



March 13, 2008

The Honourable Robert D. Nicholson, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada
East Memorial Building, 4th Floor
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Minister:

Re: Tax Court of Canada

I am writing on behalf of the Canadian Bar Association to recommend that the jurisdiction of the Tax Court of Canada be expanded to include the matters listed in the attached Appendix that are currently within the jurisdiction of the Federal Court or the Federal Court of Appeal.

Tax Court's Jurisdiction

As a statutory court, the Tax Court is limited in its jurisdiction to the matters assigned to it by legislation.¹ The primary function of the Court, based on the number of cases brought before it, is to hear and determine appeals from assessments of taxes, interest and penalties under the *Income Tax Act* (the ITA) and the GST legislation, which is Part IX of the *Excise Tax Act* (the ETA). The Court also has jurisdiction with respect to a number of other matters, including: (1) references concerning questions that arise under the ITA and Part IX of the ETA in connection with assessments; (2) appeals and references under ten other statutes, including the *Canada Pension Plan*, the *Customs Act*, the *Employment Insurance Act* and the *Excise Act, 2001*, to the extent provided in those statutes; and (3) applications for extensions of time to institute objections or appeals under the ITA, Part IX of the ETA and six other statutes.

There are, however, a number of important matters relating to the application of taxation statutes for which the Tax Court does not at present have jurisdiction, including the following:

- Applications for judicial review in respect of decisions of the Canada Revenue Agency (the CRA). These must be heard by the Federal Court. Currently, the majority of these applications relate to the CRA's power to waive interest and penalties under the fairness provisions.

¹ The matters for which the Tax Court has jurisdiction are in section 12 of the *Tax Court of Canada Act*.



- Applications in respect of the CRA's audit and investigatory powers under the ITA and Part IX of the ETA. The statutory provisions conferring these powers include a number of provisions that require or permit the CRA or a taxpayer to make application to a judge. For example, CRA officials must obtain judicial authorization before entering a dwelling-house to inspect books and records or before issuing a requirement that information be provided in respect of unnamed persons. All applications relating to the CRA's audit and investigatory powers are currently required to be made to the Federal Court or the superior court of a province.
- Appeals from CRA decisions with respect to the registration and deregistration of charities, pension plans and other entities under the ITA. The ITA currently requires that such appeals be initiated in the Federal Court of Appeal without proceeding in the first instance before a trial judge.

Reasons for Expanding Jurisdiction

The Canadian Bar Association believes that taxpayers and the CRA would be better served if the Tax Court's jurisdiction were extended to these matters as well as to the other matters described in the attached Appendix. The proposed expansion of the Court's jurisdiction is desirable, in our view, for the following reasons:

- The ability for taxpayers to institute all tax-related proceedings in a single court that has the power to grant all forms of relief would constitute a substantial procedural simplification. It would be beneficial for all tax litigants and in particular for unrepresented taxpayers, for whom the divided jurisdiction in tax matters can be very confusing. The Tax Court is the venue to which taxpayers would naturally expect to turn when they wish to contest actions of the CRA.
- The expansion of jurisdiction would enable all matters in issue to be dealt with by a single court. At present, concurrent proceedings must sometimes be instituted in the Tax Court and the Federal Court. This is more costly for litigants, and an inefficient use of court time, particularly where similar evidence is introduced in each proceeding.
- Through their hearing of tax appeals, Tax Court judges develop considerable familiarity with the CRA's methods of operation and with its interaction with taxpayers. This uniquely situates them to evaluate the appropriateness of granting all forms of relief in relation to tax matters. It also provides them with a useful foundation for making determinations in connection with the CRA's audit and investigatory powers.
- Day-to-day exposure to the substantive provisions of tax legislation provides a context for making decisions in connection with the procedural provisions of the legislation and for the judicial review of the CRA's actions.
- The Tax Court is more accessible than the Federal Court or the Federal Court of Appeal. It sits in approximately 70 locations across Canada whereas the other courts sit only in major centres.
- In the case of the registration and deregistration of charities and other entities, the initiation of the appeal process in the Tax Court would make the process more accessible and potentially less expensive. In addition, it would eliminate a procedural limitation



that prevents charities and other entities from presenting the strongest possible case for their positions.

Increasing Responsibilities of Tax Court

Since the formation of the Tax Court in 1983 pursuant to a recommendation of the Royal Commission on Taxation (the Carter Commission),² its responsibilities have gradually but regularly been expanded. Initially, the Court had concurrent jurisdiction with the Federal Court Trial Division to hear income tax appeals, and also jurisdiction to hear a limited range of appeals under three other statutes. In 1991, the Tax Court's jurisdiction over income tax appeals was made exclusive and it was granted exclusive original jurisdiction to hear GST and certain other appeals. Since then, the Court has been given exclusive original jurisdiction to hear appeals under a number of other statutes. The expansion of the Court's jurisdiction as proposed in this submission would represent a natural next step in the evolution of the Court. In our view, the Tax Court is now a fully mature and highly experienced court that should have jurisdiction over all tax-related matters.

We note that the Tax Court is a well-respected component of the Canadian judicial system. The key role played by the Court in this system was acknowledged when the Court was granted the status of a superior court of record in 2003. In commenting on this change of status, the Parliamentary Secretary to the Minister of Justice stated that it "is intended to recognize the Tax Court as a well respected institution that provides an exemplary service to Canadians."³ The Canadian Bar Association believes that this service would be further enhanced if the Court were given more comprehensive powers with respect to federal taxation matters.

We would be pleased to assist your officials in preparing the necessary legislative amendments to implement the expansion of the Tax Court's jurisdiction as recommended in this letter.

Thank you for your consideration of this important proposal.

Yours truly,

(original signed by Bernard Amyot)

Bernard Amyot
President

² In its Report released in 1966, the Carter Commission recommended that there be a tax court with exclusive original jurisdiction in all federal tax matters.

³ Canada, House of Commons, *Debates*, October 1, 2001. Stephen Owen (Parliamentary Secretary to the Minister of Justice and Attorney General of Canada), second reading stage of Bill C-30.

APPENDIX

Proposed Expansion of the Jurisdiction of the Tax Court of Canada

This Appendix describes the additional jurisdiction that the Canadian Bar Association is proposing be given to the Tax Court of Canada. It is organized as follows:

- A. Judicial Review
- B. Refusals to Register and Revocations of Registration
- C. Audit and Investigatory Powers
- D. Solicitor-Client Privilege
- E. Collections
- F. Non-GST Appeals under the *Excise Tax Act*

The following acronyms and abbreviations are used in this Appendix:

CBA	Canadian Bar Association
CRA	Canada Revenue Agency
ETA	<i>Excise Tax Act</i>
GST	Goods and Services Tax
ITA	<i>Income Tax Act</i>
Minister	Minister of National Revenue, and any authorized delegates
Tax Court	Tax Court of Canada

A. Judicial Review

Section 18 of the *Federal Courts Act* confers on the Federal Court the exclusive original jurisdiction to grant judicial review remedies and declaratory relief against any federal board, commission or other tribunal (except boards, commissions and tribunals in respect of which the Federal Court of Appeal has been given jurisdiction to hear and determine applications for judicial review). For this purpose, it has been held that the Minister is a “federal board, commission or other tribunal”.¹ Hence, certain decisions and actions of the Minister can be subjected to judicial review.

Based on reported decisions, the majority of the applications for judicial review of actions and decisions of the Minister relate to the fairness provisions of the ITA. The fairness provisions give the Minister the discretion to grant relief in respect of certain provisions of the ITA. In particular, the Minister may waive penalties and interest (subsection 220(3.1)), extend the time for making prescribed elections (subsection 220(3.2)) and, on the request of a taxpayer, reassess after the normal reassessment period to reduce tax payable by the taxpayer

¹ See, for example, *Addison & Leyen Ltd. v. The Queen*, 2006 DTC 6248 (FCA), paragraph 46. The Supreme Court of Canada agreed with this position in paragraph 8 of its decision in this case (2007 DTC 5365).

(subsection 152(4.2)). There are also fairness provisions in respect of the GST that allow the Minister to waive interest and penalties (ETA, section 281.1).

Other decisions and actions of the Minister have also been the subject of judicial review applications, or may be so in the future. For example, there have been several cases in which taxpayers have sought judicial review of a decision by the Minister not to accept the taxpayer's disclosure under the Voluntary Disclosures Program, and hence not to waive penalties applicable in respect of the taxpayer's failure to comply with the ITA. Other cases have involved the exercise of the Minister's collection powers and the issuance of "Requirements to Provide Information".

The CBA proposes that the Tax Court be given exclusive original jurisdiction to exercise judicial review powers with respect to the Minister. Given the specialised nature of the Tax Court, and its familiarity with the CRA and the methods and aims of tax administration, it is in the best position to exercise an oversight role. Furthermore, this would be a convenience for taxpayers, since it would enable them to seek judicial review remedies in the same court that hears income tax and GST appeals.

B. Refusals to Register and Revocations of Registration

1. Charities

A charity qualifies for exemption from income tax and is eligible to issue charitable donation receipts only if it is registered by the Minister. After being registered, a charity must comply on an ongoing basis with conditions set out in the ITA. Where the Minister refuses to register a charity, or gives notice that a charity's registration is proposed to be revoked, the charity may object in accordance with the procedure set out in the ITA. A charity may also object to a designation of its status by the Minister as a charitable organization, public foundation or private foundation, or to a decision of the Minister to annul the registration of the charity. If the Minister confirms the decision, proposal or designation, or does not make a decision in response to the objection within 90 days, the charity has a right under subsection 172(3) of the ITA to appeal to the Federal Court of Appeal.

The CBA submits that it would be more appropriate for such appeals to be initiated in the Tax Court.² This would give charities an opportunity to fully present their positions. Appeals to the Federal Court of Appeal are limited to a record with no *viva voce* evidence tested by way of cross-examination and without the benefit of any findings of fact made by a trial court. This substantially limits the ability of charities to establish that decisions of the Minister have been made in error.

The Tax Court already has limited jurisdiction over matters relating to charities. Appeals in respect of assessments of tax and penalties under Part V of the ITA are initiated in that Court. Part V levies a tax on a charity whose registration has been revoked, and imposes various penalties on charities that violate specified conditions. In addition, the Tax Court has jurisdiction to hear appeals from the suspension of a registered charity's right to issue

² This was one of the recommendations in the final Report of the "Broadbent" Commission, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* (1999).

donation receipts. It would make sense, and would avoid confusion, to have the Tax Court as the court of first instance for all matters concerning charities.

2. Other Matters for Which Initial Appeal is to Federal Court of Appeal

There are a number of matters listed in subsection 172(3) of the ITA, in addition to those noted above, that can only be appealed to the Federal Court of Appeal. Specifically, subsection 172(3) permits an appeal to the Federal Court of Appeal where the Minister:

- refuses to register an association as a Canadian amateur athletic association,
- refuses to register a pension plan, retirement savings plan, profit sharing plan, retirement income fund or education savings plan,
- refuses to accept an amendment to a registered pension plan, or
- revokes or proposes to revoke the registration of a pension plan, profit sharing plan or education savings plan.

Also, subsection 204.81(9) of the ITA provides for a right of appeal to the Federal Court of Appeal if the Minister refuses to register a corporation as a labour-sponsored venture capital corporation under Part X.3 of the ITA or proposes to revoke the registration of a corporation.

For the same reason as stated above for matters relating to charities, the CBA proposes that the Tax Court be given exclusive original jurisdiction to hear appeals with respect to all these matters.

C. Audit and Investigatory Powers

The Minister has extensive audit and investigatory powers under the ITA and the ETA.³ The provisions conferring a number of these powers provide that their exercise is subject to judicial authorization or judicial oversight. For this purpose, applications are required to be made to a judge of a superior court having jurisdiction in the province where the matter arises, or a judge of the Federal Court.

The ITA requires or permits application to be made to a judge, *inter alia*, in the following circumstances:

- A warrant is required before entering into a dwelling-house without the consent of the occupant in order to carry out inspections, audits and examinations: section 231.1.
- Judicial authorization must be obtained (on *ex parte* application) before imposing a requirement on a third party to provide any information or document relating to one or more unnamed persons: section 231.2. The third party may apply to a judge for a review of the authorization.
- A person who has been served by the Minister under section 231.6 with a notice to provide any foreign-based information or document may apply to a judge for a review of the requirement.

³ The audit and investigatory powers are contained in sections 231 to 231.7 of the ITA and sections 287 to 290 of the ETA.

- If a person fails to provide any access, assistance, information or document as required by section 231.1 or 231.2, the Minister may apply to a judge for a compliance order: section 231.7. If the person fails or refuses to comply with the order, a judge may find the person in contempt of court.

The CBA proposes that jurisdiction to act as a judge for purposes of the above-noted ITA provisions and the corresponding provisions of the ETA be given to Tax Court judges, in place of Federal Court judges. In our view, the Tax Court's expertise in tax matters provides its judges with a contextual framework that would aid in making the determinations required under these provisions. We note that the Tax Court currently has a role, albeit a narrow one, in connection with the appointment of a hearing officer under section 231.4 of the ITA to conduct an inquiry for any purpose related to the administration or enforcement of the ITA.

The ITA and ETA also include provisions enabling a judge, on the application of the Minister, to issue a search warrant authorizing the persons named in it to search for evidence of the commission of an offence under the ITA or the ETA.⁴ Seized articles must be brought before a judge or a report made to a judge. As with the other investigatory provisions referred to above, a judge for this purpose is a judge of a superior court having jurisdiction in the province where the matter arises, or a judge of the Federal Court. The CBA has considered whether the Tax Court's jurisdiction should be extended to include the issuance of search warrants under these provisions. The Tax Court does not hear criminal matters and the CBA is not recommending that its jurisdiction be expanded into this sphere (assuming this were constitutionally possible). Accordingly, since the search warrants that may be issued under the provisions in question relate to investigations of potential criminal wrongdoing, we do not recommend that Tax Court judges be given jurisdiction to issue or quash search warrants.

D. Solicitor-Client Privilege

Section 232 of the ITA and section 293 of the ETA set out a process intended to prevent the Minister from obtaining documents in the possession of a lawyer that are protected by solicitor-client privilege. Where an authorized person is about to inspect, examine or seize documents in the possession of a lawyer, or has required a lawyer to provide such documents, the lawyer may assert solicitor-client privilege on behalf of a named client in respect of the documents. The client, or the lawyer on behalf of the client, must then make application to a judge for a determination as to whether the documents are protected by solicitor-client privilege. If an application is not made, the Crown can apply to a judge to obtain access to the documents. For the purpose of these provisions, application may be made to a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court.

The Supreme Court of Canada has declared a similar provision in section 488.1 of the *Criminal Code* to be unconstitutional on the basis that it offends section 8 of the *Canadian Charter of Rights and Freedoms*.⁵ In view of this decision, it is likely that sections 232 of the ITA and 293 of the ETA are also unconstitutional.

⁴ The search warrant provisions are contained in section 231.3 of the ITA and section 290 of the ETA.

⁵ *Lavallée, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 3 C.R. (6th) 209, 167 C.C.C. (3d) 1.

Assuming that these provisions are eventually replaced by provisions that comply with the *Charter*, the CBA proposes that the new provisions authorize judges of the Tax Court to hear applications that are permitted to be made under them. The Tax Court already deals with claims of solicitor-client privilege, in particular in connection with motions for the production of documents. It would be a natural extension of this jurisdiction for the Tax Court also to determine whether documents in the possession of a lawyer are privileged.

E. Collections

In general, the ITA prohibits the Minister from taking any collection actions while a taxpayer has a right to object to or appeal from an assessment, or while an objection or appeal is pending.⁶ This limitation on the Minister's collection powers ceases when a decision has been rendered by the Tax Court. In the case of taxpayers that are large corporations, the limitation applies with respect to only one-half of amounts in dispute.

Section 225.2 of the ITA permits the Minister to apply to a judge on an *ex parte* basis for authorization to take collection proceedings with respect to an amount assessed in respect of a particular taxpayer, if there are reasonable grounds to believe that the collection of all or any part of the amount would be jeopardized by a delay in collection. The application can be made before a notice of assessment has been sent to the taxpayer, if the judge is satisfied that the receipt of the notice would likely further jeopardize the collection of the amount. The judge to whom application is made must be a judge or a local judge of a superior court of a province or a judge of the Federal Court.

There are similar jeopardy order mechanisms in section 322.1 of the ETA (GST), section 97.35 of the *Customs Act*, section 287 of the *Excise Act, 2001*, and section 87 of the *Softwood Lumber Products Export Charge Act, 2006*.

Collection proceedings are an integral aspect of taxation statutes. Accordingly, the CBA submits that it would be appropriate for Tax Court judges to be given jurisdiction to authorize collection proceedings. If this were done, there would appear to be no need for Federal Court judges to retain their present jurisdiction with respect to these proceedings.

F. Non-GST Appeals under the *Excise Tax Act*

The ETA imposes taxes in addition to the GST. Specifically, Part I imposes a tax on insurance premiums and Part III imposes an excise tax in respect of certain goods. Part VII of the ETA gives taxpayers rights of objection and appeal with respect to assessments and determinations of the Minister under Parts I and III. Appeals may be made to the Federal Court or, in the case of assessments or determinations under Part III, to the Canadian International Trade Tribunal. Decisions of the Tribunal may be appealed to the Federal Court.

In furtherance of the Tax Court's role as the specialized court for taxation matters, the CBA proposes that the Tax Court assume the jurisdiction of the Federal Court under the administrative provisions in Part VII of the ETA.

⁶ Section 225.1 of the ITA.