Husky Oil – Tax Court Reaffirms Basic Rules of a Pleading

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Tax litigation can be a very complex process. Many of the rules and procedures that govern tax disputes are designed to match the mechanics of the federal tax system in Canada, including GST/HST, income tax and Canada Pension Plan.

One of the defining features of tax litigation is that the Minister of National Revenue (the Minister), who represents the Canada Revenue Agency (CRA), must set out all of their assumptions of fact in the Reply to a Notice of Appeal. The Minister's assumptions should reflect the basis upon which the taxpayer was assessed. The Minister's assumed facts are, *prima facie,* presumed to be true.

Taxpayer must demolish assumptions of fact

The Appellant bears the responsibility or onus to "demolish" the Minister's assumptions of fact. Stated differently, the taxpayer must introduce evidence that would persuade the Court to reverse the presumption of correctness. The overall effect is that in tax litigation the burden rests on the taxpayer to prove the facts of their case on a balance of probabilities[1].

In the recent decision of the Tax Court of Canada in *Husky Oil Operations Limited v. The Queen* (2019 TCC 136), Judge Sommerfeldt set out and reaffirmed the basic rules of tax pleadings and, particularly, the parameters that the Minister must follow in pleading the assumption of facts in the Reply.

Reply must include concise statements of material fact only

In allowing the Appellant's motion to strike portions of the Reply, Judge Sommerfeldt reiterated existing case law that every pleading in a tax litigation matter must state:

1. facts rather than mere conclusions of law,
2. *material* facts only,
3. facts rather than evidence, and
4. facts concisely in a summary form.

In pleading assumptions of fact, the Crown should refrain from pleading evidence or assumptions of mixed fact and law and should only plead material facts of the case. Spotting assumptions of mixed fact and law can be tricky and, if unaddressed, may significantly disadvantage a taxpayer who must then carry the burden to demolish a presumed fact. The jurisprudence holds that a consequence to the Minister pleading assumed facts other than material facts is that the Minister may lose the presumption of correctness with respect to the assumed fact.

Portions of Reply struck as contravening fundamental principles of a pleading

Beyond the assumption of facts in the Minister's Reply, the Court also drew upon the following principles to rule against the Crown on a number of issues:

1. **Overreaching admissions**: the Crown purported to admit facts not pleaded by the taxpayer in the notice of appeal.
2. **No Knowledge:** The Minister plead "no knowledge" to facts pled by the Appellant and that assumed by the Minister when reassessing the taxpayer. The Court stated that it appeared to be pleading "no knowledge" as an indirect and inappropriate way of resiling from assumed facts.
3. **Assumptions of law:** the Crown was not permitted to plead assumptions of law.
4. **Abandoning assumptions:** the Crown attempted to abandon assumptions by requalifying, reinterpreting or recharacterizing them, rather than by advancing an alternative position as was required by the jurisprudence.
5. **Repetition and redundancy:** repetitive allegations were struck out without leave to amend.
6. **Inconsistency**: inconsistent allegations should be clearly pled in the alternative.

Perhaps most helpful were comments by the court that confirmed the principle that the Crown was not permitted to deliberately omit assumptions of fact simply because they were favourable to the taxpayer. This is crucial as assumed facts are *prima facie* presumed to be true.

Husky Oil is a welcome reminder that pleadings should not be drafted lightly and that the principles surrounding pleadings are as important as ever in modern-day tax litigation.

Should you have any questions regarding tax litigation and dispute resolution, please contact the authors of this article or a member of our Tax Litigation and Dispute Resolution Group.

[1] The main exceptions being penalties, assessments barred by statute, and certain assessments under the General Anti-Avoidance Rule.

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