

Large Corporation Rules for Tax Appeals - Motion to Strike

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Devon Canada Corporation v The Queen, [2014 TCC 255](#)

The *Income Tax Act*, subsection 169(2.1) limits the issues and relief that large corporations may appeal to only those issues and related relief in respect of which they complied with subsection 165(1.11) in their Notices of Appeal.

On this motion to strike, the only issue was whether the portions sought to be struck were issues and relief in regards to which the large corporation complied with subsection 165(1.11).

ANALYSIS

The TCC recognizes that subsection 165(1.11) has not yet been fully analyzed by the courts, but identified the following items from the cases at paragraph 11:

[11] The courts have not yet had the opportunity to fully consider the parameters of subsections 165(1.11) and 169(2.1) but there are themes that have emerged from the cases that have been decided:

- (a) a taxpayer is not required to describe each issue exactly but is required to describe it reasonably (*Potash Corporation of Saskatchewan Inc. v. The Queen*, [2003 FCA 471](#));
- (b) the determination of what degree of specificity is required for an issue to have been described reasonably is to be made on a case by case basis (*Potash*);
- (c) a taxpayer may add new facts or reasons on appeal but not new issues (*British Columbia Transit v. The Queen*, [2006 TCC 437](#));
- (d) if the proposed additional argument would result in the large corporation seeking greater relief than was previously sought, the courts are more likely to consider the argument to be a new issue rather than a reason (*Potash*; *Telus Communications (Edmonton) Inc. v. The Queen*, [2005 FCA 159](#));
- (e) if the proposed additional argument would result in the large corporation seeking the same relief that was previously sought, the courts are more likely to consider the argument to be the same issue (*British Columbia Transit*; *Canadian Imperial Bank of Commerce v. The Queen*, [2013 TCC 170](#)); and
- (f) if the proposed additional argument would result in the large corporation seeking completely different relief than was previously sought, the courts are more likely to consider the argument to be a new issue rather than a reason (*Bakorp Management Ltd.*

v. The Queen, [2014 FCA 104](#)).

Before determining whether the impugned arguments are new issues or new reasons, the court must first determine what issues were set out by the taxpayer in its Notice of Appeal. If the alternative arguments are merely alternative reasons in support of the issues raised, there is no problem. But where the alternative arguments are new issues, they must be struck.

The TCC held that the sole issue set out by the taxpayer in its Notice of Objection was the deductibility of surrender payments. Although the Notice of Objection sets out one reason why this deduction should be permitted, the taxpayer is not precluded from raising other reasons in the Notice of Appeal (para 15). It does not matter that the alternative reason is a new reason that is a result of a later development of the case law.

So long as the alternative arguments were alternative reasons for allowing the deduction of the surrender payments they were not struck. However, there will be a new issue if the taxpayer seeks to deduct additional amounts, even if those amounts fall within the same category of deductions: [Potash](#).

The taxpayer argued that the Crown's acceptance of its Supplemental Memo has the effect of altering its Notice of Objection. The Court rejected this argument and stated that the ITA does not provide a mechanism for a large corporation to amend its Notice of Objection.

Paragraph 165(1.11)(b) requires that the taxpayer specify the relief sought in respect of each issue, and not in respect of each reason (para 21). If a certain amount of relief is specified in the Notice of Objection, a less favourable amount of relief is automatically included: [Potash](#).

Although subsections 165(1.14) and 169(2.1)(b) together allow a large corporation to appeal to the TCC in respect of new issues despite the fact that those issues were not described in its Notice of Objection. The Court, however, identified a gap in the ITA being where the Minister confirms reassessment on a basis that differs from the basis upon which a large corporation objected. There is no ITA provision allowing a large corporation to appeal on the basis of the new issues.

The court held that this was not the case for granting relief by closing the perceived gap because the Minister had not abandoned the original basis of its reassessment - rather only added additional explanations to deal with supplemental arguments raised by the taxpayer's supplemental memo.

- Sas Ansari, JD LLM PhD (exp)

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