

# Determination of a common question - Section 174

## Determination of a Common Question using Section 174 of the Income Tax Act

*Canada v ACI Properties Ltd*, [2014 FCA 45](#)

At issue was when it was proper for the MNR to ask the TCC to determine a common question under ITA s 174, when that question is the sole issue before the TCC on an appeal.

The FCA determined that the TCC applied the wrong test, and all that is required for an application under Section 174 is that there is a question of fact, law, or mixed fact and law, that is common between two or more taxpayers.

### FACTS

Two companies were involved in a deal where one made a series of payments to the other. The payor deducted these amounts from income for income tax purposes, while the recipient treated the amounts as capital gains on the disposition of an interest in a joint venture.

The MNR audited both companies and, after the auditor's agreement that the amount was a capital gain was overruled by the Rulings Directorate of the Canada Revenue Agency, the amount was included as income to the recipient and was reassessed accordingly. The appeal is still before the TCC.

During the appeal before the TCC, the MNR brought a motion to determine a common question pursuant to section 174 of the *Income Tax Act*, but the TCC dismissed the application ([2013 TCC 101](#)) on the basis that "without any evidence of doubt or ambivalence on [the part of the Minister, the Minister is precluded] from seeking a determination of a common question" (para 4).

### ANALYSIS

Section 174 allows the MNR to apply to the TCC in order to determine a common question of law, fact, or mixed fact and law that comes up as a result of a transaction or event or series between/among taxpayers.

In *Canada v Miller*, [2005 FCA 394](#), it was said that when faced with a section 174 application, the TCC must answer three questions:

1. *Is section 174 applicable?* In reviewing the TCC's determination of the application of section 174, being a question of mixed fact and law, the standard of review is "palpable and overriding error" (*Housen v. Nikolaisen*, [2002 SCC 33](#));
2. *Even if applicable, should the application be refused?* This is a truly discretionary decision and can only be overturned on appeal if the TCC relied on a wrong principle, made an error of law, has exercised discretion wrongly, has considered irrelevant

factors, or has failed to consider relevant factors (*Elders Grain Co. v. M/V Ralph Misener (The)*, [2005 FCA 139](#)); and

3. *What procedure should be used in determining the question?* A matter of discretion related to procedure and costs.

The TCC held that in order for section 174 to apply, "there must be some doubt or ambivalence on the Minister's part as to the correct answer to the proposed question" (para 10) - and referred to *Brenneur v. Canada*, [2010 TCC 610](#); *Daruwala v. Canada*, [2012 TCC 116](#).

The FCA held that the TCC applied the wrong test - the test is in subsection 174(3) and look at whether there is "a question set out in an application under this section [that] is common to assessments or proposed assessments in respect of two or more taxpayers who have been served with a copy of the application." (para 12). This:

- requires the judge to decide whether the question in the application is common to assessments or proposes assessments in respect of two or more taxpayers;
- requires an inquiry into the legal or factual nexus between taxpayers who are parties to the determination;
- does NOT require any doubt in the mind of the Minister as to the position to be taken in assessing any of the taxpayers;
- does NOT require a pending assessment, but may involve a pending assessment;

Section 174 is meant to ensure that taxpayer's party to a transaction are taxes consistently with respect of that transaction, since the findings of fact and law as between one taxpayer and the MNR are not binding on another taxpayer's appeal. Section 174 is meant to avoid multiple proceedings and the potential for inconsistent decisions. Applications under Section 174 are to be encouraged because "they encourage the efficient use of the Court's resources, avoid the risk of inconsistent Court decisions and of separate proceedings, ensure that the Court hears relevant evidence, and ensure the collection of taxes that are properly due".

The FCA noted that there is nothing inappropriate with the MNR using section 174 to bind a second taxpayer's appeal or assessment to that of another taxpayer if the conditions are met. The MNR taking steps that deprive the taxpayer of a tactical advantage is not, in and of itself, an abuse of process. The public has an interest in having tax cases determined on the basis of correct facts, and in the most expeditious and least expensive way possible (*Continental Bank Leasing Corporation et al. v. The Queen*, [1993] T.C.J. No. 18 (Q.L.)).

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