Docket: 2020-1885(GST)G

BETWEEN:

THE THOMAS 2009 FAMILY TRUST,

Appellant,

and

HIS MAJESTY THE KING,

Respondent/Applicant.

Motion disposed of upon consideration of written representations

Before: The Honourable Justice Gabrielle St-Hilaire

Participants:

Counsel for the Appellant:	Sara L. Scott
Counsel for the Respondent/Applicant:	Devon E. Peavoy

ORDER

In accordance with the attached reasons for order, the Respondent's motion to obtain an order that a question be determined before the hearing pursuant to section 58 of the *Tax Court of Canada Rules (General Procedure)* is dismissed, with costs in the cause.

The Order dated March 17, 2022, is amended to read:

> The written questions on examination for discovery shall be served on the opposing party on or before October 17, 2022.
>
> Answers to the written questions on examination for discovery shall be served on the opposing party on or before December 16, 2022.
>
> Follow-up written questions on examination for discovery shall be served, or oral examinations for discovery shall be completed, on or before January 17, 2023.

Answers to the follow-up written questions given at the examinations for discovery, if any, shall be served on or before March 11, 2023.

The parties shall communicate with the Hearings Coordinator in writing on or before April 11, 2023, to advise the Court whether the case will settle, whether a Settlement Conference would be beneficial or whether a hearing date should be set. In the latter event, the parties shall file a joint application to fix a time and place for the hearing in accordance with section 123 of the *Tax Court of Canada Rules (General Procedure)* by said date.

Signed at Ottawa, Canada, this 15th day of September 2022.

"Gabrielle St-Hilaire"

St-Hilaire J.

Citation: 2022 TCC 102
Date: 20220915
Docket: 2020-1885(GST)G

BETWEEN:

THE THOMAS 2009 FAMILY TRUST,

Appellant,

and

HIS MAJESTY THE KING,

Respondent/Applicant.

REASONS FOR ORDER

St-Hilaire J.

I. Introduction

[1] The Respondent has filed a motion requesting an order that a question be determined before the hearing pursuant to section 58 of the *Tax Court of Canada Rules (General Procedure)* (Rules). The Respondent requested that the motion be disposed of upon consideration of written representations and the Appellant has responded with written submissions opposing the motion.

[2] The Appellant is the sole shareholder of 147842 Canada Limited (147842). 147842 paid dividends to the Appellant in the amounts of $22,000 and $70,000 in 2010 and 2011 respectively. On November 7, 2019, the Minister of National Revenue (Minister) assessed the Appellant for a non-arm's length transfer for an amount of $92,000 pursuant to section 325 of the *Excise Tax Act* (ETA).

[3] Several events took place between the transfer of dividends in 2010 and 2011 and the Appellant's assessment in 2019. Although there are facts in dispute, the parties agree that the Appellant's trustee, Mr. Derek Thomas, made a Division I proposal under the *Bankruptcy and Insolvency Act* (BIA) in March 2013. 147842 formed part of Mr. Thomas' corporate structure. The Minister and the trustee, Grant Thornton Limited (GTL), were involved in discussions including about 147842 and in June 2013, 147842 made a Division I proposal under the BIA. 147842 successfully completed the terms of the proposal in August 2016.

[4] Whether the Minister required that 147842 file a Division I proposal under the BIA and whether the discussions between the Minister and GTL related to a plan to address the "entire Canada Revenue Agency (CRA) debt" is a matter of dispute. In my view, these facts are relevant to the issues as framed by the Appellant in its Notice of Appeal.

[5] At paragraph 14 of its Notice of Appeal, the Appellant stated that the issues in dispute in this appeal are:

> (a) that any debt owing by the Company [147842] has been satisfied by the BIA proposal; and
>
> (b) that the Minister is precluded from seeking any further recovery from the Taxpayer [Appellant] or the Company, as the Company's debt has been satisfied.

[6] At paragraph 9 of its Reply, the Respondent wrote that "the issue is whether the Minister correctly assessed the Appellant in the amount of $92,000 relating to the non-arm's length transfer of dividends." In my view, this is the very broad issue in any appeal of an assessment under section 325 of the ETA involving the transfer of dividends.

[7] In its written submissions on this motion, the Respondent stated the question to be determined under section 58 of the Rules (Rule 58) as follows:

> The question to be determined is whether the Appellant can escape the joint and several liability imposed by section 325 of the *Excise Tax Act*, which arises at the time of transfer of property, due to the subsequent discharge in bankruptcy of the original tax debtor (Question).

[8] In the Respondent's view, this is a question of law, which can be determined without consideration of any facts.

The Law on Rule 58

[9] Rule 58 provides a two-step process by which a party can request that the Court determine a question prior to the hearing. Rule 58 reads 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.
>
> (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.
>
> (3) An order that is granted under subsection (1) shall
>
> (a) state the question to be determined before the hearing;
>
> (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;
>
> (c) fix time limits for the service and filing of a factum consisting of a concise statement of facts and law;
>
> (d) fix the time and place for the hearing of the question; and
>
> (e) give any other direction that the Court considers appropriate.

[10] The motion presently before the Court involves the first step of the two-step process contemplated by Rule 58. At the first step of the process, the Court determines whether the proposed question can be appropriately dealt with under Rule 58 having due regard to the requirements of the provision. If the Court finds that Rule 58 is appropriately invoked and the order is granted, under the second step of the process, the Court will hear arguments and decide the question before the hearing.

[11] In *Paletta v R*, 2016 TCC 171, conf. 2017 FCA 33, Justice Owen made a thorough and useful analysis of the most recent version of Rule 58, parts of which are worth quoting to set the legal context within which this motion will be decided. At paragraphs 13 to 25, Justice Owen wrote as follows:

> 13 Rule 58 continues to describe a two-stage process. Subsection 58(1) states that the Court *may*, in response to an application by a party, grant an order that
>
> 1. a question of law, fact or mixed law and fact raised in a pleading, or

2. a question as to the admissibility of any evidence,

be determined before the hearing.

14 Under subsection 58(2), the Court *may* grant such an order *if it appears* that the determination of the question before the hearing *may*

1. dispose of all or part of the proceeding,

2. result in a substantially shorter hearing, or

3. result in substantial savings in costs.

15 In the first stage, the Court determines whether an order should be granted, having due regard to the requirements of subsections 58(1) and (2), which are determined by applying the usual rules of statutory interpretation, keeping in mind, however, subsection 4(1) of the Rules, which requires that "[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

16 With respect to the requirements in subsections 58(1) and (2), subsection 58(1) requires that there be either (i) a question of law, fact or mixed law and fact raised in a pleading, or (ii) a question as to the admissibility of evidence.

17 In *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.) , the Supreme Court of Canada described what constitutes a question of law, fact or mixed law and fact as follows (at paragraph 35):

> ... Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact....

18 The question of law, fact or mixed law and fact must have been raised in the pleadings. Rule 58 does not provide a means to address such questions that are not raised in the pleadings.[7]

19 The second, alternative, requirement in subsection 58(1) was introduced with the 2014 amendments to Rule 58. It expands the scope of Rule 58 to allow for questions regarding the admissibility of evidence. The inclusion of this requirement confirms the broad scope of current Rule 58, as it may now be used to address virtually any issue that could arise in a full hearing of the appeal.

20 Subsection 58(2) requires only that "it appear" that the Rule 58 hearing "may" lead to one or more of the specified outcomes. The word "may" is used in two senses in subsection 58(2). The first sense is permissive and this is also the sense in which it is so used in subsection 58(1). The repetition of the permissive sense makes clear the fact that the decision to grant an order is wholly in the discretion of the Court. In particular, the fact that a question may meet the requirements in subsections 58(1) and (2) by no means compels the Court to grant an order under Rule 58.

21 This discretionary aspect of the rule is entirely consistent with the fact that the Tax Court of Canada has the implied authority to control the process of the Court. In *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.) , the Supreme Court of Canada stated:

Likewise in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a "doctrine of jurisdiction by necessary implication" when determining the powers of a statutory tribunal:

> ... the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime ....

(*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51)

Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.[8]

22 Apart from being reflective of the Court's implied authority to control its own process, the repetition of the permissive aspect of Rule 58 reinforces the point that there may well be other considerations at play that factor into the Court's decision whether or not to grant an order. The repeated use of permissive language in subsections 58(1) and (2) confirms that the Court is not limited to considering only the requirements set out in those subsections.[9]

> 23 The second sense of "may" used in subsection 58(2) expresses possibility. Specifically, if "it appears" to the judge hearing the Rule 58 application that the determination of the question "may" (i.e., could possibly) give rise to one or more of the three outcomes described in subsection 58(2), then the judge may (not must) grant the order.
>
> 24 The cases on the former version of Rule 58 are well summarized by the Chief Justice in *Suncor , supra*. As the Chief Justice observes, some cases under former Rule 58 have held that a question fails to meet the requirement now in subsection 58(2) if only one of two possible answers would lead to the desired results.
>
> 25 I do not read these cases as setting a hard and fast rule that must be applied to the current version of Rule 58. Moreover, the broad discretionary language used in current subsection 58(2) supports the position that a question should not automatically fail to meet the requirement in that subsection because one possible answer to the question would not lead to one or more of the desired results. Rather, the possibility of that answer should be factored into the Court's consideration of whether or not to exercise its discretion to grant an order under Rule 58. In my view, such an approach respects the broad discretionary language of subsection 58(2) and is consistent with the mandate under subsection 4(1) of the Rules and the general principles enunciated by the Supreme Court of Canada in *Hryniak* .
>
> 26 With these considerations in mind, I will now address the application made by the Appellant. It is clear that the Question is a question of mixed law and fact that is raised in the Notice of Appeal filed by the Appellant. Accordingly, the Question meets one of the alternative requirements in subsection 58(1) of the Rules.
>
> [footnotes omitted]

[12] It bears repeating that subsection 58(1) of Rule 58 requires that there be a question of law, fact or mixed law and fact raised in a pleading or a question related to the admissibility of evidence. Further, under subsection 58(2) of Rule 58, the Court may grant such an order if it appears that the determination of the question before the hearing may

1. dispose of all or part of the proceeding;
2. result in a substantially shorter hearing; or
3. result in a substantial saving of costs.

[13] With these considerations in mind, I will address the Respondent's motion.

II. **Analysis**

[14] For ease of reference, I will reiterate the Question for which the Respondent seeks determination:

> The question to be determined is whether the Appellant can escape the joint and several liability imposed by section 325 of the *Excise Tax Act*, which arises at the time of transfer of property, due to the subsequent discharge in bankruptcy of the original tax debtor.

[15] The Respondent asserts that the Question is a question of law that the Court can answer without consideration of any facts. The Appellant submits that the question is not a pure question of law. Bearing in mind the pronouncement of the Supreme Court of Canada in *Southam* quoted above, the Question as posed by the Respondent requires consideration of whether the Appellant satisfies the legal test and consequently, is a mixed question of law and fact. This is not a bar to the use of Rule 58 in light of the 2014 amendments to the Rule. However, it does speak to the fact that to answer the Question, the Court would be called upon to consider the facts of the case.

[16] At paragraph 19 of its written submissions, the Respondent writes that it will argue that the Appellant's joint and several liability for 147842's debt arose at the time of transfer of property and that the subsequent bankruptcy discharge of 147842 is irrelevant. The Respondent submits that an order of discharge in bankruptcy does not extinguish 147842's liability for the debt although it relieves 147842 from having to pay it.

[17] The Question as framed by the Respondent is problematic. Firstly, the Appellant points out that 147842, the original tax debtor, was never adjudged a bankrupt and submits that the appeal does not involve a bankruptcy but rather a Division I proposal. In addition, the Respondent asks whether the Appellant can escape liability due to the subsequent discharge of the original tax debtor. I do not understand that to be the particular issue raised in this appeal. In its Reply, the Respondent stated the issue very broadly as being that of the correctness of the section 325 assessment. The Appellant was more precise in its Notice of Appeal, stating the first issue in dispute is "that any debt owing by the Company [147842] has been satisfied by the BIA proposal" and secondly, "that the Minister is precluded from seeking any further recovery" as the debt has been satisfied. As I understand it, the issue is not whether the Appellant can escape liability because of any bankruptcy discharge, but rather, whether in the circumstances of this case, there is

any debt owing by 147842 for which the Appellant can be held jointly and severally liable in light of the BIA proposal and the circumstances in which it was made.

[18] It is not obvious that the Question was raised in the pleadings as required by subsection 58(1) of Rule 58 but more importantly, the Court may grant an order if it *appears* that the Question may lead to one or more of the outcomes specified in subsection 58(2). I find that it does not appear so. I agree with the Respondent's submissions at paragraph 24 that the Court need not be satisfied that answering the Question will absolutely dispose of part of the appeal. However, as found by the Federal Court of Appeal in *Canadian Forest Navigation Co. Ltd. v The Queen*, 2017 FCA 39, the Court should resist answering the question if it does not appear that the answer will resolve anything in the context of the appeal.

[19] The Appellant submits that the appeal does not involve a bankruptcy but rather a Division I proposal filed by 147842 in circumstances where the CRA was the sole creditor and had significant involvement in the proposal process, including allegedly inducing 147842 to enter into a proposal as a precondition to accepting Mr. Thomas' proposal with the knowledge that dividends had been paid by 147842 prior to the proposal. The Appellant alleges that the CRA framed a multi-tiered proposal as a way of dealing with *all tax debt* within the corporate group. In its Reply, the Respondent denied that the proposal planned to address the entire CRA debt. The central question in this appeal concerns material questions of fact that are in dispute and that are best left to the Judge who will hear the evidence (see *Fiducie Historia v R*, 2021 TCC 38 at para 42, quoting *3488063 Canada Inc. v Canada*, 2016 FCA 233).

[20] As an alternative to its opposition to the motion, and in light of the Court's authority to exercise its discretion to rephrase the Rule 58 question, the Appellant proposed the following questions (and further, provided its proposed answers to these questions):

a) What is the legal effect of a corporate bankruptcy proposal under Division I of the BIA on the applicability of subsection 325(1) of the ETA where CRA is the sole creditor of the corporation?

b) What is the legal effect of a corporate bankruptcy proposal under Division I of the BIA on the applicability of subsection 325(1) of the ETA where CRA,

as the sole creditor of the corporation, induced the corporation to enter into the proposal?

c) What is the legal effect of a corporate bankruptcy proposal under Division I of the BIA on the applicability of subsection 325(1) of the ETA where CRA, as the sole creditor of the corporation and/or as the creditor who induced or required the corporation to enter into the proposal, accepts the proposal with actual knowledge of dividends paid by the corporation prior to the date of the proposal and at a time when the corporation owed amounts to CRA?

[21] In my view, answering the Question as posed by the Respondent does not get the parties any closer to resolving the central issue in this appeal. Even if the Court were to find that a transferee's debt is unaffected by a bankruptcy discharge, it does not assist in determining the effect of a proposal under the BIA, and in particular, one that was negotiated in the circumstances alleged by the Appellant. Contrary to the Respondent's position, answering the Question would not result in any significant time and cost savings. Further, if the Court were to grant this motion and move to the second step of Rule 58 to answer the questions as reframed by the Appellant, the Court would be hearing testimony from the witnesses and deciding the issues raised in this appeal. Simply put, the motions judge would be essentially holding a full hearing of the appeal. As asserted by Justice Campbell in *McIntyre v R*, 2014 TCC 111, a Rule 58 motion is not a substitute for a trial. I find that this is not an appropriate matter in which to grant the order requested under the first step of Rule 58. In so concluding, I am mindful that subsection 4(1) of the Rules requires that the Rules "shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

[22] For the foregoing reasons, the motion is dismissed with costs in the cause.

[23] As this motion was filed prior to discoveries being held in this matter, the Order dated March 17, 2022, is amended to read:

> The written questions on examination for discovery shall be served on the opposing party on or before October 17, 2022.
>
> Answers to the written questions on examination for discovery shall be served on the opposing party on or before December 16, 2022.

Follow-up written questions on examination for discovery, or oral examination for discovery shall be completed, on or before January 17, 2023.

Answers to the follow-up written questions given at the examinations for discovery, if any, shall be satisfied on or before March 11, 2023.

The parties shall communicate with the Hearings Coordinator in writing on or before April 11, 2023, to advise the Court whether the case will settle, whether a Settlement Conference would be beneficial or whether a hearing date should be set. In the latter event, the parties shall file a joint application to fix a time and place for the hearing in accordance with section 123 of the *Tax Court of Canada Rules (General Procedure)* by said date.

Signed at Ottawa, Canada, this 15th day of September 2022.

"Gabrielle St-Hilaire"

St-Hilaire J.

CITATION:	2022 TCC 102
COURT FILE NO.:	2020-1885(GST)G
STYLE OF CAUSE:	THE THOMAS 2009 FAMILY TRUST AND HIS MAJESTY THE KING
PLACE OF HEARING:	Ottawa, Ontario
REASONS FOR ORDER BY:	The Honourable Justice Gabrielle St-Hilaire
DATE OF ORDER:	September 15, 2022

APPEARANCES:

Counsel for the Applicant:	Sara L. Scott
Counsel for the Respondent:	Devon E. Peavoy

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