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Can Anybody Hear Me?

The Jurisdiction of the Federal Court and Tax Court of Canada

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Introduction

The area of tax law is often referred to as one of the more complex areas of law in which to practice. Practitioners can spend a great deal of time navigating through a myriad of highly technical and ever-changing rules. Because of the complex and technical nature of this area of law, a specialized court, the Tax Court of Canada ("**TCC**") was established to hear cases on tax matters.

The TCC was established and provided with the "exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under various taxing statutes including the *Income Tax Act (Canada)* (the "**ITA**") and the *Excise Tax Act*".[1] However, as with most facets of tax law, the jurisdiction to hear tax related issues is far from simple and straight forward. In fact, there have been numerous cases which have discussed the jurisdiction of the TCC and federal or superior courts. For example, while the TCC has jurisdiction when the issue relates to the correctness of an assessment or reassessment issued by the Canada Revenue Agency ("**CRA**") or the Minister of National Revenue (the "**Minister**"), it is the Federal Court that has the jurisdiction to preside over cases in which an abuse of power by the CRA or Minister is at issue.[2]

In the recent case of *JP Morgan Asset Management (Canada)* v. *The Queen*[3], the issue before the Federal Court was to what extent is the Federal Court's jurisdiction to hear issues involving the discretion of the Minister and the CRA regarding reassessments relating to the imposition of tax under Part XIII of the ITA.

Facts:

JP Morgan Asset Management ("**JP Canada**") carried on business in Canada and is a resident of Canada for purposes of the ITA. JP Canada provides investment advisory services to its clients in Canada and also refers their clients to other members in the JP Morgan corporate family (the "**JP Family**") to obtain other investment advice. One such company is the JP Family is JF Asset Management Inc. ("**JFAM**"), a Hong Kong corporation. JP Canada's clients pay a fee to JP Canada on the value of assets invested. JP Canada will then pay 75% of such fees to other members of the JP Family, such as JFAM. JP Canada states that the fee represents the market value of the services being provided and is in accordance with the transfer pricing policy established by the JP Family. Following a 2009 audit of JP Canada's 2007 and 2008 taxation years, the CRA assessed JP Canada's Part XIII tax with respect to the fees paid by JP Canada to JFAM for all its fiscal periods from December 31, 2002 to December 31, 2008 (the "**Assessments**").

JP Canada brought forth a motion for an order to quash the decision of the Minister and the CRA (the "**Respondents**") to assess JP Canada for amounts payable under Part XIII of the ITA. Alternatively, JP Canada brought a motion for an order that the decision to issue the Assessments was an invalid and unlawful exercise of a statutory power under subsection 227(10) of the ITA.[4] JP Canada argued that the CRA improperly exercised its discretion as it did not sufficiently consider its own policies,

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guidelines, bulletins, internal communiqués and practices which would otherwise have limited assessments to the current tax year and the two immediately preceding years. The CRA thus acted arbitrarily, unfairly, contrary to the rules of natural justice and in a manner inconsistent with CRA's treatment of other tax payers.[5]

The Respondents brought a motion to strike the application on the grounds that the matter deals with tax assessments and is therefore solely within the jurisdiction of the TCC. The Respondents argued that the Minister's duty to assess arises from the fundamental principle that she must enforce and administer the ITA and applying the principles set forth by the Supreme Court of Canada ("**SCC**") in *Canada* v. *Addison & Leyen LTD.*, ("***Addison***"),[6] judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system. Accordingly, the Respondents argued that JP Canada's application is bereft of any chance of success and should therefore be struck.

In response, JP Canada argued that an exercise of the Minister's discretion in issue is outside the ambit of the jurisdiction of the TCC and is precisely the situation contemplated by the SCC in Addison which would grant jurisdiction to the Federal Court.

Addison & Leyen:

In *Addison*, the applicants brought an application for judicial review of a tax assessment. Without discussing the particular facts of the *Addison* case, for our purposes, it is important to note that rather than appeal to the TCC, the applicants brought a judicial review application in the Federal Court to review the decision of the Minister to assess under section 160 of the ITA. The applicants alleged that the decision was abusive because of a long delay in pursuing the matter which prevented the applicants from mounting a proper defence. The Minister moved to strike the application based on the ground that it was the jurisdiction of the TCC. The application was struck. The narrow issue determined by the Supreme Court was whether judicial review was available to challenge the exercise of the Minister's decision to assess the applicants under section 160. At paragraph 11 in Addison, the SCC stated the following with respect to statutory system of tax assessments and appeals:

> The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.

In *Chrysler Canada Inc.* v. *Canada*, the Federal Court stated that the SCC decision in *Addison* "left open the door for judicial review of a discretionary decision of the Minister in certain Circumstances".[7] The Federal Court went on to state that it is not precluded from hearing judicial review applications in relation to discretionary decisions to issue assessments under the ITA. The only limitation on the Federal Court is to hear a judicial review application is that it is not available if the matter is otherwise appealable. Nevertheless, judicial review will still be available to control an abuse of power. Such an approach, in the eyes of the Federal Court, would not only preserve the integrity and efficiency of the system of tax assessments and the exclusive jurisdiction of the TCC to deal with those matters, but also avoids the unnecessary and incidental litigation.[8]

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The Decision:

It was argued by JP Canada and accepted by the Court that under subsection 227(10) of the ITA, the Minister "may" assess at any time, not "shall" assess. JP Canada argued that the interpretation of this provision of the ITA is that the Minister has a wide discretion on whether to assess. The Federal Court, while agreeing with the Respondent that the Minister has a duty to assess, nevertheless points out that this issue currently before the court is not the Minister's duty to assess, but rather the discretion to assess as described in various policies of the CRA. A decision to depart from such policies and assess is subject to judicial review and is the type of situation contemplated by *Addison*. Accordingly, the issue before the Court was not whether the reassessments issued by the Respondents were accurate but whether there was an abuse of process of the Minister in the exercise of her discretion pursuant to the provisions of the ITA.

Furthermore, the Court notes that striking out an application for judicial review is an "extraordinary remedy which will only be granted in exceptional cases". [9] The test to strike out an application for judicial review is whether the application, if allowed to proceed, would be "clearly futile" or that it is "plain and obvious" that it does not have any possible success.[10] As noted in *Addison*, cases with respect to judicial jurisdiction are to be decided based on the facts of each particular case. Based on the facts in this case, the Federal Court held that it is not plain and obvious that this court is without jurisdiction to entertain the application brought forth by JP Canada and that it cannot be said at this juncture that it is clearly futile.

What does this mean?

This decision is consistent with the existing jurisprudence and does not veer from the principles enunciated in *Addison* or the provisions contained in the ITA, *Tax Court of Canada Act* or *Federal Court Act*. However, a further question should be addressed; namely, should the provisions of the *Tax Court of Canada Act* be amended to give the TCC jurisdiction to hear cases regarding the discretion and possible abuse of power exercised by the Minister and CRA?

It cannot be said that the Federal Court lacks the expertise to properly adjudicate such proceedings; however, the TCC was created with the purpose and jurisdiction to hear cases on matters arising from the ITA. The Minister's and CRA's exercise of power pursuant to the provisions of the ITA should be included within this scope of the TCC. The consolidation of jurisdiction on tax matters would result in less confusion and less resources being spent on litigating to clarify such confusion.

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[1] *Tax Court of Canada Act*, R.S.C. 1985, c. T-2 (as amended) at subsection 12(1).

[2] *Federal Courts Act* , R.S.C. 1985, c. F-7 (as amended) at section 18. See also *Main Rehabilitation Cole v. R.*, 2004 FCA 403 at paragraph 6.

[3] 2012 FC 651.

[4] Part XIII of the ITA imposes a tax on various payments to non-residents. Under section 215 of the ITA, the tax must be withheld by the payer (the Canadian resident) and remitted on account of the tax payable by the non-resident. Pursuant to subsection 227(10) of the ITA, the Minster may therefore generally assess for the tax the Canadian resident who is obligated to withhold and remit the tax.

[5] Supra Note 3 at paragraph 22.

[6] (2007 SCC 33).

[7] 2008 FC 727 at para. 24.

[8] Ibid.

[9] Supra Note 3 at para. 28.

[10] See, for example, *David Bull Laboratories (Canada) Inc.* v. *Pharmacia Inc.*, [1995] 1 F.C. 588 (CA) at pp. 596-598 and 600; *Amnesty International Canada et al.* v. *Chief of Defence Staff et al.*, [2007] FC 1147; and *Sanofi-Aventis Canada Inc.* v. *Novopharm Ltd.* (2007), 59. P.R. 4th) 416 (FCA) at pars. 31 – 34.

Can Anybody Hear Me?.. *(Cont'd)*

Do you have a question about a tax or business law matter, or a topic that you would like to see discussed here? Contact Jonah Mayles at (416) 775 8820 or jmayles@torkinmanes.com.

Torkin Manes' Tax Group has significant experience in tax planning and dispute resolution matters.Jonah Mayles' practice focuses on corporate and personal income tax and commodity tax planning, and dealing with the Canada Revenue Agency and provincial tax authorities on tax dispute matters. Jonah works with accountants, financial advisors and non-tax lawyers on a variety of tax matters on behalf of their clients.

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On November 20, our Business Law Group and Tax Law Group will be presenting its annual morning breakfast seminar at the Estates of Sunnbrook. Our featured speaker will be Mr. J. Paul Dube, the Taxpayers' Ombudsman. Mr. J. Paul Dube will discuss the role of the Taxpayers' Ombudsman.

Please contact members of our Tax, Business, Trusts and Estates, and Banking, Finance and Insolvency Groups for more information.

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