

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140616

**Dockets: A-297-13
A-296-13**

Citation: 2014 FCA 161

**CORAM: DAWSON J.A.
TRUDEL J.A.
NEAR J.A.**

A-297-13

BETWEEN:

**SENTINEL HILL PRODUCTIONS IV
CORPORATION, IN ITS CAPACITY AS
DESIGNATED MEMBER OF SENTINEL
HILL NO. 207 LIMITED PARTNERSHIP**

Appellant

and

HER MAJESTY THE QUEEN

Respondent

A-296-13

BETWEEN:

**SENTINEL HILL PRODUCTIONS IV
CORPORATION, IN ITS CAPACITY AS
DESIGNATED MEMBER OF SHAAE (2001)
MASTER LIMITED PARTNERSHIP**

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on June 11, 2014.

Judgment delivered at Ottawa, Ontario, on June 16, 2014.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

TRUDEL J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Paragraph 58(1)(a) of the *Tax Court of Canada Rules* (General Procedure), SOR/90-688a, allows a party to request that the Tax Court determine, before the hearing of an appeal, a question of law, a question of fact or a question of mixed fact and law. The requesting party must persuade a judge of the Tax Court that such a determination may dispose of all or part of the proceeding, substantially shorten the hearing, or result in a substantial saving of costs.

[2] The appellants in these consolidated appeals sought to have the following question determined:

Whether the notices of determination (“Partnership Determinations”) issued under subsection 152(1.4) of the *Income Tax Act* (“ITA”) should be vacated and the appeals consequently allowed (subparagraph 170(1)(b)(i), of the ITA) since the Minister concluded at a subsequent time (on or prior to March 31, 2010), after the time the Partnership Determinations were issued, that Sentinel Hill No. 207 Limited Partnership and SHAAE (2001) Master Limited Partnership (the “Partnerships”) and the 72 other limited partnerships did not exist for the fiscal years ended December 31, 2001 and December 31, 2002 (the “Periods”)

[3] For reasons cited as 2013 TCC 267, a judge of the Tax Court concluded that the proposed question should not be set down for hearing. This is an appeal from that decision.

[4] Among other reasons, the Judge concluded that the proposed question had no reasonable chance of success and therefore would not dispose of the proceeding, shorten the hearing, or save costs.

[5] I see no error in the Judge's finding on this point. This finding is fatal to these appeals. I reach this conclusion for the following reasons.

[6] First, the proposed question is premised on the unproven assumption that the partnerships did not exist during the relevant periods. As the Judge noted in her reasons at paragraph 21, the existence of the partnership is a disputed question. In her replies and amended replies to the notices of appeal and amended notices of appeal, the Minister advanced alternate positions as to whether the "partnerships" were partnerships at law. It would be an academic exercise to answer the proposed question before the issue of the existence of the partnership is settled.

[7] Second, a notice of determination issued under subsection 152(1.4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act), does not make a partnership liable to pay taxes. Rather, it allows the Minister to determine the income or losses of the partnership in order to determine the tax payable by any member of that partnership. A notice of determination, therefore, is simply a method of computing income at the partnership level and binding the members of the partnership to that computation. Determinations are subject to an objection and appeal procedure that is similar to the procedure applicable to assessments (subsection 152 (1.2) of the Act).

[8] As such, I agree with the Judge (reasons, paragraphs 36 to 39) that the appellants seek to have the determinations vacated on grounds that have nothing to do with whether they are incorrect or invalid. This is contrary to well-established principles of law. The role of the Tax Court in an appeal of an assessment under the Act, or a determination, is to decide the validity and correctness of the assessment, or determination, based on the relevant provisions of the Act and the facts giving rise to the taxpayer's statutory liability (*Ereiser v. Canada*, 2013 FCA 20, 444 N.R. 64).

[9] Third, I disagree that the Judge considered the wrong question. The appellants argue that the Judge erred by considering that the proposed question raised the issue of whether reassessments issued to individual partners would be statute-barred. However, as explained below, it was the appellants who first raised this issue.

[10] As evidenced at paragraph 6 of the Judge's reasons, the notice of motion seeking determination of the question contains five grounds on which the motion was based. Two of the grounds referenced subsection 152(1.8) of the Act and asserted that the Minister was no longer entitled to proceed further pursuant to the notices of determination issued to the partnerships, or to issue any notices of reassessment to the members of the partnership, because of the application of the limitation period found in subsection 152(1.8). This position was reiterated in counsel's letter of February 12, 2013 which restated the proposed question.

[11] In order to consider whether the question should be answered, the Judge was required to consider the argument that formed the foundation of the question.

[12] Finally, I agree with counsel for the appellants that it is not appropriate in the circumstances for this Court to answer the proposed question, and the Court will not do so. That said, it is fair to observe that the appellants' argument appears to be difficult to sustain in light of the statutory scheme. Specifically, subsection 152(1.4) permits the Minister to issue a notice of determination when a partnership information return is filed. The filing of such a return in effect constitutes a representation that the entity is in fact and law a partnership.

[13] Moreover, subsection 152(1.8) contemplates the specific scenario where, notwithstanding that a representation was made that a person was a member of a partnership, the Minister or a court of competent jurisdiction concludes the partnership did not exist.

[14] For these reasons, these appeals will be dismissed with one set of costs. Pursuant to the consolidation order, a copy of these reasons shall be placed in the incidental appeal file (A-296-13).

“Eleanor R. Dawson”

J.A.

“I agree.
Johanne Trudel J.A.”

“I agree.
D.G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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MEMBER OF SENTINEL HILL
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v. HER MAJESTY THE QUEEN

PLACE OF HEARING: VANCOUVER, BRITISH
COLUMBIA

DATE OF HEARING: JUNE 11, 2014

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: TRUDEL J.A.
NEAR J.A.

DATED: JUNE 16, 2014

APPEARANCES:

Robert W. Grant, QC FOR THE APPELLANTS

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Ryan Hall

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