Dockets: 2012-3093(IT)G
2012-3094(IT)G

BETWEEN:

2078970 ONTARIO INC., IN ITS CAPACITY AS DESIGNATED PARTNER OF LUX OPERATING LIMITED PARTNERSHIP,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent,

And

BETWEEN:

2078702 ONTARIO INC., IN ITS CAPACITY AS DESIGNATED PARTNER OF LUX INVESTORS LIMITED PARTNERSHIP,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on October 27, 2016 at
Vancouver, British Columbia

By: The Honourable Justice Henry A. Visser

Appearances:

Counsel for the Applicants:	David R. Davies Shawn W. Tyron
Counsel for the Respondent:	Michael Taylor Raj Grewal

ORDER

UPON Motion by the Applicants for the determination of the following question pursuant to section 58 of the *Tax Court of Canada Rules (General Procedure)*:

> Where the Minister has at all times concluded that no partnership existed, can the Minister issue a valid Notice of Determination in respect of that purported partnership under subsection 152(1.4) of the Act?

AND UPON hearing from the parties;

IT IS ORDERED THAT:

a) the Applicants' Motions are allowed and the question to be determined at the Rule 58 stage two hearing shall be as follows:

> Where the Minister has at all times concluded that no partnership existed, can the Minister issue a valid Notice of Determination in respect of that purported partnership under subsection 152(1.4) of the *Act*?;

b) costs shall be payable as determined by the judge presiding at the Rule 58 stage two hearing;

c) the hearing for the determination of the question shall be held on a date to be determined in consultation with counsel at the Tax Court of Canada, 701 West Georgia Street, 6th floor, Vancouver, British Columbia;

d) the evidence to be presented at the hearing shall include, but not be limited to:

   i. the Amended Notice of Appeal for each of the two Appeals;

   ii. the Amended Reply for each of the two Appeals;

   iii. the affidavits of Carole Lacapra sworn October 18, 2016 in support of the two Applications; and

   iv. upon application, such other evidence as may be permitted by the judge hearing the Rule 58 stage two hearing of the question;

e) the Applicants' factum shall be filed and served 30 days prior to the scheduled hearing date;

f) the Respondent's factum shall be filed and served 15 days prior to the scheduled hearing date;

g) the Applicants' Reply to the Respondent's factum, if any, shall be filed and served 7 days prior to the scheduled hearing.

Signed at Ottawa, Canada, this 7th day of September 2017.

"Henry A. Visser"

Visser J.

Citation: 2017 TCC 173
Date: 20170907
Dockets: 2012-3093(IT)G
2012-3094(IT)G

BETWEEN:
2078970 ONTARIO INC., IN ITS CAPACITY AS DESIGNATED PARTNER OF LUX OPERATING LIMITED PARTNERSHIP,
Applicant,
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BETWEEN:
2078702 ONTARIO INC., IN ITS CAPACITY AS DESIGNATED PARTNER OF LUX INVESTORS LIMITED PARTNERSHIP,
Applicant,
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REASONS FOR ORDER

Visser J.

INTRODUCTION

[1] The applicant corporation 2078970 Ontario Inc. ("**2078970**") is the general and designated partner for the Lux Operating Limited Partnership ("**Lux OLP**") and the applicant corporation 2078702 Ontario Inc. ("**2078702**") is the general and designated partner for the Lux Investor Limited Partnership ("**Lux ILP**") in respect of their appeal of partnership Notices of Determination issued by the Minister of National Revenue (the "**Minister**") pursuant to subsection 152(1.4) of the *Income*

Tax Act (Canada)[1] (the "***Act***") and dated February 11, 2010, and February 25, 2010.[2] In the course of making these determinations, the Minister concluded that neither partnership was a valid partnership at law and accordingly determined that the losses reported by the two partnerships were nil for the 2006, 2007 and 2008 fiscal periods at issue in the underlying appeals. Although the Applicants argue that the partnerships are valid partnerships, they argue, *inter alia*, that the corresponding Notices of Determination issued by the Minster are procedurally invalid because the Minister cannot issue a Notice of Determination pursuant to subsection 152(1.4) of the *Act* in respect of a purported partnership where the Minister has concluded (before issuing the Notices of Determination) that no valid partnership exists.

[2] In this respect, the Applicants have each brought a motion under section 58 ("**Rule 58**") of the *Tax Court of Canada Rules (General Procedure)* (the "**Rules**") to have the following question (the "**Question**") determined by this Court pursuant to Rule 58 prior to the hearing of the related appeals:

> "Where the Minister has at all times concluded that no partnership existed, can the Minister issue a valid Notice of Determination in respect of that purported partnership under subsection 152(1.4) of the Act?"

[3] There are two stages to a Rule 58 motion. In this first stage, the Court must decide if an order will be granted that the proposed Question be heard by this Court pursuant to Rule 58 at a subsequent second stage hearing of the Question on its merits. The Respondent opposes the motions on the basis that the Question does not meet the requirements of Rule 58(2), particularly because the Respondent argues it has no reasonable prospect of success. For the reasons that follow, it is my view that the Applicants' motions should be allowed and the Question should proceed to a stage two hearing on its merits under Rule 58.

BACKGROUND FACTS

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1 R.S.C., 1985, c. 1 (5th Supp.), as amended.

2 Pursuant to subsection 165(1.15) of the *Act*, an appeal of a determination made by the Minister in respect of a fiscal period of a partnership pursuant to subsection 152(1.4) of the *Act* may be brought by a designated partner of the partnership.

[4] Lux OLP and Lux ILP are part of a multi-level partnership financing structure which the Respondent described as follows in its written submissions:[3]

a. "In August 2005, a limited partnership, the Lux Operating Limited Partnership (Lux OLP), was formed and purchased the assets of an operating business, including a portfolio of intellectual property, from Luxell Technologies Inc. (Luxell);

b. a second limited partnership, the Lux Investor Limited Partnership (Lux ILP), was formed to become the limited partner in Lux OLP;

c. units of Lux ILP were sold to 58 outside investors as limited partners, raising capital of $30,000,000, of which $4,000,000 was paid in cash and $26,000,000 was paid by promissory notes (the Investor Notes). The Investor Notes were payable in five annual instalments not commencing until January 31, 2008 (28 months later);

d. Lux ILP became the limited partner of Lux OLP and contributed $30,000,000 for Lux OLP units ($4,000,000 in cash and $26,000,000 by assigning of the Investor Notes);

e. Lux OLP then purchased the assets from Luxell for $29,000,000;

f. the asset purchase was subject to an option granted to Luxell to acquire the outstanding units of Lux OLP from Lux ILP - and thereby to reacquire control of the business assets - for a minimum purchase price of $26,000,000. The outside date for exercising the option was January 31, 2008;

g. Lux OLP contracted with Luxell to operate the business using the assets for Lux OLP's account in exchange for a service fee. Amounts owing to Luxell were to be paid by promissory notes that would become payable only 36 months after their date of issue (the Service Notes);

h. Lux [OLP] paid the $29,000,000 for Luxell's assets with cash of $3,000,000 and by an assignment of the Investor Notes with a face value of $26,000,000;

i. Lux OLP began to issue Service Notes annually to Luxell for fees relating to operating the business. The first Service Note did not become payable until December 31, 2008 (40 months after the asset purchase);

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[3] Paragraphs 3(a) – (o) of the Respondent's written submissions, which are in turn drawn from the Minister's assumptions as pleaded in paragraph 14 of the Replies to the Amended Notices of Appeal.

j. in November 2007 (26 months after the asset purchase), Luxell exercised its option to reacquire the units of Lux OLP from Lux ILP for $26,000,000;

k. Luxell paid the $26,000,000 option price by assigning the Investor Notes to Lux ILP;

l. on January 7, 2008, Luxell wound up Lux OLP and cancelled the Service Notes owing to itself, 11 months before the first note became payable;

m. the investors who became limited partners in Lux ILP were never required to pay the principal amount of the Investor Notes;

n. the amounts that Lux OLP deducted in computing income from the business included CCA claimed in respect of intellectual property assets purchased from Luxell and operating expenses incurred by Luxell under the service contract; and

o. from September 1, 2005 to January 7, 2008, Lux OLP's reported losses totaled $35,149,485, which were flowed up from Lux OLP to Lux ILP and then allocated to the limited partners of Lux ILP who deducted them in computing their income."

LAW AND ANALYSIS

[5] Rule 58 provides as follows:

> 58. (1) On application by a party, the Court may grant an order that a question of law, fact or mixed law and fact raised in a pleading or a question as to the admissibility of any evidence be determined before the hearing.
>
> (2) On the application, the Court may grant an order if it appears that the determination of the question before the hearing may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs.
>
> (3) An order that is granted under subsection (1) shall
>
> (a) state the question to be determined before the hearing;
>
> (b) give directions relating to the determination of the question, including
>
> directions as to the evidence to be given — orally or otherwise — and as to the service and filing of documents;
>
> (c) fix time limits for the service and filing of a factum consisting of a concise

statement of facts and law;

(d) fix the time and place for the hearing of the question; and

(e) give any other direction that the Court considers appropriate.

[6] At paragraphs 10 to 25 of *Paletta v. R.*, 2016 TCC 171, Justice Owen provided the following overview of Rule 58 as it now reads following changes thereto which came into effect in 2014:[4]

> "[10] Rule 58 has been considered in a number of cases. However, only a few cases have considered the most recent iteration of the rule, which came into effect on February 7, 2014 (SOR/2014-26, s. 6). The Regulatory Impact Analysis Statement describes the 2014 amendments to Rule 58 as follows:
>
> > To amend sections 53 and 58 to regroup all matters where the Court may strike out a pleading under section 53, and all matters relating to the determination of questions of law, fact or mixed law and fact under section 58. As a consequence of these changes, sections 59, 60, 61 and 62 are repealed.
>
> [11] Accordingly, current Rule 58 represents a consolidation of sections 58, 59, 60, 61 and 62 of the Rules under a single rule, which is in some respects similar to, but in other respects quite different from, the version of Rule 58 that it replaced. The previous version stated:
>
> > 58(1) A party may apply to the Court,
> >
> > > (*a*) for the determination, before hearing, of a question of law, a question of fact or a question of mixed law and fact raised by a pleading in a proceeding where the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, or
> > >
> > > (*b*) to strike out a pleading because it discloses no reasonable grounds for appeal or for opposing the appeal,
> >
> > and the Court may grant judgment accordingly.

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[4] *Paletta* was upheld by the Federal Court of Appeal following the hearing of these motions. See *Paletta v. R.*, 2017 FCA 33.

(2) No evidence is admissible on an application,

(*a*) under paragraph (1)(*a*), except with leave of the Court or on consent of the parties, or

(*b*) under paragraph (1)(*b*).

(3) The respondent may apply to the Court to have an appeal dismissed on the ground that,

(*a*) the Court has no jurisdiction over the subject matter of an appeal,

(*b*) a condition precedent to instituting a valid appeal has not been met, or

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

and the Court may grant judgment accordingly.[6]

[12] In my view, the changes to the text and structure of Rule 58, when compared to the previous version, are sufficient to warrant a fresh consideration of the rule as it now exists.

[13] Rule 58 continues to describe a two-stage process. Subsection 58(1) states that the Court may, in response to an application by a party, grant an order that

1. a question of law, fact or mixed law and fact raised in a pleading, or
2. a question as to the admissibility of any evidence,

be determined before the hearing.

[14] Under subsection 58(2), the Court may grant such an order if it appears that the determination of the question before the hearing may

1. dispose of all or part of the proceeding,
2. result in a substantially shorter hearing, or
3. result in substantial savings in costs.

[15] In the first stage, the Court determines whether an order should be granted, having due regard to the requirements of subsections 58(1) and (2), which are determined by applying the usual rules of statutory interpretation, keeping in mind, however, subsection 4(1) of the Rules, which requires that "[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive

determination of every proceeding on its merits."

[16] With respect to the requirements in subsections 58(1) and (2), subsection 58(1) requires that there be either (i) a question of law, fact or mixed law and fact raised in a pleading, or (ii) a question as to the admissibility of evidence.

[17] In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, the Supreme Court of Canada described what constitutes a question of law, fact or mixed law and fact as follows (at paragraph 35):

> . . . Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. . .

[18] The question of law, fact or mixed law and fact must have been raised in the pleadings. Rule 58 does not provide a means to address such questions that are not raised in the pleadings.[7]

[19] The second, alternative, requirement in subsection 58(1) was introduced with the 2014 amendments to Rule 58. It expands the scope of Rule 58 to allow for questions regarding the admissibility of evidence. The inclusion of this requirement confirms the broad scope of current Rule 58, as it may now be used to address virtually any issue that could arise in a full hearing of the appeal.

[20] Subsection 58(2) requires only that "it appear" that the Rule 58 hearing "may" lead to one or more of the specified outcomes. The word "may" is used in two senses in subsection 58(2). The first sense is permissive and this is also the sense in which it is so used in subsection 58(1). The repetition of the permissive sense makes clear the fact that the decision to grant an order is wholly in the discretion of the Court. In particular, the fact that a question may meet the requirements in subsections 58(1) and (2) by no means compels the Court to grant an order under Rule 58.

[21] This discretionary aspect of the rule is entirely consistent with the fact that the Tax Court of Canada has the implied authority to control the process of the Court. In *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, the Supreme Court of Canada stated:

> Likewise in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a "doctrine of jurisdiction by necessary implication" when determining the powers of a statutory tribunal:
>
> > . . . the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime . . . .
> >
> > *(ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51)*
>
> Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.[8]

[22] Apart from being reflective of the Court's implied authority to control its own process, the repetition of the permissive aspect of Rule 58 reinforces the point that there may well be other considerations at play that factor into the Court's decision whether or not to grant an order. The repeated use of permissive language in subsections 58(1) and (2) confirms that the Court is not limited to considering only the requirements set out in those subsections.[9]

[23] The second sense of "may" used in subsection 58(2) expresses possibility. Specifically, if "it appears" to the Judge hearing the Rule 58 application that the determination of the question "may" (i.e., could possibly) give rise to one or more of the three outcomes described in subsection 58(2), then the Judge may (not must) grant the order.

[24] The cases on the former version of Rule 58 are well summarized by the Chief Justice in *Suncor*, *supra*. As the Chief Justice observes, some cases under former Rule 58 have held that a question fails to meet the requirement now in subsection 58(2) if only one of two possible answers would lead to the desired results.

[25] I do not read these cases as setting a hard and fast rule that must be applied to the current version of Rule 58. Moreover, the broad discretionary language used

> in current subsection 58(2) supports the position that a question should not automatically fail to meet the requirement in that subsection because one possible answer to the question would not lead to one or more of the desired results. Rather, the possibility of that answer should be factored into the Court's consideration of whether or not to exercise its discretion to grant an order under Rule 58. In my view, such an approach respects the broad discretionary language of subsection 58(2) and is consistent with the mandate under subsection 4(1) of the Rules and the general principles enunciated by the Supreme Court of Canada in *Hryniak*."[5]

[7] I agree with Justice Owen's overview of Rule 58 as it now reads. While earlier cases dealing with previous versions of Rule 58 may still be of assistance, they should be considered cautiously and distinguished where necessitated by the changes to Rule 58.

[8] At paragraphs 13 to 16 of *Suncor Energy Inc. v. The Queen*, 2015 TCC 210, Chief Justice Rossiter provided the following summary of the technical requirements that must be met under the first stage of a Rule 58 motion:

> "13 In *McIntyre v. R.*, 2014 TCC 111 (T.C.C. [General Procedure]) Justice Campbell held at paragraph [23] that three technical requirements must be met under the first stage of a Rule 58 motion:

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[5] Footnotes 6 to 9 referenced in the excerpted quotation from *Paletta* read as follows:
[6] Paragraph 58(1)(a) was amended by SOR/2004-100 to add: ", a question of fact or a question of mixed law and fact". Prior to that amendment, the rule addressed only a question of law.
[7] As to what "raised in the pleadings" means, see, for example, the comments of Justice Woods in *Sentinel Hill Productions IV Corp. v. The Queen*, 2013 TCC 267 at paragraphs 27 to 31, a decision cited by Chief Justice Rossiter in *Suncor Energy Inc. v. The Queen*, 2015 TCC 210 at paragraph 14. The text of this requirement has not changed in the current version of Rule 58.
[8] Paragraph 19. See also *M.N.R. v. RBC Life Insurance Company*, 2013 FCA 50 at paragraphs 35 and 36.
[9] In *McIntyre v. The Queen*, 2014 TCC 111, Justice Campbell confirmed that this discretion also existed under the prior version of Rule 58 (see paragraph 25). The Chief Justice cited this observation with approval in *Suncor, supra* (at paragraph 16) in addressing the current version of Rule 58. In *Rio Tinto Alcan Inc. v. The Queen*, 2016 TCC 31, Justice D'Auray stated at paragraph 55:

> > . . . the judge always has discretion and can decide, citing other grounds, that the question does not lend itself to a determination under section 58 of the Rules.

> (1) there are questions of law, fact or mixed law and fact;
>
> (2) they are raised by the pleadings; and
>
> (3) the questions may dispose of all or part of the proceeding, may substantially shorten the hearing of the appeal, or may result in a substantial savings of costs.
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> 14 In *Sentinel Hill Productions IV Corp. v. R.*, 2013 TCC 267 (T.C.C. [General Procedure]), Justice Woods held at paragraph [3] that the "main focus" of the first stage is to determine whether the second and third requirements, above, are met. This suggests that Justice Woods did not see the first requirement that the questions be of law, fact, or mixed law and fact as important, perhaps because every question must be either a question of law, fact, or mixed law and fact. These are all the possibilities of what form a question could take.
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> 15 Based on *McIntyre* and *Sentinel Hill*, there are essentially only two requirements:
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> (1) the questions are raised by the pleadings; and
>
> (2) the questions may dispose of all or part of the proceeding, may substantially shorten the hearing of the appeal, or may result in a substantial savings of costs.
>
> 16 Also, it should be noted that Campbell, in *McIntyre*, supra at paragraph [25] found that beyond the technical requirements, "the Court has the discretion to consider other factors, together with all the circumstances of the case"."

[9] In this case, the parties agree that the first two requirements of a Rule 58 motion are met. In particular, they agree that the Question is a question of law or mixed law and fact and that the Question has been raised in the parties' pleadings. I agree. In this case, the Question raises a very narrow legal question about the validity of the issuance of Notices of Determination in the context of a very narrow

set of facts which appear not to be in dispute.[6] It is also clear that the Question has been raised in the parties' pleadings.[7]

[10] The parties disagree on the application of the third requirement of a Rule 58 motion that "the determination of the question before the hearing may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs." The Applicants argue that the Question raises a threshold issue, and if the Question is answered in the negative, the Applicants' appeals must be allowed as the underlying Notices of Determinations will be invalid. The Applicants also argue that a trial on all of the merits of these two appeals would likely take 10-12 days, whereas given that there are no factual disputes in relation to the determination of the Question, legal argument on that preliminary issue would likely only take one half day. As a result, the Applicants' argue that answering the Question in the negative would dispose of all of the appeal and would thus obviate the need for a potentially long trial and therefore result in both a substantially shorter hearing and a substantial savings in costs.

[11] Because the Question raises a preliminary issue which must be addressed at trial if this Rule 58 motion is not allowed, the Applicants further argue that answering the Question in the affirmative will obviate the need to address that issue at trial because the issue would be *res judicata*, and thus both shorten the trial, and the cost thereof, by a similar amount of time and cost as the Rule 58 hearing.

[12] The Applicants have noted that this Court has been divided in the past as to whether the third requirement of a Rule 58 motion has been met in circumstances where the Question will only dispose of part of the proceeding or shorten the hearing if it is answered in favour of the Applicants, and argue that *Rio Tinto Alcan*

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6 See paragraph 3 under the heading "THE GROUNDS FOR THE MOTION ARE:" on page 2 of each of the Applicant's Notice of Motion which summarizes the four facts which the Applicants say are material to the determination of the Question, all of which are admitted by the Respondent.

7 See paragraph 32(a) of 2078970's Amended Notice of Appeal and paragraphs 15 and 19 of the Respondent's Amended Reply in respect thereof as well as paragraph 30(a) of 2078702's Amended Notice of Appeal and paragraphs 16 and 21 of the Respondent's Amended Reply in respect thereof.

Inc. v. The Queen[8] and *Paletta*[9] support their position that the third requirement of a Rule 58 motion has been met in the circumstances of this case under the current version of Rule 58.

[13] While the Respondent appears to agree that the Question relates to a preliminary issue to the hearing of the trial on its merits,[10] the Respondent argues that the third requirement of a Rule 58 motion will not be met for two reasons. Firstly, the Respondent argues that the Question will only dispose of part of the proceeding or shorten the hearing if it is answered in favour of the Applicants, and, citing *Kwok v. The Queen*[11] and *McIntyre v. The Queen*[12], argues that this Court has previously held that the third requirement of a Rule 58 motion is not met where the Question will only dispose of all or part of the proceeding or substantially shorten a hearing when answered in favour of the Applicant.

[14] I agree with the Applicants. In this case, answering the Question in favour of the Applicants may invalidate the Notices of Determination issued by the Minister and therefore may dispose of all or part of the proceedings or result in a substantially shorter hearing or a substantial savings of costs. In addition, if the Question is answered in favour of the Respondent, the preliminary issue dealing with the validity of the Notices of Determination will have been addressed and would therefore be *res judicata*, and that preliminary part of the proceedings will therefore be disposed of. The hearing of the appeals should therefore also be shortened by an amount of time approximately equal to the time taken to argue the Question at the Rule 58 stage two hearing. While in my view the Question would therefore meet the three requirements when answered either way, I also agree with Justice Owen in *Paletta*, at paragraph 25, and am of the view that the current version of Rule 58 should not be read narrowly and does not set a hard and fast rule that must be applied in each case.

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8 2016 TCC 31, at paragraphs 49 to 52.

9 At paragraph 25.

10 In summarizing the "ISSUES TO BE DECIDED" in its Reply to each of these appeals, the Respondent describes the validity of the determinations as a "preliminary issue".

11 2008 TCC 238 at paragraph 6.

12 2014 TCC 111 at paragraph 24.

[15] As a second reason raised by the Respondent in support of the Respondent's position that the third requirement of a Rule 58 motion will not be met, the Respondent argues that the Question has no reasonable prospect of success, and therefore cannot substantially shorten the hearing. The Respondent cites *Sentinel Hill*[13] in support of this position both generally and specifically in relation the Question. The Respondent also argues that the issue on appeal is the correctness of the amount of the partnership losses in dispute as determined by the Minister, not the Minister's thought process or reasons, as it is open to the Minister to advance an alternative basis of assessment in defending an appeal.[14] The Respondent further argues that subsection 152(1.4) of the *Act* clearly provides that the Minister may issue a partnership determination where a partnership return has been filed,[15] and that the Question presumes a threshold requirement for issuing a partnership determination which is not supported in the *Act*.

[16] The Respondent also argues that the Question leads to an absurd interpretation of the partnership determination provisions of the *Act*. In particular, while the Applicants argue that the two partnerships are valid partnerships, they seek to invalidate the Minister's Notices of Determination on a procedural ground based on the Minister's position that the partnerships were not valid partnerships. The Respondent argues that it would be absurd for the partnership determination provisions not to apply to a partnership because the Minister wrongly believed the partnership was an invalid partnership, and that the Applicant's position undermines the purpose of the partnership determination provisions.

[17] While the Respondent acknowledges that an assessment can be overturned both for being procedurally invalid and because it is incorrect, the Respondent argues that subsection 152(1.2) of the *Act* incorporates all of the procedural provisions in Divisions I (Returns, Assessments, Payments and Appeals) and J (Appeals to the Tax Court and the Federal Court of Appeal) as they relate to an assessment or to a reassessment of tax and that they therefore apply to the

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13 *Sentinel Hill Productions IV Corp. v. R.*, 2013 TCC 267 (T.C.C. [General Procedure]), affirmed by the Federal Court of Appeal 2014 FCA 161.

14 See *Loewen v. R.*, 2004 FCA 146, at paragraphs 11 and 13 and subsection 152(9) of the *Act*.

15 See also the FCA decision in *Sentinel Hill*, at paragraph 12.

partnership determination rules. The Respondent also notes that it is open to the Minister to assess taxpayers, such as trusts, where the Minister takes the positon the taxpayer does not legally exist.[16] As such, the Respondent argues that there is no procedural invalidity to the Notices of Determination issued in the two appeals at issue herein.

[18] As the validity of the two partnerships is a central issue in the Applicants' Appeals, and those appeals raise complex factual issues, the Respondent also argues that Rule 58 should not be used in substitute for a full hearing of the appeals.

[19] The Applicants argue that *Sentinel Hill* can be distinguished from this case, as the Question does not raise any irrelevant or peripheral questions and because the Minister has never concluded in these appeals that a valid partnership existed, unlike in *Sentinel Hill*, where the Minister changed assessing positons on appeal.

[20] The Applicants also argue that there are a number of important differences between the partnership determination rules and the assessment rules applicable to taxpayers generally. Pursuant to subsection 152(1) of the *Act*, the Minister must assess the tax payable by a taxpayer after the taxpayer files a return. While partnerships are generally not subject to tax under the *Act*, they are required to file an annual partnership return and taxpayer partners of partnerships are required to include the income or loss from partnerships in computing their income annually. The Applicants further argue that, pursuant to subsection 152(1.4), the Minister may determine the income or loss of a partnership after a partnership return is filed, but is not required to do so. Rather, the Minister may choose to assess the taxpayer partners directly. The Applicants thus argue that the Minister has two procedural routes available when deciding upon the correctness of the income or loss reported by members of a partnership, and while the partnership determination provisions provide for a procedural shortcut, they are not mandatory but discretionary to the Minister. The Applicants also argue that the Minister must first determine that a valid partnership exists before issuing a partnership determination, and in this case, having concluded that there was no valid partnership, the Minster should have assessed the taxpayer partners of the partnerships instead of using the partnership determination process.

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[16] See *Antle and Renee Marquis-Antle Spousal Trust v. R.*, 2010 FCA 280.

[21] I agree that there are a number of important differences between *Sentinel Hill* and this case. In *Sentinel Hill*, the Minister did not initially conclude that the partnership was invalid, but rather raised that in the alternative on appeal. In this case, the Minster initially concluded that no valid partnerships existed. In *Sentinel Hill*, Justice Woods determined that the proposed question was not raised by the applicant in the pleadings, whereas it is clear that the Question was raised in the pleadings in this case.

[22] There is also an important difference between the proposed question in *Sentinel Hill* and the Question in this case. The proposed question in *Sentinel Hill* was framed by Justice Woods at paragraph 7 as follows:

> The excerpt above clarifies that the focus of the Proposed Question is on whether the Minister of National Revenue is now statute barred from issuing reassessments to partners by virtue of subsection 152(1.8) of the Income Tax Act.

[23] In this case, the Question clearly only relates to procedural validity pursuant to subsection 152(1.4) of the *Act*, and only relates to the validity of the Notices of Determination issued to the partnerships, and importantly does not relate to assessments of the partners.

[24] At paragraph 12 of the Federal Court of Appeal's decision in *Sentinel Hill*, Justice Dawson noted the following:

> Finally, I agree with counsel for the appellants that it is not appropriate in the circumstances for this Court to answer the proposed question, and the Court will not do so. That said, it is fair to observe that the appellants' argument appears to be difficult to sustain in light of the statutory scheme. Specifically, subsection 152(1.4) permits the Minister to issue a notice of determination when a partnership information return is filed. The filing of such a return in effect constitutes a representation that the entity is in fact and law a partnership.

[25] While Justice Dawson's comments on the procedural validity of a Notice of Determination appear to address the Question, I note that they were obiter. In light of the important differences between *Sentinel Hill* and these Applications, I am of the view that the Question has not previously been fully considered by either this Court or the Federal Court of Appeal. As such, it is my view that the decision in *Sentinel Hill* does not inevitably lead to the conclusion that the Question has no reasonable prospect of success.

[26] Having concluded that the three requirements of a Rule 58 stage one hearing have generally been met in this case, it is my view that this case would be an appropriate case to advance to a stage two hearing unless the Question has no reasonable prospect of success. It is important to note that in considering whether the Question has no reasonable prospect of success, it is not the role of this Court at a stage one hearing to answer the Question or to consider it fully.

[27] Subsections 152(1.4) to (1.9) of the *Act* are set out in an Appendix hereto. In my view, the partnership determination provisions, read in conjunction with the *Act* as a whole, clearly establish that the Minster has two possible routes when assessing the income of partners. In particular, the Minister may assess the partners directly or may utilize the partner determination provisions where applicable. It is also worth noting some differences between subsections 152(1.4) and 152(1.8). Subsection 152(1.4) references the Minister making a determination in respect of a "partnership", but does not explicitly reference the Minister making such a determination where the Minister initially concludes there is no valid partnership. Subsection 152(1.8) applies to allow the Minster to assess a partner of a partnership where representations are made to the Minster that the person was a member of the partnership and the Minster issued a notice of determination, but the Minister (or the Courts) "concludes at a subsequent time that the partnership did not exist". Although it is my view that there is some ambiguity as to how subsection 1542(1.8) would apply in any particular scenario,[17] it arguably contemplates a scenario where the Minister initially issues a notice of determination under subsection 152(1.4) on the basis that a partnership did exist and subsequently concludes that it did not exist. It also shows that "conclusions" of the Minster as to the existence or validity of a partnership are relevant to at least some of the partnership determination provisions.

[28] Overall, considering the legislative scheme of the partnership determination provisions, it is my view that it cannot be said that the Question has no reasonable prospect of success.

CONCLUSION

[29] Based on all of the foregoing reasons, the Applicants' motions are allowed with costs payable as determined by the Judge presiding at the Rule 58 stage two

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[17] See also paragraph 24 of Justice Woods' decision in *Sentinel Hill*.

hearing of the Question. The Question to be determined at the Rule 58 stage two hearing will be as follows:

> Where the Minister has at all times concluded that no partnership existed, can the Minister issue a valid Notice of Determination in respect of that purported partnership under subsection 152(1.4) of the *Act*?

[30] The following evidence shall be used at the hearing of the Question:

(a) The Amended Notice of Appeal for each of the two Appeals;

(b) The Amended Reply for each of the two Appeals;

(c) The affidavits of Carole Lacapra sworn October 18, 2016 in support of the two Applications; and

(d) Upon application, such other evidence as may be permitted by the judge hearing the Rule 58 stage two hearing of the Question.

[31] The Applicants' factum shall be filed and served 30 days prior to the scheduled hearing date. The Respondent's factum shall be filed and served 15 days prior to the scheduled hearing date. The Applicants' Reply to the Respondent's factum, if any, shall be filed and served 7 days prior to the scheduled hearing.

Signed at Ottawa, Canada, this 7th day of September 2017.

"Henry A. Visser"

Visser, J.

APPENDIX

SUBSECTIONS 152(1.4) - (1.9) OF THE ACT

152(1.4) Determination in respect of a partnership — The Minister may, within 3 years after the day that is the later of

> (a) the day on or before which a member of a partnership is, or but for subsection 220(2.1) would be, required under section 229 of the Income Tax Regulations to make an information return for a fiscal period of the partnership, and
>
> (b) the day the return is filed,

determine any income or loss of the partnership for the fiscal period and any deduction or other amount, or any other matter, in respect of the partnership for the fiscal period that is relevant in determining the income, taxable income or taxable income earned in Canada of, tax or other amount payable by, or any amount refundable to or deemed to have been paid or to have been an overpayment by, any member of the partnership for any taxation year under this Part.

(1.5) Notice of determination — Where a determination is made under subsection (1.4) in respect of a partnership for a fiscal period, the Minister shall send a notice of the determination to the partnership and to each person who was a member of the partnership during the fiscal period.

(1.6) Absence of notification — No determination made under subsection (1.4) in respect of a partnership for a fiscal period is invalid solely because one or more persons who were members of the partnership during the period did not receive a notice of the determination.

(1.7) Binding effect of determination — Where the Minister makes a determination under subsection (1.4) or a redetermination in respect of a partnership,

(a) subject to the rights of objection and appeal of the member of the partnership referred to in subsection 165(1.15) in respect of the determination or redetermination, the determination or redetermination is binding on the Minister and each member of the partnership for the purposes of calculating the income, taxable income or taxable income earned in Canada of, tax or other amount payable by, or any amount refundable to or deemed to have been paid or to have been an overpayment by, the members for any taxation year under this Part; and

(b) notwithstanding subsections (4), (4.01), (4.1) and (5), the Minister may, before the end of the day that is one year after the day on which all rights of objection and appeal expire or are determined in respect of the determination or redetermination, assess the tax, interest, penalties or other amounts payable and determine an amount deemed to have been paid or to have been an overpayment under this Part in respect of any member of the partnership and any other taxpayer for any taxation year as may be necessary to give effect to the determination or redetermination or a decision of the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada.

(1.8) Time to assess — Where, as a result of representations made to the Minister that a person was a member of a partnership in respect of a fiscal period, a determination is made under subsection (1.4) for the period and the Minister, the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada concludes at a subsequent time that the partnership did not exist for the period or that, throughout the period, the person was not a member of the partnership, the Minister may, notwithstanding subsections (4), (4.1) and (5), within one year after that subsequent time, assess the tax, interest, penalties or other amounts payable, or determine an amount deemed to have been paid or to have been an overpayment under this Part, by any taxpayer for any taxation year, but only to the extent that the assessment or determination can reasonably be regarded

(a) as relating to any matter that was relevant in the making of the determination made under subsection (1.4);

(b) as resulting from the conclusion that the partnership did not exist for the period; or

(c) as resulting from the conclusion that the person was, throughout the period, not a member of the partnership.

(1.9) Waiver of determination limitation period — A waiver in respect of the period during which the Minister may make a determination under subsection (1.4) in respect of a partnership for a fiscal period may be made by one member of the partnership if that member is

(a) designated for that purpose in the information return made under section 229 of the Income Tax Regulations for the fiscal period; or

(b) otherwise expressly authorized by the partnership to so act.

CITATION:	2017 TCC 173
COURT FILE NO.:	2012-3093(IT)G 2012-3094(IT)G
STYLE OF CAUSE:	2078972 ONTARIO INC., IN ITS CAPACITY AS DESIGNATED PARTNER FOR LUX OPERATING LIMITED PARTNERSHIP, AND HER MAJESTY THE QUEEN, AND BETWEEN: 2078970 ONTARIO INC., IN ITS CAPACITY AS DESIGNATED PARTNER FOR LUX INVESTORS LIMITED PARTNERSHIP, AND HER MAJESTY THE QUEEN,
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	October 27, 2016
REASONS FOR JUDGMENT BY:	The Honourable Justice Henry A. Visser
DATE OF JUDGMENT:	September 7, 2017
APPEARANCES:	
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Counsel for the Respondent:	Michael Taylor

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