



Commentary on Department of Finance Proposals for Caseload Management - Tax Court of Canada

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Submitted to: **Department of Finance**

Submitted by: **Ontario Bar Association
Taxation Law Section**



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The Ontario Bar Association's Tax Section Executive has reviewed the Department of Finance's proposals (the "Government Proposals"), dated November 10, 2011, in relation to the *Tax Court of Canada Act* (the "TCC Act"). We appreciate the opportunity to comment on this proposal.

The OBA.

As the largest voluntary legal organization in the province, the Ontario Bar Association, a branch of the Canadian Bar Association, represents approximately 18,000 lawyers, judges, law professors and students in Ontario. OBA members are on the frontlines of our justice system in no fewer than 37 different sectors. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission was formulated by the OBA Tax Section. The members of this practice section include the leading lawyers in the field and would count among their clients virtually every stakeholder in the Tax Court process.

Monetary Limits.

The TCC Act permits a taxpayer to have his income tax appeal heard under the Informal Procedure Rules, subject to a monetary restriction. In particular, section 2.1 and subsection 18(1) of the TCC Act provide that a taxpayer can elect to have his or her income tax appeal heard under the Informal Procedure Rules if the "aggregate of all amounts" at issue is equal to or less than \$12,000 of federal tax and federal penalties *per year* or if the amount of the loss is equal to or less than \$24,000. For these purposes, federal interest, provincial tax, provincial penalties and provincial interest are not included in the calculation of the "aggregate of all amounts".

The Government Proposals recommend an increase to the "aggregate of all amounts" to \$25,000 of federal tax and federal penalties per year and \$50,000 in losses, with a possible further increase by regulation to \$50,000 in tax or \$100,000 in losses. In addition, the Department of Finance proposes to limit discoveries to cases involving \$50,000 in federal tax, an increase from the current \$25,000 threshold.

The OBA Tax Executive supports the proposed increase of the monetary limit for an appeal to be heard under the Informal Procedure Rules to \$25,000 of federal tax and federal penalties per year and \$50,000 in losses. In addition, we agree that it is appropriate to have a similar limit for



excise tax appeals. However, we do not support a possible further increase by regulation to \$50,000 in tax or \$100,000 in losses.

In addition, the OBA Tax Executive recommends a change to the TCC Act definition of “aggregate of all amounts”, given that it does not consider the total of all amounts in issue for all years assessed and can, therefore, lead to unintended results. For example, a taxpayer with \$11,000 of federal tax and penalties in dispute each year for 10 years can elect to have his or her appeal heard under the Informal Procedure Rules. By contrast, the General Procedure Rules will apply to a taxpayer with \$13,000 of federal tax and penalties in dispute for a single year.

We recommend that the Department of Finance amend the definition of “aggregate of all amounts” in Informal Procedure cases to include an upper limit of \$50,000 of total federal tax and federal penalties and \$75,000 of losses for all taxation years under appeal in the TCC to avoid unintended results.

With respect to discoveries, we see no reason why the monetary limit for that rule should be different than the limits for Informal Procedure cases. To avoid confusion and provide consistency, we recommend that the discovery limit remain at \$25,000, to match the new Informal Procedure limit, and that the two limits remain in tandem if the latter is raised, after public consultation, in the future.

The OBA Tax Executive also recommends that the Department of Finance add a new rule to the Informal Procedure Rules to incorporate this change. Rule 25 of the TCC General Procedure Rules provides that an appellant may appeal assessments for different taxation years in one Notice of Appeal. While there is no similar Informal Procedure rule, the TCC’s practice is to allow one Notice of Appeal to be filed in respect of several taxation years. We suggest that the Informal Procedure Rules include a rule similar to Rule 25 of the General Procedure Rules. This way, taxpayers appealing several income tax or excise tax assessments under the above-noted monetary limits will only be required to file one Notice of Appeal.

Self-Represented Litigants & Information.

The TCC has stated on a number of occasions that it has difficulty dealing with self-represented litigants because, in many cases, their understanding of the facts, issues and, in particular, procedural rules and substantive tax law is limited. It appears that the difficulty stems from the TCC often not being provided with sufficient information about the case, beyond what is in the Notice of Appeal and the Reply, which are often not well drafted.



The OBA Tax Executive believes that the government should amend the TCC Act to ensure that unrepresented litigants and the TCC have the basic information about the case at the hearing of the appeal. We recommend that the TCC, in sending a Notice of Hearing to the Crown in a matter in which the Appellant is not represented by legal counsel, include a direction to Crown counsel to bring to Court on the date of the hearing, among other things, copies of all returns, notices of assessment, notices of objection and notifications, if any, that are relevant to the appeal. In addition, we recommend that the TCC, in sending a Notice of Hearing to the Appellant, remind the Appellant to bring all relevant documents to the hearing of the appeal and, if necessary, contact Crown counsel before the hearing of the appeal to request copies of any outstanding documents.

We believe that this will allow the TCC to have access to the relevant background documents without giving rise to procedural concerns around the TCC's review and consideration of documents that are not on the record.

***Pro-Tanto* Judgments.**

Under existing law, the Minister of Revenue must issue a single assessment or reassessment which covers all issues involved in a single taxation year. Except in the unusual case of the Minister issuing an additional assessment, each reassessment nullifies and replaces all previous assessments. A taxpayer may appeal an assessment for a particular taxation year. Where the assessment involves more than one issue, all issues must be dealt with in a single appeal.

The Department of Finance proposes to amend the *Income Tax Act* (and, we presume, Part IX of the *Excise Tax Act* and any other similar legislation) to allow the TCC to dispose of a particular issue separately, but only when both the parties to the appeal and the TCC agree (a “*pro-tanto* judgment”).

The OBA Tax Executive agrees that this proposal is sound. However, we suggest the amendment provide that either party may bring a motion to have an issue dealt with separately, and that the TCC may accept the motion if, on a consideration of all relevant circumstances, it believes the issue may be dealt with separately without causing prejudice to anyone and will be more convenient and less time-consuming and expensive.

The Department of Finance proposes that, where the TCC issues a *pro-tanto* judgment and the original Notice of Appeal contains further issues, the Minister could issue a reassessment on the issues decided by the *pro-tanto* judgment and the appeal at the TCC would continue on the remaining issues.



While we agree with this proposal, we see a need for clarity on such reassessments, to avoid confusion over which issues are being reassessed. Further, we recommend that the legislation be amended so that if the *pro-tanto* judgment results in a refund owing to the taxpayer, the Minister must pay the refund notwithstanding that other issues are still before the TCC in the main appeal.

The Government Proposals provide that taxpayers (and presumably the Crown) would be able to appeal a *pro-tanto* judgment to the Federal Court of Appeal (the “FCA”) while the remaining issues continue to be dealt with at the TCC. While we generally agree with this proposal, we see some difficulty with it. The FCA may not wish to hear two or more appeals by the same parties regarding the same taxation year but would likely prefer to hear one appeal that would cover all issues. The cost of multiple appeals may be prohibitive and a losing party could run the risk of multiple sets of costs awards against it. Furthermore, given the time limits for filing appeals under the FCA Rules, the parties may be involved in an FCA appeal on one issue while the TCC litigation is still proceeding on the remaining issues. Finally, there may be problems with how appeals to the Supreme Court of Canada (the “SCC”) would be dealt with on multiple issues. Accordingly, the OBA Tax Executive recommends that this aspect of the Government Proposals not be implemented as is but, instead, amend the legislation to provide that the deadline for filing an appeal in the FCA against a *pro-tanto* judgment in the TCC will be 30 days after the date of the last judgment issued by the TCC in respect of the original Notice of Appeal filed by the taxpayer.

Common Questions.

In recent years, the TCC has seen an increase in the number of appeals where issues and facts common to two or more taxpayers are repeatedly litigated.

The Government Proposal would amend the *Income Tax Act* (and, we presume, Part IX of the *Excise Tax Act* and any similar legislation) to allow the Crown to apply to the TCC to hear a question arising out of identical, or substantially similar, transactions and cause the resulting judicial determination to be binding across the group. This proposed measure would allow the TCC to bind taxpayers whose income tax filings raise issues identical, or substantially similar, to a “lead” court case. The questions put before the TCC would be restricted to the common issues, allowing other issues to be dealt with independently.

The Crown, and any taxpayer who has filed an appeal from an assessment in the TCC, could appeal the determination to the FCA. Any other taxpayers named in the determination could appeal a determination of the substantive question only if they were granted leave by a judge of



the FCA. Taxpayers bound by the determination by the TCC would also be bound by a subsequent decision of the FCA. We presume similar rules would apply at the SCC level.

The Government Proposals would also amend the *Income Tax Act* (or *Excise Tax Act*) to specify that the Minister can serve notice of the application by way of regular mail or may seek direction from the TCC on alternate means of service.

The OBA Tax Executive does not support these proposals. Although taxpayers may have a similar question arising out of similar facts, the facts may not be identical and seemingly minor factual differences may be important to the final outcome of the case. Further, the taxpayer listed as the lead case may be self-represented or not well represented, or may dismiss counsel mid-way through litigation. Alternately, the lead taxpayer may decide to settle or give up on the litigation, leaving other taxpayers to start over again with another test case. In essence, this proposal would bind all taxpayers and may create a situation where taxpayers are asked to contribute to a test case fund to pay counsel over whom they have no choice and no control, in order to protect their own interests. Or it may be that taxpayers choose not to fund the test case but are then bound by the result anyway.

Accordingly, while all members are sympathetic to the government's and the TCC's concerns over "large-case" situations, we do not believe that taxpayers should be co-opted into funding, and participating in, what is effectively class action tax litigation, without being able to decline to be part of the class. The facts and issues may not be the same for each taxpayer even though the broad outline of facts and issues is the same.

Moreover, we do not support the government's proposal to amend the *Income Tax Act* and Rule 24 of the TCC General Procedure Rules to enable the Minister to serve a notice of application by regular mail. We believe that the Minister must be held to the strictest standard of service on affected taxpayers to ensure that taxpayers are notified of any application.

On the other hand, if a process could be developed whereby taxpayers could, at their option, join a class action tax case, the OBA Tax Executive would generally be supportive of that process, depending on its actual wording. Accordingly, we suggest that more study be given to this idea, with the involvement of interested parties.

Additional Recommendations.

On December 14, 2011, the Tax Executives Institute ("TEI") provided the Department of Finance with submissions related to the Government Proposals. Although the TEI's submissions do not provide detailed responses to the Government Proposals, the TEI recommended that the Department of Finance develop legislation to authorize the Canada Revenue Agency and the



Department of Justice to enter into settlements at the appeals, pre-trial and trial stages based on a "risks (or hazards) of litigation" approach. The OBA Tax Executive supports the TEI's recommendation in this regard.

Second, we recommend that the Department of Finance increase the tariff payable under Rule 11 of Informal Procedure Rules. Further, we recommend that the Informal Procedure Rules include a rule similar to Rule 147 of General Procedure Rules and Practice Notes 17 and 18, which would, in general, allow taxpayers the opportunity to obtain increase costs if they obtain a judgment as favourable as, or more favourable than, a settlement offer. We believe that these changes will promote settlement, efficiency and access to justice.

Thank you again for the opportunity to comment on the Government Proposals and please do not hesitate to contact us if we can be of further assistance. We look forward to continued consultation on these important issues.

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