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IMPORTANT DEVELOPMENTS IN CANADIAN TRANSFER PRICING

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There have been two recent decisions of the Tax Court of Canada involving transfer pricing: one is the *McKesson Canada* case, in which the Court held that the Organisation for Economic Co-operation and Development's ("OECD's") transfer pricing methodologies are irrelevant in a court case involving transfer pricing; the other is the *Elk Trading* case, in which the Crown essentially conceded that the transactional net margin method ("TNMM") cannot be applied in Canada.

McKesson Canada

On December 20, 2013, the Court released its long-awaited and lengthy decision in *McKesson Canada Corporation v. The Queen*,[1] a case involving transfer pricing adjustments under section 247 of the *Income Tax Act* (the "Act")[2] and the limitation period in Article 9(3) of the *Canada-Luxembourg Tax Convention* (the "Luxembourg Treaty").

Facts

McKesson Canada is the principal Canadian operating company in the McKesson Group. Its core business and that of McKesson Canada is the wholesale distribution of "over-the-counter" and prescription pharmaceutical medicine products. In 2002, McKesson Canada and its Luxembourg parent company, MIH, entered into a Receivables Sales Agreement (the "RSA") and a Servicing Agreement. Under the RSA, MIH agreed to purchase all of McKesson Canada's eligible receivables as of 2002 (about $460 million) and committed to purchase all eligible receivables daily as they arose for the next five years unless earlier terminated as provided for in the RSA and subject to a $900 million cap. The price to be paid for the receivables was at a 2.206% discount to their face amount (if one takes into account that, historically, receivables were paid on average within 30 days, this rate equates to an annual financing rate of approximately 27%). The Minister of National Revenue reassessed McKesson Canada's 2003 taxation year on the basis that if the RSA had been made between arm's length parties, then the Discount Rate would have been 1.013%. The Minister increased McKesson Canada's income under section 247 of the Act by $26,610,000. As McKesson Canada's 2003 taxation year under appeal ended March 29, 2003 and was only three and a half months long, the annualized transfer pricing adjustment was approximately $80 million.

The Tax Court trial lasted 32 days over a period of five months. Following the Supreme Court of Canada's decision in *Canada v. GlaxoSmithKline Inc.*[3] in October 2012, both parties made further written submissions.

Under the RSA, eligible receivables were trade receivables owing by arm's length customers not in default and whose receivables would not represent in the aggregate more than 2% of McKesson Canada's then outstanding receivable pool. However, the 2% concentration limit on eligibility did not apply to McKesson Canada's largest customers, who accounted for about one-third of the sales. MIH had the right to put non-performing receivables back to McKesson Canada for a price equal to 75% of the face amount, to be later readjusted to the amount actually collected; MIH did not otherwise have recourse against McKesson Canada for unpaid purchased receivables. The receivables under the RSA were expected to be collected within 30 days and the historical bad debt experience was 0.043%.

Under the Servicing Agreement, McKesson Canada agreed to service the accounts receivable and received a servicing fee of $9.6 million annually, regardless of the amount outstanding. The amount paid under the Servicing Agreement was not challenged by the Minister.

The amount payable for a purchased receivable under the RSA was determined by multiplying the face amount of the receivable by one minus the Discount Rate. The Discount Rate was defined to be the sum of

(1) the Yield Rate (equal to the 30-day Canadian dollar banker's acceptance rate or the Canadian dealer offered rate ("CDOR") on the first business day of the relevant settlement);

(2) the Loss Discount (intended to reflect the credit risk of the McKesson Canada customers whose receivables were covered by the RSA and was set at 0.23% for the year under appeal. For the remaining term of the RSA commencing January 1, 2004, the Loss Discount was to be recalculated as often as MIH considered necessary based on the credit risk of certain customers); plus

(3) the Discount Spread (which was set at the fixed rate of 1.7305% and related to (a) the risk that McKesson Canada's creditworthiness might deteriorate significantly and receivable debtors might set off their rebate entitlements in such event; (b) the risk that McKesson Canada's customers might increase their take-up of available prompt payment discounts; (c) the risk that MIH might decide to appoint a new service provider who would require a greater servicing fee; and (d) the need for the Discount Rate to fully cover MIH's cost of funds).

Toronto Dominion Securities Inc. ("TDSI") was retained by McKesson Canada to provide advice on the arm's length aspects of certain terms and conditions of the RSA and certain components of the Discount Rate calculation at the time the RSA was entered into. The TDSI reports qualified as contemporaneous documentation and, therefore, the Minister did not assess the otherwise applicable 10% transfer pricing penalty under subsection 247(3) of the Act.[4]

Issues and Analysis

Justice Boyle stated that the reassessment was made under paragraphs 247(2)(*a*) and (*c*) of the Act. Accordingly, the task of the Court was to determine whether the terms and conditions of the transactions carried out by the parties resulted in a Discount Rate that was within the range of what they would have agreed to had they been dealing at arm's length. Interestingly, in light of recent OECD discussion papers, he noted that the Minister and the Canada Revenue Agency ("CRA") did not raise "any [of the] fair share or fiscal morality arguments that are currently trendy in international tax circles" and that "it wisely stuck strictly to the tax fundamentals: the relevant provisions of the legislation and the evidence relevant thereto". He noted that issues of fiscal morality and fair share are within the realm of Parliament.

Boyle J set out in detail the evidence from the two material witnesses and the five expert witnesses who testified and criticized much of the expert evidence. In respect of the transfer pricing report prepared by a major accounting firm in 2005 in response to the CRA's review of the RSA transaction, he stated that the report was primarily a piece of advocacy work, "perhaps largely made as instructed", and that the examples used by the accounting firm resulted in "picking and choosing" and mixing and matching the performance of the receivable pools which resulted in "transparently poor advocacy and even more questionable valuation opinions".

Boyle J also criticized McKesson Canada for the manner in which the appeal was undertaken: "Overall I can say that never have I seen so much time and effort by an Appellant to put forward such an untenable position so strongly and seriously. This had all the appearances of alchemy in reverse."

In determining the appropriate methodology to determine the Discount Rate, Boyle J did not accept the conclusions of any of the experts or their reports in their entirety, although he acknowledged that the Court's analysis was informed by their testimony and information. He noted that the purpose of the RSA transaction was to reduce McKesson

Canada's Canadian tax liability by paying the maximum under the RSA that was justifiable (McKesson Canada had been profitable for the years prior to the RSA, but after the RSA was executed, McKesson Canada operated at a loss) and that there is nothing wrong with taxpayers engaging in "tax-oriented transactions, tax planning, and making decisions based entirely upon tax consequences (subject only to GAAR which is not relevant to this appeal)". However, Boyle J also notes that the reasons for, and predominant purposes of, non-arm's length transactions form a relevant part of the factual context being considered.

He then reviewed the various elements of the Discount Rate. In respect of the Yield Rate, he accepted that the 30-day CDOR was appropriate. However, for the period in question, he stated that it was necessary to review the historical evidence in respect of when payment would be made. He held that the parties should have taken into account the fact that the first period had a "missing" 15 days because the agreement was entered into in the middle of the month. In respect to the Loss Discount, which was fixed by the RSA at 0.23%, Boyle J stated that this should have been based on historical data which showed write-offs of approximately 0.04%: even if the parties provided a buffer of 50% to 100% increase in write-offs, the Loss Discount would have been between 0.6% to 0.8%.

In respect of the Discount Spread, Boyle J looked at the various elements which were included in this number. Based on the historical data and the facts provided, he found that the servicing discount risk should have been between 0.17% and 0.25%; the prompt payment dilution discount should have been between 0.5% and 0.53%; the accrued rebate dilutions discount (which involves a customer paying a lesser amount in respect of its accounts taking into account an expected rebate) was not justified; and the interest discount, which was intended to provide MIH with a return from a discounted purchase of receivables, should have been between 0.0% and 0.08%, for a total Discount Rate range of 0.959% to 1.17%. Accordingly, because the taxpayer did not rebut the Minister's assumptions in respect of a reasonable Discount Rate, the taxpayer's appeal was dismissed.

In coming to his decision, probably the most important point for future cases is Boyle J's complete rejection of the importance of the various transfer pricing methods put forward by the OECD in its Transfer Pricing Guidelines and adopted by the CRA and many other revenue authorities around the world. Essentially, said Boyle J, these "methods" are irrelevant. What is relevant, and all that is relevant, is direct evidence of whether the taxpayer's pricing is equal to or different from arm's length pricing:

> [120] The Supreme Court of Canada in *GlaxoSmithKline* had occasion to address the scope of the review of the relationships and circumstances that a Court is to undertake in a transfer pricing appeal:
>
> > (1) A judge is to take into account all transactions, characteristics and circumstances that are relevant (including economically relevant) in determining whether the terms and conditions of the transactions or series in question differ from the terms and conditions to which arm's length parties would have agreed.
> >
> > (2) The transfer pricing provisions of the *Act* govern and are determinative, not any particular methodology or commentary from the OECD Guidelines, or any source other than the *Act*.
>
> I would add the observation that OECD Commentaries and Guidelines are written not only by persons who are not legislators, but in fact are the tax collection authorities of the world. Their thoughts should be considered accordingly. For tax administrators, it may make sense to identify transactions to be detected for further audit by the use of economists and their models, formulae and algorithms. <u>But none of that is ultimately determinative in an appeal to the Courts.</u> The legal provisions of the *Act* govern <u>and they do not mandate any such tests or approaches</u>. The issue is to be determined through a fact finding and evaluation mission by the Court, as it is in any factually based issue on appeal, having regard to all of the evidence relating to the relevant facts and circumstances. [emphasis added]

The second issue reviewed by the Court involved the shareholder benefit and withholding tax on the deemed dividend which resulted from the excess amount paid by McKesson Canada to MIH. By utilizing a Discount Rate greater than an arm's length rate, McKesson Canada provided a benefit to MIH, which the Minister assessed as a deemed dividend subject to non-resident withholding tax, pursuant to paragraph 214(3)(*a*) and subsection 15(1) of the Act. McKesson Canada was jointly liable with MIH for the withholding tax under subsection 215(6) of the Act. McKesson Canada did not deny this liability, but argued that the assessment for such tax was statute-barred because the Luxembourg Treaty provided for a five-year limitation period (Article IX(3)) and the assessment was issued after this period.

Boyle J held that because Article IX(3) deals only with Article IX(1) in respect of transfer pricing adjustments and not deemed dividends and because there was no evidence that MIH was subject to any "extra tax" in Luxembourg because of the deemed dividend, the five-year limitation period did not apply to the withholding tax assessment.

In his final footnote, Boyle J apologizes for the length of the decision and, quoting Lord Neuberger of Abbotsbury from a 2013 address, states:

> We seem to feel the need to deal with every aspect of every point that is argued, that makes the judgement often difficult and unrewarding to follow. Reading some judgements one rather loses the will to live — and that is particularly disconcerting when it's your own judgment that you are reading.

McKesson Canada has 30 days to file an appeal with the Federal Court of Appeal.

Elk Trading[5]

This appeal was filed in 2012[6] and involved Elk Trading's ("Elk's") 2006 to 2008 taxation years.[7] Elk was a Canadian company. It was related to and, hence, not dealing at arm's length with a Japanese company, Emachu. Emachu purchased logs and lumber from around the world and resold it in Japan. In 1973, Emachu had established Elk in Canada to assist in finding Canadian logs and lumber.

Elk and Emachu operated under a written agreement. Elk had three business segments: custom-cut lumber (lumber cut into specific dimensions to satisfy the Japanese market), wholesale lumber (lumber cut by Canadian suppliers to general dimensions), and logs. For each business segment, Emachu would specify the exact logs or lumber required and the price. Elk would find that material at that price, purchase it in Canada, and then resell it to Emachu. For these services, Elk charged a commission equal to a percentage of all costs incurred in reselling the logs and lumber, including the original purchase price, insurance, freight, etc. The commission was different for each of the three business segments.

The Minister reassessed Elk. However, rather than specify what the arm's length commission should have been, the Minister applied the TNMM. As a first step, the Minister did a database search to find companies that were, at least in the Minister's eyes, carrying on a business similar to Elk's. The Minister then applied various "filters" to narrow the search to companies that were as similar as possible to Elk. This resulted in exactly one comparable company, a US, publicly listed company that arranged for the delivery of automobiles ("USco"). The Minister then calculated USco's Return on Total Costs ("ROTC"), being the profit USco earned as a percentage of its total costs. The Minister then increased Elk's gross revenue in each taxation year until its ROTC equalled USco's ROTC.

In her Reply to Notice of Appeal, the Crown stated the issue not as "what is the arm's length commission that Elk should have charged Emachu", but rather, "how much profit would Elk have earned had it been dealing at arm's length with Emachu". On discovery, the Crown conceded that the Minister had not assumed what specific arm's length commission Elk should have charged Emachu to earn that ROTC and further admitted that she could not determine what that arm's length commission should be.

The case law in Canada is clear that because paragraphs 247(2)(*a*) and (*c*) refer to the "terms and conditions" of a transaction, the Crown is not permitted simply to plead that the taxpayer's prices are not arm's length prices. The Crown must go further and specify exactly what the arm's length prices should have been in the taxpayer's situation.[8]

Faced with this case law and the Crown's pleadings and admissions, Elk filed a Notice of Motion for the appeal to be allowed, on the basis that the Crown's Reply had no reasonable prospect of success.

The Crown has now filed a Consent to Judgment allowing the appeal in full, with costs. This is, essentially, an admission that the TNMM, at least in the manner in which it is used in this case, cannot apply under the "terms and conditions" rule in paragraphs 247(2)(*a*) and (*c*). As the CRA uses the TNMM in the vast majority of its transfer pricing adjustments, this is a very significant development in Canadian transfer pricing. Only time will tell how this development will play out in future assessments.

A number of tax lawyers from Dentons Canada LLP write commentary for CCH's Canadian Tax Reporter *and sit on its Editorial Board as well as on the Editorial Board for CCH's Canadian* Income Tax Act with Regulations, Annotated. *Dentons Canada lawyers also write the commentary for CCH's* Federal Tax Practice *reporter and the summaries for CCH's* Window on Canadian Tax. *Dentons Canada lawyers wrote the commentary for* Canada–U.S. Tax Treaty: A Practical Interpretation *and have authored other books published by CCH:* Canadian Transfer Pricing *(2nd Edition, 2011);*

Federal Tax Practice; Charities, Non-Profits, and Philanthropy Under the Income Tax Act; *and* Corporation Capital Tax in Canada. *Tony Schweitzer, a Tax Partner with the Toronto office of Denton's Canada LLP and a member of the Editorial Board of CCH's* Canadian Tax Reporter*, is the editor of the firm's regular monthly feature articles appearing in* Tax Topics.

Notes:

[1] 2013 TCC 404, Boyle J.

[2] RSC 1985, c. 1 (5th Supp.), as amended.

[3] 2012 DTC 5147 (SCC).

[4] Boyle J stated in a footnote that the Minister may need to review her threshold criteria in respect of contemporaneous documentation under subsection 247(4) of the Act and that he would not "have expected last minute, rushed, not fully informed, paid advocacy that was not made available to the Canadian taxpayer and not read by its parent would satisfy the contemporaneous documentation requirements".

[5] Joel Nitikman was counsel for Elk.

[6] TCC Appeal No. 2012-3423(IT)G.

[7] A loss had been carried from its 2008 to its 2009 taxation year, so 2009 was reassessed as well. In addition, the Minister assessed Elk under a combination of subsection 15(1), paragraph 214(3)(*a*), and subsections 215(1) and (6) for a failure to withhold 5% of the dividends deemed to have been paid to Emachu in its 2006 to 2008 taxation years. These various assessments were all dependent on the outcome of the appeal on the main reassessments under section 247 for the 2006 to 2008 taxation years.

[8] See, for example, *General Electric Capital Canada Inc. v. Her Majesty the Queen*, 2009 DTC 1186 (TCC).

INCOME TAX FOLIO S4-F3-C1, PRICE ADJUSTMENT CLAUSES

Effective January 14, 2014, the Canada Revenue Agency announced an update to Income Tax Folio S4-F3-C1, Price Adjustment Clauses. The update to the Folio — which replaces and cancels Interpretation Bulletin IT-169, Price Adjustment Clauses — addresses issues including use of a price adjustment clause, requirements governing the recognition of a price adjustment clause, and consequences arising from a price adjustment clause's application. Special applications of price adjustment clauses are also addressed, including interactions with share redemptions, estate freezes, butterfly reorganizations, and sales of accounts receivable.

CONSULTATION PAPER: PROPOSED REGISTRATION OF TAX PREPARERS PROGRAM

On January 17, 2014, the Minister of National Revenue invited comments on its proposed Registration of Tax Preparers Program. Introduced as part of a new three-point plan to improve compliance and provide support to the small and medium-sized business community, the process consultation is open to everyone, and comment can be submitted online at http://cra-arc.sondages-surveys.ca/s/RTPP-PIPDR/?l=en or in writing to: Registration of Tax Preparers Program Consultations, Canada Revenue Agency, Place de Ville, 806-8th Floor, Tower B, 112 Kent Street, Ottawa, Ontario, K1A 0L5.

2014 CORPORATE TAX RATE CHARTS

Charts have been added to the product for 2014 federal and provincial corporate income and capital tax rates, payroll taxes, and health premiums. These charts can be accessed from the "Quick Links" feature in the *Canadian Tax Reporter* table of contents on CCH Online and will be added to the DVD and to Volume 1 in print in a future update. The 2014 personal tax rate charts will be available shortly.

RECENT CASES

Corporate taxpayer liable for tax owing by third party depositing funds in taxpayer's bank account

After his building was destroyed by fire, G received an insurance settlement of $305,441.32. Knowing that these funds would be seized by one of his creditors, the Business Development Bank (the "BDB"), if he deposited them in his own bank account, G deposited them in the bank account of the corporate taxpayer, 9101-2310, with the concurrence of 9101-2310's owner, P, who was G's long-time friend. Relying on subsection 160(1) of the *Income Tax Act*, the Minister assessed 9101-2310 for the $63,433.46 in tax owing by G at the time of this deposit (the "Deposit"). In allowing G's appeal, the Tax Court concluded, in part, that there was no "transfer" under subsection 160(1) because G and P had agreed in writing that the $305,441.32 would always remain the property of G; there was no arm's length relationship between G and 9101-2310 since G and P were not related; and the Minister was not entitled to rely on the simulation provisions of article 1451 of the *Civil Code of Quebec* (the "Code") (2013 DTC 1136). The Crown appealed to the Federal Court of Appeal ("FCA").

The Crown's appeal was allowed. G deposited the $305,441.32 in 9101-2310's account to avoid any portion of it being seized by the BDB, which P's testimony made clear. G was attempting to make the BDB believe that the $305,441.32 belonged to 9101-2310, despite his secret agreement with P to the contrary. This conduct amounted to simulation. Under article 1451 of the Code, simulation occurs where the parties agree to express their true intent not in an apparent contract but in a secret one, also known as a counterletter; under article 1452 of the Code, third persons acting in good faith may avail themselves of either the apparent contract or the secret agreement. The Minister was entitled to rely on the apparent contract, which in this case was the actual making of the Deposit. Despite the Tax Court judge's finding to the contrary, the Deposit constituted a non-arm's length transfer, since P and G were acting in concert so that G could hide the fact that he owned the funds to avoid seizure proceedings by the BDB. Neither P's ignorance about G's tax indebtedness at the time of the Deposit nor the Minister's failure to raise the simulation issue in his Reply filed at the Tax Court level were relevant. The Tax Court judge, however, did not err in refusing to apply *Livingston v. The Queen* (FCA) in support of the taxpayer's position at the Tax Court level. Not only was the *Livingston* case decided in a common law jurisdiction, but it involved a transfer the taxpayer made in a deliberate attempt to avoid the application of subsection 160(1). In that situation, the FCA concluded that the subsection applied, even though the transfer was one of legal, but not beneficial, ownership of the property involved, because the purpose of the transfer was to hide the fact that the transferor remained the beneficial owner of the property at all times. As a result of the foregoing analysis, the Tax Court judge's decision was set aside, 9101-2310's original appeal was dismissed, and the Minister's subsection 160(1) assessment was affirmed.

¶48,632, *9101-2310 Québec Inc.*, 2013 DTC 5170

Taxpayer not liable for tax owing by common-law spouse when business deposits made into taxpayer's bank account were immediately withdrawn

From 1977 to 2001, the taxpayer's common-law spouse, D, an accountant, was experiencing cash flow problems because of his bank holding funds on business cheques, which he presented for deposit. To alleviate this problem, he asked the taxpayer to deposit these cheques in her account (the "Deposits"), immediately withdraw the funds in cash, and give that cash back to him, all of which she did. The Minister assessed the taxpayer under subsection 160(1) of the *Income Tax Act* for amounts in excess of $200,000 in tax owing by D at the times at which his business cheques were being deposited into her account. In allowing the taxpayer's appeal, the Tax Court of Canada concluded, in part, that (a) the "transfer" provisions of subsection 160(1) were inapplicable because the taxpayer was always under a mandate to return the Deposits to D and there was no intention that she herself would ever become the owner of them; (b) *Livingston v. The Queen* (FCA) was of no assistance to the Minister because it applied only to transfers of ownership of property, as opposed to D's accommodation Deposits; (c) a simple transfer of possession of an asset without a diminution in the transferor's assets does not attract the vicarious liability provisions of subsection 160(1); and (d) neither D nor the taxpayer engaged in any subterfuge even though the taxpayer may not have understood the consequences of her actions (2013 DTC 1065). The Crown appealed to the Federal Court of Appeal.

The Crown's appeal was dismissed. The Tax Court judge's findings on the mandate governing D's relationship with the taxpayer were in accordance with civil law, and he refused to apply the *Livingston* decision to this set of facts. Since there was no "transfer" under subsection 160(1), this left the Minister with only an argument based on the simulation provisions of articles 1451 and 1452 of the *Civil Code of Quebec*. These provisions, however, were inapplicable without any subterfuge between D and the taxpayer, simply because there was no secret contract or counterletter between them within the meaning of articles 1451 and 1452. The fact that the taxpayer did not understand the possible tax significance of the Deposits was not a ground for appellate intervention. The Minister was ordered to vacate his assessment accordingly.

¶48,633, *Lemire*, 2013 DTC 5171

Taxpayers entitled to retroactively correct documentation to properly express their original tax-planning objectives

The corporate taxpayers, AES and Centre Technologique, entered into a reorganization and tax-planning agreement using the share exchange provisions of section 86 of the *Income Tax Act* so that the agreement would be tax-neutral. The adjusted cost base of the transferred shares was calculated incorrectly, and both the Canada Revenue Agency ("CRA") and the Agence du Revenu du Québec ("ARQ") issued adverse assessments as a result. The parties asked the Quebec Superior Court ("QCCS") to approve the retroactive amendment of their original agreements to reflect their original intention. Their request was granted because, in the QCCS's view, the requested amendment was not prohibited by Quebec civil law. The Quebec Court of Appeal ("QCCA") affirmed the QCCS's judgment; the Court held that courts have the power under Quebec civil law to correct acts that give effect to the parties' true intention, and for this purpose there is no need to import the common law doctrine of rectification (2011 DTC 5045). In a separate case (*Riopel*), a plan was developed to amalgamate a corporation owned by the two individual taxpayers with a holding company owned by one of the individual taxpayers. The plan was intended to be tax-neutral and to generate a tax-free dividend of $385,000, paid out of the amalgamated corporations' capital dividend account to one of the individual taxpayers. The transaction was not tax-neutral because of a series of errors made in preparing the juridical acts required to implement the plan, so the amalgamation preceded the sale of the shares, contrary to the plan. The CRA and the ARQ issued adverse assessments characterizing the dividend as a taxable dividend of $335,000 rather than as a capital dividend of $385,000. The taxpayers instituted proceedings in the QCCS by way of "rectification of contract" to effect the original terms of their transaction by amending or replacing the documents that they had originally signed. The CRA and ARQ's position was that an application for this kind of rectification was foreign to Quebec's law of obligations. In dismissing the taxpayers' application, the QCCS held that the alleged error in this case was not merely clerical and that what was being sought was a substantive restructuring of the whole transaction, which it could not authorize since the common law doctrine of rectification does not apply under Quebec civil law. In setting aside the judgment of the QCCS, the QCCA followed its judgment in the *AES* case and concluded that a court may recognize the parties' true agreement and find that it does not correspond to their declared will by interpretation under article 1425 of the *Civil Code of Quebec* ("CCQ") without applying the common law doctrine of rectification. It was, therefore, open to the QCCS to correct the identified errors in the documents originally signed by the taxpayers. The ARQ appealed to the Supreme Court of Canada.

The ARQ's appeal was dismissed. Under the civil law of Quebec, the law of contracts is founded on consensualism, and there is a fundamental distinction between an exchange of consents between contracting parties and the written recording of that exchange. In addition, if the written recording contains errors, it is incumbent on the courts to ensure that those errors are remedied once they have been proved under the laws of evidence. Also, courts dealing with challenges to transactions that have tax implications have no jurisdiction to make decisions on tax-related notices of assessment. This task falls within the jurisdiction of the tax courts. However, the tax courts still must consider the consequences of judgments reached by the civil courts relating to the transactions in question. Determining the common will of the parties involves a true exercise of contractual interpretation, as was pointed out by the QCCA. In addition, the taxing authorities have no acquired right to benefit from errors made by parties to a contract after they have corrected such errors by mutual consent. For the foregoing reasons, the QCCS was entitled to intervene under article 1425 of the CCQ in both the *AES* and *Riopel* cases because the parties expressed their common intention erroneously in their original documentation. It was, therefore, open to the courts to find that the amendments made by those parties in both cases were legitimate and necessary. This exercise was not precluded by Quebec's rules of civil procedure, and the taxing authorities were properly involved in the litigation as they should have been. In conclusion, the taxpayers in both cases were entitled to the relief they had originally sought in the QCCS. The intervenor, the Attorney General of Canada, asked the Court to consider and reject a line of authority that had developed since the advent of *A-G Canada v. Juliar* (ONCA) and that broadened the scope of the common law remedy of rectification. This suggestion was inappropriate, however, since the *Juliar* case was decided under the common law, whereas the two appeals presently before the Court were concerned with the application of the Quebec civil law.

¶48,635, *Services Environnementaux AES Inc.*, 2013 DTC 5174

Conviction for failing to comply with notices upheld; filing deadline to be strictly applied

The taxpayer appealed a February 2013 conviction for failing to comply with notices of requirement to file tax returns for 2007 and 2008. On February 18, 2010, P, a Canada Revenue Agency ("CRA") field officer, served the taxpayer with the requirements that included a 60-day filing deadline of April 19, 2010. P told the taxpayer there would be no extensions. The taxpayer failed to file the outstanding returns. On April 12, 2010, the taxpayer hired a certified general accountant, X, who sent P an authorization to deal with her that he received on April 19, 2010. The taxpayer argued that communications between X and P acted to extend the deadline for filing, that he exercised due diligence, and that the trial judge's reasons were insufficient.

The taxpayer's appeal was dismissed. The trial judge found that the April 19, 2010 deadline was to be strictly enforced. The taxpayer's argument that the CRA often did not strictly enforce its deadlines did not help the taxpayer. He had been told there would be no extension and failed to take any reasonable precautions to comply with the deadline. Once the judge concluded that the filing deadline was April 19, there was no reason to deal with X's evidence as most of her work took place after the deadline had passed. Due diligence is determined on an objective basis. By failing to take any steps to file his returns, the taxpayer did not exhibit due diligence. Hiring X a week before the deadline was not sufficient. Reasons given by a judge are sufficient as long as they plainly set out the reasons for the conviction and need not be long in nature. The trial judge properly outlined the reasons for his decision and committed no reversible error.

¶48,636, *Nicol*, 2013 DTC 5176

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