Federal Court of Appeal | Cour d'appel fédérale

Date: 20160916

Dockets: A-340-15
A-399-15

Citation: 2016 FCA 233

CORAM: **STRATAS J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

3488063 CANADA INC., 2534-2825 QUEBEC INC., 3488071 CANADA INC., 4077211 CANADA INC., 3421848 CANADA INC. and 3488055 CANADA INC.

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on April 12, 2016.

Judgment delivered at Ottawa, Ontario, on September 16, 2016.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: STRATAS J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The Appellants have filed two appeals:

- A-340-15 is an appeal from the Order of the Tax Court of Canada dated July 22, 2015 denying the Appellants' motion for an order allowing their appeals under Rule 91(c) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a

(Rules) or alternatively, an order under Rule 58 to determine certain questions; and

– A-399-15 is an appeal from the Order of the Tax Court of Canada dated September 1, 2015 pursuant to which the Respondent made certain amendments to the Replies in these matters.

[2] There are six Appellants and eight different docket numbers for the various appeals that were filed with the Tax Court of Canada. Since there are six Appellants and six taxation years (2005 – 2010), there could be as many as 36 different reassessments related to this proceeding.

[3] Although the appeals before this Court have not been consolidated, they were heard together. Since the appeals relate to the same taxpayers and the same taxation years, these reasons will apply to both appeals. The original of these reasons will be filed in A-340-15 and a copy shall be filed in A-399-15.

[4] For the reasons that follow, I would dismiss the appeal (A-340-15) in relation to *Rules* 58 and 91 and allow the appeal (A-399-15) to limit the amendments to the replies to only the amendments that are not contested by the Appellants.

I. Factual Background

[5] These appeals not only involve a complex factual situation but also a complex procedural background. As a result, the factual background which has resulted in the reassessments under appeal will be described first and then the procedural background will be set out.

[6] All of the Appellants are Canadian resident corporations controlled by Mr. Irving Ludmer, a resident of Canada.

[7] In 1998, the Appellants acquired shares in St. Lawrence Trading Inc. (SLT), a British Virgin Islands corporation, as a result of a reorganization of corporations controlled by Mr. Ludmer. SLT owned a fund of hedge funds managed by Global Asset Management Limited (GAM).

[8] In 2000, the Minister of Finance proposed amendments to the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the *Act*) to replace section 94.1 of the *Act* with the foreign investment equity rules. In 2001 two reorganizations of SLT were completed – one for the shareholders who were not Canadian and the other for those shareholders who were Canadian. For the shareholders who were not Canadian, GAM Global Diversity Inc. acquired their pro-rata share of the assets of SLT and these shareholders acquired shares in GAM Global Diversity Inc.

[9] For the Canadian shareholders, one-half of the remaining assets (which consisted of a fund of hedge funds and which are referred to as the "Reference Assets") were sold to Scotiabank (Ireland) Limited (Scotia Ireland), an Irish subsidiary of The Bank of Nova Scotia, and the other one-half of the Reference Assets were sold to TD Global Finance, an Irish subsidiary of the Toronto-Dominion Bank. Bank of Nova Scotia International Limited, a Bahamian subsidiary of The Bank of Nova Scotia, and Toronto Dominion International Limited, a Barbadian subsidiary of the Toronto Dominion Bank, each issued notes payable to SLT. The amounts payable under the notes are equal to the fair market value of the Reference Assets,

determined as of the date of payment. The Bank of Nova Scotia and the Toronto-Dominion Bank have each guaranteed the payment of the particular notes issued by its own subsidiary.

[10] GAM continued to manage the Reference Assets. The Appellants have the right to put their shares of SLT to Scotia Ireland for an amount determined by reference to the fair market value of the Reference Assets with an adjustment for costs and liabilities. There is no similar right to put the shares of SLT to the Irish subsidiary of the Toronto-Dominion Bank.

II. Procedural History

[11] Only the notice of appeal filed with the Tax Court of Canada for 3488063 Canada Inc. was included in the Appeal Book. However, based on this notice of appeal and statements made by counsel for the Appellants during the hearing of these appeals, it would appear that the procedural history is as outlined below.

[12] The Appellants were reassessed for their 2005 taxation year in 2009, for their 2006 taxation year in 2010 and for their 2007, 2008, 2009, and 2010 taxation years in 2012 for amounts payable under section 94.1 of the *Act*. Notices of objection were filed in relation to each reassessment. Notices of Appeal were filed under paragraph 169(1)(*b*) of the *Act* with the Tax Court of Canada in 2012 by 3488063 Canada Inc. and 2534-2825 Québec Inc. (the Original Appellants) in relation to the reassessments issued for their 2005 taxation years.

[13] An Order was subsequently issued by the Tax Court of Canada that *Rule* 82 would apply to the appeals that were then before the Tax Court of Canada and therefore each party was

obligated to provide “a list of all the documents that are or have been in that party’s possession, control or power relevant to any matter in question between or among them in the appeal”.

[14] Lists of documents were exchanged and discovery examinations were held. The Appellants also requested documents under the *Access to Information Act*, R.S.C. 1985, c. A-1. As a result of the documents received under the *Access to Information Act*, the Appellants determined that the list of documents that the Crown had provided under *Rule* 82 was incomplete. In particular, it appears that the Canada Revenue Agency was not diligent in preserving the e-mail accounts of its employees who had retired and who were, before their retirement, involved with the reassessments of the Appellants. As a result, the Crown was not able to provide the Appellants with copies of all of the e-mails that those employees may have sent in relation to the Appellants.

[15] There was a case management judge (the Judge) assigned to this matter. Although the date that the Judge started as case management Judge is not clear, she was the case management Judge for the Motions and Orders described below.

[16] By a Notice of Motion dated May 30, 2014, the Crown brought a Motion for “an order to suspend the deadlines provided by the timetable order dated December 11, 2013”. The reason for this request was that the Crown had instructions to consent to judgment allowing the appeals that had been filed.

[17] Following this Notice of Motion, the Original Appellants prepared notices of appeal for the reassessments for their 2006 to 2010 taxation years (inclusive) and the other Appellants prepared notices of appeal for the reassessments for their 2005 to 2010 taxation years (inclusive). These notices of appeal were dated and filed with the Tax Court of Canada on June 19, 2014.

[18] By Order dated October 6, 2014, the proceedings in all appeals were consolidated and "immediately after the consolidation of the proceedings, all appeals except with respect to the 2010 taxation years" were allowed. This included the two appeals filed in 2012 in relation to the reassessments issued for the 2005 taxation years for the Original Appellants and the appeals filed in June 2014 by all of the Appellants (other than the appeals related to the 2010 taxation years). The parties confirm that only three of the six Appellants have a tax liability for 2010 that is still before the Tax Court of Canada – 3488063 Canada Inc., 3488071 Canada Inc., and 3488055 Canada Inc. These three Appellants are referred to herein as the "Remaining Appellants".

[19] This Order also provided that:

> 3. subject to further Order of the Court, Rule 81 (Partial Disclosure) shall apply to these appeals;
>
> 4. the Appellants are granted leave to file an amendment to the Refusals Motion to request an Order for the application of Rule 82 (Full Disclosure), which amendment shall be filed no later than Monday, October 6, 2014;

[20] Although it would appear that the Remaining Appellants made the permitted amendment to the Refusals Motion, that Motion has not been heard. Therefore, the only Order potentially addressing the issue of whether *Rule* 81 or *Rule* 82 would apply to the consolidated appeals is the Consolidation Order dated October 6, 2014.

[21] Each party then brought a motion before the Judge. The Remaining Appellants brought a motion dated February 6, 2015 for an Order under *Rule* 91(c) allowing the appeals for the Remaining Appellants in relation to the reassessments for their 2010 taxation year or, in the alternative, directing that the following questions be determined under *Rule* 58:

> (a) whether section 94.1 of the Income Tax Act (Canada) (the "Act") applies where the Appellants have no direct or indirect proprietary or security interest whatsoever in the Reference Assets [as defined in the pleadings], which are owned by controlled foreign affiliates of Canadian-resident taxpayers that are unrelated to each other and deal at arm's length with the Appellants; and, if so
>
> (b) whether the taxes on the income, profits or gains, if any, from the Reference Assets in the 2010, 2011 and 2012 taxation years were significantly less than the tax that would have been applicable under Part I of the Act if the income, profits or gains, if any, had been earned directly by the Appellants, within the meaning of the post-amble to section 94.1 of the Act.
>
> [footnote references have been omitted]

[22] The Judge dismissed the Remaining Appellants' motion for an order allowing the remaining appeals and for an order directing that the questions as set out above be determined under *Rule* 58.

[23] The Crown brought a motion dated August 3, 2015 for an Order allowing the Crown to amend its replies. The proposed amendments fall into two categories – those that are not contested and those that are contested. Some of the amendments arose as a result the reassessments issued for earlier taxation years and other changes that are not contested. The Remaining Appellants do not challenge the amendments that fall within this category. Since, following the close of pleadings, any party can amend its pleading with the consent of the other parties, leave of the Tax Court of Canada would not be required for these amendments (*Rule* 54).

[24] The amendments that are contested are those related to the payments of fees to Sandringham Limited and The Thames Trust. These fees were paid from the Reference Assets. In the replies, the Crown alleged that the controlling shareholder of the Appellants and persons who were related to such controlling shareholder had an indirect 50% beneficial interest in Sandringham Limited and the controlling shareholder of the Appellants had an indirect 100% beneficial interest in The Thames Trust. For ease of reference these amendments are referred to herein as the "Sandringham Amendments".

[25] The Order related to this motion to amend the replies was issued on September 1, 2015. This Order provided that:

> UPON motion by the respondent for an Order granting leave to amend the replies in respect of the 2010 taxation year;
>
> IT IS ORDERED THAT:
>
> 1. the motion is dismissed with leave to revise the amended replies so that evidence is not pleaded as material facts;
> 2. the amended replies shall be filed and served no later than September 30, 2015;
> 3. if the appellants wish to oppose the amended replies, on or before October 15, 2015 they may request a further case management conference call;
> 4. either party may request reasons for this Order by filing a written request on or before September 8, 2015; and
> 5. costs in respect of this motion are awarded to the appellants.
>
> [emphasis added]

[26] As a result of a request for reasons, the Judge issued reasons dated September 8, 2015. In these reasons, the Judge concluded with the following:

> [24] At paragraph 31 of the appellants' submissions, they suggest that the respondent should not be allowed to raise transactions involving Sandringham because there is no link between these transactions and the reassessments at issue.
>
> [25] I disagree with this submission. The proposed amendments essentially allege that Sandringham is part of the complex arrangements that are at issue in these appeals.
>
> [26] I have concluded that the respondent should be allowed to make this argument, subject to pleading material facts and not evidence.
>
> [27] I will also permit the appellants to file amended notices of appeal, as requested, and will issue a separate order to this effect.

[27] Although the Reasons indicate that the Crown will be allowed to amend its replies to include all of the proposed amendments (provided that only material facts are pled), the Order, that had been issued previously, indicated that the motion to amend the replies was "dismissed, with leave to revise the amended replies so that evidence is not pleaded as material facts". The Appellants indicate that following this Order, the Sandringham Amendments as proposed by the Crown in its draft amended replies submitted with the motion for leave to amend the replies, were included, unchanged, in the amended reply filed September 30, 2015 except that the paragraph numbers were changed. The Appellants also indicate that these amendments also reappeared, unchanged, in the reply filed in December 2015 in response to the fresh as amended notice of appeal. Neither the amended reply filed September 30, 2015 nor the reply filed in December 2015 were included as part of the record in this appeal.

[28] It would therefore appear that no revisions were made to the Sandringham Amendments following the Order dated September 1, 2015. Neither party questioned the wording of the Order indicating that "the motion is dismissed with leave to revise the amended replies so that evidence is not pleaded as material facts" and whether, based on this wording of the Order, the

Sandringham Amendments should have been included in the amended replies or whether the Crown could only revise the existing replies to eliminate any pleadings of evidence. There is no indication that any party brought a motion to clarify the wording of the Order. It is trite law that an appeal is from the order, not the reasons (*Genpharm Inc. v. The Minister of Health and Procter & Gamble Pharmaceuticals Canada, Inc. and The Procter & Gamble Company*, 2002 FCA 290, [2003] 1 F.C. 402, at paragraph 7). Since the only matter raised by the Crown in its motion was the request to amend its replies and since the Order provided that the Crown's motion was dismissed, arguably, this is the result that the Appellants were seeking and no appeal would lie with the Appellants from this Order.

[29] In my view, however, nothing turns on this point as I have concluded that the part of the Sandringham Amendments that is contested should not have been included in the amended replies. Therefore, the Crown's motion to amend the replies should have been dismissed, in relation to the contested Sandringham Amendments.

III. Issues

[30] The issues in these appeals are whether:

(a) the Judge erred in dismissing the Appellants' motion for an Order under *Rule* 91 allowing the remaining appeals;

(b) the Judge erred in dismissing the Appellants' motion for an Order under *Rule* 58 that the questions as posed by the Appellants be determined before the hearing; and

(c) the Crown should be allowed to include the Sandringham Amendments in the amended replies.

IV. *Rules* 58 and 91

[31] *Rules* 58 and 91 are as follows:

58. (1) On application by a party, the Court may grant an order that a question of law, fact or mixed law and fact raised in a pleading or a question as to the admissibility of any evidence be determined before the hearing.	**58** (1) Sur requête d'une partie, la Cour peut rendre une ordonnance afin que soit tranchée avant l'audience une question de fait, une question de droit ou une question de droit et de fait soulevée dans un acte de procédure, ou une question sur l'admissibilité de tout élément de preuve.
(2) On the application, the Court may grant an order if it appears that the determination of the question before the hearing may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs.	(2) Lorsqu'une telle requête est présentée, la Cour peut rendre une ordonnance s'il appert que de trancher la question avant l'audience pourrait régler l'instance en totalité ou en partie, abréger substantiellement celle-ci ou résulter en une économie substantielle de frais.
(3) An order that is granted under subsection (1) shall	(3) L'ordonnance rendue en application du paragraphe (1) contient les renseignements suivants :
(*a*) state the question to be determined before the hearing;	*a*) la question à trancher avant l'audience;
(*b*) give directions relating to the determination of the question, including directions as to the evidence to be given — orally or otherwise — and as to the service and filing of documents;	*b*) des directives relatives à la manière de trancher la question, y compris des directives sur la preuve à consigner, soit oralement ou par tout autre moyen, et sur la méthode de signification ou de dépôt des documents;
(*c*) fix time limits for the service and filing of a factum consisting of a concise statement of facts and law;	*c*) le délai pour la signification et le dépôt d'un mémoire comprenant un exposé concis des faits et du droit;
(*d*) fix the time and place for the hearing of the question; and	*d*) la date, l'heure et le lieu pour l'audience se rapportant à la question à trancher;

(*e*) give any other direction that the Court considers appropriate.

...

91 Where a person or party who is required to make discovery of documents under sections 78 to 91 fails or refuses without reasonable excuse to make a list or affidavit of documents or to disclose a document in a list or affidavit of documents or to produce a document for inspection and copying, or to comply with a judgment of the Court in relation to the production or inspection of documents, the Court may,

(*a*) direct or permit the person or party to make a list or affidavit of documents, or a further list or affidavit of documents,

(*b*) direct the person or party to produce a document for inspection and copying,

(*c*) except where the failure or refusal is by a person who is not a party, dismiss the appeal or allow the appeal as the case may be,

(*d*) direct any party or any other person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the discovery necessitated by the failure to disclose or produce, and

e) toute autre directive que la Cour estime appropriée.

…

91 Si une personne ou une partie qui est tenue de communiquer des documents sous le régime des articles 78 à 91 omet ou refuse sans excuse raisonnable de produire une liste ou une déclaration sous serment de documents, de divulguer un document mentionné dans la liste ou une déclaration sous serment de documents ou de produire un document pour fins d'examen et de copie, ou de se conformer à un jugement de la Cour portant sur la production ou l'examen de documents, la Cour peut,

a) soit ordonner ou permettre à la personne ou à la partie de produire une liste ou une déclaration sous serment de documents ou une nouvelle liste ou une nouvelle déclaration sous serment de documents;

b) soit ordonner à la personne ou à la partie de produire un document pour fins d'examen et de copie;

c) soit sauf en cas d'omission ou de refus de la part d'une personne qui n'est pas une partie, rejeter ou accueillir l'appel, selon le cas;

d) soit ordonner à toute partie ou à toute autre personne de payer personnellement et immédiatement les frais de la requête, les débours et les coûts de toute prolongation de la communication découlant de l'omission de divulger ou de produire;

(*e*) give such other direction as is just.	*e*) soit donner toute autre directive appropriée.

V. Standard of Review

[32] *Rule* 58 provides that the Court *may* grant the order to determine a question before a hearing and *Rule* 91 provides that, if any of the conditions as set out in that *Rule* are satisfied, the Judge *may* grant certain remedies, one of which is to allow the appeal. Any decision made under either of these *Rules* is therefore a discretionary decision of the Judge.

[33] Similarly the decision with respect to the amendments to pleadings has been described as a discretionary decision (*Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459).

[34] At the time that the hearing of this appeal was held, there was some debate with respect to the exact wording of the standard of review in relation to appeals from discretionary decisions. It was clear, however, that the Judge was to be shown deference in relation to her discretionary decisions and this Court should not lightly interfere with the exercise of discretion by the Judge. However, if the Judge made an error in law or an obvious serious error, then this Court could intervene (*Turmel v. Canada*, 2016 FCA 9, 481 N.R. 139, at paragraph 12). Since the hearing of this appeal, the decision of the five member panel of this Court in *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2016] F.C.J. No. 943 was rendered which held, in paragraph 79, that the standards of review as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*) are applicable to appeals of discretionary decisions of Judges (palpable and overriding error for questions of fact and correctness for questions of law).

[35] In my view, the result in this appeal would be the same whether the standard of review as set out in *Turmel* or *Housen* is applied.

VI. Analysis

[36] The Appellants, at the hearing of these appeals, focused almost entirely on their arguments that the Judge should have allowed the remaining appeals under *Rule* 91. As a result, I will first address these arguments and then deal with the other two issues.

A. *Rule 91*

[37] As noted by the Judge in paragraph 27 of her reasons, the failures of the Crown identified by the Appellants can be generally described as follows:

> (a) the respondent failed to exercise the required diligence in preparing lists of documents,
>
> (b) the respondent refused to produce supplementary lists of documents after it was clear that the lists were incomplete, and
>
> (c) the respondent deleted and destroyed documents, even after the appeals were initiated, and the Crown did not disclose this fact to the appellants.

[38] During the course of the hearing of this appeal, the Crown acknowledged that email accounts of certain employees of the Canada Revenue Agency who were involved with the reassessments or the objections to these reassessments were deleted after these employees retired. The Crown acknowledged that there was no specific policy in place to ensure that email accounts of retired employees are preserved when there is ongoing litigation or potential litigation, other than each employee is directed to determine what emails should be archived and not destroyed.

[39] It would seem to me that any party to litigation or potential litigation should have an adequate policy in place to ensure that potentially relevant documents are not destroyed. In particular, once a notice of objection has been served on the Minister, the Canada Revenue Agency should ensure that the email accounts of those involved are preserved and a policy is in place to ensure that such emails will be available for disclosure if they are determined to be documents that are to be disclosed in relation to any subsequent litigation before the Tax Court of Canada.

[40] However, in this appeal, in my view, it is not necessary to review the conduct of the Canada Revenue Agency but rather the issue can be resolved by examining the procedural history and the provisions of the *Act* and the *Rules* that deal with assessments and appeals.

[41] When the lists of documents were being exchanged and discovery examinations were being held, the only appeals that were before the Tax Court of Canada were the appeals of the Original Appellants in relation to the reassessments issued for their 2005 taxation years. An order had been issued by the Tax Court of Canada that *Rule* 82 would be applicable to these appeals. Under this *Rule* each party is obligated to "file and serve on each other party a list of all the documents that are or have been in that party's possession, control or power relevant to any matter in question between or among them in the appeal".

[42] As noted above, the Crown agreed that the appeals for 2005 should be allowed. Following the filing of the motion by the Crown to suspend the timelines for the appeals that were then before the Tax Court of Canada (because the Crown had received instructions to allow

these appeals), the Appellants filed additional appeals in relation to the reassessments issued not only for the two companies who had filed appeals in relation to the reassessments issued for 2005 but also for the other Appellants. These appeals were for reassessments for a number of years and included the appeals in relation to the reassessments for 2010 by the Remaining Appellants. As noted above, the order allowing the settled appeals and consolidating the remaining appeals provided that *Rule* 81 would apply to the consolidated appeals.

[43] *Rule* 81 differs from *Rule* 82. Under *Rule* 81 a party is only obligated to "file and serve on every other party a list of the documents of which the party has knowledge at that time that might be used in evidence, (a) to establish or to assist in establishing any allegation of fact in any pleading filed by that party, or (b) to rebut or to assist in rebutting any allegation of fact in any pleading filed by any other party". Therefore, under *Rule* 81, a party is only obligated to provide a list of those documents that such party would be proposing to use either to establish its case or to attack the case of the other side. There is no obligation under *Rule* 81 to provide a list of all relevant documents that may have been in a party's possession or control.

[44] The Appellants argue that the effect of the consolidation is that *Rule* 82 is still applicable, and, in any event, the failures identified above occurred at a time when *Rule* 82 did apply to the appeals that were then before the Tax Court of Canada.

[45] In my view, the starting point for this analysis should be the assessment or reassessment of the taxpayer. Without an assessment or reassessment there is nothing that can be appealed to the Tax Court of Canada.

[46] Under section 152 of the *Act*, the Minister is to assess the tax payable by a particular taxpayer for a particular taxation year. Therefore, each taxation year of the taxpayer is assessed separately. Under section 165 of the *Act* "a taxpayer who objects to an assessment … may serve on the Minister a notice of objection…". The notice of objection relates to a particular assessment or reassessment. Under section 169 of the *Act*, "where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied…". Therefore, an appeal to the Tax Court of Canada is an appeal in relation to a particular assessment.

[47] Section 17.2 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, provides that a proceeding under the general procedure is to be "instituted by filing an originating document in the form and manner set out in the rules of Court…". *Rule* 25 provides that "a party may join in a notice of appeal all assessments under appeal". Therefore a notice of appeal may refer to more than one assessment (or reassessment).

[48] When a matter is concluded, the Tax Court of Canada, under section 171 of the *Act*, "may dispose of an appeal by (a) dismissing it; or (b) allowing it and (i) vacating the assessment, (ii) varying the assessment, or (iii) referring the assessment back to the Minister for reconsideration and reassessment". Since the options available to the Tax Court, if the appeal is allowed, relate to the particular assessment (or reassessment) that was issued under the *Act*, the assessment must remain as a separate assessment throughout the Tax Court process so that the remedy can be applied to the appropriate assessment when the matter is concluded. Therefore, even though more than one assessment may be joined in a single notice of appeal, the assessments must retain

their separate identity as individual assessments throughout the Tax Court process. While taxpayers may add together the amounts owing under each assessment to determine their total liability, this does not change the statutory scheme that each taxpayer is liable for the amounts payable under each separate assessment, which will include interest calculated separately on the amount owing under such assessment.

[49] The *Rules* related to the consolidation of proceedings before the Tax Court of Canada are brief. *Rule* 26 provides that:

26 Where two or more proceedings are pending in the Court and	**26** Si, dans le cas où la Cour est saisie de plusieurs instances, il appert :
(*a*) they have in common a question of law or fact or mixed law and fact arising out of one and the same transaction or occurrence or series of transactions or occurrences, or	*a*) qu'elles ont en commun une question de droit, une question de fait ou une question de droit et de fait, tenant à une même transaction ou à un même événement, ou à une même série de transactions ou d'événements;
(*b*) for any other reason, a direction ought to be made under this section,	*b*) que pour toute autre raison, il y a lieu de rendre une directive en application du présent article,
the Court may direct that,	la Cour peut ordonner :
(*c*) the proceedings be consolidated or heard at the same time or one immediately after the other, or	*c*) la réunion de ces instances ou leur instruction simultanée ou consécutive;
(*d*) any of the proceedings be stayed until the determination of any other of them.	*d*) l'ajournement de l'une d'entre elles en attendant l'issue de n'importe quelle autre.

[50] The Appellants submitted that a consolidation of proceedings would be analogous to an amalgamation of corporations, which the Supreme Court of Canada has described as two streams

flowing together as one (*R. v. Black and Decker Manufacturing Co.*, [1975] 1 S.C.R. 411, 13 C.P.R. (2d) 97). As a result, according to the Appellants, the appeals related to the 2010 taxation year (which the Appellants are seeking to have allowed) are merged with the appeals for the 2005 taxation year (which were the appeals before the Tax Court of Canada when the alleged failures occurred) and therefore became one appeal following the consolidation.

[51] As noted above, each assessment that is under appeal to the Tax Court of Canada retains its separate identity throughout the Tax Court process with respect to the merits of the assessment. Because each assessment retains its separate identity, it would seem to me that each appeal of a particular assessment would also retain its identity as a separate appeal with respect to the merits of the appeal. Since the *Act* provides that an appeal relates to a particular assessment, this one to one relationship of an appeal to an assessment with respect to the merits of such assessment or appeal cannot be altered by the *Rules*.

[52] However, the *Rules* can operate to consolidate or merge the appeals in relation to the procedural steps that will be applicable to all of the appeals that are the subject of a consolidation order. As a result, any appeals that are consolidated will proceed as if they are one appeal for the purposes of the *Rules* and each procedural step under the *Rules* will apply equally to each appeal that is part of the consolidated proceedings so that, for example, one list of documents would apply to all of those appeals.

[53] However, the underlying assessments are not consolidated. Therefore, each appeal of a particular assessment (or reassessment) remains as a separate appeal in relation to the merits of

the assessment (or reassessment), although the procedural steps, as provided in the *Rules*, apply concurrently to all of the appeals that are consolidated.

[54] This has a direct bearing on the application of *Rule* 91. If a failure to disclose documents has occurred, *Rule* 91(c) provides that "the Court may …allow the appeal". In this case, when any alleged failure to disclose occurred, the only appeals that were before the Tax Court were the appeals related to the 2005 taxation years for the Original Appellants. These were the only appeals that were affected by the Order that *Rule* 82 would apply.

[55] *Rule* 82 can only apply if the parties agree or there is an order of the Tax Court of Canada. The Order dated October 6, 2014 that consolidated the 2005 appeals with the appeals filed for several taxation years (including the 2010 taxation year) provided that *Rule* 81 would apply. Since prior to this order there was no agreement or order related to the appeals for the 2010 taxation year that provided that *Rule* 82 would apply to these appeals, there was no point in time when *Rule* 82 applied to the appeals in relation to the 2010 taxation year, even as part of the consolidated appeals.

[56] Since *Rule* 82 did not apply to the appeals for 2010, in my view, *Rule* 91(c) would not provide the relief sought by the Appellants even if the conduct of the Crown did warrant some sanction under *Rule* 91 in relation to the appeals of the 2005 reassessments. Any sanction under this *Rule*, in my view, would have to relate to these appeals for 2005 since *Rule* 82 did not apply to the 2010 appeals.

[57] As well, in applying *Rule* 91, any sanction, in my view, must relate to the particular appeal to which the misconduct relates. If there is a failure to disclose documents related to one taxpayer for one taxation year that is under appeal, why would the appeals of that taxpayer for other years or the appeals of other taxpayers for other years be allowed, even though the appeals are consolidated?

[58] The Appellants argue that the appeals of the 2005 reassessments were test cases and that the same issues arise in the appeals of the other reassessments. However, when the alleged failures occurred, the dispute with respect to the other reassessments was at the notice of objection stage – there were no appeals before the Tax Court of Canada in relation to these reassessments. In my view, the reference to "the appeal" in *Rule* 91 refers to an appeal before the Tax Court of Canada, not an objection before the Minister. If the Appellants are correct that misconduct in relation to one appeal could lead to other subsequent appeals that raise the same issue being allowed, then when do the sanctions end? Taxpayers would, however, be able to raise, in any subsequent appeal, any issue of misconduct that arises in that subsequent appeal.

[59] For example, assume a taxpayer is reassessed for 2010, 2011 and 2012 and at the appeal stage before the Tax Court of Canada there is misconduct which results in the appeals in relation to these reassessments being allowed under *Rule* 91. Assume that the taxpayer has continued to file tax returns on the same basis which gave rise to the reassessments for 2010, 2011 and 2012. Would the Crown face the argument when a reassessment for 2013 reaches the appeal stage before the Tax Court of Canada that, since this appeal raises the same issue as the earlier appeals which were allowed because of misconduct, the appeal in relation to the reassessment for 2013

should also be allowed under *Rule* 91? This could not have been the intended result of *Rule* 91 and therefore, the application of *Rule* 91 must be restricted to appeals that are before the Tax Court of Canada when the misconduct occurs and to which the misconduct relates. As noted above, taxpayers could raise, in relation to the appeal of the reassessment for 2013, any misconduct that arises in relation to that appeal.

[60] As a result, I would dismiss the appeal from the decision of the Judge to dismiss the motion of the Appellants for an order allowing their remaining appeals under *Rule* 91.

B. *Rule 58*

[61] The questions that were proposed by the Appellants for determination before the hearing are set out above. To address the issue related to *Rule* 58, these questions should be reviewed in relation to section 94.1 of the *Act*, which is the section that is in dispute. This section provides that:

94.1 (1) If in a taxation year a taxpayer holds or has an interest in property (referred to in this section as an "offshore investment fund property")	**94.1** (1) Lorsque, au cours d'une année d'imposition, un contribuable détient un bien ou a un droit sur un bien (appelé « bien d'un fonds de placement non-résident » au présent article) qui répond aux conditions suivantes :
(*a*) that is a share of the capital stock of, an interest in, or a debt of, a non-resident entity (other than a controlled foreign affiliate of the taxpayer or a prescribed non-resident entity) or an interest in or a right or option to acquire such a share, interest or debt, and	*a*) il est une action du capital-actions d'une entité non-résidente (autre qu'une société étrangère affiliée contrôlée du contribuable ou une entité non-résidente visée par règlement) ou une participation dans une tell entité, ou une créance sur elle, ou un droit sur une telle action, participation ou créance ou un droit ou une option d'achat

d’une telle action, participation ou créance;

(*b*) that may reasonably be considered to derive its value, directly or indirectly, primarily from portfolio investments of that or any other non-resident entity in

b) sa valeur peut raisonnablement être considérée comme découlant principalement, directement ou indirectement, de placements de portefeuille de cette même entité ou de toute autre entité non-résidente :

(i) shares of the capital stock of one or more corporations,

(i) en actions du capital-actions d’une ou de plusieurs sociétés,

(ii) indebtedness or annuities,

(ii) en créances ou en rentes,

(iii) interests in one or more corporations, trusts, partnerships, organizations, funds or entities,

(iii) en participations dans un ou plusieurs fonds ou organismes ou dans une ou plusieurs sociétés, fiducies, sociétés de personnes ou entités,

(iv) commodities,

(iv) en marchandises,

(v) real estate,

(v) en biens immeubles,

(vi) Canadian or foreign resource properties,

(vi) en avoirs miniers canadiens ou étrangers,

(vii) currency of a country other than Canada,

(vii) en monnaie autre que la monnaie canadienne,

(viii) rights or options to acquire or dispose of any of the foregoing, or

(viii) en droits ou options d’achat ou de disposition de l’une des valeurs qui précèdent,

(ix) any combination of the foregoing,

(ix) en toute combinaison de ce qui précède,

and it may reasonably be concluded, having regard to all the circumstances, including

et que l’on peut raisonnablement conclure, compte tenu des circonstances, y compris :

(*c*) the nature, organization and operation of any non-resident entity and the form of, and the terms and conditions governing, the taxpayer’s interest in, or

c) la nature, l’organisation et les activités de toute entité non-résidente, ainsi que les formalités et les conditions régissant la participation du contribuable dans

connection with, any non-resident entity,

toute entité non-résidente ou les liens qu'il a avec une telle entité;

(*d*) the extent to which any income, profits and gains that may reasonably be considered to be earned or accrued, whether directly or indirectly, for the benefit of any non-resident entity are subject to an income or profits tax that is significantly less than the income tax that would be applicable to such income, profits and gains if they were earned directly by the taxpayer, and

d) la mesure dans laquelle les revenus, bénéfices et gains qu'il est raisonnable de considérer comme ayant été gagnés ou accumulés, directement ou indirectement, au profit de toute entité non-résidente sont assujettis à un impôt sur le revenu ou sur les bénéfices qui est considérablement moins élevé que l'impôt sur le revenu dont ces revenus, bénéfices et gains seraient frappés s'ils étaient gagnés directement par le contribuable;

(*e*) the extent to which the income, profits and gains of any non-resident entity for any fiscal period are distributed in that or the immediately following fiscal period,

e) la mesure dans laquelle les revenus, bénéfices et gains de toute entité non-résidente pour un exercice donné sont distribués au cours de ce même exercice ou de celui qui le suit,

that one of the main reasons for the taxpayer acquiring, holding or having the interest in such property was to derive a benefit from portfolio investments in assets described in any of subparagraphs 94.1(1)(b)(i) to 94.1(1)(b)(ix) in such a manner that the taxes, if any, on the income, profits and gains from such assets for any particular year are significantly less than the tax that would have been applicable under this Part if the income, profits and gains had been earned directly by the taxpayer, there shall be included in computing the taxpayer's income for the year the amount, if any, by which

que l'une des raisons principales pour le contribuable d'acquérir, de détenir ou de posséder un droit sur un tel bien était de tirer un bénéfice de placements de portefeuille dans des biens visés à l'un des sous-alinéas b)(i) à (ix) de façon que les impôts sur les revenus, bénéfices et gains provenant de ces biens pour une année donnée soient considérablement moins élevés que l'impôt dont ces revenus, bénéfices et gains auraient été frappés en vertu de la présente partie s'ils avaient été gagnés directement par le contribuable, celui-ci doit inclure dans le calcul de son revenu pour l'année l'excédent éventuel du total visé à l'alinéa f) sur le montant visé à l'alinéa g):

(*f*) the total of all amounts each of which is the product obtained when

f) le total des montants dont chacun est le produit de la multiplication du montant visé au sous-alinéa (i)

	par le quotient visé au sous-alinéa (ii):
(i) the designated cost to the taxpayer of the offshore investment fund property at the end of a month in the year	(i) le coût désigné, pour le contribuable, du bien d'un fonds de placement non-résident à la fin d'un mois donné de l'année,
is multiplied by	
(ii) 1/12 of the total of	(ii) 1/12 du total des pourcentages suivants :
(A) the prescribed rate of interest for the period that includes that month, and	(A) le taux d'intérêt prescrit pour la période comprenant ce mois,
(B) two per cent	(B) deux pour cent;
exceeds	
(*g*) the taxpayer's income for the year (other than a capital gain) from the offshore investment fund property determined without reference to this subsection.	*g*) le revenu du contribuable pour l'année (autre qu'un gain en capital) tiré d'un bien d'un fonds de placement non-résident et déterminé compte non tenu du présent paragraphe.

[62] The first question posed by the Remaining Appellants is essentially whether section 94.1 of the *Act* can apply if the Remaining Appellants do not have a direct or indirect proprietary or security interest in the investment portfolio. However, the question that must be addressed for the purposes of section 94.1 is how the shares of SLT derive their value, since these shares are the "offshore investment fund property" described in paragraph 94.1(1)(*a*) of the *Act*. The Judge indicated that the question of how the shares of SLT derive their value is a question that is best left to the judge who will be hearing the appeal. The Appellants have not persuaded me that the Judge committed any error in making this determination.

[63] The second question posed is a factual determination based on the actual income earned during the years referred to in that question. Since section 94.1 of the *Act* is based on a purpose test ("one of the main reasons for the taxpayer acquiring, holding or having the interest in such property"), I agree with the Judge that what impact the actual results may have in determining whether the purpose test is satisfied is best left to the Judge who will hear all of the evidence.

[64] As a result, I would dismiss the appeal from the Order of the Judge dismissing the Appellants' motion for an order under *Rule* 58.

C. *Amendments to the Replies*

[65] The test for allowing amendments to pleadings is that amendments will generally be allowed at any stage of the proceeding unless it is plain and obvious that the amendments do not disclose a reasonable cause of action (*Canderel Ltd. v. Canada*, [1994] 1 F.C. 3, 1993 CanLII 2990 (FCA) at paragraph 9 and *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at paragraph 17).

[66] The Sandringham Amendments are set out in paragraph 17 of the Appellants' memorandum of fact and law. The Appellants included paragraphs 25(hh) and (ii) from the amended reply submitted by the Crown as part of its motion for leave to amend its replies. However, theses paragraphs simply set out the monthly management fee paid to GAM and that this fee was paid from the Reference Assets. There is no indication in the Appellants' memorandum of fact and law that they contest the inclusion of these two paragraphs in the amended replies.

[67] The proposed amendments in question are summarized by the Crown in its memorandum of fact and law submitted in this appeal as follows:

> 21. The respondent moved to amend its pleadings in order to advance factual allegations which shed additional light on SLT's investment structure. The bulk of these amendments demonstrate SLT has substantial contractual rights over the Reference Assets that allow it to exercise control over the manner in which the Reference Assets are managed. A subset of these amendments constitutes the Management Fee Amendments.
>
> 22. The Management Fee Amendments concern the payment of fees to the asset manager. These fees are paid monthly from, and funded by the liquidation of, the Reference Assets. They are calculated based on the rate of 1.6125% per annum of the value of the Reference Assets (excluding the value of SLT shares acquired pursuant to the put option).
>
> 23. On November 30, 2001, concurrently with SLT's reorganization, the asset manager agreed to pay Sandringham Limited a substantial portion of its monthly fees, that is, all its fees received in excess of the rate of 0.35% per annum of the first US$65 million of value of the Reference Assets and all its fees in excess of the rate of 0.85% per annum for the value of the Reference Assets over US$65 million.
>
> 24. On July 27, 2007, that agreement was replaced and the manager thereafter agreed to pay The Thames Trust 50% of the amounts formerly paid to Sandringham Limited.
>
> 25. The appellants' controlling shareholder, Mr. Irving Ludmer, and persons related to him, have an indirect 50% beneficial interest in Sandringham Limited. Mr. Irving Ludmer has an indirect 100% beneficial interest in The Thames Trust.

[68] The Crown submits that these amendments are related to the value test under section 94.1 of the *Act* and in particular whether the shares of SLT derive their value from the Reference Assets. It is not plain and obvious that the *payment* of management fees from the Reference Assets will not be relevant in this determination, nor was the payment of management fees to GAM contested by the Appellants. However, the amendments in dispute are those related to the payment of amounts to Sandringham Limited and The Thames Trust. It is plain and obvious that

the *identity* of the persons to whom GAM may have paid (or directed payment of) a portion of the management fees, and how much was paid, will not be relevant since there is no allegation that these persons are the Appellants or any person in which the Appellants have any direct or indirect proprietary or security interest. There is no allegation by the Crown that any of the Appellants have any interest in Sandringham Limited or The Thames Trust.

[69] The final version of the fresh as amended notice of appeal and the replies were not submitted. In paragraph 17 of the Appellants' memorandum of fact and law, the Appellants set out the paragraphs from the draft amended reply for 3488063 Canada Inc. as submitted by the Crown with its motion dated August 3, 2015 to amend its replies. Based on this version, I would allow the Crown to amend its replies to include the paragraphs identified in this version as paragraphs 25(hh) and (ii) (which amendments were not contested) and I would not allow the amendments as set out in paragraphs 25(jj), (kk), (ll), (mm), (nn), or (oo) of this version nor the following part of paragraph 33:

> 33. […] SLT's shareholders, including the appellants and their controlling shareholder, also have rights to amounts which derive their value from the Reference Assets.

VII. Conclusion

[70] I would dismiss the appeal in A-340-15 from the Order of the Judge dismissing the Appellants' motion for an Order under *Rule* 91 allowing the Appellants' appeals in relation to the reassessments for 2010 and dismissing the Appellants motion for an Order under *Rule* 58 directing that the questions as posed by the Appellants be determined prior to the hearing.

[71] I would allow the appeal in A-399-15 and vary the Order of Woods, J. dated September 1, 2015 to provide that the Crown's motion to the Tax Court of Canada to amend its replies is dismissed with respect to the amendments that were contested by the Appellants. Therefore, I would not grant leave for the Crown to include the amendments as set out in paragraphs 25(jj), (kk), (ll), (mm), (nn), or (oo) of the proposed amended reply submitted with the Crown's motion to amend the replies dated August 3, 2015 nor the following part of paragraph 33 as contained in this version of the amended replies:

> 33. […] SLT's shareholders, including the appellants and their controlling shareholder, also have rights to amounts which derive their value from the Reference Assets.

[72] I would also award one set of costs to the Crown.

"Wyman W. Webb"
J.A.

"I agree.
David Stratas J.A."

"I agree.
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPEAL FROM ORDERS OF THE HONOURABLE JUSTICE WOODS OF THE TAX COURT OF CANADA DATED JULY 22, 2015 AND SEPTEMBER 1, 2015, DOCKET NOS. 2012-2662(IT)G AND 2014-2166(IT)G)

DOCKET:	A-340-15
STYLE OF CAUSE:	3488063 CANADA INC, 2534-2825 QUEBEC INC., 3488071 CANADA INC., 4077211 CANADA INC., 3421848 CANADA INC., 3488055 CANADA INC. v. HER MAJESTY THE QUEEN
AND DOCKET:	A-399-15
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PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 12, 2016
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	STRATAS J.A. RENNIE J.A.
DATED:	SEPTEMBER 16, 2016

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