Docket: 2018-4468(GST)G

BETWEEN:

ANDREY RYBAKOV,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2018-4469(GST)G

AND BETWEEN:

YULIA RYBAKOVA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions heard, on common evidence, on April 29, 2019
at Ottawa, Ontario

Before: The Honourable Justice K.A. Siobhan Monaghan

Appearances:

Counsel for the Appellants:	Bobby B. Solhi Bhuvana Sankaranarayanan
Counsel for the Respondent:	Alexander Nguyen

ORDER

UPON the Appellants bringing motions, on common evidence, for the following relief:

1. Judgment in default allowing this appeal in accordance with subsection 63(1) and paragraph 63(2)(b) of the *Rules*;

2. Costs of this application in accordance with paragraph 63(2)(c) of the *Rules*; and

3. Such further and other relief as this Honourable Court may grant.

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

NOW THEREFORE in accordance with the attached Reasons for Order, the Court orders that:

1. The Appellants' motions are hereby denied;

2. Each of the Appellants is directed to amend the Amended Notice of Appeal under general procedure Rule 54 to add any material facts they intend to rely on in their appeal to the Facts section of the amended Amended Notice of Appeal (the "Second Amended Notice of Appeal"), and each of the Appellants is directed to do so no later than 15 days after the date of this Order;

3. Each of the Appellants is directed to comply with general procedure Rule 55 in respect of the Second Amended Notice of Appeal and to transmit a copy of the Second Amended Notice of Appeal to counsel for the Respondent by facsimile transmission on the same day as the Second Amended Notice of Appeal is filed with the Court;

4. The Respondent is directed to file the Reply to the Second Amended Notice of Appeal for each Appellant no later than 45 days after receipt by facsimile transmission of a copy of the Second Amended Notice of Appeal for that Appellant. The 45-day period for filing the Reply will commence on the day following the day that the Second Amended Notice of Appeal is transmitted by the relevant Appellant to counsel for the Respondent; and

5. The parties shall have 30 days from the date of this Order to make cost submissions, which shall not exceed 10 pages.

Signed at Ottawa, Canada, this 4th day of October 2019.

"K.A. Siobhan Monaghan"

Monaghan J.

Citation: 2019 TCC 209
Date: 20191004
Docket: 2018-4468(GST)G

BETWEEN:

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Docket: 2018-4469(GST)G

AND BETWEEN:

YULIA RYBAKOVA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Monaghan J.

[1] Yulia Rybakova was assessed by the Minister for taxes under Part IX of the the *Excise Tax Act* (Canada) (the "ETA") for the reporting period June 1, 2015 to December 31, 2015. Following Mrs. Rybakova's objection to and appeal from that assessment, the Minister reassessed Mrs. Rybakova for the same reporting period. Mrs. Rybakova immediately amended her notice of appeal to address the reassessment rather than the initial assessment.

[2] Andrey Rybakov, Mrs. Rybakova's husband, has had a similar experience. The Minister issued an assessment to him for the reporting period January 1, 2014 to December 31, 2014. However, following his objection to and appeal from that assessment, the Minister reassessed Mr. Rybakov for the same reporting period. He too immediately amended his notice of appeal to address the reassessment rather than the initial assessment.

[3] Each of Mrs. Rybakova and Mr. Rybakov have brought a motion under Rule 63 of the *Tax Court of Canada Rules (General Procedure)* (the "GP Rules") seeking judgment in default. The moving parties each claim that the Respondent did not meet the time limit for filing a reply to their amended notices of appeal. The Respondent disputes that the replies are late, contending that, at the time the Notice of Motion was filed, the replies were not yet due. Alternatively, the Respondent seeks an extension for the time to file the replies. The moving parties object to that application.

[4] The two motions were heard together because the facts and circumstances for both moving parties are substantially the same. In these reasons I address the issues only in relation to the motion by Mrs. Rybakova, whom I refer to as the Appellant. However, the reasons apply equally to Mr. Rybakov's motion and similar orders will be issued in respect of both motions.

I. FACTS AND CHRONOLOGY OF RELEVANT EVENTS

[5] Mrs. Rybakova (the "Appellant") was assessed by the Minister under the ETA for the reporting period June 1, 2015 to December 31, 2015 (the "Reporting Period") by a notice of assessment dated April 18, 2017 (the "Initial Assessment"). The Minster confirmed that assessment following the Appellant's notice of objection.

[6] The Appellant appealed the Initial Assessment by filing a notice of appeal (the "Original Notice of Appeal") with the Court on November 22, 2018 and elected to have the informal procedure rules apply to that appeal. The amount in

dispute under the Initial Assessment was less than $50,000 and accordingly the Appellant was entitled to make that election.[1]

[7] When an election is made to have the informal procedure rules apply to an appeal of an assessment under the ETA, sections 18.3001, 18.3003, 18.3005 and 18.3008 to 18.302 of the *Tax Court of Canada Act* (Canada) (the "TCC Act") and the *Tax Court of Canada Rules of Procedure respecting the Excise Tax Act (Informal Procedure)* (the "ETA IP Rules") apply.

[8] Subsection 18.3003(1) of the TCC Act requires the Respondent to file a reply to a notice of appeal within 60 days following the Court's transmittal of the notice of appeal to the Minister of National Revenue (the "Minister") unless (i) the Appellant consents to an extension or (ii) this Court, on application, grants an extension to the time for filing the reply. The Original Notice of Appeal was sent to the Respondent by this Court no later than December 10, 2018,[2] so that, absent an extension, the reply to the Original Notice of Appeal was due no later than February 26, 2019.[3]

[9] On or about January 28, 2019, the Respondent sought the Appellant's consent to extend the period for filing a reply, suggesting a two month extension.[4] The Appellant agreed to extend the period to March 13, 2019.[5]

[10] On February 21, 2019, the Respondent sought consent to a further extension to the time for filing a reply on the basis of what was described by Respondent's counsel in the request as "the substantive audit" being near completion.[6] The Appellant did not consent to a further extension and the Respondent did not apply

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[1] Paragraph 18.3001(c) of the *Tax Court of Canada Act* (Canada).

[2] Exhibit F to the Affidavit of Taylor Leigh Bell sworn April 5, 2019 (the "Affidavit").

[3] See subsections 27(3) and (4) of the *Interpretation Act* (Canada) and section 18.18 of the TCC Act.

[4] Exhibit E to the Affidavit.

[5] Paragraph 10 of the Affidavit.

[6] Exhibit G to the Affidavit.

to this Court for an extension. Thus, the initial extension to March 13, 2019 remained in effect.

[11] By a notice of reassessment dated March 11, 2019, the Minister reassessed the Appellant for the Reporting Period (the "Second Assessment"). The notice of reassessment states that it "explains the results of our audit (re)assessment of return(s) you have or may have previously filed," that the CRA "conducted the audit with a missing return for this period" and that the details of the assessment "were displayed on the statement of audit adjustments we [CRA] provided to you previously during the audit."[7] I infer that each of these references to an audit in the notice of reassessment is a reference to the substantive audit referred to in the Respondent's February 21, 2019 request for a further extension to the time for filing the reply. The amount in dispute under the Second Assessment is well in excess of $50,000.

[12] On March 11, 2019, the Appellant filed an amended notice of appeal (the "Amended Notice of Appeal"), substituting the Second Assessment for the Initial Assessment as the reassessment under appeal, and stating the Appellant elects to have the appeal of the Second Assessment heard under the GP Rules. In the Amended Notice of Appeal, the Appellant states the amendments are permitted under Rule 54 of the GP Rules and section 302 of the ETA ("Section 302").

[13] On March 11, 2019, the Appellant also sent the Amended Notice of Appeal by facsimile transmission to Respondent's counsel.

[14] On April 5, 2019, the Appellant filed the Notice of Motion seeking judgment in default under GP Rule 63.

[15] On April 17, 2019, this Court issued an order that the provisions of sections 17.1 to 17.8 of the TCC Act apply to the Appellant's appeal (the "Bump-Up Order"). Those provisions apply to proceedings before the Court other than proceedings to which the informal procedure rules apply. The Bump-Up Order

[7] Exhibit H to the Affidavit.

states that it is made pursuant to section 18.12 of the TCC Act, at the request of the Appellant and upon the consent of counsel for the Respondent.[8]

[16] On April 23, 2019, the Registry served the Amended Notice of Appeal on the Attorney General of Canada.

[17] On April 29, 2019, the Appellant's motion for judgment in default was heard.

II. POSITIONS OF THE PARTIES

[18] The Appellant has made a motion for judgment in default relying on GP Rule 63. GP Rule 63 states in relevant part:[9]

> 63(1) If a reply to a notice of appeal has not been filed and served within the applicable times specified under section 44, the appellant may apply on motion for judgment in respect of the relief sought in the notice of appeal.
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> (2) On the return of the application for judgment, the Court may
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> (a) direct that the appeal proceed to hearing; or
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> (b) allow the appeal if the facts alleged in the notice of appeal entitle the appellant to the relief sought; and
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> (c) give such other direction as is just, including direction regarding the payment of costs.

[19] The Appellant's view is that the reply was due ten days after March 11, 2019, the date the Appellant filed the Amended Notice of Appeal and sent it by facsimile to the Respondent. GP Rule 57 provides that a response to an amended

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[8] Section 18.12 of the TCC Act concerns appeals under the *Income Tax Act* (Canada) and so has no application to the Appellant's appeal. However, I view the reference to section 18.12 as in the nature of a typographical error; the correct reference is section 18.30022 of the TCC Act. Other than that they apply to appeals under different statutes, there is no relevant difference between the two provisions.

[9] I have not reproduced GP Rule 63(3) as it is not relevant to the motion and, given the most recent amendments to GP Rule 63(2), may no longer have any relevance.

pleading must be made within 10 days after the amended pleading has been served where the period for responding would otherwise expire before that time. Service of the Amended Notice of Appeal is said to have been in accordance with GP Rule 56.[10] The Appellant states that whether an appeal is to be heard under the general or informal procedure rules, the GP Rules regarding the time for responding to amended pleadings apply; therefore, because the reply was not filed within 10 days, the Appellant is able to seek judgment in default pursuant to GP Rule 63.

[20] The Respondent objects to the application for judgment in default on the basis that the conditions for the application are not met. The Respondent submits that the deadline for filing the reply had not yet passed because, although the Appellant filed the Amended Notice of Appeal, it is in substance a new appeal. Accordingly, in the Respondent's view, the 60-day period for filing a reply effectively restarts and is measured from the date the Amended Notice of Appeal was served on the Respondent by the Registry. The Respondent also points to the different requirements for service of a notice of appeal under the GP Rules and the ETA IP Rules. Because the GP Rules apply to the new appeal, the Respondent submits the Amended Notice of Appeal was not effectively served by the Registry until April 23, 2019 – a date that follows filing of the Notice of Motion seeking judgment in default. As a result, the Respondent submits that the 60-day period for filing the reply did not commence until after the Appellant filed her Notice of Motion.

[21] Alternatively, the Respondent seeks an extension for the time to file the reply pursuant to GP Rule 44(1). The Appellant objects to that application on the basis that no Notice of Motion was filed and the Respondent led no evidence in support of that application. The Respondent counters that the evidence led by the Appellant in support of the motion seeking judgment in default is sufficient to support the application for an extension of time.

III. QUESTIONS TO BE ADDRESSED

[22] GP Rule 63 permits an appellant to seek judgment in respect of the relief sought in the notice of appeal where the conditions in GP Rule 63 are satisfied.

[10] Exhibit I of the Affidavit.

While the Court may allow the appeal if the facts alleged in the notice of appeal entitle the appellant to the relief sought, the Court is not required to do so. The decision is a discretionary one. On the application, the Court instead may direct that the appeal proceed to hearing. Regardless, the Court may give any other direction as is just, including direction regarding the payment of costs.

[23] In issuing the order in this motion, I have had to consider a number of questions:

1. Is the filing of the Amended Notice of Appeal the institution of a new appeal that restarts the 60-day period for filing a reply or is it to be treated as a continuation of an existing appeal under an Amended Notice of Appeal such that the timelines established for filing a reply to an amended pleading (i.e., the Amended Notice of Appeal) apply?

2. Were the appeal of the Second Assessment the continuation of the appeal from the Initial Assessment, would the Appellant be entitled to apply for judgment in default?

3. Should the Appellant's motion for judgment in default under GP Rule 63 be granted?

4. Should the Respondent be granted an extension of time for filing the reply to the Amended Notice of Appeal?

5. Should any other directions be given by this Court in connection with this appeal?

IV. IS THE FILING OF THE AMENDED NOTICE OF APPEAL THE INSTITUTION OF A NEW APPEAL THAT RESTARTS THE 60-DAY PERIOD FOR FILING A REPLY OR IS IT TO BE TREATED AS A CONTINUATION OF AN EXISTING APPEAL UNDER AN AMENDED NOTICE OF APPEAL SUCH THAT THE TIMELINES ESTABLISHED FOR FILING A REPLY TO AN AMENDED PLEADING (I.E., THE AMENDED NOTICE OF APPEAL) APPLY?

[24] I have concluded that the filing of the Amended Notice of Appeal is to be treated as the institution of a new appeal. That appeal will be governed by the GP Rules, unless the Appellant elects to limit the appeal and have the ETA IP

Rules apply. Accordingly, the 60-day period for filing the reply to the Amended Notice of Appeal commenced on April 24, 2019, the day following the date the Amended Notice of Appeal was served by the Registry on the Attorney General of Canada. As the reply was neither filed nor served late, the Appellant's motion for judgment in default must be dismissed.

[25] Let me explain my reasons for those conclusions.

[26] The Original Notice of Appeal was an appeal from the Initial Assessment. It is clear that the Second Assessment rendered the Initial Assessment a nullity.[11] Accordingly, once the Second Assessment was issued, no appeal lies with respect to the Initial Assessment.[12]

[27] The appeal of the Initial Assessment was governed, at the Appellant's election, by the ETA IP Rules. Those Rules do not contemplate amendments to pleadings. In contrast, GP Rules 54 to 57 expressly deal with amendments to pleadings for general procedure cases – when they are made, how they may be made, how they are served, and the means of responding to them. The Appellant suggests that GP Rule 54 entitles her to amend her Original Notice of Appeal filed under the ETA IP Rules and thereby appeal the Second Assessment. I do not agree.

[28] First, where a matter is not provided for in the ETA IP Rules, the practice is to be determined by the Court.[13] It is open to the Court to decide that GP Rules 54 to 57 will apply to an appeal governed by the ETA IP Rules. It is also open to the Court to make an order concerning what may be described as gaps in the ETA IP Rules, which order may differ from but be influenced by a GP Rule whose rationale has merit in the circumstances. But GP Rules do not automatically apply where there is a gap in the ETA IP Rules. The Court decides whether a GP Rule or some modified version of a GP Rule should apply to an informal procedure appeal

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[11] See *Ramdeen* v. *The Queen* 2004 TCC 486; *Shair* v. *The Queen* 2006 DTC 2869 (TCC); *Hess* v. *The Queen* 2011 TCC 387; *The Queen* v. *Bowater Mersey Paper Co*. 87 DTC 5382 (FCA); *TransCanada Pipelines Ltd*. v. *The Queen* 2001 DTC 5625 (FCA), leave to appeal to the SCC refused [2001] SCCA No. 619; and *Ford* v. *The Queen* 2015 DTC 5009 (FCA).

[12] *TransCanada Pipelines* and *Hess, ibid.*

[13] ETA IP Rule 19(4).

on a case-by-case basis. No order was issued in this case addressing amendments to pleadings.

[29] But more importantly, this case involves the appeal of a reassessment that is separate from and supersedes the Initial Assessment that was the subject of the Original Notice of Appeal. In my view GP Rules 54 to 57 address amendments to pleadings in respect of the appeal of a specific assessment,[14] but do not permit the Original Notice of Appeal to be amended to substitute the Second Assessment for the Initial Assessment as the subject of the appeal. Once the Second Assessment was issued, the Initial Assessment was nullified and cannot be the subject of an appeal. Thus, while it may be desirable for the Court to decide that GP Rules 54 to 57 apply to amended pleadings in an informal procedure case where the assessment that is the subject of the pleadings remains valid, and so is the assessment under appeal, this is not that case.

[30] However, that does not mean the Amended Notice of Appeal cannot be validly filed with the Tax Court and used to institute an appeal of the Second Assessment. Section 302 expressly permits an amendment to an appeal in circumstances such as those in this case. In particular, Section 302 provides:

> Where a person files a notice of objection to an assessment and the Minister sends to the person a notice of reassessment or an additional assessment, in respect of any matter dealt with in the notice of objection, the person may, within ninety days after the day the notice of reassessment or additional assessment was sent by the Minister,
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> (a) appeal therefrom to the Tax Court, or
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> (b) where an appeal has already been instituted in respect of the matter, amend the appeal by joining thereto an appeal in respect of the reassessment or additional assessment in such manner and on such terms as the Tax Court directs.
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> [Emphasis added.]

[14] Generally I will refer to an assessment or reassessment, but the same principles would apply to a determination or redetermination under the *Income Tax Act* (Canada).

[31] The purpose of this provision, and the analogous provision in the *Income Tax Act* (Canada) (the "ITA"),[15] is to facilitate speedy resolution of disputes. Justice Rothstein, writing for the Federal Court of Appeal in *TransCanada Pipelines*,[16] described the purpose as being:

> . . . to save the time and expense of the filing of a further notice of objection when the Minister reassesses after an original notice of objection is served and the taxpayer is still dissatisfied, and either has not yet appealed or has appealed but the appeal has not been decided.

[32] This is precisely what happened in this case. After the Original Notice of Appeal in respect of the Initial Assessment was filed, the Minister issued the Second Assessment in respect of the same matter as was dealt with in the notice of objection to the Initial Assessment – liability for tax under the ETA for the Reporting Period. While the Appellant had appealed the Initial Reassessment, the appeal had not yet been heard. Accordingly, the Appellant has the right, under Section 302, to "amend the appeal by joining thereto an appeal in respect of the reassessment" (in this case the Second Assessment).

[33] But what does this mean? It is important to focus on the language of Section 302. It expressly draws a distinction between the appeal that was previously instituted (in this case, the appeal of the Initial Assessment) and the appeal of the reassessment or additional assessment (in this case, the appeal of the Second Assessment) which appeal may be joined to the original appeal. Moreover, it addresses the appeal (i.e., the proceedings) rather than the notice of appeal (the originating document for the appeal). They are not the same thing.[17]

[34] GP Rule 25 permits a taxpayer to join in a notice of appeal all assessments under appeal unless otherwise directed. The language of joinder in GP Rule 25 is the same as the language used in Section 302 and in Section 165(7). However, while GP Rule 25 permits a taxpayer to join in a single notice of appeal all

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[15] Subsection 165(7) of the ITA ("Section 165(7)").

[16] *Supra*, note 11.

[17] See GP Rule 43 for example: "In an appeal, the pleadings shall consist of the notice of appeal . . .". Similarly, an assessment is not the same thing as a notice of assessment – one is an operation and one is a piece of paper. See *Pure Spring Co.* v. *MNR* [1947] 1 DLR 501 at p. 528.

assessments under appeal, each assessment retains its separate identity.[18] Similarly, the statutory language in Section 302 contemplates separate appeals of the two assessments.[19] The appeal of the reassessment or additional assessment is joined to the original appeal, but it remains a separate appeal of a distinct reassessment.

[35] The French version of Section 302 is even clearer:

> si un appel a déjà été interjeté auprès de la Cour canadienne de l'impôt relativement à cette cotisation, modifier l'avis d'appel en y joignant un appel relativement à la nouvelle cotisation ou à la cotisation supplémentaire, dans la forme et selon les modalités qui peuvent être fixées par la Cour canadienne de l'impôt.
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> [Emphasis added.]

[36] I believe this interpretation makes sense in the context of the manner in which assessments are challenged, the purpose of Section 302, the language in the legislation and the rules, with particular regard to the manner in which appeals are to be instituted, and the differences between the GP Rules and the ETA IP Rules.

(1) Challenging Assessments

[37] Before appealing an assessment to the Tax Court, a taxpayer must first file a notice of objection. The taxpayer may institute the appeal only following confirmation of the assessment by the Minister or the passage of 180 days following the notice of objection.[20] An appeal from an assessment must be

[18] See *3488063 Canada Inc.* v. *The Queen* 2016 FCA 233. A similar approach was taken in the context of interpreting the phrase "the aggregate of all amounts" in dispute in section 2.1 of the TCC Act. That phrase applies to each assessment under appeal notwithstanding that a single notice of appeal may address more than one assessment. See *Maier* v. *Canada* [1994] TCJ No. 1260 (QL) and *Pink Elephant Inc.* v. *The Queen* 2011 TCC 395 (Inf. Proc.).

[19] Whether assessment, reassessment or additional assessment.

[20] See section 306 of the ETA and section 169 of the ITA. In the ITA context, the period is only 90 days.

instituted by filing an originating document (i.e., a notice of appeal) in accordance with the TCC Act and the rules made thereunder.[21]

[38] Section 302 is an exception to this mandated process for appealing an assessment. Under Section 302 a taxpayer has 90 days following a reassessment or additional assessment to decide whether to join the appeal from that reassessment or additional assessment to an existing appeal. But a taxpayer is not required to do so; a taxpayer may instead pursue the usual process and file a notice of objection to the reassessment or additional assessment. Whichever option is chosen, notice of objection or amending the appeal, the 90-day period applies.

[39] Consider, for example, a taxpayer who is assessed for a taxation year on the basis that a payment made in that year is not deductible. Following confirmation of the assessment after a notice of objection, the taxpayer files a notice of appeal. Before the appeal is heard, the Minister issues an additional assessment for that year imposing penalties under subsection 163(2) of the ITA on the basis that the taxpayer knew the payments were not deductible. Section 165(7) permits the taxpayer to amend the appeal of the assessment to join the appeal of the additional assessment. However, although joined together in a single notice of appeal, they are appeals of two different assessments.

[40] The same approach is taken under the ETA. Assume a taxpayer has instituted an appeal from a reassessment that assumes supplies made under a particular contract were exempt supplies and therefore adjusts the taxpayer's claim for input tax credits. The taxpayer's position is that they are zero-rated supplies. Following the taxpayer's institution of an appeal, the Minister reassesses the taxpayer claiming that the supplies are taxable supplies and that the taxpayer should have collected tax in respect of those supplies. In that event, the taxpayer could amend the appeal to join the second reassessment, since both are concerned with the same matter – the status of supplies under a particular contract. However, notwithstanding that the appeal of the reassessment may be instituted by filing an amended notice of appeal, it is an appeal of a different reassessment.

[41] In contrast, GP Rule 25 does not permit a notice of appeal to be amended to add, and thereby appeal, a reassessment or additional assessment. GP Rule 25

[21] See section 307 of the ETA and section 175 of the ITA.

permits joinder of assessments in a single notice of appeal only where the assessments are under appeal. Thus, unlike Section 302 or Section 165(7), GP Rule 25 does not permit a taxpayer to sidestep the "normal" appeal procedures described in the ITA or ETA.

[42] Therefore, while Section 302 is an exception to the normal means by which assessments are challenged, in that it permits a taxpayer to appeal from a reassessment or additional assessment without first filing a notice of objection to that reassessment or additional assessment, that appeal nonetheless is, and must be, an appeal from that reassessment or additional assessment.

(2) The Purpose of Section 302

[43] The "direct to appeal" approach permitted by Section 302 and Section 165(7) does not apply to any reassessment or additional assessment. It is limited to a reassessment or additional assessment that deals with a matter addressed in a notice of objection for an assessment that has been served or appealed to the Court. This narrow scope is consistent with the limited purpose as explained in the *TransCanada* case.

[44] Under the Appellant's view, if a taxpayer chooses to pursue its rights under Section 302 or Section 165(7) and does so by filing an amended notice of appeal, the respondent would have only 10 days to prepare and file its reply to the notice of appeal. In contrast, the respondent would have a full 60 days to reply to every notice of appeal of a reassessment or additional assessment made otherwise than in reliance on Section 302 or Section 165(7).

[45] In my view, there is no basis to suggest that a choice given to the taxpayer "to save time and expense of filing a further notice of objection" should reduce from 60 days to 10 days the respondent's time to file a reply to a notice of appeal from a particular assessment. Parliament cannot have intended that the normal timelines applicable following the institution of an appeal would be abridged solely as a result of offering this choice to the taxpayer. It would be particularly troubling for Section 302 and Section 165(7) to have that effect when the reassessment or additional assessment results in an amended notice of appeal that raises new issues, statutory provisions, facts or arguments that need to be considered and addressed in

the reply,[22] or, as in this case, where a change to the amount in dispute affects the procedure that governs the appeal.

[46] Section 165(7) and Section 302 provide procedural relief which must be distinguished from the substantive appeal rights.[23] The purpose of Section 302 and Section 165(7) is fulfilled without any need for an abridgement in timelines of the nature suggested by the Appellant. It is always open to the Court to abridge the timelines but, in my view, absent an order of the Court, the timeline that would follow the filing of any other notice of appeal applies.

(3) Instituting an Appeal

[47] Section 17.2 of the TCC Act provides that "unless the Act under which the proceeding arises provides otherwise, a proceeding in respect of which this section [section 17.2] applies shall be instituted by filing an originating document in the form and manner set out in the rules of the Court and by paying, in accordance with the rules, any required filing fee." Section 17.2 applies to all general procedure cases. Section 18.15 of the TCC Act is the analogous provision applicable to appeals from assessments under the ETA or ITA that are governed by informal procedure rules.[24]

[48] What does the ETA state about the manner in which an appeal is instituted? Section 307 of the ETA is clear. An appeal to the Tax Court, other than one governed by the ETA IP Rules, must be instituted in the manner set out in the TCC Act and in any rules made under the TCC Act.

[49] Section 307 is not modified by Section 302 and Section 302 is not an exception to section 307. The two provisions do not conflict, but rather work

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[22] For example, the Minister may agree with the taxpayer's objection that particular provisions in the ITA support the tax return as filed but nonetheless issue a reassessment asserting that the general anti-avoidance rule in section 245 of the ITA applies. The taxpayer would have 90 days to prepare an appropriate amended notice of appeal to address that claim which undoubtedly would involve very different arguments than an assessment that did not rely on section 245.

[23] See *Newmont Canada Limited* v. *The Queen* 2005 TCC 143; aff'd 2005 FCA 431.

[24] That rule is made applicable to ETA appeals by section 18.302 of the TCC Act.

together. Section 302 addresses the right to appeal an assessment without having to first file an objection to that assessment, while section 307 deals with the method by which appeals from all assessments are instituted. This same approach is replicated in the ITA.[25]

[50] Under the GP Rules, an appeal from an assessment under the ETA is instituted by filing a notice of appeal in Form 21(1)(a) and paying the appropriate filing fee. Under the ETA IP Rules, an appeal is instituted by filing a notice of appeal, but no filing fee is payable; although no form of notice of appeal is mandated, the form set out in Schedule 4 to those rules may be used.[26]

[51] Counsel for the Appellant submits that there is no support for the proposition that the Respondent should have 60 days following the filing of the Amended Notice of Appeal to file a reply. I do not agree. No provision of the TCC Act, the ETA IP Rules or the GP Rules addresses whether an amended notice of appeal filed in reliance of Section 302 is to be considered a notice of appeal in respect of the reassessment or additional assessment or an amended pleading for the appeal previously filed. In my view, Section 302 is procedural and the appeal of the reassessment or additional assessment permitted by Section 302 is a separate appeal that must, like all other appeals, be instituted.

[52] Counsel for the Appellant referred me to *Merchant Law Group* v. *The Queen.*[27] One of the issues addressed in that case was whether the appellant could file a new notice of appeal or was required to file an amended notice of appeal when the Minister issued an additional assessment while an appeal was pending. The appellant suggested it should be allowed to file a new notice of appeal rather than an amended notice of appeal. The Court states that when a taxpayer is relying on Section 302, the proper form in which to proceed is by amended notice of appeal.[28] I do not disagree.[29] However, as I read those reasons, the Court did not

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[25] See Section 165(7) and section 175 of the ITA.

[26] The same approach is taken in the income tax context. See rule 4 in the *Tax Court of Canada Rules (Informal Procedure)* (the "ITA IP Rules").

[27] 2008 TCC 49.

[28] *Ibid.* at paragraph 19.

consider whether an amended notice of appeal filed in those circumstances is an originating document with respect to the appeal from the additional assessment.

[53] In my view, the effect of an amended notice of appeal filed in reliance on Section 302 or Section 165(7) is the institution of an appeal separate and apart from the original appeal. That is, the appeal of the Second Assessment is instituted, just as every other appeal is instituted, only when an originating document for that appeal is filed. Where Section 302 is relied on, the form of the originating document may be an amended notice of appeal, but the substance of that document insofar as it concerns the reassessment or additional assessment is the institution of an appeal. A distinction must be drawn between the notice of appeal (the originating document) which institutes the appeal and the proceeding (i.e., the appeal from that reassessment or additional assessment which is joined to a pre-existing appeal).

[54] In the Appellant's case, the Second Assessment nullifies the Initial Assessment and accordingly no appeal lies from the Initial Assessment. The appeal of the Second Assessment must be instituted. While the Appellant can rely on Section 302 to amend the Original Notice of Appeal to join an appeal of the Second Assessment, the appeal of the Second Assessment is instituted only when an originating document for that appeal is filed.

[55] Accordingly, the Appellant's appeal from the Second Assessment was instituted no earlier than the time at which the originating document for that appeal (i.e., the Amended Notice of Appeal) was filed with the Registry on March 11, 2019.[30] The time for filing the reply commences only when that originating document is served.

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[29] However, I do not read this case as suggesting a new notice of appeal is never appropriate. For reasons discussed below, the Court may direct that a new notice of appeal be filed in a particular case.

[30] Section 17.2 of the TCC Act provides that an appeal is instituted by filing an originating document in the manner provided in the rules and paying, in accordance with the rules, any required filing fee. GP Rule 21(4) provides that the filing fee shall be paid within five days after the Registry receives the originating document. In this case, the filing fee was paid after March 11, 2019. For purposes of this motion I do not need to decide whether the appeal was instituted on March 11, 2019, when the Amended Notice of Appeal was filed with the Registry, or only

[56] GP Rule 12 permits the Court to abridge timelines if the Court believes a shorter period is appropriate. However, any abridgement requires an Order of the Court. For example, in *Merchant*[31] the Court required the reply to be filed 5 working days following the filing of the amended notice of appeal. However, it is clear that that order was made under the Court's discretionary power to give directions under Section 302 and its power under GP Rule 9. In making that order, the Court did not mention GP Rule 57, the rule that requires a reply to be filed within 10 days of service of an amended notice of appeal. Moreover, in that case the Court previously had addressed the issue of Section 302 and the Appellant had both agreed, and been ordered, to file an amended notice of appeal. In those circumstances, the Court had ample reason to abridge the timelines. This is not a similar case.

(4) Interaction of General and Informal Procedure Rules

[57] The amount in dispute under the Second Assessment exceeds $50,000. Accordingly, that appeal must proceed under the GP Rules unless the Appellant exercises her right to elect to limit the amount in dispute to $50,000. Because the Appellant purported to elect to have the GP Rules apply in the Amended Notice of Appeal,[32] it seems unlikely that she would seek to make that election.

[58] In my view, the differences between the general and informal procedure rules regarding the form of notice of appeal and service of the notice of appeal further highlight why an amended notice of appeal filed pursuant to Section 302 should be considered an originating document for purposes of establishing the timelines for filing the reply.

[59] Under the GP Rules, the notice of appeal must be in Form 21(1)(a), which requires particular details including matters not required in a notice of appeal for an appeal governed by the informal procedure rules. Section 18.15 of the TCC Act requires only that the notice of appeal in an informal procedure case set out in

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when the filing fee was paid. Whatever view of the requirement is taken, the appeal of the Second Assessment was not instituted before March 11, 2019.

[31] *Supra*, note 27.

[32] I will discuss the validity of this election below.

general terms the reasons for the appeal and the relevant facts.[33] Far more detail and greater specificity is required by Form 21(1)(a).

[60] GP Rule 44 requires a reply to a notice of appeal to be filed within 60 days of the service of the notice of appeal.[34] A notice of appeal under the GP Rules must be served by the Registry on the respondent by transmitting a copy to the Attorney General for Canada.[35] In contrast, a notice of appeal under the informal procedure rules is transmitted by the Registry to the Minister.[36]

[61] In this case, although the Appellant elected to have the ETA IP Rules apply to her appeal from the Initial Assessment, the Original Notice of Appeal is in a form similar to Form 21(1)(a). Whether it conformed to Form 21(1)(a) was of no consequence to the appeal of the Initial Reassessment since no particular form is required under the ETA IP Rules. But what about circumstances in which the notice of appeal filed in an informal case bears no resemblance to Form 21(1)(a) and the taxpayer seeks to amend it in reliance on Section 302 in a case similar to the Appellant's? In my view, the notice of appeal would have to be amended to conform to Form 21(1)(a), unless the Court issues an order waiving compliance with that requirement.[37] In fact, in such a case, the Court may decide that a new notice of appeal would be preferable because of the substantial changes necessary; Section 302 and Section 165(7) permit the Court to make such an order. A Form 21(1)(a) notice of appeal typically would have significantly more detail and the respondent presumably would need the typical 60 days to respond. Again, this supports my conclusion that the normal timelines for filing a reply to a notice of appeal should apply to an amended notice of appeal filed in reliance on Section 302 or Section 165(7).

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[33] See also ETA IP Rule 5 which requires the inclusion of the appellant's address for service.

[34] Subsection 18.3003(1) of the TCC Act provides for a 60-day period in an ETA informal procedure case also.

[35] Subsection 17.2(3) of the TCC Act.

[36] Subsection 18.16(1) (ITA) and subsection 18.3003 (ETA) of the TCC Act. A copy must also be sent to the Commissioner of Revenue. See section 170 of the ITA and section 308 of the ETA.

[37] See GP Rule 9.

[62] It is perhaps also worth observing that paragraph (b) of Section 302 permits an amendment of an appeal "in such manner and on such terms as the Tax Court directs". I contrast this language to that in paragraph (b) of Section 165(7) which provides that the taxpayer may amend the appeal in comparable circumstances "in such manner and on such terms, if any, as the Tax Court of Canada directs".

[63] The difference in language might be seen as suggesting that direction of the Tax Court need not be sought in the income tax context, but must be sought in the ETA context. I cannot conceive a reason for this difference, if a difference is in fact intended. But what is clear is that both provisions allow this Court to order that the rules that would otherwise be applicable should be varied in some way. Moreover, both provisions permit a party to seek direction of the Court and the Court to provide direction of its own volition.

[64] In my view, direction should always be sought where the effect of the reassessment or additional assessment to be joined to an existing appeal is to move the appeal from the informal procedure to the general procedure because the rules for those procedures differ in so many respects.

[65] For the above reasons, I have concluded that the Amended Notice of Appeal constitutes a notice of appeal (i.e., the originating document) in respect of the appeal of the Second Assessment. That originating document was served by the Registry on the Respondent on April 23, 2019. Accordingly, the reply to the Amended Notice of Appeal was required to be filed by the Respondent no later than 60 days after April 23, 2019.

V. WERE THE APPEAL OF THE SECOND ASSESSMENT THE CONTINUATION OF THE APPEAL FROM THE INITIAL ASSESSMENT, WOULD THE APPELLANT BE ENTITLED TO APPLY FOR JUDGMENT IN DEFAULT?

[66] The Appellant's motion is premised on the view that the appeal of the Second Assessment is a continuation of the appeal instituted by the Original Notice of Appeal so that the amendment to the Original Notice of Appeal, while made in reliance on Section 302, is nonetheless an amended pleading of the nature addressed in GP Rule 54. As such, it is to be served under GP Rule 56 and the time

limit for filing a response, the reply, in GP Rule 57 applies. For the reasons outlined above, I do not agree with that view.

[67] However, if my conclusions are incorrect, and the appeal of the Second Assessment through the Amended Notice of Appeal should be viewed as a continuation of the appeal from the Initial Assessment, I have concluded that the Appellant's motion for judgment in default nonetheless should be dismissed. The appeal of the Initial Assessment is governed by the ETA IP Rules because the Appellant elected to have them apply. If that appeal has continued notwithstanding that it now is concerned with the Second Assessment, then the ETA IP Rules continued to apply until the Bump-Up Order was issued. The ETA IP Rules do not provide for judgment in default. In my view, it would be inappropriate to extend GP Rule 63 to an informal procedure case, particularly this one.

[68] Let me explain my reasons for these conclusions.

(1) The ETA IP Rules Applied at the Time the Notice of Motion was Filed

[69] In the Original Notice of Appeal, the Appellant elected, under paragraph 18.3001(c) of the TCC Act, to have the appeal governed by the ETA IP Rules. She had the right to make that election. In the Amended Notice of Appeal, the Appellant purported to elect to have the GP Rules apply to her appeal. However, having elected to have the ETA IP Rules apply, the Appellant has no right to elect to have the appeal heard under the GP Rules. The only election provided to the Appellant is to have the ETA IP Rules apply.[38] Once that election has been made, those Rules apply unless this Court orders that the GP Rules apply.[39]

[70] Such an order is specifically provided for in three provisions of the TCC Act. While it is not clear whether the Court may issue a Bump-Up Order on application by an appellant or the respondent under its general powers,[40]

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[38] See paragraph 18.3001(c) and section 18.30022 of the TCC Act.

[39] See *Maier* v. *The Queen* [1994] T. C. J. No. 1260 (T.C.C.)(Inf. Proc.) and *Bell* v. *Canada* [1993] 2 C.T.C. 2688 (T.C.C.) (Inf. Proc.).

[40] *Ibid*., but see also *Tall* v. *The Queen* 2005 TCC 37.

section 18.3002 permits the Court to make a so-called bump-up order on application of the Attorney General of Canada. No application was made by the Attorney General of Canada in this case. Secondly, section 18.30022 of the TCC Act mandates this Court to issue such an order if, before the start of the hearing of an appeal, it appears to the Court that the amount in dispute exceeds $50,000, unless the appellant elects to limit the appeal to $50,000. Thirdly, the rule that applies once the hearing has commenced is found in section 18.30024 of the TCC Act.

[71] The Appellant applied for a Bump-Up Order and the Respondent consented.[41] However, the Bump-Up Order was not issued by the Court until April 17, 2019. If the appeal from the Second Assessment is a continuation of the appeal instituted by the Original Notice of Appeal, until the Bump-Up Order was issued, the ETA IP Rules applied to that continuing appeal.

[72] The Appellant's motion for judgment in default was made, before the Bump-Up Order was issued, and therefore, under the continuation of the initial appeal view, at a time when the appeal was governed by the ETA IP Rules. However, the ETA IP Rules do not provide for a judgment in default. Section 18.21 of the TCC Act permits the Respondent to make an application for an appeal governed by the ETA IP Rules to be dismissed where the Appellant fails to appear,[42] but nothing in the TCC Act provides for judgment in default. And, no rule in the ETA IP Rules or ITA IP Rules is comparable to GP Rule 63.

[73] This Court has, from time to time, extended the GP Rules to an appeal governed by the informal procedure rules, where there is no equivalent rule in the relevant informal rules.[43] However, in light of the differences between the informal

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[41] The Bump-Up Order states that it is made at the request of the Appellant and upon the consent of counsel for the Respondent. If my conclusion that the appeal of the Second Assessment is a separate appeal is correct, the Bump-Up Order is not necessary. However, if that conclusion is incorrect, the Bump-Up Order is necessary.

[42] Section 18.21 of the TCC Act applies to informal appeals under the ITA and is made applicable to informal appeals under the ETA by section 18.302 of the TCC Act.

[43] See, for example, *Hughes* v. *The Queen* 2017 TCC 95 (Inf. Proc.); *Bailey* v. *The Queen* 2011 TCC 233; and *Cheung* v. *The Queen* 2005 TCC 83.

and general procedure rules, in my view GP Rule 63 should not be extended to informal procedure appeals.

[74] The ETA IP Rules and ITA IP Rules, like the GP Rules, impose time limits for the filing of a reply to a notice of appeal. All require the reply to be filed within the 60-day period following service of the notice of appeal, unless the appellant consents to a longer period or the Court allows a later filing of the reply following an application.[44] In all cases, the consequence of not timely filing the reply is that the allegations of fact in the notice of appeal are presumed to be true for purposes of the appeal. This presumption is rebuttable and, consequently, the effect is that the burden of proof regarding the relevant facts shifts from the appellant to the respondent.[45]

[75] However, in another important respect the consequences of not timely filing a reply differ significantly. In particular, the failure to meet a deadline[46] established for filing a reply to a notice of appeal governed by the ETA IP Rules or ITA IP Rules does not preclude the respondent from filing a reply. Subsections 18.16(4) and 18.3003(2) of the TCC Act expressly permit a reply to be filed after the deadline, as of right. When the reply is filed, the Minister's assumptions of fact will be before the Court; the facts alleged in the notice of appeal, even if presumed true, may not be sufficient to dislodge those assumptions. Evidence led by the Minister may have the effect of rebutting the presumed facts, in which case the evidentiary burden would shift back to the Appellant.[47]

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[44] Subsection 18.3003(1) of the TCC Act and GP Rule 44, respectively. Similar rules apply to ITA informal procedure appeals. See section 18.16 of the TCC Act.

[45]See *Kirby* v. *The Queen* 2008 TCC 604; *Lori Jewellery Inc*. v. *The Queen* 2008 TCC 561 (Inf. Proc.); *Kosowan* v. *MNR* [1989] 1 CTC 2044 (TRB); *Discovery Research Systems Inc.* v. *The Queen* 92 DTC 1306 (TCC); *Discovery Research Systems Inc.* v. *The Queen* 94 DTC 1510 (TCC); *Gougeon* v. *The Queen* 2012 FCA 294; and *Vachon* v. *The Queen* 2008 G.S.T.C.194 (TCC) (Inf. Proc.).

[46] Whether established under subsection 18.3003(1) of the TCC Act or an extended deadline established by consent or Court order.

[47] *Tax Court Practice,* Bourgard and McMechan, at pages 3-95 and 3-96.

[76] In contrast, under the GP Rules, there is no right to file the reply following the deadline, absent consent of the appellant or an order of the Court. Thus the Minister has the both the burden of rebutting the facts in the notice of appeal presumed to be true and the burden of establishing the facts underlying the assessment. In that context, GP Rule 63 makes sense because it is premised on the respondent, having missed a filing deadline, being unable to file a reply in which the respondent may put forward the assumptions of fact on which the assessment is based.

[77] In these circumstances, Justice Bowie's comments in *Hinz* v. *MNR*[48] are apt. In that case he had to consider whether, in an informal procedure case, he should apply GP Rule 140. Counsel for the Attorney General of Canada argued that while that rule applied only to appeals conducted under the general procedure, by analogy it should be applied to cases conducted under the informal procedure, and to cases under the *Employment Insurance Act* and *Canada Pension Plan*. In rejecting that suggestion Justice Bowie stated:

> I cannot see any reason to apply *Rule* 140 of the *General Procedure Rules* by analogy, in the case of either an income tax appeal conducted under the informal procedure, or an appeal under either the *EIA* or the *CPP*. There is a specific provision in the *Tax Court of Canada Act*, similar in terms to *Rule* 140, which makes provision for giving default judgment if an Appellant fails to appear for the hearing of an informal procedure appeal, and for setting that judgment aside on a subsequent motion of the Appellant. No such provision is made in that *Act* to deal with failure of the Crown's representative to appear. There is no statutory provision or rule making any similar provision applicable to appeals arising under the *EIA* or the *CPP*. If either Parliament or the Rules Committee had wished to enact a provision similar to *Rule* 140 to apply in a case of failure of the Crown to appear, it would have been very simple to do so. Resort to the *General Rules of Procedure* in informal appeals, and in *EIA* and *CPP* appeals, should be limited to those occasions when a procedure is required; there is no mandate to apply the *General Rules of Procedure* to every situation in which the Rules Committee has not seen fit to make provision in the *Informal Procedure Rules* or the *EI* and *CPP Rules*. That is especially so where the matter at hand affects established rights and not simply the procedure to be followed.[49]

[48] 2003 TCC 727.

[49] *Ibid* at Paragraph 4.

[Emphasis added.]

[78] Similarly, in this case, had Parliament or the Rules Committee wanted to extend the circumstances in which judgment in default was available it could have done so, but it has not. In my view, applying GP Rule 63 to an informal procedure case is not required and applying it would affect established rights – the right of the respondent to file a reply after the time limit otherwise applicable. As a result, it would be unwise to apply GP Rule 63 to an informal procedure case.

(2) How do the Bump-Up Rules Affect Timelines?

[79] Were the appeal of the Second Assessment a continuation of the appeal of the Initial Assessment, the appeal nonetheless involves a bump-up. That context also is a relevant consideration in deciding the appropriate deadline for filing a reply.

[80] In the income tax context, where a taxpayer elects that an appeal from a reassessment be governed by the informal procedure rules, but the Attorney General applies to have the proceeding governed by the GP Rules, a reply to the notice of appeal is not required until after the Court decides which procedure applies.[50] Where the application is dismissed, the reply must be filed on or before the later of the 60th day after the notice of appeal is transmitted to the Minister (i.e., the limitation that would otherwise apply) and thirty days after the day the written judgment dismissing the application is received by the Minister from the Registry.[51] Thus, where an application is made to bump-up an income tax appeal from the informal procedure to the general procedure, the respondent would have at least 30 days following the Court's decision to file a reply, even where the informal rules continue to apply.

[81] When the bump-up application is allowed, the respondent has 60 days from service of the notice of appeal, because under the GP Rules service of the notice of appeal starts the time period for filing the reply. These timelines apply when there is no Section 165(7) amendment to join a reassessment or additional assessment (i.e., when the same reassessment is under appeal). The time period presumably

[50] Subsection 18.16(2) of the TCC Act.

[51] Subsection 18.16(3) of the TCC Act.

should be no shorter where a reassessment or additional assessment is being appealed relying on Section 165(7).

[82] In the ETA context, the TCC Act also permits the Attorney General of Canada to apply to have an informal procedure appeal bumped-up. However, those provisions are silent regarding the time for filing a reply following such an application.[52] I cannot conceive a reason why the timelines for an appeal from an assessment under the ETA should be any different from those applicable to an appeal under the ITA. ETA IP Rule 19(4) provides that where matters are not provided for in the rules, the practice is to be determined by the Court. I have concluded that the timelines for filing a reply to the Amended Notice of Appeal in this case should be no shorter than they would have been had section 18.16 of the TCC Act applied.

[83] This conclusion is consistent with other commentary on timelines in a bump-up context (i.e., that once the Registry serves the notice of appeal that is bumped-up from the informal procedure to the general procedure in accordance with section 18.3002 of the TCC Act, GP Rule 44 then operates to provide the Minister with an additional 60 days from the date of service of the appeal to file the reply[53]).

VI. SHOULD THE APPELLANT'S MOTION FOR JUDGMENT IN DEFAULT UNDER GP RULE 63 BE GRANTED?

[84] I have concluded that, at the time the Appellant filed her Notice of Motion, the Respondent had not failed to file the reply to the Amended Notice of Appeal within the required time, and alternatively that the appeal was governed by the ETA IP Rules at the time the Appellant's motion was filed such that GP Rule 63 was not available to her. On that basis, the Appellant's motion must fail. However, even if the Appellant had convinced me that GP Rules 54 to 57 and 63 govern and my conclusion regarding timelines is incorrect, the Appellant would not be entitled to judgment in default.

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[52] The relevant rules in section 18.16 of the TCC Act do not apply.

[53] See *Tax Court Practice, supra*, note 47, at page 3-119.

[85] Under GP Rule 63, judgment in default is available only where the facts alleged in the notice of appeal entitle the appellant to the relief sought in the notice of appeal.

[86] The facts alleged under the heading "Facts" in the Amended Notice of Appeal are not particularly germane to the basis of the Second Assessment; they consist of background facts personal to the Appellant or facts related to the history of the assessment, appeal and reassessment. They do not address the Appellant's liability for the assessed tax at all.

[87] When I raised this at the hearing of the motion, Appellant's counsel suggested two answers. First, because the Facts include a statement the Appellant was not registered for GST/HST in the relevant reporting period, her liability for tax has been addressed. The argument seemed to be that if she was not registered, it was because she was not required to be because she was not making taxable supplies. For obvious reasons, that is not sufficient, even when coupled with the statement under Facts that she did not file a return for the Reporting Period. Whether one is registered for GST/HST or files a return does not determine liability for tax under the ETA.[54]

[88] Secondly, it was suggested that I should look at the facts described under the heading "Reasons" in the Amended Notice of Appeal. Although conceded to be poor drafting, the suggestion was that the necessary facts were in the Amended Notice of Appeal, even if under the wrong heading and I could look to those facts wherever they might appear. I decline to adopt that view. GP Rule 48 requires a taxpayer appealing an assessment under the GP Rules to file a notice of appeal in Form 21(1)(a); that form establishes a specific structure that must be followed.[55] The material facts should be under the Facts heading, particularly where those facts are to be the basis of a judgment in default application.

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[54] There is a distinction between a registrant (i.e. one who is registered or required to be registered) and a person who is registered. The Facts section of the Amended Notice of Appeal contains no statement about the Appellant's status as a registrant.

[55] See *Metrobec Inc.* v. *The Queen* 2018 TCC 115; *Kondur* v. *The Queen* 2015 TCC 318; *O'Dwyer* v. *The Queen* 2012 TCC 261; *Strother* v. *The Queen* 2011 TCC 251; and *Grenon* v. *The Queen* 2010 TCC 364, aff'd 2011 FCA 147.

[89] However, more fundamentally, the Amended Notice of Appeal does not specify what relief is sought. GP Rule 63 asks whether the facts alleged entitle the Appellant to the relief sought in the notice of appeal. Without the relief sought being stated in the Amended Notice of Appeal, it is not possible to know whether the facts alleged anywhere in that document entitle the Appellant to the relief sought. Therefore, whatever view one takes of Section 302 and the Amended Notice of Appeal, the Appellant is not entitled to judgment in default.

VII. SHOULD THE RESPONDENT BE GRANTED AN EXTENSION TO THE TIME FOR FILING THE REPLY TO THE AMENDED NOTICE OF APPEAL?

[90] This is not a typical case – a reassessment following an appeal, coupled with a bump-up from the informal procedure to the general procedure. In the circumstances, I would have granted an extension to the time for filing the reply, regardless of my conclusion on the effect of the Amended Notice of Appeal on timelines. Procedure exists to help promote fair, just and correct resolution of disputes and an irregularity should not result in the setting aside of a proceeding unless, and then only as necessary, in the interests of justice.[56] As GP Rule 4(1) states, "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits."[57] In my view, the Respondent's assumption that the 60-day period would restart was reasonable in the circumstances.

[91] But, in any event, I have concluded that the time for filing the reply to the Amended Notice of Appeal had not expired at the time the notice of motion seeking judgment in default was filed, and that the 60-day period for filing the reply commenced on April 24, 2019. While the time had not expired at the time the Appellant's motion was heard, it expired before my decision on the motion was rendered. Accordingly, the period for filing the reply must and should be extended.

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[56] GP Rule 7.

[57] See *Kosowan, supra*, note 45; *Carew* v. *The Queen* [1993] 1 CTC 1 (FCA); and *B. W Strassburger Ltd*. v. *R* 2001 DTC 694 (TCC); aff'd except as to cost award 2002 FCA 332.

VIII. SHOULD ANY OTHER DIRECTIONS BE GIVEN BY THIS COURT IN CONNECTION WITH THIS APPEAL?

[92] On an application made pursuant to GP Rule 63, the Court is permitted to give such other direction as is just, including direction regarding the payment of costs. Section 302 also permits the Court to give directions where an appeal is amended relying on that provision. It is appropriate that I give directions in this case.

[93] The Amended Notice of Appeal does not comply with the requirements of Form 21(1)(a): it is missing section g) which requires it to indicate the relief sought. While the Appellant has the right to amend the Amended Notice of Appeal under GP Rule 54, the Appellant is directed to do so no later than 15 days after the date of my Order. The Appellant is directed to add to the Facts section of the amended Amended Notice of Appeal (the "Second Amended Notice of Appeal") any material facts she intends to rely on in her appeal. The Appellant is directed to comply with GP Rule 55 in respect of the Second Amended Notice of Appeal and to transmit a copy of the Second Amended Notice of Appeal to counsel for the Respondent by facsimile transmission on the same day as the Second Amended Notice of Appeal is filed with the Court.

[94] The Respondent is directed to file the reply to the Second Amended Notice of Appeal no later than 45 days after receipt by facsimile transmission of a copy of the Second Amended Notice of Appeal. To be clear, the 45-day period for filing the reply will commence on the day following the day that the Second Amended Notice of Appeal is transmitted by the Appellant to counsel for the Respondent, not on the expiry of the 15-day period the Appellant has for filing the Second Amended Notice of Appeal. In other words, if the Second Amended Notice of Appeal is filed on the 10th day of that 15-day period, the 45-day period will commence on the 11th day of that period.

[95] While the Appellant sought costs of this application, the Appellant has been wholly unsuccessful and will not be awarded costs. I am inclined to award costs in respect of the motion to the Respondent. Given the chronology of events, the circumstances appear to me to be ones in which haste made waste. The Second Assessment resulted in an assessment of tax that was 65 times greater than the

assessed taxes under the Initial Assessment.[58] Yet the Appellant filed the Amended Notice of Appeal and served it on the Respondent by facsimile on the date the Second Assessment was issued. It seems apparent that the Appellant did not take the time to consider whether the Amended Notice of Appeal complied with Form 21(1)(a) and whether, given the increased tax liability, any differences between the informal and general procedure rules were relevant. It appears the focus was on moving quickly to amend the Original Notice of Appeal, perhaps to start the clock running for the Respondent's reply. However, I am cognizant that I have not had the benefit of submissions on costs. Accordingly, each of the parties shall have 30 days from the date of my Order to make submissions, not exceeding 10 pages, on costs on this motion.

Signed at Ottawa, Canada, this 4th day of October 2019.

"K.A. Siobhan Monaghan"

Monaghan J.

[58] In Mr. Rybakov's case, it was approximately 25 times greater.

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PLACE OF HEARING:	Ottawa, Ontario
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DATE OF ORDER:	October 4, 2019

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