Pre-Emptive Strike Using Rule 58 - Sas Ansari

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Paletta v The Queen, 2016 TCC 171

[For CanLII Connects commentary see HERE]

Rule 58 of the Tax Court of Canada Rules (General Procedure) allows the parties to ask the court to decide a question before a hearing. In this case, the Appellant brought a motion to have the issue of whether the taxpayer's actions allow for a re-assessment beyond the normal reassessment period determined (ITA s 152(4)(a)(i)). This motion was brought prior to discovery being held, and the crown opposed the motion.

The Court held that, at least in this case containing complex and contested facts, the question of whether the Minister satisfied the onus of being able to re-assess beyond the normal reassessment period was not appropriate for Rule 58. This is because the circumstances surrounding the tax position taken by the taxpayer were complex and contested, requiring evidence that would be akin to a full trial (even with misrepresentation being admitted).

The court did not say this expressly, but it may have also been influenced by the fact that Discoveries had not yet been completed which, since the onus of proving the requirements of 152(4) rests with the Minister, would deprive the Minister of the ability to make full representations.

ANALYSIS

The Court noted that the Notice of Appeal, the Amended Reply, and Answers filed by the Parties suggest that this is a complex appeal wherein the trial judge would have to address a number of significant issues (para 3) in addition to the statute barred issue (including a question of the application of the Sham Doctrine, the Ineffective Transactions doctrine - for more on these see HERE - whether losses were incurred, whether transactions were commercial transactions).

NOTE that the taxpayer bears the onus with respect to the correctness of the amount of tax under the Reassessment, while the Minister bears the burden with the statute-barred and the gross negligence penalties issues - *House v. The Queen*, 2011 FCA 234.

The **APPELLANT** counsel, Justin Kutyan, argued that the statute-barred question is a proper one for Rule 58 as, if the matter is statute-barred the remainder of the issues are moot and if not statute-barred then the issue will not require evidence at trial. The Appellant argued that:

- the principle in *Hryniak v. Mauldin*, 2014 SCC 7 should apply when determining the

propriety of a question for Rule 58;
- disputes over material facts do not disqualify a question from Rule 58 - *Rio Tinto Alcan Inc. c. La Reine*, 2016 CCI 31;
- Summary trial rules, under Rule 58(3)(b), can be applied to determine the application of the statute-bar in ITA 152(4)(a)(i) - *Inwest Investments Ltd. v. Canada*, 2015 BCSC 1375;

The **RESPONDENT** argued that:

- The facts are complex such that the question cannot be answered without a full appreciation of the evidence forthcoming at a full hearing;
- Here credibility of the Appellant may be at issue, which would require the court to have access to rules and procedures to properly obtain and assess evidence;
- Rule 58 is not meant to circumvent safeguards of a full trial, or to by-pass a full trial (when calling *viva voce* evidence).

The **COURT**:

Justice Owen noted that a number of cases have considered Rule 58, but only a handful the latest iteration (effective Feb 7, 2014). The Court referred to the Regulatory Impact Statement in the amendment to Rule 58, concluding that the new Rule 58 was a consolidation of old Rules 58-62 inclusive. The Changes warrant a fresh reconsideration of the Rule.

Rule 58 describes a two-stage process, where the court MAY grant, on application, and order that (i) a question of law, fact or mixed law and fact raised in a pleading, or (ii)a question as to the admissibility of any evidence, be determined before the hearing. This is very broad and Rule 58 " may now be used to address virtually any issue that could arise in a full hearing of the appeal" (para 19).

Under Rule 58(2), the order MAY be granted IF it appears that the determination of the question before the hearing MAY:

1. dispose of all or part of the proceeding;
2. results in a substantially shorter hearing; or
3. result in substantial savings in costs.

The court's decision in a Rule 58applicationn must keep in mind Rule 4(1) that requires the Rules to be construed liberally to secure the just, most expeditious, and least expensive determination of every proceeding on its merits.

If the pleadings don't raise a question of law or mixed fact and law, question 58 doesn't provide a means of addressing such a question. A question of law or mixed fact and law is, as described by the Supreme Court of Canada in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, para 35:

> ... questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

The wording in the Rule makes it clear that the decision is entirely discretionary, and that "the fact that a question may meet the requirements in subsections 58(1) and (2) by no means compels the Court to grant an order under Rule 58" (para 20) - in line with the Court's power to control its own process - *R. v. Cunningham*, 2010 SCC 10. The Court came to this conclusion because subsection 58(2) uses the word "may" in two senses and grants the power to the Court where "it appears" that the speculated benefits may be attained.

Additionally, the Court held that the repetitive use of the word "may" indicates that there could be other considerations that factor into the court's decision and the court is not limited to considering only the express considerations in Rule 58(2). The Court held that a question does not automatically fail to meet the requirement of Rule 58(2) "because one possible answer to the question would not lead to one or more of the desired results" (para 25). This is only a factor by the court to consider in exercising its discretion.

In this Motion, the Court is required to consider the application of ITA s 152(4)(a)(i), and determine whether "the Appellant or the person filing the return has made a misrepresentation attributable to neglect, carelessness or wilful default, or committed fraud in filing the return or in supplying information under the ITA" (para 27). This has two requirements - *Boucher v. The Queen*, 2004 FCA 46, para 5 - "First, a misrepresentation must have been made. Second, that misrepresentation must be attributable to neglect, carelessness or wilful default" (para 28).

A misrepresentation occurs where " there is an incorrect statement on the return form, at least one that is material to the purposes of the return and to any future reassessment" - *Nesbitt v. The Queen*, 96 DTC 6588.

Thus, for the court to determine whether there was a misrepresentation, the court has to see whether "there were one or more incorrect statements in the Appellant's returns for the Taxation Years" (ara 30). Since the correctness of the returns is the crux of the reassessment, it would be difficult to address the question without a full hearing that addresses all of the issues raised in the pleadings.

Even though the Appellant was willing to concede that there was a misrepresentation, leaving only the question of whether this was due to "neglect, carelessness or wilful default", the court felt that "the issue of whether the conceded misrepresentation is attributable to neglect, carelessness or wilful default cannot be resolved without an appreciation of all of the circumstances surrounding the filing positions taken by the Appellant in his returns for the Taxation Years" as the circumstances have not been agreed to and are at the heart of the reassessment issue (para 32).

The court highlighted that a Rule 58 hearing is not a substitute for a full trial, and that "if the evidence that is required in order to determine the question is akin to the evidence that would be tendered at a full hearing, then the requirement in subsection 58(2) would not be satisfied" (para 36). The Court felt that the other issues could not be separated from the statute-barred issue (para 40). The court stated that:

> To assess whether the Appellant acted as a wise and prudent person in the complex circumstances of this case, it is in my view necessary for the Court to understand all of the circumstances in which the relevant actions of the Appellant took place. This requires a full-blown trial in which the Court has the opportunity to see and assess all of the witnesses presented by the parties and all of the evidence tendered through those witnesses. Such a hearing will also provide the parties with a full opportunity to tender their evidence through examination in chief, cross-examination, discovery read-ins, etc. in a forum that provides the safeguards of the rules of evidence and the rules and procedures of the Court. This opportunity is clearly in the interests of justice in a case where the facts are complex and highly contentious and each of the parties bears an onus with respect to those facts.

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