Dockets: 2014-972(IT)G
2015-148(IT)G

IN THE MATTER of an application by the Minister of National Revenue under section 174 of the *Income Tax Act*, for the determination of a question.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE,

Applicant.

and

THE 52 PERSONS NAMED IN SCHEDULES A and B OF THE AMENDED APPLICATION,

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Application heard on September 8, 2017, November 20, 2017 and April 4, 2018 at Winnipeg, Manitoba

Before: The Honourable Justice Steven K. D'Arcy

Counsel who appeared at the hearing:

Counsel for the Applicant:	Philippe Dupuis Sara Jahanbakhsh
Counsel for two of the parties named in the Amended Application:	David E. Silver

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ORDER

UPON the Minister of National Revenue bringing an application under section 174 of the *Income Tax Act* (the "Act") for a determination of the following question (the "Question"):

> Whether the *partial cells* acquired by the taxpayers named in **Schedules A and B** are a "tax shelter", as defined in subsection 237.1(1) of the *Income Tax Act*, in respect of which no amount may be deducted or claimed pursuant to subsection 237.1(6) or 237.1(6.1) of the *Income Tax Act*.

AND UPON having heard the submissions of counsel and having read the materials filed;

NOW THEREFORE in accordance with the attached Reasons for Order, the Court orders that:

1. The Application is denied.

2. Costs are awarded as follows:

    a) Kenneth Muzik (2015-148(IT)G) and Leonard Boguski (2014-972(IT)G) are awarded one set of costs of $14,000 plus disbursements; and

    b) Each of the Assessed Taxpayers is awarded costs of $150 for each day they appeared at the hearing.

Signed at Ottawa, Canada, this 22nd day of November 2018.

"S. D'Arcy"

D'Arcy J.

Citation: 2018 TCC 236
Date: 20181122
Dockets: 2014-972(IT)G
2015-148(IT)G

IN THE MATTER of an application by the Minister of National Revenue under section 174 of the *Income Tax Act*, for the determination of a question.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE,

Applicant.

and

THE 52 PERSONS NAMED IN SCHEDULES A and B OF THE AMENDED APPLICATION,

REASONS FOR ORDER

D'Arcy J.

[1] On May 16, 2016 the Minister of National Revenue (the "Minister") filed this application (the "Application") under section 174 of the *Income Tax Act* (the "Act") for a determination of the following question (the "Question"):

> Whether the *partial cells* acquired by the taxpayers named in **Schedules A and B** are a "tax shelter", as defined in subsection 237.1(1) of the *Income Tax Act*, in respect of which no amount may be deducted or claimed pursuant to subsection 237.1(6) or 237.1(6.1) of the *Income Tax Act*.

[2] The Application, as filed, named 67 taxpayers in Schedule A to the Application and 14 taxpayers in Schedule B to the Application whom the Minister wishes to be bound by the Question.

[3] All of the taxpayers originally listed in Schedule A have filed notices of objection with the Canada Revenue Agency (the "CRA") in respect of assessments/reassessments issued by the Minister, but have not appealed the assessments/reassessments[1] to the Court (the "Assessed Taxpayers"). The taxpayers originally listed in Schedule B to the Application filed appeals to the Court in respect of assessments issued by the Minister (the "Group Appellants").

[4] Prior to the hearing of the Application, for reasons explained later in these reasons, the Minister removed 12 of the 14 Group Appellants. I will refer to the appeals of the two remaining appellants listed in Schedule B to the Application as the "Lead Cases".

[5] Between the time of the filing of the Application and the conclusion of the hearing of the Application, the Minister removed 17 of the 67 Assessed Taxpayers listed in Schedule A to the Application. The Minister removed these taxpayers either because the taxpayer reached a settlement with the CRA or because the taxpayer agreed to be bound by the decision in the Lead Cases.

I. **The Law**

[6] In 2013, Parliament amended section 174 to expand its potential application. Prior to the amendment, section 174 only applied to questions arising out of one and the same transaction or occurrence or series of transactions or occurrences. Typically, the Minister applied to have the section apply to two taxpayers who were involved in the same transaction, such as the vendor and the purchaser in the same commercial transactions.

[7] Section 174 now allows the Court, on application of the Minister, to hear a question arising out of substantially similar transactions or occurrences or a series of transactions or occurrences. As a result, it can potentially apply to a large group of unrelated taxpayers who entered into similar transactions with a third party.

[8] The amendment was part of a series of amendments made to the *Income Tax Act*, the *Tax Court of Canada Act* and the *Tax Court of Canada Rules (General Procedure)* to help the Court manage its caseload. Other amendments related to

[1] I will refer to both assessments and reassessments as "assessments".

pro tanto judgments (allowing the Court to separately dispose of issues raised in an appeal) and the Court's general procedure rules relating to case management, lead cases, settlement conferences and trial management conferences.

[9] It is my understanding that this is the first application heard by the Court under the amended section 174 as it applies to a large group of unrelated taxpayers.

[10] The relevant portions of section 174 for the purposes of my decision are subsections 174(1),(2),(3) and (4), which currently read as follows:

> (1) The Minister may apply to the Tax Court of Canada for a determination of a question if the Minister is of the opinion that the question is common to assessments or proposed assessments in respect of two or more taxpayers and is a question of law, fact or mixed law and fact arising out of
>
> (a) one and the same transaction or occurrence or series of transactions or occurrences; or
>
> (b) substantially similar transactions or occurrences or series of transactions or occurrences.
>
> (2) An application under subsection (1)
>
> (a) shall set out
>
> (i) the question in respect of which the Minister requests a determination,
>
> (ii) the names of the taxpayers that the Minister seeks to have bound by the determination of the question, and
>
> (iii) the facts and reasons on which the Minister relies and on which the Minister based or intends to base assessments of tax payable by each of the taxpayers named in the application; and
>
> (b) shall be served by the Minister on each of the taxpayers named in the application and on any other persons who, in the opinion of the Tax Court of Canada, are likely to be affected by the determination of the question,
>
> (i) by sending a copy to each taxpayer so named and each other person so likely to be affected, or

> (ii) on *ex parte* application by the Minister, in accordance with the directions of the Court.
>
> (3) If the Tax Court of Canada is satisfied that a question set out in an application under this section is common to assessments or proposed assessments in respect of two or more taxpayers who have been served with a copy of the application, the Tax Court of Canada may
>
> (a) make an order naming the taxpayers in respect of whom the question will be determined;
>
> (b) if one or more of the taxpayers so served has or have appealed an assessment to the Tax Court of Canada in respect of which the question is relevant, make an order joining a party or parties to that or those appeals as it considers appropriate; and
>
> (c) proceed to determine the question in such manner as it considers appropriate.
>
> (4) Subject to subsection (4.1), if a question set out in an application under this section is determined by the Tax Court of Canada, the determination is final and conclusive for the purposes of any assessments of tax payable by the taxpayers named in the order made under paragraph (3)(a).

[11] Subsection 174 sets out a number of steps that must be taken before the Court may grant an order under subsection 174(3).

[12] First, under subsection 174(1), the Minister must form the opinion that there is a question of law, fact, or mixed law and fact that is common to assessments or proposed assessments in respect of two or more taxpayers arising out of the same or similar transactions or series of transactions as described in paragraphs 174(1)(a) and (b). Once the Minister has formed this opinion she is entitled, under subsection 174(1), to bring an application to have the Court determine the Question. The Application must contain the information required in subsection 174(2).

[13] Under subsection 174(3), the Court *may* determine the Question if it is satisfied that the Question is common to assessments or proposed assessments in respect of taxpayers who have been served with a copy of the application. In my view, the burden is on the Minister to satisfy the Court that the question is common to the assessments and that the Minister has served a copy of the application on the

taxpayers named in the application. It is the Minister who knows the facts required to make these determinations; individual taxpayers only know the facts with respect to their own tax filings.

[14] If the Minister satisfies the Court that the question is common to the taxpayers named in the application and that the Minister has served the application on the taxpayers, then the Court must decide whether it will exercise its discretion and direct that the Court should determine the question.

[15] The Court must exercise this discretion in a manner that is consistent with the provisions of section 174(3) and does not result in an abuse of process.[2] Specifically, the Court must make a determination that ensures all parties are treated fairly, results in an efficient use of the Court's resources, does not place an undue administrative or compliance burden on the parties, and allows for the issues raised by taxpayers or the Crown with respect to assessments or proposed assessments to be resolved in the most expeditious, least expensive way.

[16] These factors flow from the Court's implied jurisdiction to control its own process and ensure its proper functioning as a court of law. The jurisdiction was explained by the Supreme Court of Canada in *R. v. Cunningham* as follows:[3]

> [18] Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice (see I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at pp. 27-28). Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner. . . .
>
> [19] 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. . . .

[17] Prior to the Minister filing the Application, I directed that the Court would hear the Application in two parts. First, the Court will decide whether it should issue an order under subsection 174(3). Specifically, the Court will decide whether

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[2] *Canada v. ACI Properties Ltd.*, 2014 FCA 45, at paragraph 25.

[3] 2010 SCC 10, [2010] 1 S.C.R. 331, at paragraphs 18 and 19.

it will determine the Question. If the Court decides that the Question should be determined, then the second hearing, a hearing to answer the Question, will occur.

[18] The Minister notes in paragraph 44 of the Application that she seeks the following with respect to the Application:

> (a) An order under paragraph 174(3)(a) naming the taxpayers in respect of whom the question will be determined.
>
> (b) An order that the taxpayers named in Schedule A be joined as parties to the Lead Cases (appeals 2014-972(IT)(G) and 2015-148(IT)(G)).
>
> (c) A determination of the Question "within appeals 2014-972(IT)G and 2015-148(IT)G [the Lead Cases] in such manner as the Court considers appropriate, pursuant to paragraph 174(3)(c)".

[19] The Court held hearings to determine whether it should issue an order under section 174(3) in Winnipeg, Manitoba, on September 8, 2017, November 20, 2017 and April 4, 2018. The Minister and the appellants in the two Lead Cases were each represented by counsel. A number of the taxpayers listed in Schedule A also appeared and they were all self-represented.

II. **History of the Proceedings**

[20] Before I discuss the reasons for my order, I will set out the history of the proceedings involving certain taxpayers who claimed Canadian development expenses (the "CDEs") related to certain mining rights the taxpayers purchased from Royal Crown Gold Reserve Inc. ("Royal Crown").

[21] In early 2015, the Chief Justice appointed me the case management judge of 23 appeals that were before the Court (the "Group Appeals"). The pleadings for each appeal discussed the relevant appellant's investment in the mining rights and the denial of the CDEs. The Court scheduled case management conferences for all of the appellants and the Respondent. The conferences were held in Winnipeg on May 14, 2015 and October 5, 2015. In addition, the Court held numerous show cause hearings with individual appellants.

[22] At the commencement of the first case management conference, I directed that the appeals proceed under the court's lead case rules contained in

section 146.1 of the *Tax Court of Canada Rules (General Procedure)* (the "Lead Case Rules").

[23] Only two of the 23 appeals before the Court were filed under the Court's general procedure rules. The appellants filed the remaining 21 appeals under the Court's informal procedure rules (the "Informal Appeals"). After hearing representations from the parties, I directed that the two appeals proceeding under the general procedure be the Lead Cases and all of the Informal Appeals be held in abeyance. As case management judge, I will deal with the Informal Appeals once a final judgment is issued in the Lead Cases. Currently the Court is only holding 12 of the Informal Appeals in abeyance. The remaining nine appeals have either been settled or withdrawn. Schedule B of the Application, as filed, included the appellants in the 12 Informal Appeals still before the Court.

[24] With respect to the Lead Cases and the Informal Appeals, I chose to proceed in a manner that I felt was fair to all parties while ensuring the appeals proceeded in the most expeditious, least expensive manner.

[25] During the course of the case management conferences for the Group Appeals, counsel for the Respondent informed the Court that the CRA had identified approximately 200 taxpayers who had filed notices of objection that the CRA believed included objections to the denial of CDEs claimed in respect of mining rights purchased from Royal Crown. The Court suggested that the CRA deal with these taxpayers as follows:

- The CRA should ask each of the taxpayers to be bound by the final judgment in the Lead Cases.

- If a taxpayer did not agree to be bound, then the CRA should issue its decision (i.e., reassessment/notice of confirmation) with respect to the taxpayer's outstanding notice of objection.

- Taxpayers who wished to appeal the CRA's decision would then file appeals with the Court. These appeals would be included with the appeals of the other Group Appellants in the case managed group.

[26] I informed counsel for the Respondent that while the Court cannot order the CRA to issue reassessments or notices of confirmation, this method has been

successfully used in the past to efficiently and fairly deal with appeals involving large groups of appellants.

[27] The CRA elected to proceed in a different manner. As evidenced by Exhibit R-1, it did ask the relevant taxpayers to agree to be bound by the final judgment in the Lead Cases. Counsel for the Respondent informed the Court that 69 taxpayers agreed to be bound by the Lead Cases and that 67 taxpayers did not agree to be bound (most did not respond to the CRA's letter).

[28] The CRA decided not to issue reassessments or notices of confirmation for the 67 taxpayers who did not agree to be bound by the final judgment in the Lead Cases. Instead, the Minister elected to file this section 174 application. The 67 taxpayers who did not agree to be bound by the Lead Cases are the taxpayers originally named in Schedule A to the Application (i.e., the Assessed Taxpayers).

[29] As I discussed previously, the Application as originally filed also included the 14 remaining appellants in the Group Appeals. After the Minister filed the Application, the Court held a case management conference call with counsel for the Minister during which I voiced my concern that schedule B to the Application contained the appellants in the Informal Appeals that are being held in abeyance. I noted that the inclusion of these appellants in the Application was, in my view, a breach of my order that their appeals be held in abeyance.

[30] I also expressed concern that the filing of the Application was not consistent with my order that all of the Group Appeals, including the Lead Cases, proceed under the Court's Lead Case Rules.

[31] During a case management conference call on January 18, 2017, I directed counsel for the respondent in the Group Appeals (who is also the Minister's counsel in these proceedings) to report back to the Court by February 1, 2017 to inform the Court whether the Minister intended to proceed with her Application in its then current form, withdraw the Application and issue reassessments/notices of confirmation in respect of the Assessed Taxpayers, or continue with the Application but remove the names of the appellants in the Informal Appeals.

[32] In a letter to the Court dated January 31, 2017, the Minister stated that she would withdraw the Application in respect of the appellants in the Informal Appeals, but would proceed with the Application in respect of the appellants in the

two Lead Cases and the 67 Assessed Taxpayers listed in Schedule A to her Application.

[33] I recognize that the Minister has, under subsection 174(1), the option to bring the Application. Further, prior to filing the Application, counsel for the Respondent informed the Court that the Minister would likely pursue such action. However, as I will discuss, in my view, the inclusion in the Application of the two Lead Case appellants constitutes an abuse of process.

[34] The Application was then called for hearing on September 8, 2017 at Winnipeg, Manitoba. Approximately 20 of the Assessed Taxpayers appeared at the hearing. They were all self-represented. The appellants in the two Lead Cases and the Minister were each represented by counsel.

[35] After outlining the purpose of the proceedings, I asked the Assessed Taxpayers whether they understood the purpose of the proceedings. It was clear that none of the self-represented Assessed Taxpayers understood the purpose of the proceedings.

[36] Counsel for the Minister then provided a lengthy opening statement explaining in some detail the purpose of the Application and the Minister's position. He also provided the Assessed Taxpayers with copies of the Minister's written submissions. I then adjourned the proceedings to allow the Assessed Taxpayers time to digest the information provided by the Minister and her counsel.

[37] The hearing continued on November 20, 2017, at which time I heard from the Minister's three witnesses. I then adjourned the hearing until April 4, 2018, directed that the Assessed Taxpayers be provided with copies of the transcripts for the September 8 and November 20 proceedings and informed the Assessed Taxpayers that they would have the opportunity to present evidence once the hearing continued.

[38] The hearing continued on April 4, 2018. The Assessed Taxpayers did not present any evidence. I then proceeded to hear arguments.

III. **Disposition of the Application**

A. **First issue: Is the Question common to assessments in respect of the taxpayers named in the Application?**

[39] The Minister is of the opinion that the Question is common to assessments in respect of two or more taxpayers (the Assessed Taxpayers and the Lead Case appellants) and is a question of mixed law and fact arising out of substantially similar transactions or occurrences or series of transactions or occurrences. The Application relates only to assessments issued; the Minister's opinion does not extend to any proposed assessments.

[40] In paragraph 19(b) of the Application, the Minister refers to the purported transactions, occurrences or series of transactions as "the promotion of the sale and issuance of, the sale and issuance of and the acquisition of *partial cells* pursuant to the *arrangement* described in paragraph 16 of this Application" (the "Purported Transactions**"**).

[41] Paragraphs 16.1 to 16.104 of the Application set out in some detail the Purported Transactions, which relate to the sale by Royal Crown of interests in certain gold mining rights (referred to as "Partial Cells") in respect of properties located in Canada. Counsel for the Minister noted that the Purported Transactions are the transactions set out in the pleadings of the appellants in the Lead Cases.

[42] The Minister asserts that each of the Assessed Taxpayers and the appellants in the Lead Cases claimed CDEs in respect of the Purported Transactions.

[43] Since the Minister has formed the opinion that the Question is common to assessments issued against the Assessed Taxpayers and the appellants in the Lead Cases and is a question of mixed law and fact arising out of the Purported Transactions, she is entitled, under subsection 174(1), to bring the Application.

[44] As noted previously, the Minister must satisfy the Court that the Question is common to the assessments and that the Minister has served a copy of the Application on the Assessed Taxpayers and the Lead Case appellants. It is the Court, not the Minister, that determines whether the Court should determine the Question.

[45] It is clear from the pleadings filed by the appellants in the Lead Cases that the Question is common to their appeals. I must determine whether the Question is common to the Assessed Taxpayers.

[46] Schedule C to the Application sets out, for each of the Assessed Taxpayers, the Minister's belief with respect to the following:

- The taxation year in respect of which the Minister issued an assessment for the specific Assessed Taxpayer denying CDEs claimed in respect of the Purported Transactions and denying related interest and carrying charges.

- The date of the assessment.

[47] Schedule D contains similar information for the appellants in the Lead Cases. Schedule C and D to the Application show that the taxation years at issue are 2005 to 2009.

[48] In a situation where the Minister has assessed a taxpayer to deny an amount claimed in respect of a specific transaction or a series of transactions, the taxpayer will only have the right to pursue an appeal in respect of the amount if she/he has filed, within the allowed statutory period, a notice of objection in which she/he contests the Minister's denial of the amount. In such a situation, section 174 can only apply to a taxpayer who has filed a valid notice of objection. Section 174 cannot apply to a taxpayer in respect of an amount denied on assessments if the taxpayer has not filed a valid notice of objection, within the allowed statutory period, in respect of the denied amount. In such a situation, the taxpayer has no right to appeal the assessment to the Court.

[49] Since the Minister has assessed each of the Assessed Taxpayers, the Minister must satisfy the Court that each Assessed Taxpayer has filed a valid notice of objection to a valid assessment issued in respect of one of the relevant years and such notice of objection constitutes an objection to the denial by the Minister of the CDEs claimed by the taxpayer in respect of the Purported Transactions.

[50] In an attempt to satisfy this burden, the Minister called the following witnesses:

- Ms. Mussara Ziaiedana, a CRA auditor in the Toronto office of the CRA. She was in charge of the audit of Royal Crown for 2005 and 2006.

- Mr. Ray Aschenbrenner, a CRA auditor in the Penticton BC office of the CRA. His primary role in the audit of Royal Crown appears to be assigning the audit of investors in Royal Crown to various CRA offices. He provided these offices with a sample auditor report and position paper. He also conducted some form of audit of 13 taxpayers located in British Columbia and Alberta. Only two of the 50 Assessed Taxpayers reside in British Columbia, none reside in Alberta.

- Mr. Andre-John Camara, a CRA appeals officer located in Winnipeg, Manitoba. I will discuss his involvement with the Assessed Taxpayers shortly.

[51] Counsel for the Minister informed the Court that the purpose of Ms. Ziaiedana's and Mr. Aschenbrenner's testimony was to explain how the audit proceeded, how it led to the assessments of the Assessed Taxpayers and how these assessments arise from the same type of transactions.

[52] I did not find the testimony of either Ms. Ziaiedana or Mr. Aschenbrenner helpful. I found a significant portion of their evidence to be either hearsay or opinion evidence. Further, Mr. Aschenbrenner had very little involvement with the audit of the Assessed Taxpayers.

[53] Counsel for the Minister described Mr. Camara as the appeals officer who was the person responsible at the Appeals Division of the CRA for "this group of objections". I assume he meant the Assessed Taxpayers. He noted that it is the Minister's position that the Assessed Taxpayers have outstanding notices of objection regarding the denial of the CDEs claimed in respect of the Partial Cells sold by Royal Crown. Counsel stated that Mr. Camara, who prepared the schedules to the Application, would provide testimony on the existence of these objections, the object of these objections and the validity of these objections.

[54] The difficulty I have with counsel's description of Mr. Camara's testimony is that Mr. Camara testified that he had no involvement with the notices of objection filed by the Assessed Taxpayers. He testified that he has not reviewed or

"looked at" the underlying arguments of any of the notices of objection filed by the Assessed Taxpayers.[4]

[55] Mr. Camara testified that he was assigned to the so-called Royal Crown group of appeals in January 2016, a few months before the Minister filed the Application. At the time he was assigned to the Royal Crown group of appeals, he and another CRA appeals officer were provided with a list of the Assessed Taxpayers by their team leader. Mr. Camara does not know the identity of the person who prepared the list.

[56] His role, and the role of the other CRA appeals officer, was to compare the list of taxpayers provided by their team leader to the CRA's internal system to ensure that, for each Assessed Taxpayer, the list contained the desired taxation years and the taxpayer's name and mailing address as shown in the CRA internal system. The two appeal officers were also responsible for sending settlement letters to the Assessed Taxpayers.

[57] Counsel for the Minister stated that it was the Minister's position:

> . . . that the testimony of the appeals officer saying that he has prepared the schedules, that he has identified these taxpayers as having been reassessed, claimed these expenses, reassessed, and objected to these expenses is evidence enough to demonstrate that they have outstanding objections regarding expenses claimed for Royal Crown.[5]

[58] I do not accept counsel's argument. It is for the Court, not a CRA appeals officer, to make the determination as to whether the Question is common to the Assessed Taxpayers. The Court will not make this determination based on the testimony of a CRA appeals officer who has not even reviewed the relevant notices of objection. While Mr. Camara's work may have been sufficient for the Minister to form her opinion, the Court requires objective evidence such as the relevant notices of assessment issued by the Minister and/or the valid notices of objection filed by the Assessed Taxpayers.

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[4] Transcript of November 20, 2017 proceedings, at pages 182-183.

[5] Transcript of November 20, 2017 proceedings, at page 161.

[59] The Minister must present the Court with evidence establishing that she assessed the Assessed Taxpayers in respect of the Purported Transactions and that they objected to the amounts denied in respect of the CDEs. Schedule C of the Application states that the tax years in issue are 2005 to 2009 and that all but two of the assessments were issued between 2009 and 2012 (two taxpayers have assessments issued in 2014). Thus, the taxation years are statute-barred and the taxpayer's right to file any additional notice of objection is statute-barred. As a result, the only relevant assessments and notices of objection are those issued or filed before the hearing of the Application.

[60] If the only evidence before the Court was the testimony of the three witnesses, I would dismiss the Application. However, the testimony of the witnesses was on November 20, 2017. The hearing of the Application began on September 8, 2017, when the Minister provided the Court with her opening statement. During the September 8th hearing, I informed counsel for the Minister that while the Minister was free to file whatever evidence she felt would satisfy her burden, the Court expected to receive some objective evidence. Fortunately for the Minister, her counsel listened to the Court's concern and filed affidavits under subsection 244(9) of the Act in respect of each of the Assessed Taxpayers (the "Affidavits"). Mr. Camara swore each of the Affidavits, which contained (with one or two exceptions) an audit report prepared for the specific taxpayer, certain notices of objection filed by the taxpayer and a copy of a settlement letter sent to the specific taxpayer.

[61] I did not find the audit report or the settlement letter helpful. The Court requires evidence with respect to whether each of the Assessed Taxpayers has filed a valid notice of objection in which he/she objects to the denial of the CDEs. The only relevant documents provided in the Affidavits were the notices of objection. The Affidavits did not contain the Minister's copies of the relevant assessments. The Court was not otherwise provided with the Minister's copies of such assessments.

[62] The only assessments provided to the Court were copies of assessments that certain Assessed Taxpayers filed with their notices of objection. These copies were contained in the Affidavits. The Minister chose to heavily redact these assessments. The redacted assessments provided very little relevant evidence. Further, since I was not provided with the complete document, I have given them no weight.

[63] Since the Minister did not provide the Court with copies of the assessments issued to the Assessed Taxpayers, I must decide the first issue using the notices of objection contained in the Affidavits. After reading the 50 Affidavits provided by the Minister, I have reached the conclusions set out in the following paragraphs.

[64] The notices of objection provided in the Affidavits for four of the taxpayers (Ms. Peggy Allman-Anderson, Mr. Gordon Denning, Mr. Otto Kemerle and Mr. Rodney Wall) are invalid; each was filed prior to the date of the last assessment for the specific taxation year of the taxpayer.

[65] For example, the affidavit for Ms. Allman-Anderson contains notices of objection for the 2007, 2008 and 2009 taxation years, which were filed in 2011. However, Schedule C to the Application shows that the Minister reassessed Ms. Allman-Anderson for each of these years in 2014. As a result, the notices of objection provided are invalid. I was not provided with either the 2014 notices of reassessment or any notices of objection that may have been filed in respect of the 2014 reassessments.

[66] Another example is the notices of objection contained in the Affidavit for Mr. Otto Kemerle. They are invalid as Mr. Kemerle filed them two and a half years before the date of the last assessment issued to him in respect of the relevant taxation years.

[67] In summary, I do not have a copy of a valid notice of objection for any of the four Assessed Taxpayers or a copy of any of the final notices of reassessment issued to the taxpayers. Therefore, I do not have any objective evidence (or any reliable evidence) that would allow me to conclude that each of these taxpayers filed a valid notice of objection objecting to the Minister's denial of the CDEs relating to the Purported Transactions. As a result, the Application is dismissed against each of these taxpayers.

[68] For the following seven Assessed Taxpayers, the Affidavits contain valid notices of objection for each taxpayer that were filed by the taxpayer after the Minister issued her last reassessment for the specific taxation year. However, the notices of objection do not provide the Court with information that would allow me to conclude that the taxpayer has objected to a denial of the CDEs relating to the Purported Transactions. The Application is dismissed against each of these Assessed Taxpayers. The taxpayers are as follows:

- Estate of Woo Chin: The notices of objection for the two relevant years state "please see attached for the relevant facts and reasons for this objection". I was not provided with the attachment that sets out the facts and reasons for the objection.

- Ms. Lynda Penner: The notice of objection filed for the relevant taxation year makes no reference to the Purported Transactions or the CDEs.

- Ms. Carla Reinheimer: Two notices of objection were provided in the affidavit. The first for 2006 and 2007 is invalid; the taxpayer filed it before the final assessment for those taxation years. In addition, it does not refer to the Purported Transactions. The second relates to 2007 and 2008. It is valid for the 2007 taxation year, but invalid for the 2008 taxation year. It also does not refer to the Purported Transactions or the CDEs.

- Mr. Lance Reinheimer: The three notices of objection provided make no reference to the Purported Transactions or the CDEs.

- Estate of Louise Reinheimer: Although Mr. Camara's affidavit for this taxpayer states that notices of objection for 2007 and 2008 are attached, the only notice of objection attached was one for 2008, it does not refer to the Purported Transactions or the CDEs.

- Ms. Beverly Oliver: The sole notice of objection attached states, "I disagree with the 2008 reassessment and would like it reviewed. I have enclosed a copy". The Minister heavily redacted the attached notice of reassessment including references to any adjustments made by the Minister and the reason for the adjustments. As a result, there is no reference in the notice of objection to the Purported Transactions or the CDEs.

- Mr. Michael Wilhelm: The affidavit does not provide an actual notice of objection or any date as to when one was filed.

[69] For 19 of the Assessed Taxpayers, I have valid notices of objection that show the taxpayer is objecting to the denial of the CDEs claimed for some of the taxation years at issue. For other years at issue, either the Minister provided invalid notices of objection (i.e., notices of objection that were filed prior to the Minister's final assessment for the specific taxation year) or provided notices of objection that do not refer to either the Purported Transactions or the CDEs. For the invalid

notices of objection, I was not provided with the notices of reassessment or any valid notice of objection that the taxpayer may have filed after the last assessment.

[70] For example, for the Assessed Taxpayer Mr. David Blackmore, the notices of objection provided for the 2006 and 2009 taxation years are invalid because they were filed prior to the Minister's final assessment for these taxation years. I was not provided with any notices of objection for either year that Mr. Blackmore filed after the date of the final assessment. However, the valid notices of objection provided for the 2007 and 2008 taxation years reference the Purported Transactions and the CDEs.

[71] Another example is the affidavit for the Estate of Thomas Hall. I was provided with a valid notice of objection for the 2005 and 2006 taxation years that reference the Purported Transactions and the CDEs. However, the Minister asks that the Application also apply to the 2007, 2008 and 2009 taxation years. The affidavit for the Estate of Thomas Hall does not contain a notice of objection that refers to any of these years. The Affidavit contains a notice of objection that the CRA received on July 9, 2012, but it does not refer to a specific taxation year and does not refer to the Purported Transactions or the CDEs. A notice of assessment for the 2008 taxation year is attached, but it is completely redacted.

[72] For these 19 Assessed Taxpayers, the Minister has only satisfied the Court that the taxpayers filed valid notices of objection objecting to the Minister's denial of the CDEs in respect of the Purported Transactions for certain of the taxation years at issue. Specifically, the Minister has satisfied the Court that the Question is common to valid notices of objection filed by the following taxpayers, but only for the noted taxation years:

- Mr. Jose Araujo: 2007, 2008, 2009.
- Mr. David Blackmore: 2007, 2008.
- Mr. John Ross German: 2005, 2006, 2007.
- Ms. Donna Guenther: 2006, 2007.
- Ms. Lois Guenther: 2006.
- Robert Guenther: 2005, 2006, 2007.
- Estate of Thomas Hall: 2005, 2006.

- Mr. Art Kornelsen: 2005, 2006, 2007.
- Mr. James Mann: 2006 and 2007.
- Mr. Nicole Michaud-Brunette: 2007.
- Mr. Craig Ozirney: 2007.
- Mr. Alex Penner: 2006.
- Mr. Rodney Romyn: 2005.
- Mr. Gary Sloan: 2006.
- Mr. Jeffrey Taylor: 2007.
- Mr. Aime Tetrault: 2007.
- Ms. Ruth Wall 2007.
- Ms Linda Wieler 2007.
- Mr. Darcy Woychyshyn 2006, 2007.

The Application is dismissed with respect to the other taxation years noted in Schedule C for each of these Assessed Taxpayers.

[73] The Affidavits for the remaining 20 Assessed Taxpayers show that the taxpayers are objecting to amounts denied in respect of the CDEs relating to the Purported Transactions for the taxation years shown in Schedule C. As a result, the Court is satisfied that the Question is common to valid notices of objection filed by these 20 Assessed Taxpayers for the taxation years noted in Schedule C.

B. **Second issue: Should the Court exercise its discretion?**

[74] Having found that the Question is common to certain Assessed Taxpayers for certain taxation years, I must now decide whether the Court should exercise its discretion and direct that the Court should answer the Question.

[75] For the following reasons, I have decided that the Court will not answer the Question. I have concluded that an order of this Court directing that a hearing be held involving 42 different parties would not be fair to the parties, particularly the self-represented Assessed Taxpayers. It would result in an extremely inefficient use of the Court's resources, would not be consistent with my ruling that the

appeals of the Group Appellants proceed under the Court's Lead Case Rules and would result in proceedings that would be significantly more expensive and time-consuming than proceedings that would otherwise occur under the Court's Lead Case Rules.

[76] The Minister's application seeks, in part, an order that the taxpayers named in Schedule A to the Application (the Assessed Taxpayers) be joined as parties to the Lead Cases. During the hearing, counsel for the Minister clarified the Minister's position with respect to joining the Assessed Taxpayers to the Lead Cases. He noted that the Court should join the Assessed Taxpayers as parties to the Lead Cases if they wish to participate, subject to one caveat. Before an Assessed Taxpayer is joined, he/she must file "pleadings" setting out their case so that the Minister can know the facts and reasons each Assessed Taxpayer is relying on.[6] It appears to me that the Minister is asking that I first direct the Assessed Taxpayers to file notices of appeal and then decide whether to join them as parties to the Lead Cases.

[77] If I were to grant the Application, then I would join all of the Assessed Taxpayers as parties to the Lead Cases. Before a Court makes its decision in any matter before it, be it an appeal, an application, an interlocutory motion or any other proceeding involving parties adverse in interest, a court must give each party an opportunity to be heard, present evidence and challenge the evidence of parties adverse in interest.[7] In short, if the Assessed Taxpayers are to be bound by the Court's decision with respect to the Question, then they have the right to fully participate in the determination of the Question. Subsection 174(3)(b) indicates that this is to be done by joining the Assessed Taxpayers as parties to the Lead Cases.

[78] This right arose once the Minister named the Assessed Taxpayers in the Application. It is not dependent on the Assessed Taxpayers filing "pleadings" containing information requested by the Minister. In addition, requiring each of the Assessed Taxpayers to file such a document would be time-consuming, further tax the Court's resources and be very confusing for the self-represented Assessed Taxpayers.

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[6] Transcript of September 8, 2017 proceedings, at page 30.

[7] See for example, *The Dominion Canners Ltd. v. Costanza*, [1923] S.C.R 46.

[79] In summary, if I were to direct that the Question be answered, I would join all of the Assessed Taxpayers as parties to the Lead Cases, resulting in a proceeding involving 42 different parties. In my view, in a situation such as the one before the Court where the Question is one of mixed law and fact, it is not possible to conduct a fair hearing involving 42 or more independent parties, especially when the vast majority of the parties are self-represented.

[80] The conduct of a fair hearing involving 42 different parties who are located in five different provinces is very difficult, if not impossible. Further, the conduct of such a hearing would place significant strains on the Court's resources. For example, when scheduling Part I of the application, the Court was faced with the task of sending notices relating to the Application, such as notices of hearing dates, to 55 to 60 parties who had not previously filed any documents with the Court or otherwise provided contact information with the Court. The only contact information the Court had was the mailing addresses provided by the CRA. The Court does not have the resources to verify the mailing addresses. It would face the same issue with respect to scheduling a hearing to answer the Question since a number of the Assessed Taxpayers did not appear at the hearing of Part I of the Application.

[81] Further, since the Court does not have any other contact information, such as telephone numbers, it was impossible to hold a conference call to manage any issues that arose during the hearing of Part I of the Application. All issues had to be addressed during one of the hearings. This is extremely inefficient, resulting in delays in the hearing of the Question. Even if the Court had contact information for each of the parties, it would be very difficult to hold an effective pre-hearing conference involving 42 different parties.

[82] Since the Question involves an issue of mixed fact and law, evidence would have to be provided at the hearing. As a result, I would allow for discovery. It is not clear to me how discovery would proceed in a fair manner because of the large number of parties. One suggestion was to have oral discovery with only counsel for the appellants in the Lead Cases and the Minister present. Each of the Assessed Taxpayers would then be provided with the transcript of the discovery and have the opportunity to provide written questions. This is not a viable solution. It would be extremely time-consuming and is not fair to the Assessed Taxpayers since it favours the Minister and the Lead Case appellants (who would be present at the discovery).

[83] The location of a hearing involving the Assessed Taxpayers and the Lead Case appellants is also an issue. The Court heard Part I of the Application in Winnipeg since it is the location of the largest number of Assessed Taxpayers. However, a number of the taxpayers live in other provinces. None of these taxpayers appeared at the hearing of the Application. This is not surprising since for many taxpayers the cost of attending the proceedings would exceed the amount of taxes at issue.

[84] It is extremely time-consuming and very inefficient to conduct a hearing with a large number of participants. For example, each of the participants has the right to cross-examine any witness who testifies at the hearing. Each party must be provided a copy of any documents filed with the Court. It is not reasonable or fair to allow for a proceeding where a witness may be cross-examined by up to 41 different parties or to require each of the parties to provide 44 or more copies of each document entered as evidence.

[85] In my view, trying to conduct a hearing involving 42 different parties will lead to confusion on the part of the self-represented Assessed Taxpayers. As one of the Assessed Taxpayers noted during the last day of the hearing of Part I of the Application, we feel "like cattle herded into a corral on their way to the slaughterhouse".[8] The Court must ensure that taxpayers who appear before it are never left with this feeling. The taxpayers must leave the Court believing that they have been heard and have had the opportunity to present their case. In short, they must believe they were treated fairly.

[86] In considering the above issues, I recognize that if the Assessed Taxpayers filed appeals with the Court, most of these appeals will be heard under the Court's informal procedure at locations close to their homes. Counsel for the Minister informed the Court that the amount of tax in dispute for approximately 75% of the Assessed Taxpayers is less than $25,000.

[87] However, if I join them to the Lead Cases then their appeals will be heard under the Court's general procedure, a much more rigorous and time-consuming process. Further, the hearing would occur in one location, probably Winnipeg. In my view, it is not fair to require such taxpayers to join a hearing under the Court's

[8] Transcript of April 4, 2018 proceedings, at page 126.

general procedure in Winnipeg in a situation where most of these taxpayers had the right to incur only minimal costs by electing to proceed under the Court's informal procedure and choose a hearing location close to where they reside. The Court sits across Canada in nearly 60 cities and towns.

[88] In summary, I am not prepared to allow for a proceeding that involves a large number of self-represented parties, especially since there is an alternative that would allow for the appeals to be heard in a manner that would ensure that all parties are treated fairly, allow for the efficient use of the Court's resources and for the issues to be resolved in much more expeditious, less expensive way. This alternative is proceeding by way of a test case or cases, i.e., the Lead Cases.

[89] The other concern I have with granting the Application is, even if a fair hearing could be conducted in a reasonable period, it may not be determinative of the issues relating to the Partial Cells. If the courts answer the Question in the negative, then the Lead Cases and the appeals of the other Group Appellants will proceed. Further, a number of the Assessed Taxpayers have raised other significant issues in their notices of objection. I would expect that if these Assessed Taxpayers and the CRA do not resolve the other issues, the Assessed Taxpayers will file appeals with the Court.

[90] I also believe that the Application is not consistent with my ruling, as case management judge, that the appeals of the Group Appellants proceed under the Lead Case Rules, specifically my ruling that the Court will hear the Lead Cases and hold the Informal Appeals in abeyance. My ruling was made pursuant to paragraph 126(3)(b) of the *Tax Court of Canada Rules (General Procedure)* which provides in part that the case management judge may give "any directions that are necessary for the just, most expeditious and least expensive determination of the appeal on its merits".

[91] I determined that the most just, expeditious and least expensive manner of determining the issues relating to the CDEs claimed in respect of the Purported Transactions was by hearing two test cases involving counsel for the Respondent and one counsel for the appellants in the two Lead Cases. In my view, the Minister ignored this decision when she brought the Application that, if granted, would result in a proceeding involving an additional 39 parties, all of whom will be self-represented.

[92] Further, if the Minister thought that the Court's answering of the Question could resolve the issues relating to the Purported Transactions, then the Minister, as respondent in the Lead Cases, should have brought an application to have the Question determined under Rule 58 of the *Tax Court of Canada Rules (General Procedure)* ("Rule 58").

[93] Rule 58 allows for the hearing of a question in the context of an appeal before the Court. The Court has issued numerous decisions setting out the criteria that must be satisfied before it will issue an order allowing for the determination of a question under Rule 58. The Court does not normally grant such an order when there is a factual issue that cannot be addressed by an agreed statement of fact. (i.e., the current situation before the Court). In other words, it is not likely that the Court would grant an order under Rule 58 allowing for the determination of the Question as it applies to the Lead Cases. It appears to me that if I were to allow the Application, it would circumvent the Court's previous rulings with respect to Rule 58 as it would apply to the parties in the Lead Cases.

[94] In my view, bringing an application that is inconsistent with the Court's ruling with respect to the Lead Cases, and which would circumvent the Court's previous rulings with respect to Rule 58 is an abuse of process.

[95] For the foregoing reasons, the Application is denied with costs. The Court will not determine the Question.

[96] Costs are awarded as follows:

a) The appellants in the Lead Cases are awarded one set of costs of $14,000 plus disbursements.

b) Each of the Assessed Taxpayers is awarded costs of $150 for each day they appeared at the hearing.

Signed at Ottawa, Canada, this 22nd day of November 2018.

"S. D'Arcy"

D'Arcy J.

CITATION:	2018 TCC 236
COURT FILE NO.:	2014-972(IT)G 2015-148(IT)G
STYLE OF CAUSE:	IN THE MATTER of an application by the Minister of National Revenue under section 174 of the *Income Tax Act*, for the determination of a question. THE MINISTER OF NATIONAL REVENUE and THE 52 PERSONS NAMED IN SCHEDULES A AND B OF THE AMENDED APPLICATION.
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	September 8, 2017, November 20, 2017 and April 4, 2018
REASONS FOR ORDER BY:	The Honourable Justice Steven K. D'Arcy
DATE OF ORDER:	November 22, 2018

COUNSEL WHO APPEARED AT THE APPLICATION:

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