Tax Court of Canada — Experts' Panel and "Hot Tubbing"

March 21, 2019

The Tax Court of Canada recently released Practice Note No. 22 entitled "Experts' Panel (Hot Tubbing)" (Protocol).1Comments made by Chief Justice Rossiter at the Canadian Tax Foundation's Tax and Expert Witnesses Conference on February 20, 2019 foreshadowed the Tax Court's commitment to increasing collaboration amongst expert witnesses. As a starting point, the Protocol assumes that judges will proceed with the hot tubbing process unless there is a possible exclusion from the process. The Protocol does not identify what these exclusions may be.

Below is a brief summary of the new "hot tubbing" process for experts:

1. The presiding judge will first review the pleadings and determine preliminary considerations such as scope of the issue, whether experts are required, if there are contests in qualifications or issues with the exchange of reports, and whether exclusions from the hot tubbing process may apply.
2. The judge will then determine whether the experts are qualified, through consent and judicial assessment or a*voir dire.*
3. If the judge determines the experts are qualified, the judge will then review any dispute or challenge to the reports provided.
4. The judge will read the experts' reports with written consent of the parties.
5. The experts will be ordered to meet pre-trial to attempt to narrow the issues, discuss points of disagreement, and explore common areas.
6. All of the factual evidence must be on the record before the hot tubbing panel is set.
7. Once the hot tubbing panel is set, the judge will prepare the questions and ask each panellist the same question in turn to get a comprehensive answer from each panellist which the judge can compare in real time.
8. Once the judicial questions are complete, each counsel may examine their witness(es) and cross-examine the remaining panellists in order to have the experts clarify or expand on their answers or address new issues.

The Protocol represents judicial recognition of the independence of experts. It is also a move towards ensuring that the Court has a comprehensive and unbiased understanding of the complex issues often at play in tax litigation. Hopefully, the hot tubbing process will lead to efficiencies and clearer decisions for taxpayers.

1 View the Protocol

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