Docket: 2011-1404(IT)G

BETWEEN:

DEVON CANADA CORPORATION,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

Motion heard on November 29, 2012, at Toronto, Ontario.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the appellant:	Al Meghji Pooja Samtani
Counsel for the respondent:	Josée Tremblay Marie-France Camiré Ryan Gellings

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ORDER

UPON the appellant bringing a motion for the determination, before hearing, of the following question of law pursuant to paragraph 58(1)(*a*) of the *Tax Court of Canada Rules* (*General Procedure*) (the "*Rules*"):

> whether, by operation of paragraphs 66.7(10)(j) and 66.7(10)(c) of the *Income Tax Act*, following the acquisition of control of Home Oil…and the transfer of the [Anderson Properties] by the [Anderson Partnership] to the [Devon Partnership], the proportionate share of income earned from the [Anderson Properties] owned through the Devon Partnership, allocated to the Anderson Partnership and further allocated to Home Oil, may reasonably be regarded as having been attributable to production from a particular resource property owned before the acquisition time by an original owner for purposes of subsections 66.7(1) to (5).

AND UPON having heard the submissions of counsel and having read the materials filed;

IT IS ORDERED:

1. The question is set down for determination by a motion judge.
2. The parties shall communicate with the hearing's coordinator on or before January 31, 2013, to fix the date for the determination.
3. The order dated April 24, 2012, is vacated and the parties shall communicate with the hearings coordinator on or before May 31, 2013, to establish a new timetable for completion of examinations for discovery, for answers to undertakings and for further communications with the hearings coordinator. Costs shall be in the cause.

Signed at Ottawa, Canada, this 8th day of January 2013.

Hogan J.

Citation: 2013 TCC 4
Date: 20130108
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BETWEEN:

DEVON CANADA CORPORATION,

appellant,

and

HER MAJESTY THE QUEEN,

respondent.

REASONS FOR ORDER

Hogan J.

[1] In this motion, the appellant, Devon Canada, seeks an order under section 58 of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") for a determination, before the hearing of its appeal, of a question of law that the appellant claims is raised by the pleadings.

Background

[2] The appeal instituted by the appellant concerns the application of the "successor rules" found in section 66.7 of the *Income Tax Act* (the "*ITA*"). These rules provide that a subsequent owner of resource properties may in prescribed circumstances deduct the resource expenses incurred by the transferor of the properties.

[3] In general terms, where an original owner transfers all or substantially all of its resource properties to a successor, the successor may claim the unused resource expenses of the transferor against the income that may reasonably be regarded as attributable to the production from the properties. In other words, the unused deductions can only be used to shelter the income from the transferred resource properties.

[4] Where control of a corporation is acquired, the corporation is made subject to the successor rules by virtue of subsection 66.7(10). This provision deems the corporation to be a successor to itself such that in the future its resource deductions can only be used to shelter the income reasonably attributable to the resource properties that it owned prior to the acquisition of control.

[5] A similar streaming rule applies where the corporation is a member of a partnership that owns resource properties. Under that rule, the corporation is deemed to have acquired its proportionate share of the partnership's resource properties immediately prior to the acquisition of control.[1] A "look- through rule" found in subparagraph 66.7(10)(*j*)(ii) permits the deduction of the resource expenses incurred with respect to the partnership resource properties against the corporation's proportionate share of the income of the partnership. As can be seen in the pleadings, the Minister of National Revenue (the "Minister") takes the view that the look-through rule operates only where the corporation is a direct member of a partnership that owns resource properties. According to the Minister, the look-through rule does not apply when the properties are owned by a lower-tier partnership. In such a case, it would appear the Minister's view is that the resource deductions become stranded.

[6] The pleadings reveal that the above rules are relevant to the matter at issue. The application of the successor rules was triggered as a result of the acquisition of control of Anderson Exploration Ltd., the parent corporation of Home Oil Company of Canada, now Devon Canada, by the Devon group of companies (the "Acquisition of Control"). Prior to the Acquisition of Control, Home Oil owned its resource properties (the "Anderson Properties") through a partnership of which it was a direct member (the "Anderson Partnership"). Following the acquisition of control, the Anderson Partnership transferred all of its properties to a subsidiary partnership (the "Devon Partnership"). The pleadings reveal that the Minister reassessed Devon Canada, denying its claim for the successor deductions attributable to the Anderson Properties on the grounds that the "look-through rule" enunciated in paragraph 66.7(10)(*j*) ceased to apply following the transfer of the Anderson Properties to the Anderson Partnership. According to the respondent's Reply, the appellant cannot benefit from the successor deductions in the taxation year at issue in the appeal because it does not have income reasonably attributable to the Anderson Properties. The appellant disagrees with the Minister's interpretation and submits that the "look- through rule" found in paragraph 66.7(10)(*j*) of the

[1] Subparagraph 66.7(10)(*j*)(i) of the *ITA*.

ITA continues to operate notwithstanding the fact that the Anderson Properties are owned through a lower-tier partnership. This issue is referred to as the "Successor Issue".[2]

[7] The pleadings also reveal that the assessment raises a computational issue which would be relevant, *inter alia*, if the Court were to find that the successor deductions attributable to the Anderson Properties are not stranded, as claimed by the Minister. This secondary issue concerns three deductions which, the Minister claims, reduce the appellant's proportionate share of income attributable to the Anderson Properties (the "Computational Issue").[3]

[8] The appellant submits that the Successor Issue gives rise to the following question of law susceptible of being determined under paragraph 58(1)(*a*) of the *Rules*:

> whether, by operation of paragraphs 66.7(10)(j) and 66.7(10)(c) of the *Income Tax Act*, following the acquisition of control of Home Oil…and the transfer of the [Anderson Properties] by the [Anderson Partnership] to the [Devon Partnership], the proportionate share of income earned from the [Anderson Properties] owned through the Devon Partnership, allocated to the Anderson Partnership and further allocated to Home Oil, may reasonably be regarded as having been attributable to production from a particular resource property owned before the acquisition time by an original owner for purposes of subsections 66.7(1) to (5).

[9] At the motion hearing, the appellant, in response to a question from the bench, sought to broaden the proposed question by adding the words "or any other provisions of the Act" immediately after the reference to paragraph 66.7(10)(*j*) of the *ITA*.

Analysis

[10] Paragraph 58(1)(*a*) of the *Rules* reads as follows:

> (1) A party may apply to the Court,
> (*a*) for the determination, before hearing, of a question of law, a question of fact or a question of mixed law and fact raised by a pleading in a proceeding where the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs.

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[2] This issue is outlined by the appellant in paragraph 22(a) of its Notice of Appeal and is identified by the respondent in paragraphs 19, 20 and 21 of the Reply to the Notice of Appeal.

[3] This issue is identified in paragraph 22(b) of the Notice of Appeal and in paragraphs 24 and 25 of the respondent's Reply.

[11] Paragraph 58(1)(*a*) of the *Rules* calls for a two-step process. At the first stage, before setting down the question for determination, I must be satisfied:
(a) That the question posed by the appellant is a question of law or a mixed question of fact and law;
(b) That the question is raised by the pleadings; and
(c) That the determination of the question may dispose of all or part of the appeal, may substantially shorten the hearing or may result in a substantial saving of costs.

[12] If the answer to all of the above is affirmative, the Court may set down the question for determination by a motion judge.

[13] It is incontrovertible that the proposed question encapsulates the Successor Issue which is identified in the pleadings of the parties.

[14] The respondent submits that the question should not be the subject of a determination by a motion judge because there are material facts still in dispute. I acknowledge that there are still facts in dispute, but these are not germane to the Successor Issue. They concern the Computational Issue raised in the pleadings. In my opinion, the test is not whether there are facts in dispute but whether there are facts which are in dispute that are material to a determination of the proposed question.

[15] As correctly pointed out by the appellant in its written representations, the pleadings show that there is no dispute as to the facts underpinning the proposed question:

> (i) the sole shareholder of Home Oil (Anderson Exploration Ltd.) was acquired by Devon Acquisition Corporation. This resulted in an acquisition of control of Home Oil. (paragraphs 14(d) and (e) of the Reply);
> (ii) prior to the Acquisition, Home Oil held an interest in Canadian resource property (i.e., the Anderson Property) which it transferred to the Anderson Partnership such that at the time of the Acquisition it held an interest in the Anderson Partnership that held the Anderson Property (paragraphs 14(b) and (c) of the Reply);
> (iii) as a result of the Acquisition, the Anderson Property was subject to the successor rules, including paragraph 66.7(10)(j) (paragraph 14(f) of the Reply); and
> (iv) following the Acquisition, the Anderson Partnership transferred all of its assets, including the Anderson Property, to the Devon Partnership (paragraph 14(dd) of the Reply).[4]

[4] Paragraph 15 of the written representations of the appellant.

[16] The proposed question requires the motion judge to decide a discrete legal issue, namely, whether the "look-through rule" in paragraph 66.7(10)(*j*) is applicable if the resource properties are held by a second-tier partnership.

[17] The Crown contends that a determination of the proposed question may not shorten the hearing or dispose of the appeal in its entirety because the Computational Issue will still be outstanding. I agree that a hearing may still be required if the parties are unable to resolve the Computational Issue before trial. However, I am of the view that the appeal hearing will be considerably shortened if the proposed question is answered in the affirmative. In the instant case, the Computational Issue is of lesser importance because it affects only the timing of the deduction of the resource expenses. If the appellant succeeds on the Successor Issue, the resource expenses can be used if and when income is generated from the Anderson Properties. In that context, the Computational Issue may lend itself to settlement by the parties. On the other hand, the Successor Issue is an all or nothing matter. If the Minister's position is correct, the successor's deductions attributable to the Anderson Properties may be forfeited.

[18] I am not inclined to accede to the appellant's request to amend the question as posed in its motion record because I am not satisfied that all of the material facts necessary to address the question as reformulated by the appellant are agreed upon by the parties.

[19] For all of these reasons, I am satisfied that the determination of the question as originally formulated in the appellant's written motion record may dispose of a significant part of the appellant's appeal, resulting in cost savings to the parties. Therefore, the question should be set down for determination by a motion judge.

Signed at Ottawa, Canada, this 8th day of January 2013.

Hogan J.

CITATION:	2013 TCC 4
COURT FILE NO.:	2011-1404(IT)G
STYLE OF CAUSE:	DEVON CANADA CORPORATION v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 29, 2012
REASONS FOR ORDER BY:	The Honourable Justice Robert J. Hogan
DATE OF ORDER:	January 8, 2013

APPEARANCES:

Counsel for the appellant:	Al Meghji Pooja Samtani
Counsel for the respondent:	Josée Tremblay Marie-France Camiré Ryan Gellings

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