

Devon Canada Corporation v The Queen, 2013 TCC 4

When can an Appellant employ Rule 58 of the TCC Rules (General Procedure) to have a question decided prior to the hearing of the Appeal?

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The Appellant brought a motion under the *Tax Court of Canada Rules (General Procedure)* section 58, to have a question of law raised in the pleadings determined before the hearing of the appeal.

The TCC set down the matter for a hearing, as the three relevant questions were answered in the affirmative.

FACTS

The Appellant corporation bought into a partnership that was a member of a partnership that owned resource properties, but not directly. The MNR took the position that the "look through rules" in subparagraph 66.7(10)(j)(ii) only apply where the corporation is a direct member of the partnership that owns the resource properties, and not where there resource property is owned by a lower tier partnership (as was the case here).

ISSUE

The question of law involves the "successor rules" found in section 66.7 of the ITA that allow the successor to a resource property to claim the unused resources expenses of the original transferor against income that may reasonably be regarded as attributable to the production from the properties. Specifically, do the look through rules in section 66.7 apply only to a corporation that is a direct member of the partnership that owns resource properties, or can there be a tier of partnerships that can be looked through:

whether, by operation of paragraphs 66.7(10)(j) and 66.7(10)(c) of the *Income Tax Act*, following the acquisition of control of Home Oil...and the transfer of the [Anderson Properties] by the [Anderson Partnership] to the [Devon Partnership], the proportionate share of income earned from the [Anderson Properties] owned through the Devon Partnership, allocated to the Anderson Partnership and further allocated to Home Oil, may reasonably be regarded as having been attributable to production from a particular resource property owned before the acquisition time by an original owner for purposes of subsections 66.7(1) to (5).

The Court was asked to determine whether section 58 of the Rules allows for the determination of this question of law before the hearing of the appeal.

ANALYSIS

Paragraph 58 of the Rules reads:

(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

The Court identified that this is a two (2) step process, and that the judge hearing the motion must be satisfied that:

- (a) That the question posed by the appellant is a question of law or a mixed question of fact and law;
- (b) That the question is raised by the pleadings; and
- (c) That the determination of the question may dispose of all or part of the appeal, may substantially shorten the hearing or may result in a substantial saving of costs.

If all three are determined in the affirmative, then the court MAY set down the issue identified in the pleadings, and have a motion judge make the determination. Here, though there were material facts still in dispute, the disputed facts didn't relate to the issue to be decided by the motions judge - "the test is not whether there are facts in dispute but whether there are facts which are in dispute that are material to a determination of the proposed question". (para 14)