CURRENT CASES

SPEAKERS:

Heather DiGregorio, Burnet, Duckworth & Palmer LLP, Calgary

Dan Jankovic, Blake, Cassels & Graydon LLP, Calgary

Michael H. Lubetsky, Davies Ward Phillips & Vineberg LLP, Toronto

Martha MacDonald, Torys LLP, Toronto

MODERATOR:

Julie D'Avignon, Stikeman Elliott LLP, Calgary

3792391 CANADA INC. v R, 2023 TCC 37

3792391 Canada Inc. v R, 2023 TCC 37

- NumberCo leased an apartment in Montreal
- NumberCo claimed no knowledge that the lessor was non-resident
- CRA assessed NumberCo for failure to withhold and remit Part XIII tax on six years of rent
- Tax Court: the lessor was non-resident so the assessments are correct
- Tax Court comments on the due diligence defence:
  - It's not a defence to Part XIII tax – subsection 215(6)
  - It's only potentially a defence to penalties – subsection 227(8)
- Informal procedure case

LEVETT v CANADA, 2022 FCA 117

Levett v Canada

- Facts
  - CRA conducted audits in relation to taxpayers' foreign investments and income
  - Taxpayers were given two opportunities to disclose information, but they denied having property or income outside Canada
  - CRA sent Requests for Information (RFIs) to the Swiss tax authorities pursuant to Article 25 of the Canada – Switzerland tax treaty
  - Appellants judicially challenged the legality of the RFIs on a number of grounds, including that CRA failed to pursue all available means under our domestic law & procedure

Levett v Canada

- Article 25 (Exchange of Information)
  - The competent authorities of the Contracting States shall exchange such information as is **foreseeably relevant** for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes covered by the Convention, insofar as the taxation thereunder is not contrary to the Convention

Levett v Canada

- Interpretative Protocol – Article 2 – Regarding Article 25:

(a) It is understood that an exchange of information will only be requested once the requesting Contracting State has pursued **all reasonable means** available under its internal taxation procedure to obtain the information.

(b) It is understood that the competent authority of the requesting State shall provide the following information to the competent authority of the requested State when making a request for information under Article 25 of the Convention:

[enumerated prescribed information]

(c) It is understood that the standard of "foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. While subparagraph 2(b) contains important procedural requirements that are intended to ensure that fishing expeditions do not occur, clauses (i) through (v) of subparagraph 2(b) nevertheless are to be interpreted in order not to frustrate effective exchange of information.

Levett v Canada

- Decision

(1) Did the CRA exhaust all domestic avenues to obtain the information sought?

- Paragraph 2(b) of the Interpretative Protocol did not require the CRA to pursue all available domestic means to obtain the information; only reasonable means
- The CRA pursued all reasonable domestic means before resorting to an RFI
- Relying on *Crown Forest*, the FCA emphasized that a tax treaty must be given a liberal interpretation with a view to implementing the true intentions of the parties
  - The CRA sent questionnaires and proceeded to interview the appellants
  - On both occasions, they denied having foreign interests or any links with foreign companies or entities
  - The CRA had no authority to contact a corporation located in Switzerland to inquire about the taxpayers' financial affairs, especially in light of the fact that the appellants denied any ongoing relationship with the Swiss entity.

Levett v Canada

- Decision

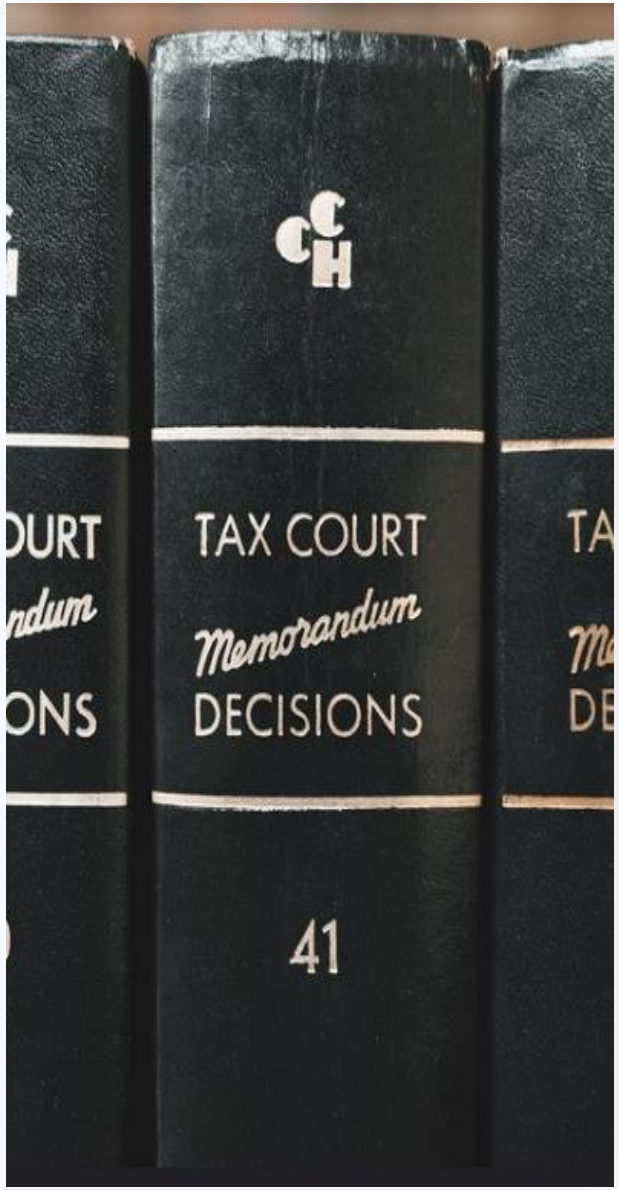
(1) Did the CRA exhaust all domestic avenues to obtain the information sought?

- Relying on *Crown Forest*, the FCA emphasized that a tax treaty must be given a liberal interpretation with a view to implementing the true intentions of the parties
  - "True intentions" of Canada and Switzerland was to "promote the exchange of information to the maximum extent possible, not to limit it."
- Based on the appellants' refusal to provide information, and given the treaty's goal of encouraging the exchange of information, it was reasonable for the CRA to proceed with the RFIs

Levett v Canada

(2) Did the CRA make false allegations on RFIs and fail to provide full and frank disclosure?

- The CRA had pursued all reasonable means available under the *ITA* at the time to obtain the information sought in the RFIs
- The Swiss Authorities knew that the actual audits contemplated by the RFIs covered only the taxation years of 2010-11 to 2013 and that the CRA intended to extend these audits to the 2014-2015 taxation years
- Although the CRA could have used more accurate language for the 2014-2015 taxation years, this lack of precision did not amount to a "false" allegation



Levett v Canada

(3) Did the CRA exceed what it was allowed to communicate to the Swiss authorities?

- "Paragraph 2(b) of the Interpretative Protocol establishes a threshold, not an upper limit"
- "On a reasonableness analysis … there is no issue with the fact that the CRA provided the Swiss Authorities with more information—essentially background information—than what was minimally required by paragraph 2(b) of the Interpretative Protocol."
- The appellants failed to establish that their rights under ss. 7 and 8 of the Charter were engaged by the issuance of the RFIs

Levett v Canada

- Takeaways

1. Gives CRA additional judicial backing for sending RFIs to tax authorities of other tax treaty countries

2. Under some treaties, the CRA does not need to pursue *all available domestic means* to obtain information; reasonable means will suffice

3. Decision consistent with growing international trend promoting the exchange of information

***BITTNER v UNITED STATES*, 598 US __ (2023)**

Bittner v United States

- Background
  - US case concerning the penalty for the failure to timely file the annual *FinCEN Form 114 – Report of Foreign Bank and Financial Accounts* ("**FBAR**")
  - Case of particular relevance to US taxpayers living or doing business abroad

Bittner v United States

- Background
  - The US *Bank Secrecy Act* requires (with some exceptions) US taxpayers to declare annually every foreign bank account in which they have a "qualifying interest" (*i.e.* a financial interest or signing authority)
  - The FBAR is the form prescribed for this purpose
  - "US taxpayers" includes United States citizens and permanent residents living abroad

Bittner v United States

- Background
  - Alexandru Bittner immigrated to the US from Romania and became a US citizen
  - Returned to Romania after fall o Communism and became a successful businessman

Bittner v United States

- Background
  - Fell behind in his reporting obligations to the US while living in Romania
  - Returned to the US in 2011 and sought to regularise his filings for a five-year period (2007-2011)
  - During the relevant years, had "qualifying interests" in up to 61 different bank accounts

Bittner v United States

- Background
  - The *Bank Secrecy Act* prescribes a flat penalty of $10K for a non-willful failure to comply with disclosure obligations
  - *Quaere*: does that penalty apply *per form* or *per account*?
  - In the case of Mr. Bittner: $50K (*i.e.*, 5 forms) versus $2.72M. (*i.e.* 272 undeclared accounts over 5 years)
  - A "reasonable cause" defence (US version of "due diligence") was rejected, largely because Mr. Bittner was a sophisticated businessman

Bittner v United States

- Background
  - US Courts of Appeal had split on the per-form vs per-account issue
  - Ninth Circuit, in a case from California, found that the penalty applied on a per-form basis (*United States v. Boyd,* 991 F. 3d 1077, 1079 (CA9 2021))
  - Mr. Bittner lived in Texas, and the Fifth Circuit found that the penalty allied on a per-account basis
  - SCOTUS granted certiorari to resolve the split

Bittner v United States

- Holding
  - SCOTUS split 5-4 in favour of the per-form method, with unusual configuration of judges
  - Majority: Gorsuch, Jackson, Roberts, Alito, Kavanaugh JJ





Bittner v United States

- The Majority's Analysis
  1. Plain wording of provisions supports per-form approach
  2. Contrast with the penalty provision for *wilful* noncompliance, which is based on the amounts in the undeclared accounts
  3. IRS publications repeatedly suggested that FBAR penalties would not exceed $10K per form
  4. Absurd outcomes caused by the per-account approach
  5. Gorsuch and Jackson add: any ambiguities in legislation imposing penalties are to be resolved against the government

Bittner v United States

- 31 US Code § 5321 — Civil Penalties

(5)FOREIGN FINANCIAL AGENCY TRANSACTION VIOLATION.—

(A) Penalty authorized.—The Secretary of the Treasury may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314.

(B) Amount of penalty.—

(i) In general.—Except as provided in subparagraph (C) [wilful violations], the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000. […]

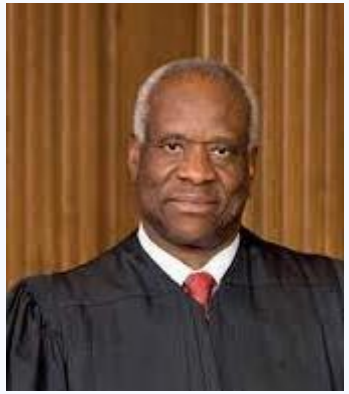
Bittner v United States

- 31 US Code § 5314 — Records and reports on foreign financial agency transactions

  (a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes: [….]

Bittner v United States

- Dissent
  - Barrett, Thomas, Sotomayor, Kagan JJ

  - Gist: The penalty is for failure to file a "report", and the FBAR is a form that includes many "reports"

Bittner v United States

- Comments & Observations
  - Decision is a major relief for US taxpayers, especially those living abroad
  - Important reminder that US taxpayers living abroad have a heavy compliance burden, with significant penalties associated with any failures
  - Taxpayers do not always have all the information necessary to file a timely FBAR, such as if an account is inherited or if they are given signing authority unknowingly

DEEGAN v CANADA, 2022 FCA 158

Deegan v Canada

- Background & Facts
  - Canada was concerned with risks that FATCA posed for the Canadian financial sector, its customers and investors, and the Canadian economy as a whole
  - Canada and US entered into an intergovernmental agreement (with Canada obtaining certain concessions)
  - In 2014, Canada enacted the *Canada-United States Enhanced Tax Information Exchange Implementation Act* ("Legislation") that assists the US in its compliance efforts relating to accounts held outside the US by persons subject to US taxation
  - Legislation requires Canadian financial institutions to report account information concerning US customers to CRA
  - CRA then discloses information to IRS

Deegan v Canada

- Background & Facts
  - The appellants were dual citizens of Canada and the US
  - They brought an action in the Federal Court claiming, among other things, that the Legislation was *ultra vires* Parliament and unconstitutional
  - The Federal Court dismissed their claim
  - The appellants only appealed the decision of the Federal Court regarding the constitutionality of the Legislation under s. 8 of the Charter
    - Whether the Federal Court erred when it concluded that the Legislation does not contemplate an unreasonable search or seizure for purposes of s. 8 of the Charter
    - Section 8 of the Charter states that "everyone has the right to be secure against unreasonable search or seizure"

Deegan v Canada

- Main issue of the Decision: Was the search or seizure unreasonable?
  - The general principle was to consider all the circumstances and assess whether the privacy interests of affected persons were outweighed by the public interest in requiring a seizure

(1) What is Canada's purpose in enacting the Legislation?

- Major purpose for the enactment was to avoid the impact of FATCA on Canadian financial institutions, their customers, and the Canadian economy as a whole

(2) Is the purpose of avoiding FATCA relevant to s. 8?

- Sections 8 and 1 of the Charter both contain a reasonableness test
- The principal purpose of the Legislation, from Canada's perspective, was to mitigate the perceived risk that FATCA presented in Canada
  - Intergovernmental agreement (and Legislation) designed to address a risk within Canada and better the lives of people in Canada

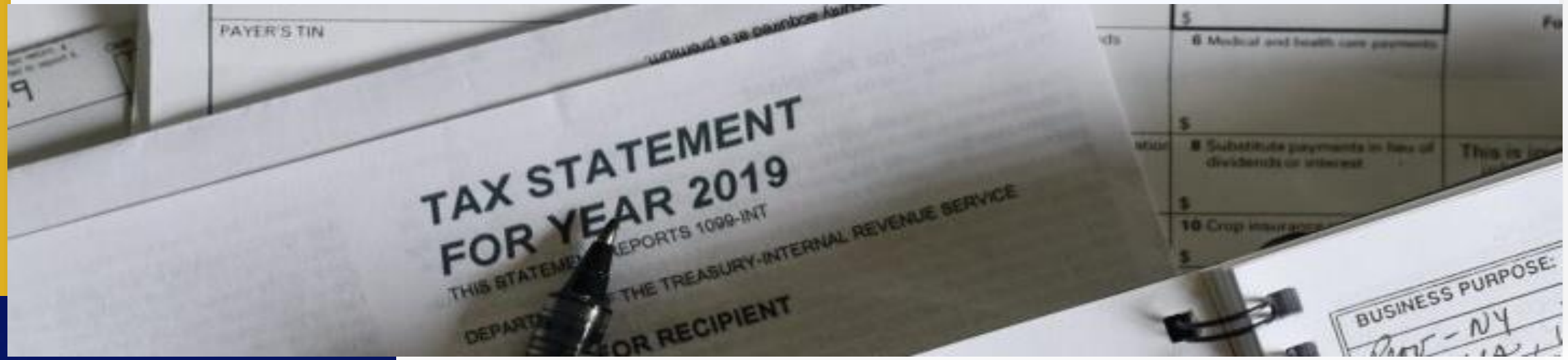
Deegan v Canada

(3) Is there a risk of criminal prosecution, and is this factor significant?

- The 'seized' information may be used for a criminal prosecution for tax evasion in the US
- However, such possibility is not a significant intrusion into the affected persons' privacy interests partly because the Legislation is essentially of an administrative nature
- Taxpayers have very little privacy interest in the materials and records that they are obliged to keep under the *ITA* and that they are obliged to produce during an audit
- There is nothing preventing auditors from passing to investigators their files containing validly obtained audit materials

Deegan v Canada

- Takeaways
  - Example of international cooperation in the administration of income tax laws
    - Such cooperation is widely accepted and strengthened in recent years
  - Appellants failed to demonstrate that the Legislation was more intrusive than was necessary to be effective, or that Canada could have achieved a more favourable outcome for affected persons



UPCOMING AT THE SUPREME COURT OF CANADA

- *DOW CHEMICAL CANADA ULC v R*
- *IRIS TECHNOLOGIES INC. v R*

Which Court has Jurisdiction?

- Tax Court of Canada
- Federal Court of Canada
- Other? *(Provincial Superior Court or Court of King's Bench)*

Which Court has Jurisdiction?

- Appeals from assessments → Tax Court
- Review of discretionary decisions → Federal Court
- Discretionary component of the assessment
- Actions of Canada Revenue Agency during audit
- File in both courts?

Dow Chemical Canada ULC v R

- Transfer Pricing Adjustment
  - S. 247(10)
    - Downward transfer pricing adjustment
    - Circumstances must be appropriate “in the opinion of the Minister”
  - S. 247(11)
    - Adopts the assessment, objection and appeal provisions "with such modifications as the circumstances require"

Dow Chemical Canada ULC v R

- Minister refused downward adjustment
  - *Canada – Swiss Tax Treaty* limitation period passed

- Which court has jurisdiction?
  - Tax Court has jurisdiction over **upward** adjustments
  - Due to uncertainty on **downward** – Dow filed in both courts

Dow Chemical Canada ULC v R

- Application for leave to SCC
  - "jurisdictional lines between the Tax Court and the Federal Court …are arbitrary, unclear and confusing"
  - "a long-standing and persistent source of conflict in Canadian tax law"
  - "prohibitively expensive for most Canadians"

Iris Technologies Inc. v R

- *GST refunds*
  - *Withheld during audit*
  - *Section 229(1) Excise Tax Act:*

"Minister shall pay the refund with all due dispatch"

Iris Technologies Inc. v R

- CRA withheld GST refunds until audit complete
- $60M refunds
- Suspected "carousel scheme"

Iris Technologies Inc. v R

- Multiple applications for relief – Federal Court
  - Order to reassess
  - Order to pay refunds
  - Order to produce documents

Iris Technologies Inc. v R

- GST assessments issued
  - Arguments:
    - Relief applications are moot
    - Can retain refunds to cover taxes owing
    - Federal Court has no jurisdiction – collateral attack on the assessments
  - Iris applies to Federal Court to review the decision to issue the assessments

Iris Technologies Inc. v R

- CRA withholds Canada emergency wage subsidy (CEWS)
  - Reason: GST audit
  - CEWS contains 2 discretionary components:
    1. whether an amount is payable
    2. whether to pay some of all of it

Iris Technologies Inc. v R

- Minister → appeals the Federal Court decisions
- **Federal Court of appeal:**
  - Essential character is correctness of the assessment → Tax Court
  - No utility in "parsing" the separate motivation behind a decision to assess from the correctness of the assessment
  - Assessing under the legislation cannot be an improper motive reviewable by the Federal Court

Iris Technologies Inc. v R

- Application for leave to SCC
  - "…if no Court exercises supervisory jurisdiction over the conduct of the Minister of National Revenue, who hears the aggrieved taxpayer?"
  - " …the government is likely not immune in the case of absolutely heinous, abusive audits. What of actions less than heinous? Does no Court have the power to stop the damage?"
  - "…the Minister's administration of the fiscal legislation remains unchecked and unlimited"

What can the Supreme Court of Canada do?

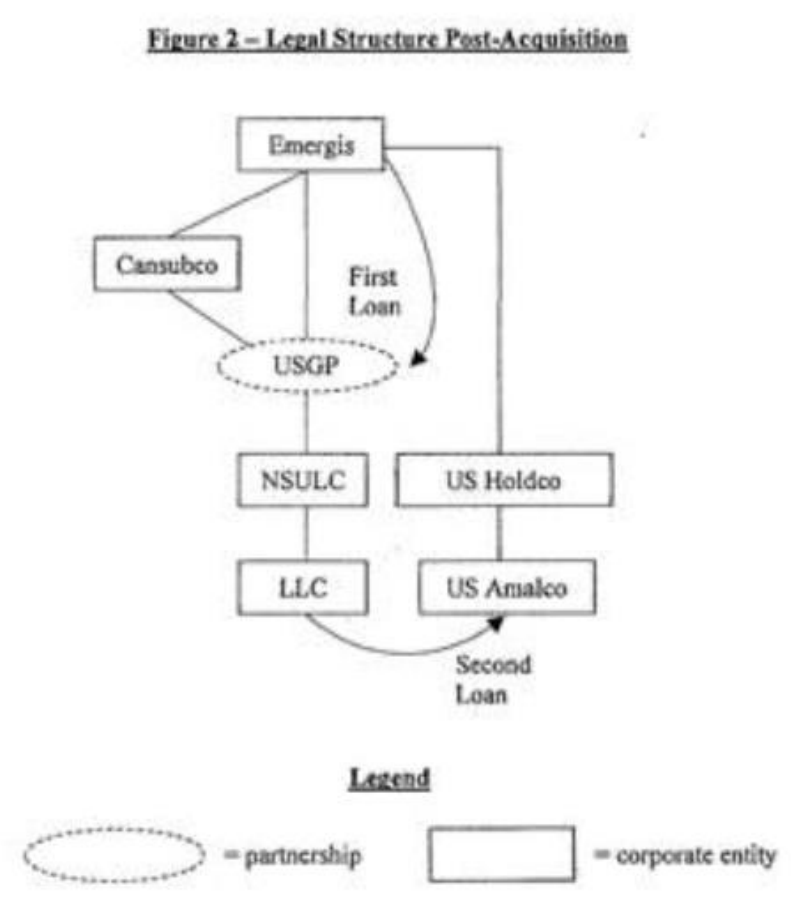
- *Separate jurisdictions are created by statute*
- *Common law has entrenched the restricted jurisdiction of the Tax Court*
- *Parliament increasingly adds Ministerial discretion to the tax legislation*
- *Can a judicial decision give clarity on Ministerial oversight?*
- *Is the Minister using the uncertainty of jurisdiction against taxpayers?*

Should we even have discretion in assessing provisions?

- *Taxpayers should have the right to know the results of the tax legislation*
- *Tax legislation is confiscatory and should be principled and predictable*
- *Transfer pricing is well-known to be on CRA's top ten list of actively scrutinized issues*

EMERGIS INC. v CANADA, 2023 FCA 78

Emergis Inc. v Canada, 2023 FCA 78



- Familiar cross-border tower financing structure
- USGP paid interest to Emergis minus US withholding tax
- Emergis claimed subsection 20(12) deduction for the US withholding tax
- FCA: deduction allowed
  - The tests in subsection 20(12) are satisfied
    - *FLSmidth Ltd. v The Queen*, 2013 FCA 160 distinguishable
  - Emergis could not claim a foreign tax credit under section 126 because there is no foreign source
  - One purpose of subsection 20(12) is to allow a deduction where no foreign source exists

BOLIDEN MINERAL AB v FQM KEVITSA SWEDEN HOLDINGS AB, 2023 ONCA 105, CONFIRMING 2021 ONSC 6844 (COMMERCIAL LIST)

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Background
  - Case concerns the Kevitsa mine in the far north of Finland
  - Mine owned/operated by a Finnish corporation ("**Kevitsa Mining**")
  - Corporation was originally owned by First Quantum Minerals Ltd. ("**FQM**")
  - Mine started up in 2012

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Background
  - On June 1, 2016, FQM sold Kevitsa Mining to Boliden Mineral AB of Sweden ("**Boliden**") for US$712M in a share purchase deal
  - Share Purchase Agreement ("**SPA**") governed by Ontario law and subject to Ontario courts

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Kevitsa Mining's Tax Losses
  - Kevitsa Mining had accumulated substantial losses (€81M+) prior to June 2016
  - As in Canada, tax losses are generally extinguished upon a change of control
  - In Finland, a taxpayer can apply for a permit to use pre-change-of-control tax losses, subject to various conditions (such as continuing to operate the business)

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Kevitsa Mining's Tax Losses
  - Losses written down immediately prior to closing
  - Post-closing, Kevitsa Mining applied for and obtained a permit from the Finnish Tax Administration ("**FTA**") to use its pre-change-of-control tax losses
  - Losses then restored to the balance sheets

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- The Tax Audit
  - About 10 months post-closing, FTA commenced audit of Kevitsa Mining
  - Audit focused largely on a reorganisation that had taken place in 2010 (*i.e.*, six years before the closing and two years before the mine started production) (the "**Reorganisation**")
  - Details of the Reorganisation: https://www.taxjustice.net/wp-content/uploads/2013/04/Fin%C3%A9rYl%C3%B6nen-Metal-Ores-in-Tax-Driven-Wealth-Chains-London-workshop-2016.pdf

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- The Tax Audit
  - FTA found that the Reorganisation had been performed for tax avoidance purposes and thus triggered the Finnish counterpart to Canada's general anti-avoidance rule
  - Nearly €113 million of expenses (mostly interest and foreign exchange expenses) disallowed for 2012-2016 taxation years

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Reassessments
  - Disallowance of expenses between 2012 and 2016 wiped out the pre-2016 losses available for carryforward, and also resulted in assessments of additional taxes in:
    - 2015 (thus year before the sale)
    - 2016 (the year of the sale)
    - 2017 and 2018 (through elimination of loss carryforwards)
  - Significant interest and penalties were also assessed

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Reassessments
  - All in all, Kevitsa Mining was reassessed over €30M
  - €8.6 million paid immediately; remainder stayed pending resolution of dispute between Finnish courts
  - Not clear why certain amounts paid and others not

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Tax Litigation in Finland
  - FQM took carriage of the dispute on behalf of Kevitsa Mining
  - Appeal to the Finnish Tax Adjustment Board rejected
  - Further appeal to Northern Finnish Administrative Court rejected
  - Leave to appeal denied by Supreme Administrative Court
  - Reconsideration request currently pending

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Indemnification
  - Boliden and Kevitsa Mining applied to the Commercial List of the Ontario SCJ for a declaration of their rights under the SPA, claiming that FQM had to indemnity the additional taxes both:
    - Pursuant to a tax indemnification clause (SPA, clause 8.2(c)(i))
    - As losses attributable to a breach of a tax warranty (SPA, clause 3.1.22(d))

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Key Grounds Raised by FQM to Resist Payment
  - Disallowed losses did not fall within the scope of the tax warranty or the tax indemnification clause
  - The reassessments were not final, since they were still being challenged before the Finnish courts
  - Pre-closing writedown of the tax losses established that they had no value
  - Alternatively, FQM was only liable for amounts of tax reassessed incurred during the pre-closing period (*i.e.* 2015 and the first 5 months of 2016)

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Case Proceeded Though Reassessments not Final
  - FQM originally sought to stay the claim pending the conclusion of the Finnish litigation against the reassessments. Rejected in an interlocutory decision by Koehnen J:

The injustice here is substantial. Boliden has already paid €8.6 million to Finnish tax authorities as a result of the assessment. It says it is entitled to indemnity for that amount and wants that issue determined. FQM's only apparent answer is to wait three or four more years until Finnish tax appeals are exhausted at which point Boliden can lift the stay on the Ontario application, schedule a hearing and potentially wait for several more years until FQM exhausts all possible appeals in Ontario. <u>The commercial idea behind an indemnity is based on a substantially more real-time approach than that</u>.

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Commercial List Judgement (November 2021)
  - Justice Penny of the Commercial List found for the buyer on all grounds, holding, among things, that both the tax indemnity and tax warranty clauses applied, even to the taxes in post-closing years resulting from disallowance of pre-closing losses
  - Ordered FQM to pay immediately the €8.6 million already remitted to the FTA, to be held in trust, and remained seized of the case pending the outcome of the Finnish proceedings

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Commercial List Judgement (November 2021)
  - The Commercial List decision—especially with respect to the tax indemnification clause—raised quite a few eyebrows among practitioners and prompted review and redrafting of boilerplate tax indemnity clauses
  - Detailed case comment on the Commercial List decision in *Canadian Tax Journal* (2022) 70:2, page 422

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Appeal
  - FQM appealed to the Ontario Court of Appeal, focusing primarily on the question of the post-closing taxes
  - February 2023: OCA issued a unanimous decision confirming the Commercial List judgement, although on a relatively narrow basis

    [21] As we find no reversible error in the application judge's conclusion under the first route (breach of representation and warranty/general indemnification), it is unnecessary to consider the arguments advanced relating to the second route (the tax-specific indemnity).

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Tax Warranty (SPA, clause 3.1.22(d))

  (d) There are no grounds for the reassessment of the Taxes of the Corporation or the Subsidiary.

- Losses for Breach of Warranty

  "Loss" or "Losses": any loss, Liability, demand, claim, cost, damage, award, suit, action, penalty, Tax, fine or expense (including interest, penalties and reasonable lawyers' fees and expenses) that are sustained, suffered or imposed, however, (i) a consequential or indirect loss shall only be considered a Loss to the extent it is a reasonably foreseeable consequence of the event or circumstance constituting the ground for the applicable indemnification obligation […].

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Appeal
  - FQM made two key arguments on appeal, namely:
    - the "grounds for the reassessment" of Kevitsa Mining only arose subsequently as a result of a "post-closing reinterpretation of tax legislation", which was the position both parties endorsed in the Finnish tax proceedings, such that the tax warranty was accurate at the time it was made;
    - the write-down at closing of the pre-closing tax losses made it "unforeseeable" that a post-closing reassessment of pre-closing taxation years would result in higher taxes in post-closing years
  - Both of these arguments had been raised before the Commercial List and the OCA found that the Commercial List made no error rejecting them

Boliden Mineral AB v FQM Kevitsa Sweden Holdings AB

- Takeaways
  - Latent tax liabilities can lie hidden and dormant for many years, and if raised, can take many more years to resolve, during which arrears interest (often at punitive rates and non-deductible) can accrue on unpaid amounts
  - Tax adjustments in one year can produce cascade effects in other years, some of which may be controllable, others may not
  - When negotiating tax indemnification clauses, it may be useful to consider how the parties intend to deal with amounts in dispute and/or complex cascade effects
  - If an SPA has both a tax warranty and a tax indemnification clause, consider how they may interact. Consider specifying expressly if one limits, or does not limit, the other

GOLDHAR v R, 2023 TCC 30

Goldhar v R, 2023 TCC 30

- Background:
  - Data leaks: Panama Papers (2016), Paradise Papers (2017), Pandora Papers (2021)
  - International Consortium of Investigative Journalists' database
  - CRA's Offshore Compliance Specialized Team
- First appeal of related assessments
  - Offshore entities used in respect of successful toy business
  - 2008-2011 taxation years reassessed beyond the normal reassessment period
- Taxpayer wins:
  - Tax assessments statute-barred: Crown failed to prove alleged misrepresentations, or attribution to neglect, carelessness or wilful default
  - Gross negligence & T1134 penalties vacated: successful due diligence defence