Applying Statutory Limitation Periods in the ITA

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Klemen v The Queen, 2014 TCC 244

The taxpayer argued that the reassessment was statute barred because it was made outside of the normal reassessment period. The Minister argued that the normal reassessment period did not apply because the second reassessment was made following the consideration of the Appellant's Notice of Objection. At issue was the interaction of the normal reassessment period in subsection 152(4) and the exception in subsection 165(5). A secondary issue was whether the amount was on account of capital or income.

The TCC disagreed with the Minister's argument. In referring to the FCA decision in *The Queen v Anchor Pointe Energy Ltd,* 2003 FCA 294, the court held that subsection 165(5) could not have the effect of supporting a reassessment beyond the normal reassessment period where the result is an increase in the taxpayer's tax payable (para 23). Thus, the Minister cannot use subsection 165(5) to include in assessment or reassessment an amount not included in the original assessment.

With reference to the categorization of the amount as capital or income, the court listed a number of factors, and held that the amount was on account of capital.

> [31] [...] criteria enunciated by Justice Rouleau in *Happy Valley Farms Ltd. v. The Queen, [86 DTC 6421 (F.C.T.D.) at pp. 6423-24],* for the purpose of deciding whether a gain is on income or on capital account:
>
> 1. The nature of the property sold. [Is the property customarily a capital asset, or is it a commodity that is bought and sold?]
>
> 2. The length of period of ownership. [Inventory is generally disposed of shortly after acquisition, while capital assets are not.]
>
> 3. The frequency or number of other similar transactions by the taxpayer. [Does the taxpayer routinely sell such property?]
>
> 4. Work expended on or in connection with the property realized. [If the taxpayer completes steps to improve the property for resale, it is more likely inventory.]
>
> 5. The circumstances that were responsible for the sale of the property. [Was this a routine disposition, or were there overriding business considerations?]
>
> 6. Motive. [Why did the particular disposition occur?]

[32] Linden J.A. identified the following additional factors in considering on appeal the Continental Bank of Canada v Canada *decision [[1995] 1 C.T.C. 2135 (TCC); affirmed* [1998] 2 S.C.R. 358*]*:

(a) The intention of the parties;

(b) Whether the conduct of the vendor was similar to that of an ordinary trader;

(c) The nature and quantity of the property in question;

(d) Whether the transactions were isolated ones; and

(e) The uniqueness of the transactions when compared to the taxpayer's normal activities.

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