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THE CASE OF *SZYMCZYK V. THE QUEEN*: THE LIMIT OF ADMINISTRATIVE "ONE-OFFS"

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Introduction

In Canada, a federal law is valid only if it is enacted by Parliament in accordance with its authority as provided for under the Constitution and parliamentary convention. Unless Parliament has specifically delegated this authority to a public body, any rule or protocol created by that body cannot have the force of law; certainly, such rule cannot prevail where it is in conflict with the law as enacted by Parliament. This is as true for the Canada Revenue Agency ("CRA") as it is for any other public agency. However, for all the specificity of certain provisions of the *Income Tax Act* (Canada) (the "Act"), the complexity of the Act's many rules can often necessitate an interpretation that is *reasonable*, if not strictly in accordance with the statutory language.

This seemingly was the motivation behind the CRA's 1981 authorization (the "Authorization") wherein it granted General Motors of Canada Limited ("GM") permission to compute the taxable benefits provided to its employees who were provided company vehicles using a simplified method that did not strictly accord with the Act. The Act had been amended around the time that the Authorization was granted to alter substantially the means of calculating automobile taxable benefits. Some 28 years later, following changes to the Act and GM's employee vehicle program (both discussed below), the CRA reassessed hundreds of GM's employees on the basis that such employees had failed to include the correct amount in their income in the years 2008 and 2009 on account of automotive taxable benefits received. The employees' benefits were computed in accordance with the Authorization, which the CRA had not revoked.

In *Szymczyk v. Her Majesty the Queen* (2014 TCC 380), the validity of this reassessment was challenged by the taxpayer on the basis that, *inter alia*, the CRA was estopped from making such an assessment. *Szymczyk* was essentially a test case for the validity of the reassessments issued to all the employees for the years in question. It was heard by the Tax Court of Canada under the informal procedure process.

The Statutory Framework

Prior to 1981, the Act contained limited rules for computing the taxable benefit arising from an employee's use of an employer-provided vehicle. The 1981 federal Budget proposed significant changes to this regime to increase the benefit inclusion to

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employees on the basis that the previous rules resulted in reported benefit "far below the true value of a car to the user".[1] The 1981 changes raised the monthly "standby charge" (i.e., the benefit that is to be included on account of the benefit of having the vehicle available to the employee) to 2.5% of the vehicle's capital cost or 5/6 of the leasing cost, subject to certain exemptions.

In 1993, additional changes were made, enacting a specific rule in respect of operating expenses (paragraph 6(1)(*k*) of the Act). In general, a prescribed charge per kilometre of personal use is required to be included in the employee's income in the year. In the relevant years, this amount was $0.24 per kilometre driven otherwise than in connection with the taxpayer's employment. As discussed below, this legislative change was critical to the decision reached by the Court.

The Authorization

The Authorization was essentially a "one-off" deal between the CRA and GM whereby the CRA agreed to allow GM to compute its employees' automobile benefits in a particular way that recognized the peculiar nature of GM's policy with respect to employer-provided vehicles. GM, of course, was a large automobile manufacturer at the time the Authorization was issued. The employee vehicle program was in part promotional in nature. The Authorization noted that the vehicles were issued for "business, marketing and personal use" of the participants in the plan, and that the plan gave rise to "administrative difficulties" in accurately establishing the standby charge to be included in the employees' income for the year.

In light of these challenges, the CRA accepted the use of an average cost of the vehicle for the calculation of the standby charge and that every employee would have an amount equal to 2% of the average cost of a vehicle in the pool included in his or her income in each month he or she participated in the plan.

The Authorization also provided a special rule for the calculation of the operating expense inclusion. The CRA allowed GM to compute the benefit on the basis that each vehicle was used 50% for personal use and 50% for business use, in light of the challenges faced by GM in determining actual personal vs. employment usage given the peculiar nature of its program.

GM computed the taxpayer's automotive benefit in accordance with the Authorization in the years in question.

The Reassessments

In 2010, the CRA conducted an audit of GM's automobile benefits reporting. At the time of the audit, which culminated with the reassessments of the taxpayer (and the other participants in the GM program), the CRA had not formally revoked the Authorization. In the view of the Tax Court, the CRA and GM had "dug in" on the issue of whether the Authorization should be followed for 2008 and 2009. A senior CRA official had informed GM that the CRA honours administrative agreements but provided that facts and circumstances remain unchanged.

In the CRA's view, a number of facts and circumstances had changed essentially, thus invalidating the Authorization, including: (1) less vehicle turnover; (2) fewer vehicles in the program; (3) ability to select a specific vehicle; (4) vehicle exclusivity; and (5) determining the cost of vehicles greatly simplified.

Arguments

The taxpayer argued that the CRA was estopped from assessing the taxpayer otherwise than in accordance with the Authorization, as it had not been revoked in the years in question. The CRA had provided explicit instructions to GM as to how to compute the benefits and the CRA could not turn around and reassess an employee in a manner contrary to the Authorization where its strict terms had been followed, unless the Authorization had been revoked. The taxpayer also argued that the CRA assessed the taxpayer in a capricious manner, including a taxable benefit that was the maximum amount possible and based on unreasonable assumptions.

The CRA, for its part, argued that paragraph 6(1)(*e*) and subsection 6(2) were straightforward and are required to be applied when computing employees' automotive benefits. The CRA contended that there is no discretion in relation to the application of these provisions and that the taxpayer had accordingly failed to report the correct amount of income in the years in question. As for the estoppel argument, the CRA's view is that an assessment in accordance with the Act cannot be set aside on the basis of estoppel.

Analysis

The Court considered two separate forms of estoppel argued by the taxpayer. The first, known as estoppel by convention, operates where the parties have agreed that certain facts are true and form the basis of the transaction to be entered into. If each party acts upon the agreed assumption, then each party is estopped from questioning the truth of the statement against the other in a manner that would be unfair to such party. The other form of estoppel, estoppel by representation, requires a positive representation made by the party against whom estoppel is being claimed, where the party making the statement intended that it be acted on by the other party.

The Tax Court noted that regardless of whether the elements of an estoppel are present, estoppel cannot be successfully applied against the CRA if the approval given is contrary to law. This concept is integral to the reasoning at the heart of this case. As noted above, the CRA is not generally authorized to make *law*; it is only authorized to collect tax and it must do so in accordance with the law as enacted by Parliament. In the view of the Tax Court, courts ought not to set aside such approvals too readily, lest the administration of the Act be adversely affected. With little in the way of analysis, the Court quickly dispensed with this part of the argument, finding that the Authorization was not contrary to law, as it provided a "reasonable determination of benefits that were supportable under the legislation and yet were not burdensome to administer".

With respect, the Tax Court failed to address the incongruity of this concept. The very nature of a "special" arrangement like the Authorization is that the CRA is granting a taxpayer (or employer in this case) permission to compute his or her obligations in a manner that is not strictly in accordance with the legislation. It is not simply a matter of selecting one of several reasonable interpretations of a provision; the Authorization was explicitly an instance of the CRA allowing one taxpayer to play by a set of rules contrary to the Act and contrary to those that other taxpayers were presumably following. A more thorough explanation by the Court of why this is not contrary to law would have been useful. That it would be too difficult to comply with the law is poor reasoning for allowing Parliament's clear intention to be skirted.

The Court then considered the changes in legislation and in GM's employee automobile program in the intervening years between when the Authorization was granted and when the reassessments were issued. In the Court's view, these changes — but in particular the 1993 amendment to the Act introducing paragraph 6(1)(*k*) that provided a specific rule for computing the operating expense benefit — amounted to a material change in the law that relieved the CRA from the obligation of complying with the Authorization. Put another way, this change meant that GM's employees could not argue estoppel against the CRA as regards the Authorization. In addition, factual changes to the GM employee automobile plan had the same invalidating effect.

Accordingly, the taxpayer could not rely on the Authorization in arguing that the reassessments be set aside.

The Court also considered the taxpayer's arguments on the ordinary burden of proof (i.e., the taxpayer is required to demolish the Crown's pleaded assumptions) being reversed on the basis of the CRA making arbitrary assumptions and not contacting the taxpayer prior to issuing the reassessments.[2] However, the Tax Court did not consider this to be unfair to the taxpayer and, therefore, a reversal of onus was not granted.

Judgment

The Court found that one of the Crown's pleaded assumptions did not support the CRA's determination of the standby charge. The Crown pleaded that the total number of kilometres driven by the taxpayer was "deemed to be 20,004".[3] The Court found that this assumption did not support the standby charge that was assessed. Since the taxpayer had the use of four vehicles in each year, the Act requires a separate calculation of personal use in respect of each automobile. However, there was no assumption pleaded as to personal use for each period. As a result, the burden of proving these assumptions flipped to the Crown, and the Crown, the Court found, did not meet its burden. It is noted that the Court determined this even though neither party argued this point.

Accordingly, the Court allowed the appeal in part with respect to the standby charge.

As to the operating expense benefit, the Court did not allow the appeal. The Court found that the taxpayer did not bring evidence as to the appropriate benefit to be included and, therefore, did not satisfy the burden to demolish the Crown's assumptions.

Conclusion

The taxpayer's split victory here appears Pyrrhic at best. Presumably, the Crown could appeal the decision and fix the issues with its pleadings on appeal. Moreover, the hundreds of other assessments on this issue are likely to proceed. It is presumed that at the end of the day GM is footing the bill both for the litigation and for the eventual tax that the employees will have to bear as a result of GM's reliance on the Authorization. The Crown was able to get the Court to agree that the Authorization did not preclude the reassessments issued.

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Notes:

[1] Department of Finance, *Budget Papers*, November 12, 1981 (http://www.budget.gc.ca/pdfarch/1981-pap-eng.pdf).

[2] This point, somewhat glossed over, is one of the many interesting aspects of this case. The CRA dealt almost exclusively with GM, which theoretically has no privity as regards the issues at stake. Ordinarily the taxpayer in question would be given the opportunity to make representations at the audit stage. The facts reveal that GM did make such representations, but clearly the taxpayer did not.

[3] The Court noted that use of the word "deemed" is simply wrong here; there is no deeming rule for personal use in the Act in the years in question. However, as nothing turned on its use, this was not fatal to the Crown's case.

RECENT CASES

Minister disallowed expenses claimed as employment and medical expenses

The taxpayer was appealing the disallowance of various employment and medical expense claims. She was also seeking to deduct expenses incurred to restore a farm building. The taxpayer lived in Alberta and was employed as a distance professor by a US university for which she served as an administrator in a virtual MBA program. To perform her duties, she teleconferenced and used the internet and emerging technologies, and was required to attend conferences. She was required to carry out her duties away from the university and had to incur expenses such as computer purchases, professional development courses, legal and professional insurance, home workspace, supplies, and travel. The Minister allowed about half of the employment expenses claimed, disallowing expenses for a computer, credit card interest, travel, and the cost of home insurance, property taxes, and mortgage interest relating to the home workspace. Medical expenses were claimed for various devices used by the taxpayer, therapies, substances such as supplements and cold remedies, massages, fitness classes, and health care premiums. The taxpayer suffered a head injury when a suitcase fell on her head and claimed the alternative health remedies she used contributed to her recovery.

The appeal was dismissed. The taxpayer failed to produce any evidence to support her claim for expenses beyond those allowed by the Minister. Travel expenses to visit her husband overseas were personal in nature, as was the interest incurred on money borrowed against her credit card. The purchase of a computer is a capital expenditure, which is not deductible by an employee. An employee is only entitled to deduct utility expenses as part of the workspace at home deductions and is not entitled to deduct the cost of home insurance, property taxes, or mortgage interest. The Minister had properly disallowed expenses for a Chi machine and computer monitor, biofeedback therapy, homeopathy remedies, massages, fitness classes, and premiums paid to the Alberta Health Care Insurance Plan. None of the devices she claimed as expenses were deductible under the *Income Tax Act*. Therapies can only be deducted if the taxpayer suffers from a prolonged and severe impairment and if they are performed under the supervision of a medical doctor or occupational therapist, which was not the case here. Substances such as drugs and supplements may only be deducted if they are recorded by a pharmacist, but none of the substances the taxpayer claimed met that requirement. Massages are deductible only if the massage therapists are medical practitioners and authorized by law to practise. No evidence

was presented that any of the therapists were registered in Alberta. Only premiums paid to a private health services plan are deductible, while those paid by the taxpayer were to a public health insurance plan. The amounts spent to restore the farm property were non-deductible personal expenses.

¶48,952, *Ross*, 2015 DTC 1010

Taxpayer was an employee and not an independent contractor

The taxpayer was reassessed for unreported employment income in 2005 and 2006 in the amounts of $60,416 and $92,700, respectively. The taxpayer argued that he was an independent contractor and that, after expenses, he had net business losses of $67,338 and $61,353, respectively. During the relevant time, the taxpayer was a treasurer/chief financial officer and later the chief administrative officer ("CAO") of the Municipality of Meaford.

The taxpayer's appeal was dismissed with costs. The taxpayer was an employee of the municipality. Although the intention was for the taxpayer to be an independent contractor, his duties were essentially those of an employee with key oversight of managers and compensation. Additionally, the municipality's policies made it clear that the CAO had to be an employee of the municipality. The taxpayer received a fixed salary, which is more consistent with an employee than an independent contractor. Moreover, the taxpayer filed his tax returns to report employment income for which his expenses were reimbursed by the municipality.

¶48,954, *Free*, 2015 DTC 1012

Taxpayer knowingly purchased false donation receipts, and late reassessments were justified

The taxpayer was appealing the denial of $10,800 in charitable donation claims for 2006 to 2008. The 2006 and 2007 reassessments were made beyond the normal reassessment period. To justify the late reassessments, the Minister needed to show that the taxpayer made a misrepresentation attributable to neglect, carelessness, or wilful default. The Minister alleged that the taxpayer purchased false donation receipts from her accountants, F and S, who carried on business as F&A Accounting Corporation ("FA"). FA was investigated and charged with fraud for making false statements on income tax returns that F and S prepared for their clients. The taxpayer hired F to do her 2006 tax return and he was instrumental in her decision to make gifts to the Mehfuz Children Welfare Trust ("Mehfuz"). Mehfuz was a trust established by M, with the help of F, to build a medical clinic in Bangladesh that operated from 2003 to 2009. When M discovered that donation receipts were being forged, he informed the CRA, which investigated F and S. The taxpayer testified that she gave $600 to $800 to her accountant three times a year to be given to Mehfuz and admitted that the amounts she gave were less than the donations claimed.

The appeals were dismissed. The disallowed donation amounts represented a significant portion of the taxpayer's net income for 2006 to 2008 (16%, 10%, and 11%). The taxpayer appeared to know very little about Mehfuz, and it was unlikely that she would give such significant amounts to an unknown charity. The amounts allegedly given were inconsistent with her later donation history, which totalled $1,000 over three years. Based on the evidence and testimony given, the taxpayer purchased false donation receipts. That she relied on her accountant's advice did not absolve her of the responsibility of claiming tax credits for gifts she did not make. Misrepresentations were made in her return. Failure to review returns before filing them is neglect or carelessness, and the late reassessments were justified. The taxpayer failed to establish that any gifts were made to Mehfuz.

¶48,955, *Abootaleby-Pour*, 2015 DTC 1014

Charitable donation tax credit supported by false receipts disallowed

On reassessment, the Minister disallowed donation tax credits claimed by the taxpayer for 2008 and 2009 on the ground that he had purchased false donation receipts from his accountants at F&A Accounting Corporation ("FA"). FA had been charged with fraud for making false statements on tax returns prepared by it for clients. The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was dismissed. The Court referred to the Reasons for Judgment in *Vekkal v. The Queen*, which involved similar facts, and concluded that (a) none of the Minister's reassessments was statute-barred, so the onus was on the taxpayer to impugn those reassessments; (b) the taxpayer failed to discharge this onus and even admitted that he had not made the donations in dispute (the "Donations"), but had, on the advice of a friend, consulted FA with a

view to purchasing donation receipts; (c) the Donations were inconsistent with the taxpayer's prior donation history; (d) the taxpayer blamed FA, which was the instigator of the false donation receipt scheme, but he was equally blameworthy for ignoring the fact that the amounts supplied by him to FA did not correspond with the donation receipts FA provided him; and (e) the Court lacked jurisdiction to hear the taxpayer's arguments respecting his health, marital, and financial issues, but referred him to the forgiveness provisions of subsection 220(3.1) of the *Income Tax Act* and to the tax remission provisions of subsection 23(2) of the *Financial Administration Act*.

¶48,959, *Nocon*, 2015 DTC 1018

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