No Equity in Tax Court

Those with long memories in the charity sector will recall that the voluntary sector initiative of the 1990s promoted the introduction of sanctions for offences that were less than revocation. It also advocated that appeals of these sanctions be heard by the Tax Court, and hoped that before long a body of case law would be developed to provide additional guidance to charities seeking to avoid these penalties. Amongst these intermediate sanctions (as they were titled) included a provision allowing for the suspension of a charity's receipting privileges. These provisions were added in 2004 and it has taken until now to get our first substantive case involving a suspension. While one would have hoped it would serve as a precedent, we have deep reservations about the basis upon which this case was decided.

There are two interesting aspects of the decision. The first was a suggestion which may be of use to charities trying to keep books and records, and the second is a major comment on the consideration of future suspension cases before the Court.

In *Promised Land Ministries* v. *HMQ*[1] the CRA suspended the charity for having inadequate books and records. The Church in question conducted many of its preaching activities outside of Canada, particularly in poor countries in Africa. The CRA conducted a desk audit of the annual T3010 charity information report filed by the charity and requested additional information for the expenses listed. As it happened, the charity did not have the necessary documentation and could not justify the amounts claimed as expenses for charitable activities. The charity was given a chance to rectify this at the appeals level but the CRA felt that the charity did not, for whatever reason, do so.

The charity, on the other hand, had a number of reasons why it could not provide the necessary information. Among them was the common problem that, when operating in certain overseas economies receipts are simply not generated with the same regularity as in Canada. Charity advisors are often faced with the difficulty of how to account for purchases in areas where receipts are simply not given.

To this Justice Lyons suggested that the charity should carry around a notebook and ask a vendor to simply sign in order to confirm the amount of an expenditure in the charity's notebook. The practicality of this solution is unclear, but at least now that a judge of the Tax Court has suggested it, the CRA will have to think twice before rejecting this type of evidence.

The more impactful comments from this case concern statements Justice Lyons made in her analysis. To appreciate the importance of the comments it is first important to understand the nature of the Tax Court. Unlike the provincial courts which have a special constitutional role, the Tax Court was set up by an Act of Federal Parliament for the express intention of adjudicating disputes over tax. Consequently, the Court only has the powers bestowed upon it by the Tax Court of Canada Act. Specifically, the role of judges of this Court is to determine the facts of a transaction and apply the tax law to those facts. Put another way, the judge cannot review the fairness of the decision or the reasonableness of the Minister's actions. And, almost to

underscore the point, judges of the Tax Court often lament that the decision they must come to is unfortunate, but their hands are tied by the law. The state of the law is encapsulated in the saying that "there is no equity in tax law".

Not to berate the point, but the proposition is so important to the adjudication of appeals in the Tax Court that the fundamental 1948 Supreme Court of Canada case in *Johnston* said[2]:

> *In an appropriate case, the taxpayer may seek relief in the Tax Court. Proceedings in the Tax Court are not a judicial review of the correctness or **reasonableness** of the Minister's assessment. Rather, the function of the Tax Court is to arrive at the correct assessment itself (unless it is unable to do so and considers it necessary to refer the assessment back to the Minister for reconsideration under subparagraph 171(1)(b)(iii) of the Income Tax Act).*

[Emphasis Added]

It is for this reason that the tests in the case as stated by Justice Lyons was so surprising. They were stated as follows:

a. *Whether the Minister reasonably found that PLM failed to maintain proper books and records as required under paragraph 230(2)(a) and subsection 230(4)?*

b. *Is the Suspension a reasonable response in the circumstances pursuant to paragraph 188.2(2)(a)?*

That the tests were stated this way seems to have been based on a misunderstanding of the Federal Court of Appeal's decision in Prescient which the Court cited as stating that "*The Court in Prescient further instructed that a court must be satisfied that it was reasonable in the circumstances for the Minister to require the records or information at issue…*"[3] This statement by the Federal Court of Appeal can be true in the case of a judicial review at that Court, but, as we have seen, not before the Tax Court of Canada in dealing with a suspension.

Of the two issues stated by the Court it is the second which is the more surprising. Before pronouncing its decision the Court even stated that it had "*regard to special status that a charity holds",* and this justified the lesser sanction of suspension as opposed to revocation. The Tax Court never looks at whether the result is reasonable, indeed not a few taxpayers wish the Court had this power – but alas it does not.

Fundamentally, notwithstanding its status as the first time the Tax Court has dealt with suspension, this case is doomed to be an aberration in the case law dealing with these issues, and the intentions of the Voluntary Sector Initiative temporarily frustrated. Another suspension case will undoubtedly reach the Tax Court at some point and the Court will not be able to rely on this case as a precedent in determining the standard for making its decision. We wish that the Court's approach in this case was the right one, but alas it cannot be and wishing will not make it so.

Endnotes

1. 2019 TCC 145, https://decision.tcc-cci.gc.ca/tcc-cci/decisions/en/item/417900/index.do
2. *Johnston v. Minister of National Revenue*, [1948] 3 DTC 1182 at 1183 as cited in *A.G. of Canada v. Buchanan* [2002] 3 CTC 301 2002 DTC 7397 (FCA)
3. *Promised Land Ministries* at para. 45