relied on subsections 146(9) and 146(10) which are limited to property transactions below fair market value and the acquisition of non-qualified investments (appellant's memorandum at para. 39). However, this ignores the fact that paragraph 56(1)(h) was also invoked by the Minister in support of the reassessments (Reply to the Notice of Appeal, Appeal Book, Vol. 1, p. 56 at para. 21; Amended Reply to the Notice of Appeal, Appeal Book, Vol. 1, p. 36 at para. 21). Paragraph 56(1)(h) is a provision of general application which requires that all amounts which come within the ambit of section 146, without distinction, be included in income.

[36] While counsel for the appellant questioned whether paragraphs 56(1)(h) can be used as a charging provision, he provided no authority for the proposition that it could not. At this stage, I am not convinced that reliance on paragraph 56(1)(h) as a legal basis for the alternative argument can be excluded.

[37] As to the factual basis, the Tax Court judge found that the facts underlying the reassessments were that funds used to purchase the debentures having nil or nominal value were

diverted to a law firm's trust account in the course of RRSP stripping transactions (reasons at para. 43). According to the Tax Court judge, whether the funds were diverted to the law firm's trust account directly as the appellant now contends or by way of purchasing assets which had no value is not materially different (reasons at para. 44). The bottom line is that the appellant engaged in RRSP stripping transactions and that is the factual basis relied upon by the Minister in issuing the reassessments (reasons at para. 46).

[38] This admittedly broad view of the factual basis for the reassessments finds support in the language of the letter from the auditor addressed to the appellant outlining the proposed reassessments (reasons at para. 59) which amongst other things refers to RRSP value stripping as well as the notion of sham (Appeal Book, Vol. 1, at p. 82). I note that a sham allegation is particularly supportive of the broad view adopted by the Tax Court judge as it suggests that the true transaction is different from what the appellant made it appear to be.

[39] Counsel for the appellant pointed out during the hearing that the Notice of Confirmation subsequently issued indicates that the sham argument was not cited by the auditor in the audit report as an assessing position (Appeal Book, Vol. 1 at pp. 109 and 110). That is so. However, if anything this calls for further clarification. In my view, the determination of the factual basis for the reassessment is best left to be determined at trial based on the fullness of the evidence, including the testimony of the auditor.

The waiver

[40] The issue insofar as the waiver is concerned is whether the alternative argument “can reasonably be regarded as relating to, ... [the] matter specified in [the] waiver ...” (subparagraph 152(4.01)(a)(ii)). The fact that the waiver only provides for income inclusions relating to debentures subject to subsections 146(9) and/or subsection 146(10) is on the face of it very restrictive. The Tax Court judge appeared to recognize so much but he nevertheless held that a “non-textual objective interpretation” of the waiver (reasons at para. 60) allowed for a broader application (reasons at paras. 53 to 67).

[41] I need not dwell on this issue because I agree with the Tax Court judge’s further opinion that allowing the appellant to escape taxation on the basis of a waiver, crafted so as to include the transaction which he maintained had taken place but exclude the transaction which he later revealed after the limitation period had expired, would give rise to an absurd result (reasons at para. 66).

[42] Counsel for the appellant contends that the absurdity identified by the Tax Court judge is based on an erroneous assessment of the circumstances (appellant’s memorandum at para. 92). Specifically, counsel asserts that the appellant made no representations whatsoever to the Minister prior to the drafting and filing of the waiver (*ibidem*).

[43] That is so. However, the record reveals that the CRA was induced to maintain its initial assessing position at a time when the Minister was still in a position to reassess, *i.e.* before the limitation period had expired.

[44] In the written representations dated May 14, 2006, submitted to the CRA by the appellant's authorized representative, the following factual assertions are made (Appeal Book, Vol. 1 at pp. 139 and 141):

“... Our client exercised reasonable care with respect to the debentures investment”

“It is our contention that the RRSP investment in PI Ventures Corporation at the time our client purchased the debentures was a qualified investment ...”

“..., the documentation at the time the debentures were purchased, indicate the investment was a qualified RRSP investment.”

[45] The appellant later asserted in the Notices of Objection that were filed on March 21, 2007, when the limitation period for the 2003 taxation year had yet to expire, that the “... debenture units ...” were acquired and that “the acquisitions were conducted via a self-directed RRSP transfer ...”. I note that a person who files an objection is required by subsection 165(1) to set out “all relevant facts”.

[46] Against this background, the appellant concedes that the avowed purpose of the modification brought to the wording of the waiver initially proposed by the CRA was to “consciously and deliberately ... [restrict] ... the Waiver to ... reassessments ... in reliance on subsections 146(9) and (10) of the Act and no other provisions ...” (Notice of Motion to Strike, Appeal Book, Vol. 1 at p. 27).

[47] To the extent that the appellant actively induced the Minister to remain on the wrong path and waited until the reassessment period had passed to reveal the true transaction after having ensured that the waiver had been made air-tight, he may well be precluded from resiling from his initial position and/or relying on the waiver. In this respect, the appellant's state of mind when these representations were made is obviously crucial. Yet, the extensive affidavits sworn by the appellant and his authorized representative in support of the Motion to Strike are both silent as to when they became aware that the debentures were not acquired (Appeal Book, Vol. 1 at pp. 74 to 77 and 113 to 118). In my view, only the trial judge after having considered the evidence on point will be in position to pronounce on the behaviour of the appellant and its impact on the position which he takes on appeal.

The motion to amend

[48] Paragraphs 19A and 19B of the Amended Reply complement the alternative argument by tracing the use of the invested funds back to the appellant. Having come to the conclusion that the decision of the Tax Court judge refusing to strike this argument should be upheld, it follows that his decision allowing the amendment would also have to stand.

DISPOSITION

[49] I would dismiss the appeal with costs.

“Marc Noël”

Chief Justice

“I agree

Eleanor R. Dawson J.A.”

“I agree

Johanne Trudel J.A.”

ANNEX

Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.):

56. (1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,

(h) amounts required by section 146 in respect of a registered retirement savings plan or a registered retirement income fund to be included in computing the taxpayer's income for the year;

146. (8) There shall be included in computing a taxpayer's income for a taxation year the total of all amounts received by the taxpayer in the year as benefits out of or under registered retirement savings plans, other than excluded withdrawals (as defined in subsection 146.01(1) or 146.02(1)) of the taxpayer and amounts that are included under paragraph (12)(b) in computing the taxpayer's income.

(9) Where in a taxation year a trust governed by a registered retirement savings plan

(a) disposes of property for a consideration less than the fair market value of the property at the time of the disposition, or for no consideration, or

(b) acquires property for a consideration greater than the fair market value of the property at the time of the acquisition,

56. (1) Sans préjudice de la portée générale de l'article 3, sont à inclure dans le calcul du revenu d'un contribuable pour une année d'imposition :

h) toutes sommes relatives à un régime enregistré d'épargne-retraite ou à un fonds enregistré de revenu de retraite et qui doivent, en vertu de l'article 146, être incluses dans le calcul du revenu du contribuable pour l'année;

146. (8) Est inclus dans le calcul du revenu d'un contribuable pour une année d'imposition le total des montants qu'il a reçus au cours de l'année à titre de prestations dans le cadre de régimes enregistrés d'épargne-retraite, à l'exception des retraits exclus au sens des paragraphes 146.01(1) ou 146.02(1), et des montants qui sont inclus, en application de l'alinéa (12)b), dans le calcul de son revenu.

(9) Lorsque, au cours d'une année d'imposition, une fiducie régie par un régime enregistré d'épargne-retraite :

a) soit dispose de biens en échange d'une contrepartie d'une valeur inférieure à la juste valeur marchande que ces biens avaient au moment de la disposition, ou sans aucune contrepartie;

b) soit acquiert des biens en échange d'une contrepartie d'une valeur supérieure à la juste valeur marchande que ces biens avaient

au moment de l'acquisition,

the difference between the fair market value and the consideration, if any, shall be included in computing the income for the taxation year of the annuitant under the plan.

toute différence entre cette juste valeur marchande et la contrepartie doit être incluse dans le calcul du revenu, pour l'année d'imposition, du rentier qui bénéficie de ce régime.

(10) If at any time in a taxation year a trust governed by a registered retirement savings plan uses or permits to be used any property of the trust as security for a loan, the fair market value of the property at the time it commenced to be so used shall be included in computing the income for the year of the taxpayer who is the annuitant under the plan at that time.

(10) Si, au cours d'une année d'imposition, une fiducie régie par un régime enregistré d'épargne-retraite utilise un bien de la fiducie à titre de garantie d'un prêt ou en permet pareille utilisation, la juste valeur marchande du bien, au moment où il a commencé à être ainsi utilisé, est incluse dans le calcul du revenu, pour l'année, du contribuable qui est le rentier en vertu du régime à ce moment.

152. (4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

152. (4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants:

(a) the taxpayer or person filing the return

a) le contribuable ou la personne produisant la déclaration :

(i) has made any misrepresentation that is attributable to neglect, carelessness or willful default or has committed any fraud in filing the return or in supplying

(i) soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en

any information under this Act,
or

(ii) has filed with the Minister
a waiver in prescribed form
within the normal reassessment
period for the taxpayer in
respect of the year;

(b) the assessment, reassessment or
additional assessment is made
before the day that is 3 years after
the end of the normal reassessment
period for the taxpayer in respect
of the year and

(i) is required under subsection
(6) or (6.1), or would be so
required if the taxpayer had
claimed an amount by filing
the prescribed form referred to
in the subsection on or before
the day referred to in the
subsection,

(ii) is made as a consequence
of the assessment or
reassessment pursuant to this
paragraph or subsection 152(6)
of tax payable by another
taxpayer,

(iii) is made as a consequence
of a transaction involving the
taxpayer and a non-resident
person with whom the taxpayer
was not dealing at arm's
length,

(iii.1) is made, if the taxpayer
is non-resident and carries on a
business in Canada, as a

fournissant quelque
renseignement sous le régime
de la présente loi,

(ii) soit a présenté au ministre
une renonciation, selon le
formulaire prescrit, au cours de
la période normale de nouvelle
cotisation applicable au
contribuable pour l'année;

b) la cotisation est établie avant le
jour qui suit de trois ans la fin de la
période normale de nouvelle
cotisation applicable au
contribuable pour l'année et, selon
le cas

(i) est à établir en vertu du
paragraphe (6) ou (6.1), ou le
serait si le contribuable avait
déduit une somme en
présentant le formulaire
prescrit visé à ce paragraphe au
plus tard le jour mentionné à ce
paragraphe,

(ii) est établie par suite de
l'établissement, en application
du présent paragraphe ou du
paragraphe (6), d'une
cotisation ou d'une nouvelle
cotisation concernant l'impôt
payable par un autre
contribuable,

(iii) est établie par suite de la
conclusion d'une opération
entre le contribuable et une
personne non résidente avec
laquelle il avait un lien de
dépendance,

(iii.1) si le contribuable est un
non-résident exploitant une
entreprise au Canada, est

consequence of

(A) an allocation by the taxpayer of revenues or expenses as amounts in respect of the Canadian business (other than revenues and expenses that relate solely to the Canadian business, that are recorded in the books of account of the Canadian business, and the documentation in support of which is kept in Canada), or

(B) a notional transaction between the taxpayer and its Canadian business, where the transaction is recognized for the purposes of the computation of an amount under this Act or an applicable tax treaty.

(iv) is made as a consequence of a payment or reimbursement of any income or profits tax to or by the government of a country other than Canada or a government of a state, province or other political subdivision of any such country,

(v) is made as a consequence of a reduction under subsection 66(12.73) of an amount purported to be renounced under section 66,

(vi) is made in order to give effect to the application of subsection 118.1(15) or

établie par suite :

(A) soit d'une attribution, par le contribuable, de recettes ou de dépenses au titre de montants relatifs à l'entreprise canadienne (sauf des recettes et des dépenses se rapportant uniquement à l'entreprise canadienne qui sont inscrits dans les documents comptables de celle-ci et étayés de documents conservés au Canada),

(B) soit d'une opération théorique entre le contribuable et son entreprise canadienne, qui est reconnue aux fins du calcul d'un montant en vertu de la présente loi ou d'un traité fiscal applicable,

(iv) est établie par suite d'un paiement supplémentaire ou d'un remboursement d'impôt sur le revenu ou sur les bénéfices effectué au gouvernement d'un pays étranger, ou d'un état, d'une province ou autre subdivision politique d'un tel pays, ou par ce gouvernement,

(v) est établie par suite d'une réduction, opérée en application du paragraphe 66(12.73), d'un montant auquel il a été censément renoncé en vertu de l'article 66,

(vi) est établie en vue de l'application des paragraphes

118.1(16), or

(vii) is made to give effect to the application of any of sections 94, 94.1 and 94.2;

(b.1) an information return described in subsection 237.1(7) or 237.3(2) that is required to be filed in respect of a deduction or claim made by the taxpayer in relation to a tax shelter, or in respect of a tax benefit (as defined in subsection 245(1)) to the taxpayer from an avoidance transaction (as defined in subsection 245(3)), is not filed as and when required, and the assessment, reassessment or additional assessment is made before the day that is three years after the day on which the information return is filed;

(b.2) the assessment, reassessment or additional assessment is made before the day that is three years after the end of the normal reassessment period for the taxpayer in respect of the year and if

(i) the taxpayer, or a partnership of which the taxpayer is a member, has failed to file for the year a prescribed form as and when required under subsection 233.3(3) or to report on the prescribed form the information required in respect of a specified foreign property (as defined in subsection 233.3(1)) held by the taxpayer

118.1(15) ou (16),

(vii) est établie en vue de l'application des articles 94, 94.1 ou 94.2;

b.1) la déclaration de renseignements visée aux paragraphes 237.1(7) ou 237.3(2) qui doit être produite au titre d'une déduction ou d'une demande du contribuable relative à un abri fiscal, ou au titre d'un avantage fiscal, au sens du paragraphe 245(1), du contribuable découlant d'une opération d'évitement, au sens du paragraphe 245(3), n'est pas produite selon les modalités et dans les délais prévus, et la cotisation, la nouvelle cotisation ou la cotisation supplémentaire est établie avant la date qui suit de trois ans la date à laquelle la déclaration est produite;

b.2) la cotisation, la nouvelle cotisation ou la cotisation supplémentaire est établie avant la date qui suit de trois ans la fin de la période normale de nouvelle cotisation applicable au contribuable pour l'année et, à la fois :

(i) le contribuable, ou une société de personnes dont il est un associé, a omis de produire pour l'année le formulaire prescrit selon les modalités et dans le délai prévus au paragraphe 233.3(3) ou d'indiquer dans ce formulaire les renseignements exigés relativement à un bien étranger déterminé, au sens du paragraphe 233.3(1), qu'il

at any time during the year,
and

(ii) the taxpayer has failed to report, in the return of income for the year, an amount in respect of a specified foreign property that is required to be included in computing the taxpayer's income for the year;

(c) the taxpayer or person filing the return of income has filed with the Minister a waiver in prescribed form within the additional three-year period referred to in paragraph (b) or (b.1);

(c.1) the taxpayer or person filing the return of income has filed with the Minister a waiver in prescribed form within the additional three-year period referred to in paragraph (b.2); or

(d) as a consequence of a change in the allocation of the taxpayer's taxable income earned in a province as determined under the law of a province that provides rules similar to those prescribed for the purposes of section 124, an assessment, reassessment or additional assessment of tax for a taxation year payable by a corporation under a law of a province that imposes on the corporation a tax similar to the tax imposed under this Part (in this paragraph referred to as a "provincial reassessment") is made, and as a consequence of the provincial reassessment, an assessment, reassessment or additional assessment is made on

détient au cours de l'année,

(ii) le contribuable a omis d'indiquer, dans la déclaration de revenu pour l'année, une somme relative à un bien étranger déterminé qui est à inclure dans le calcul de son revenu pour l'année;

c) le contribuable ou la personne produisant la déclaration de revenu a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période additionnelle de trois ans mentionnée aux alinéas b) ou b.1);

c.1) le contribuable ou la personne produisant la déclaration de revenu a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période additionnelle de trois ans mentionnée à l'alinéa b.2);

d) par suite d'un changement intervenu dans l'attribution du revenu imposable du contribuable gagné dans une province, déterminé selon la législation d'une province qui prévoit des règles semblables à celles établies par règlement pour l'application de l'article 124, une cotisation, une nouvelle cotisation ou une cotisation supplémentaire (appelée « nouvelle cotisation provinciale » au présent alinéa) est établie à l'égard de l'impôt à payer par une société pour une année d'imposition en vertu d'une loi provinciale aux termes de laquelle la société est assujettie à un impôt semblable à celui prévu par la présente partie et, par suite de la

or before the day that is one year after the later of

nouvelle cotisation provinciale, une cotisation, une nouvelle cotisation ou une cotisation supplémentaire est établie au plus tard le jour qui suit d'une année le dernier en date des jours suivants :

(i) the day on which the Minister is advised of the provincial reassessment, and

(i) le jour où le ministre est avisé de la nouvelle cotisation provinciale,

(ii) the day that is 90 days after the day of sending of a notice of the provincial reassessment.

(ii) le quatre-vingt-dixième jour suivant la date d'envoi de l'avis de la nouvelle cotisation provinciale.

152. (4.01) Notwithstanding subsections (4) and (5), an assessment, reassessment or additional assessment to which paragraph (4)(a), (b), (b.1) or (c) applies in respect of a taxpayer for a taxation year may be made after the taxpayer's normal reassessment period in respect of the year to the extent that, but only to the extent that, it can reasonably be regarded as relating to,

152. (4.01) Malgré les paragraphes (4) et (5), la cotisation, la nouvelle cotisation ou la cotisation supplémentaire à laquelle s'appliquent les alinéas (4)a), b), b.1) ou c) relativement à un contribuable pour une année d'imposition ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans la mesure où il est raisonnable de considérer qu'elle se rapporte à l'un des éléments suivants :

(a) where paragraph 152(4)(a) applies to the assessment, reassessment or additional assessment,

a) en cas d'application de l'alinéa (4)a):

...

[...]

(ii) a matter specified in a waiver filed with the Minister in respect of the year; and

(ii) une question précisée dans une renonciation présentée au ministre pour l'année;

(5) There shall not be included in computing the income of a taxpayer for a taxation year, for the purpose of an assessment, reassessment or additional assessment made under this Part after the taxpayer's normal

(5) N'est pas à inclure dans le calcul du revenu d'un contribuable pour une année d'imposition en vue de l'établissement, après la période normale de nouvelle cotisation qui lui est applicable pour l'année, d'une

reassessment period in respect of the year, any amount that was not included in computing the taxpayer's income for the purpose of an assessment, reassessment or additional assessment made under this Part before the end of the period.

...

(9) The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act

(a) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and

(b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

165. (1) A taxpayer who objects to an assessment under this Part may serve on the Minister a notice of objection, in writing, setting out the reasons for the objection and all relevant facts,

(a) where the assessment is in respect of the taxpayer for a taxation year and the taxpayer is an individual (other than a trust) or a testamentary trust, on or before the later of

(i) the day that is one year after the taxpayer's filing-due date

cotisation, d'une nouvelle cotisation ou d'une cotisation supplémentaire en vertu de la présente partie le montant qui n'a pas été inclus dans le calcul de son revenu en vue de l'établissement, avant la fin de cette période, d'une cotisation, d'une nouvelle cotisation ou d'une cotisation supplémentaire en vertu de cette partie.

[...]

(9) Le ministre peut avancer un nouvel argument à l'appui d'une cotisation après l'expiration de la période normale de nouvelle cotisation, sauf si, sur appel interjeté en vertu de la présente loi :

a) d'une part, il existe des éléments de preuve que le contribuable n'est plus en mesure de produire sans l'autorisation du tribunal;

b) d'autre part, il ne convient pas que le tribunal ordonne la production des éléments de preuve dans les circonstances.

165. (1) Le contribuable qui s'oppose à une cotisation prévue par la présente partie peut signifier au ministre, par écrit, un avis d'opposition exposant les motifs de son opposition et tous les faits pertinents, dans les délais suivants :

a) lorsqu'il s'agit d'une cotisation relative à un contribuable qui est un particulier (sauf une fiducie) ou une fiducie testamentaire, pour une année d'imposition, au plus tard le dernier en date des jours suivants :

(i) le jour qui tombe un an après la date d'échéance de

for the year, and

(ii) the day that is 90 days after the day of sending of the notice of assessment; and

(b) in any other case, on or before the day that is 90 days after the day of sending of the notice of assessment.

production qui est applicable au contribuable pour l'année,

(ii) le quatre-vingt-dixième jour suivant la date d'envoi de l'avis de cotisation;

b) dans les autres cas, au plus tard le quatre-vingt-dixième jour suivant la date d'envoi de l'avis de cotisation.

Tax Court of Canada Rules (General Procedure), SOR/90-688a:

53. (1) The Court may, on its own initiative or on application by a party, strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document

(a) may prejudice or delay the fair hearing of the appeal;

(b) is scandalous, frivolous or vexatious;

(c) is an abuse of the process of the Court; or

(d) discloses no reasonable grounds for appeal or opposing the appeal.

(2) No evidence is admissible on an application under paragraph (1)(d).

(3) On application by the respondent, the Court may quash an appeal if

(a) the Court has no jurisdiction over the subject matter of the appeal;

(b) a condition precedent to instituting an appeal has not been met; or

(c) the appellant is without legal capacity to commence or continue the proceeding.

53. (1) La Cour peut, de son propre chef ou à la demande d'une partie, radier un acte de procédure ou tout autre document ou en supprimer des passages, en tout ou en partie, avec ou sans autorisation de le modifier parce que l'acte ou le document

a) peut compromettre ou retarder l'instruction équitable de l'appel;

b) est scandaleux, frivole ou vexatoire;

c) constitue un recours abusif à la Cour;

d) ne révèle aucun moyen raisonnable d'appel ou de contestation de l'appel.

(2) Aucune preuve n'est admissible à l'égard d'une demande présentée en vertu de l'alinéa (1)d).

(3) À la demande de l'intimé, la Cour peut casser un appel si :

a) elle n'a pas compétence sur l'objet de l'appel;

b) une condition préalable pour interjeter appel n'a pas été satisfaite;

c) l'appellant n'a pas la capacité juridique d'introduire ou de continuer l'instance.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-428-13

**(APPEAL FROM AN ORDER OF THE HONOURABLE EUGENE P. ROSSITER,
ASSOCIATE CHIEF JUSTICE (AS HE THEN WAS) OF THE TAX COURT OF
CANADA DATED DECEMBER 10, 2013, DOCKET NUMBER 2012-315(IT)G.)**

STYLE OF CAUSE: DAVID GRAMIAK v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: VANCOUVER, BRITISH
COLUMBIA

DATE OF HEARING: JANUARY 27, 2015

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

DATED: FEBRUARY 6, 2015

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