Docket: 2010-1565(GST)G

BETWEEN:

SALISBURY HOUSE OF CANADA LTD., EARL JOEL BARISH, LORNE SAIFER, HARRIS LIONTAS AND HERSH WOLCH,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 31, 2013, at Winnipeg, Manitoba
Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Counsel for the Appellant:	Barry L. Gorlick, Q.C.
Counsel for the Respondent:	Denyse Coté and Penny Piper

JUDGMENT

Upon motion by the respondent for an order to dismiss the appeal pursuant to Rule 58(3) of the *Tax Court of Canada Rules (General Procedure)*, to strike out the Notice of Appeal without leave to amend pursuant to Rules 53 and 58(1)(b), or to set aside the appellants' Notice of Appeal and issue directions to comply with the *Rules*;

And upon reading the materials filed, and hearing counsel for the parties;

It is ordered that the respondent's motion be granted with costs and the appeal of Salisbury and the individual appellants is hereby quashed in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia, this 23rd day of July 2013.

"D.W. Rowe"

Rowe D.J.

Citation: 2013 TCC 236
Date: 20130723
Docket: 2010-1565(GST)G

BETWEEN:

SALISBURY HOUSE OF CANADA LTD., EARL JOEL BARISH, LORNE SAIFER, HARRIS LIONTAS AND HERSH WOLCH,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Rowe D.J.

[1] By Amended Notice of Motion, the respondent sought an order:

1. dismissing the appeal of the appellants, pursuant to Rule 58(3) of the *Tax Court of Canada Rules (General Procedure)*;
2. an order striking out the Notice of Appeal without leave to amend, pursuant to Rules 53 and 58(1)(b);
3. in the alternative, an order setting aside the appellants' Notice of Appeal and directing the appellant Salisbury House of Canada Ltd. (Salisbury) to file and serve a Notice of Appeal in compliance with the *Tax Court of Canada Act* (*Act*) and *Tax Court of Canada Rules* (*Rules*) within 60 days from the date of the disposition of the motion;
4. in the further alternative, an order extending the time for the respondent to file a Reply to the Notice of Appeal.

[2] First, I will deal with the motion as it pertains to Salisbury. The individual appellants Earl Joel Barish (Barish), Lorne Saifer (Saifer), Harris Liontas(Liontas), and Hersh Wolch (Wolch) were Directors of Salisbury at the time relevant to the within motion and have been referred to in various documents and affidavits collectively as the "Directors".

[3] Rules 53 states:

> The Court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (*a*) may prejudice or delay the fair hearing of the action,
>
> (*b*) is scandalous, frivolous or vexatious, or
>
> (*c*) is an abuse of the process of the Court.

[4] Rule 53(b) states:

> The Court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> . . .
>
> is scandalous, frivolous or vexatious, or

[5] Counsel for the respondent submitted that an appeal to the Tax Court of Canada is a right provided by statute and a person who has been assessed under the *Excise Tax Act* (*ETA*) may file with the Minister of National Revenue (the "Minister") a notice of objection within a specified timeline or – if necessary – apply for an extension of time to do so. Although it is possible for a taxpayer to file an appeal to the Tax Court of Canada before receiving a decision on an objection, it is still necessary to have filed the objection. Salisbury was assessed under the *ETA* but did not file with the Minister an objection to those assessments and did not apply for any extension of time.

[6] As set forth in paragraphs 2 to 7, inclusive, of the affidavit of Richard Baughman (Baughman) – Collections Officer employed by Canada Revenue Agency (CRA) – filed and dated November 24, 2010 - Salisbury was assessed for Goods and Services Tax (GST) owing for the monthly reporting periods of February, March,

April and May of 2006. The Minister assessed Salisbury, as filed, and the corporation did not object to these assessments.

[7] Section 301(1.1) of the *ETA* reads:

> **Objection to assessment** — Any person who has been assessed and who objects to the assessment may, within ninety days after the day notice of the assessment is sent to the person, file with the Minister a notice of objection in the prescribed form and manner setting out the reasons for the objection and all relevant facts.

[8] The following provisions deal with an extension of time by the Minister for filing an objection and state the requirements for any extension application.

[9] Sections 302 and 306 of the *ETA* are as follows:

> **302. Appeal to Tax Court** — Where a person files a notice of objection to an assessment and the Minister sends to the person a notice of a reassessment or an additional assessment, in respect of any matter dealt with in the notice of objection, the person may, within ninety days after the day the notice of reassessment or additional assessment was sent by the Minister,
>
> (a) appeal therefrom to the Tax Court; or
>
> (b) where an appeal has already been instituted in respect of the matter, amend the appeal by joining thereto an appeal in respect of the reassessment or additional assessment in such manner and on such terms as the Tax Court directs.
>
> **306. Appeal** — A person who has filed a notice of objection to an assessment under this Subdivision may appeal to the Tax Court to have the assessment vacated or a reassessment made after either
>
> (a) the Minister has confirmed the assessment or has reassessed, or
>
> (b) one hundred and eighty days have elapsed after the filing of the notice of objection and the Minister has not notified the person that the minister has vacated or confirmed the assessment or has reassessed.
>
> but no appeal under this section may be instituted after the expiration of ninety days after the day notice is sent to the person under section 301 that the Minister has confirmed the assessment or has reassessed.

[10] Counsel for the respondent submitted section 306 of the *ETA* is similar to section 169 of the *Income Tax Act* (*ITA*) which obliges a taxpayer to serve a notice of objection in order to appeal an assessment.

[11] In the case of *Whitford v Canada*, 2008 TCC 359, Webb J. (as he then was) heard a motion brought by the respondent to dismiss the appellant's appeal on the basis the appellant did not file a notice of objection in relation to the assessment issued by the Minister pursuant to the *ETA*. At paragraph 6, Webb J. stated:

> Both sections 302 and 306 include a prerequisite that a person must have filed a notice of objection to an assessment before the person may appeal the assessment to this Court. This is similar to the requirement under the *Income Tax Act*. . . .

[12] At paragraph 7, Webb J. stated:

> In *Bormann v. The Queen*, 2006 D.T.C. 6147, the Federal Court of Appeal stated as follows:
>
> > 3 Section 169(1) of the Income Tax Act obliges a taxpayer to serve Notice of Objection in order to appeal an assessment. In other words, service of a Notice is a condition precedent to the institution of an appeal.
> >
> > 4 As mentioned, the appellant did not serve a Notice of Objection nor is there evidence that the appellant made an application to the Ministry to extend the time to file a Notice of Objection.
> >
> > 5 Once it is clear that no application for an extension of time was made, the law is clear that there is no jurisdiction in the Tax Court to further extend the time for equitable reasons.
> >
> > Minuteman Press of Canada Company Limited v. M.N.R., 88 DTC 6278, (F.C.A.).
> >
> > 6 As a result, there is no basis upon which it can be said that the Tax Court Judge erred in quashing the appellant's appeals for the 1992 to 1998 taxation years.

[13] Webb J. continued at paragraph 10 and then at paragraphs 13-15, inclusive, as follows:

> **10** As noted by the Federal Court of Appeal in relation to appeals under the *Income Tax Act* (which are governed by a similarly worded section) filing a notice of objection is a condition precedent to filing an appeal to this Court. In determining

> whether a person has a right to appeal an assessment to this Court the circumstances related to a failure to file a notice of objection are not relevant. Without first filing the notice of objection, there can be no appeal of an assessment to this Court. The position of the Appellant appears to be that the Canada Revenue Agency has garnished one-half of his Canada Pension without first assessing him personally for any liability under the *Act*. This is not a matter for this Court.
>
> . . .
>
> **13** Justice Sobier made the following comments on the powers of this Court in *Sunil Lighting Products v. Minister of National Revenue*, [1993] T.C.J. No. 666:
>
> > **18** The jurisprudence clearly affirms that the Tax Court of Canada is not a court of equity and its jurisdiction is based within its enabling statute. In addition, the Court cannot grant declaratory relief given that such relief is beyond the jurisdiction of the Court. In an income tax appeal, the Court's powers are spelled out in subsection 171(1) of the Income Tax Act. Consequently, these powers essentially entail the determination of whether the assessment was made in accordance with the provisions of the Income Tax Act.
>
> **14** These comments are equally applicable to an assessment under the *Act* as the wording of subsection 309(1) of the *Act* is essentially the same as the wording of subsection 171(1) of the *Income Tax Act*. Therefore the only remedies that this Court can grant are related to the validity of the assessment itself and whether the tax as assessed is owing under the *Act*. If a person is taking the position that no assessment was issued, this is not a matter that can be dealt with by this Court.
>
> **15** As it is a condition precedent to appealing to this Court that a person file a notice of objection and since it is clear that the Appellant did not file a notice of objection in relation to the assessment in question, there is no jurisdiction in this Court in relation to his appeal and therefore, the Appellant's appeal is quashed.

[14] In *Goguen v The Queen*, 2007 DTC 5171 Ryer J.A. heard an appeal from a decision of the Tax Court of Canada quashing the appellant's appeal on the basis the appellant had not filed a notice of objection to his reassessment for that year.

[15] At paragraph 3, Ryer J.A. stated:

> We have not been persuaded that the Tax Court Judge erred in finding as a fact that the appellant did not serve a notice of objection to his 1999 reassessment. A matter of law, the failure of the appellant to serve a notice of objection on the Minister deprived the Tax Court of Canada of the jurisdiction to entertain an appeal in relation to the reassessment. (See Bormann v. Canada, [2006 DTC 6147] 2006 FCA 83). Accordingly, the appeal will be dismissed with costs.

[16] Counsel for the appellants agreed that Salisbury had been assessed under the *ETA* and had not filed an objection or otherwise dealt with the matter in accordance with the *Act*.

[17] Therefore, with respect to the appeal of Salisbury, it is apparent the purported appeal did not satisfy the condition precedent for a valid appeal from said assessment.

[18] I have chosen to refer to the relevant provisions of the *ETA* and to the jurisprudence on this point notwithstanding the position of counsel for the appellants with respect to Salisbury was communicated at the outset of his submissions because they are applicable to the issue whether the appeals of Barish, Saifer, Liontas and Wolch should also be dismissed or quashed.

The motion as it pertains to the individual appellants:

[19] The facts are not in dispute based, *inter alia*, on the affidavit of Baughman and the cross-examination thereon by counsel for the appellants, the affidavit of Thomas G. Frohlinger – dated October 4, 2011, and by affidavit dated May 31, 2013, re-filed to insert the correct Exhibit B therein – and the cross-examination on said affidavit by Ms. Coté, co-counsel for the Respondent. Relevant facts were contained within documents forming part of the Exhibit Booklet filed by counsel for the appellants. Further, within the Written Representations of the Respondent, relevant facts are recited at paragraphs 8 to 16, inclusive.

[20] Paragraphs 7 to 20, inclusive, of the Notice of Appeal read as follows:

> **A. STATEMENT OF FACTS**
>
> 7. Throughout the material time Salisbury House has been in the business of operating a series of retail restaurants located throughout the City of Winnipeg, its operations having commended in 1931.
>
> 8. Corporate governance of Salisbury House was under the auspices of a Board of Directors who held office until March 1, 2006. For a period of time thereafter, and at least until April 18, 2006, governance of Salisbury House was in a state of disarray and during which time either no Board of Directors held office or an ineffectual Board of Directors held office being the predecessors to the appellants Barish, Saifer, Liontas and Wolch.

9. Effective April 19, 2006, the plaintiffs volunteered to assume office as an elected Board of Directors for the purpose of attempting to continue the business of Salisbury House from that date onward.

10. At all material times the respondent was liable for, and in respect of, the matters or things hereinafter alleged on behalf of Canada Revenue Agency, formerly Canada Customs and Revenue Agency ("CRA") and including the levying and collecting of GST remittances from various entities including Salisbury House.

11. For the months of February, March, April and May to and including May 23, 2006, being the day prior to Salisbury House making a proposal under the *Bankruptcy and Insolvency Act*, GST returns were filed for all amounts assessed on that account.

12. Pursuant to a Statement of Arrears dated October 16, 2006, the respondent sought to collect from Salisbury House a total of $215,926.00, such amount based on a notice date of October 16, 2006, relating to GST returns for the period spanning February 1, 2006 to May 23, 2006, inclusive, and comprising:

Tax assessed:	$214,834.50
Penalties:	$ 410.06
Interest:	$ 681.55
TOTAL	$215,926.11

13. In respect of that Statement of Arrears, and in connection with the proposal under the *Bankruptcy and Insolvency Act*, the respondent demanded payment by Salisbury House of arrears accumulated between March 1, 2006 and April 18, 2006 being the time when either the previous Board of Salisbury House held office or during a time when no Board of Directors held office, or during a time when the previous Board of Salisbury House had abandoned or ignored its responsibilities, such amount totaling $92,826.51 and comprising:

	GST Collected		GST ITC	Net
March 1 to 31:	($87,552.73)	+	$25,609.39	$61,943.34
April 1 to 18	($52,454.73)	+	$21,571.56	$30,883.17
			TOTAL	$92,826.51

14. Pursuant to an agreement reached between the individual directors, Barish, Saifer, Liontas and Wolch, on the one hand and the respondent on the other hand, which agreement came into effect on or about September 5, 2006, ("the Agreement"), the individual plaintiffs in their capacity as Directors of

Salisbury House agreed to remit to CRA in respect of their potential personal liability under Section 232 of the Act amounts sufficient to satisfy any obligations under Section 323, which amounts totaled $147,611.66 as of September 5, 2006 and which included within that total the aforementioned sum of $92,826.51 referable to GST remittances payable from March 1 to April 18, 2006, inclusive.

15. Pursuant to the Agreement, on or about November 17, 2006, counsel for the appellants forwarded to the respondent the sum of $147,611.66 being the entire balance payable along with the further sum of $1,301.95 being the interest accrued on said amount as a result of the funds having been held in counsel's trust account from September 7, 2006 to November 17, 2006.

16. The funds as forwarded on November 17, 2006, in addition to being paid pursuant to the terms of the Agreement, were forwarded on the express condition of trust that CRA acknowledge that the within funds were being paid without prejudice to the directors seeking a determination by a court of competent jurisdiction as to their obligations to CRA on account of the amount of GST collected by Salisbury House from March 1, 2006 to April 19, 2006.

17. By letter dated December 15, 2006, counsel for the respondent confirmed that the trust condition imposed upon the funds as transmitted had been accepted by CRA.

B. ISSUES TO BE DECIDED

18. What are the obligations, if any, of the appellants Barish, Saifer, Liontas and Wolch to CRA on account of the amount of GST collected by Salisbury House from March 1, 2006 to April 19, 2006?

19. Whether the said appellants are personally liable as directors for the sums payable by Salisbury House as GST to the period between March 1 and April 19, 2006 either pursuant to subsection 323(1) of the Act or on any other basis whatsoever.

20. Whether the said appellants exercised the due diligence required of a director pursuant to subsection 323(3) of the Act.

[21] The appellants are seeking a determination of the appropriateness of their payment under protest and request an order to require the Minister to repay the sum of $92,826.51 to them together with a pro-rata portion of the sum of $1,301.95, claimed as interest on the balance owing on the Salisbury GST account during the relevant period.

[22] Counsel for the respondent submitted the appeal of Barish, Saifer, Liontas and Wolch (Directors) should be dismissed because they were not assessed under the *ETA* and there is no assessment from which to object or appeal. Therefore, as persons who were not assessed, they have no right under statute to appeal to the Tax Court. Instead, they purport to seek an order to return the money paid to CRA pursuant to an agreement within the context of a bankruptcy proposal made by Salisbury. The assessments issued to Salisbury under the *ETA* were not challenged and no assessment was issued either severally or jointly against any of the individual appellants. As a result, this Court has no jurisdiction to entertain the appeal or to grant the relief sought as it has no other jurisdiction other than that set out in section 309 of the *ETA* which is to dispose of an appeal by dismissing it, allowing it and vacating the assessment or referring the assessment back to the Minister for reconsideration and reassessment.

[23] Counsel submitted the individual appellants are in the same position as Salisbury despite the unique set of circumstances. Regardless of the intention of the parties to the agreement, the indisputable fact is there was never any assessment issued against the individual appellants and it is too late to challenge the validity of the assessment issued against Salisbury because it did not take steps to do so within the time limited by statute.

[24] Counsel for the appellants submitted that the appeal to this Court is a right provided by statute which must be considered in the context of the facts pertaining to the within appeal by Directors by virtue of the broad wording of Rule 4(1) which states:

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

[25] Counsel submitted that the traditional jurisprudence pertaining to the right to appeal to this Court is not applicable in light of the particular and peculiar facts at issue. In the within appeal, there was a clear and unambiguous written agreement between then-counsel for the appellants and counsel for the Minister. Pursuant to that agreement and confirmed by the letter of Frohlinger to Tim Doyle (Doyle), Department of Justice, Tax Litigation Section – dated November 17, 2006, trust cheques in the amounts of $147,611.66 together with an additional cheque in the sum of $1,301.95 for accrued interest, were enclosed on account of the balance owing by Salisbury as set out in Doyle's letter of September 5, 2006. Frohlinger – at paragraph 3 of his letter to Doyle stated:

> These funds are being forwarded to you on the express condition of trust that the Canada Revenue Agency acknowledge that the within funds are being paid without prejudice to the Director's seeking a determination by a Court of competent jurisdiction as to their obligation to the Canada Revenue Agency on account of the amount of GST collected by the corporation from March 1, 2006 and April 19, 2006.

[26] On December 5, 2006, Doyle wrote Frohlinger to confirm this trust condition had been accepted by CRA.

[27] Counsel submitted that without the agreement, CRA had the right to proceed against Salisbury and Directors who were newly-appointed and therefore subject to liability for GST collected but not remitted prior to April 19, 2006, if Salisbury was unable to pay in full. By virtue of said agreement, the individual appellants were challenging the correctness of any assessments that could be issued against them pursuant to the relevant provisions of the *ETA* and had preserved that right when Doyle – as counsel for the Minister – accepted the condition that the payment of money was under protest and that the issue of their liability was to be determined subsequently by a "Court of competent jurisdiction." Counsel submitted this Court has the jurisdiction to hear the appeal by Directors because the issue whether they are liable is apparent and that the clear terms of the written agreement superseded the statutory conditions in the *ETA* or, alternatively, that the respondent by its conduct waived reliance on those statutory conditions and is estopped from asserting them at this point. Had CRA intended to assess Directors notwithstanding their voluntary payment, or if the process of assessment - followed by notice of objection - was intended to be required, these conditions were not included in the agreement. Under the circumstances surrounding the potential bankruptcy of Salisbury and its inability to pay the balance of GST owing in full, the future liability of Directors was apparent and the letter of Doyle – dated September 5, 2006 – providing details of the amount they should remit in respect of their personal liability under section 323 of the *ETA* - was tantamount to an assessment on behalf of the Minister. It also stated a clear understanding that the legal basis for such payment would be the subject of a determination in the appropriate forum. Counsel submitted the arrangement was more than a factor to be taken into account within the context of a proposal by Salisbury to avoid bankruptcy. Counsel submitted the agreement was clear that the payment made by Directors was made under protest in an attempt to avert the bankruptcy of Salisbury but that they had reserved – specifically - their right to determine actual liability for such remittance. The demand for payment by Doyle on behalf of CRA was equivalent to an assessment by the Minister and, although payment was made, the legal foundation for the amount attributable to Directors was

challenged at the outset according to specific terms in the agreement which were subsequently confirmed in writing by Doyle.

[28] Counsel acknowledged the Notice of Appeal has to be amended and requested leave to do so. With respect to the applicability of Rules 53(b) and 53(c) in support of the Respondent's motion, counsel submitted the matter before the Court is far from being" scandalous, frivolous or vexatious" or " an abuse of the process of the Court." Instead, it concerned a unique set of circumstances that required a determination utilizing a novel approach to fashion an appropriate remedy.

[29] In the alternative, counsel submitted the unusual facts of the within appeal permitted the Court to hear the matter in its entirety by having the matter scheduled for a hearing in the usual course rather than to deal with it summarily by granting the Respondent's motion.

[30] In the case of *Pine Valley Enterprises Inc v Canada* 2010 TCC 324, Campbell J. heard a motion by the respondent for an order striking certain paragraphs of the taxpayers Amended Notice of Appeal. At paragraph 4, Campbell J. stated:

> The test for striking pleadings was set out at paragraph 3 of *Main Rehabilitation Co. Ltd. v. The Queen*, 2004 D.T.C. 6762, where the Federal Court of Appeal stated the following:
>
> > The test to be applied for striking out pleadings is whether it is plain and obvious that Main's Notice of Appeal to the Tax Court discloses no reasonable claim. Only if its appeal is certain to fail should the relevant portions of the Notice of Appeal be struck out. As stated, the facts alleged in the Notice of Appeal are assumed to be true. See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
>
> An Order to strike portions of a pleading should not be made "...unless it be obvious that the plaintiff's action is so clearly futile that it has not the slightest chance of succeeding..." (*Pfizer Canada Inc. v. Apotex Inc.*, [1999] F.C.J. No. 959 (Fed. T.D.) at paragraph 30).

[31] In that case, the appellant in the Notice of Appeal had described certain dealings with CRA during the objection process and in striking those portions, Campbell J. – at paragraph 17 – stated:

> 17 These paragraphs contain details concerning the garnishment proceedings in 2006. The Respondent argued that the garnishment resulted from an earlier assessment under the Act and that, if the Appellant had objections to that

> assessment, it could have challenged the validity of that assessment at the time. The Appellant's argument is that this garnishment was never valid and that there was no opportunity to legitimately dispute the amounts that CRA claimed were owed. If the Appellant can adduce evidence to show that there was some duplication of amounts which the Appellant paid under protest pursuant to this garnishment, then there may be an argument that the present assessment is incorrect. This is particularly true if, as the Appellant alleges, the garnishment was not issued pursuant to an independent assessment. The relevance and weight, if any, is best left to the presiding Judge to assess within the parameters of all the adduced evidence. It is not clear and obvious to me that these impugned paragraphs should be struck because they are scandalous, frivolous or vexatious, or an abuse of the process of the Court. It would be premature for me on a motion to deprive the Appellant of its right to present this argument to the presiding Judge. These paragraphs will remain in the pleadings.

[32] At paragraph 35, in response to the request for an order that the monies paid pursuant to the garnishment be returned, Campbell J. stated:

> The Appellant requests that this Court order that the monies, paid pursuant to the garnishment proceedings, be returned to the Appellant with interest. This relief is beyond the jurisdiction of this Court. The Appellant paid this money voluntarily, although under protest, and if a claim for such relief is possible, it may only be through an application to the Federal Court. This subparagraph should therefore be struck.

[33] In *Minister of National Revenue v Parsons*, 84 DTC 6345, the Federal Court of Appeal heard an appeal from a judgment of the Federal Court Trial Division. Pratte J. – writing for the Court – allowed the appeal in a brief judgment which is quoted in full below:

> 1 This is an appeal from a judgment of the Trial Division [83 DTC 5329] quashing assessments made by the Minister of National Revenue pursuant to subsections 159(2) and (3) of the *Income Tax Act*. The special feature of this case is that the judgment under attack was not rendered on an appeal under the provisions of the Income Tax Act. Indeed, the respondents did not bring such an appeal; instead, they chose to apply to the Trial Division under section 18 of the *Federal Court Act* for an order quashing the assessments made against them and restraining the Minister and his servants from taking further action pursuant to those assessments. That application was granted by the judgment appealed from.
>
> 2 We are all of opinion that the appeal must succeed on the narrow ground that the only way in which the assessments made against the respondents could be challenged was that provided for in sections 169 and following of the *Income Tax Act*. This, in our view, clearly results from section 29 of the *Federal Court Act*.

> 3 The learned judge of first instance held that, in this case, section 29 did not deprive the Trial Division of the jurisdiction to grant the application made by the respondents under section 18 of the *Federal Court Act* because, in his view, the appeal provided for in the *Income Tax Act* was restricted to questions of 'quantum and liability' while the respondents' application raised the more fundamental question of the Minister's legal authority to make the assessments. We cannot agree with that distinction. The right of appeal given by the *Income Tax Act* is not subject to any such limitations.
>
> 4 In our view, the *Income Tax Act* expressly provides for an appeal as such to the Federal Court from assessments made by the Minister; it follows, according to section 29 of the *Federal Court Act*, that those assessments may not be reviewed, restrained or set aside by the Court in the exercise of its jurisdiction under sections 18 and 28 of the *Federal Court Act*.
>
> 5 The appeal will be allowed, the decision of the Trial Division will be set aside and the respondents' application to the Trial Division will be dismissed. The appellant will be granted his [*sic*] costs both in this Court and in the Trial Division.

[34] In *Norejko v R*, 2004 TCC 829, the taxpayer sought an exemption from payment of income tax for the years at issue because of freedom of conscience and religion under the *Canadian Charter of Rights and Freedoms (Charter)*. The Minister brought a motion for an order quashing the appeal. After reviewing various decisions including *Prior v R*, [1989] 2 C.T.C. 280 (Fed. C.A.), *Woodside v R*, [1993] 2 C.T.C. 2348 (T.C.C.) and *O'Sullivan v R*, [1991] 2 C.T.C. 117 (Fed. T.D.), O'Connor J. - at paragraphs 11 and 12 stated:

> 11 Having considered the submissions of the Appellant and of counsel for the Respondent and having reviewed the legal provisions and authorities cited above, I conclude that this Court has no jurisdiction to grant an exemption from income tax, federal or provincial. Moreover even if the Court had jurisdiction to consider the issues raised by the Appellant it does not have the authority to grant the relief sought of ordering refunds of taxes paid and an exemption from income taxes. These conclusions are not altered by the fact that the Appellant, whether because of religious beliefs or otherwise, does not agree with or conscientiously objects to the laws of the government of Canada and/or to the policies upon which such laws are based.
>
> 12 I also conclude that even if the foregoing is incorrect, these appeals cannot be heard because the required condition precedent of giving valid Notices of Objection has not been met.

[35] In the case of *Fidelity Global Opportunities Fund v Canada* 2010 TCC 108, V.A. Miller J. heard a motion to strike an appellant's Notice of Appeal from an assessment made under the *ITA*. The facts and analysis are found in paragraphs 9-13, inclusive, of the judgment as follows:

> 9 The Appellant had 90 days after the day of mailing of the notice of assessment to serve a notice of objection on the Minister[2]. It is my opinion that the Appellant's letter of February 11, 2008 is sufficient to satisfy the conditions in subsection 165(1) of the Act.
>
> 10 Subsection 165(2) of the Act stipulates that a notice of objection shall be served by being addressed to the Chief of Appeals in a District Office or a Taxation Centre. The language in subsection 165(2) is mandatory[3] and a letter to the Ottawa Technology Centre does not meet the requirements of this subsection[4].
>
> 11 There are good reasons why subsection 165(2) specifies that a notice of objection shall be served on the Chief of Appeals. It is the Appeals Branch which deals with objections. If objections are not served in accordance with subsection 165(2), then it would be next to impossible for the Canada Revenue Agency to keep proper records and to ensure that the objections are dealt with "with all due dispatch" as is required in subsection 165(3) of the Act.[5]
>
> 12 I realize that subsection 165(6) gives the Minister the discretion to accept a notice of objection that was not served in accordance with subsection 165(2). However, that discretion lies with the Minister and not this Court.
>
> 13 For the above reasons, the Respondent's motion is granted and the Notice of Appeal is quashed, with costs to the Respondent.

---

[2] Paragraph 165(1)b.
[3] Interpretation Act, R.S.c. 1985, c. I-21, s.11.
[4] See McClelland v. R., 2004 FCA 315 at paragraph 5.
[5] Pereira v. Canada, 2008 TCC 2 at paragraph 15; affirmed 2008 FCA 264.

[36] The position of the individual appellants is that the agreement relevant to these proceedings was equivalent to an assessment by the Minister because of the unusual circumstances that prevailed in relation to the bankruptcy proposal by Salisbury and the impending liability on their part because of the inability of the corporation to satisfy the outstanding balance of GST. The *Canadian Oxford Paperback Dictionary*, Oxford University Press Canada 2000, defines "virtual" as:

> **1** that is such in essence or effect, though not recognized as such in name or according to strict definition (*she married a virtual stranger).*

> **2** **a** *computing* – not physically existing but made by software to appear to do so from the point of view of the program or user (*virtual memory*)
> **b** designating or existing or experienced in an environment created by virtual reality.
> . . .
>
> The term " virtual reality" is defined as:
>
> **1** a notional image or environment created by computer, with which a user can interact realistically using gloves fitted with sensors and a helmet containing a screen.
> **2** the software or technology used to generate this environment.

[37] In *McMillen Holdings Inc. v Minister of National Revenue*, 87 D.T.C. 585, Rip J. (as he then was) heard an appeal from a reassessment by the Minister where the appellants did not object to the levy of the tax. Instead, they appealed to the Court to vary the reassessment to provide for the payment of interest by the Minister to them. At paragraphs 44 to 48, inclusive, of his judgment Rip J. commented as follows:

> 44 Section 152 states that the Minister shall examine a taxpayer's return of income for a taxation year, assess the tax of the year, interest and penalties and determine any refund or tax paid on account. The term "assessment" or "reassessment" is not defined in the Act except to provide that an assessment includes a reassessment. The terms "reassessment" and "notice of reassessment" were discussed by Mr. Justice Thorson in *Pure Spring Company Limited v. M.N.R.*, 2 DTC 844 at page 857:
>
> The assessment is different from the notice of assessment; the one is an operation, the other a piece of paper. The nature of the assessment operation was clearly stated by the Chief Justice of Australia, Isaacs, A.C.J., in *Federal Commissioner of Taxation v. Clarke* ((1927) 40 C.L.R. 246 at 277):
>
> An assessment is only the ascertainment and fixation of liability.
>
> a definition which he had previously elaborated in *The King v. Deputy Federal Commissioner of Taxation (S.A.); ex parte Hooper* ((1926) 37 C.L.R. 368 at 373):
>
> > An 'assessment' is not a piece of paper; it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount he sends by post a notification thereof called 'a notice of assessment'. . .But neither the paper sent nor the notification it gives is the 'assessment'. That is and remains the act of operation of the Commissioner.

> It is the opinion as formed, and not the material on which it was based, that is one of the circumstances relevant to the assessment. The assessment, as I see it, is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made.
>
> 45 An assessment by its very nature is a determination of liability of a taxpayer. An amount of money owed to the taxpayer by the Crown on account of interest is not an amount which is subject to an assessment or an assessed amount of money.
>
> 46 It is the taxpayer who is assessed tax, interest and penalties and he is assessed by the Minister. If the taxpayer does not agree with an assessment he may object and if the assessment is confirmed by the Minister, or if the Minister reassesses, the taxpayer may appeal to this Court or the Federal Court to have the assessment vacated, varied or referred back to the Minister for reconsideration and reassessment: sections 165, 169 and 171.
>
> 47 Where in examining a taxpayer's return of income for a taxation year the Minister has determined a refund of tax or interest owing to the taxpayer on account of an overpayment of tax in accordance with section 164, the Minister may, on or after mailing the notice of assessment for the particular year, refund any overpayment made on account of the tax and pay interest on that amount. The Minister may notify the taxpayer of any interest due to him in the notice of assessment. If, however, the Minister does not make such refund at the time of mailing the notice of assessment the taxpayer has four years from the end of the taxation year to apply for such refund. But the determination, calculation or amount of refund and the interest resulting from any overpayment of tax do not constitute the assessment of tax, interest or penalty although the question of interest is determined in the assessment process and may be indicated on the notice of assessment. However, the notice of assessment is not the assessment. In my view the appellant at bar is not appealing from any assessment of income tax or interest but is asking the Court to make a direction to order the Minister of National Revenue to make a payment of interest.
>
> 48 In *Guerin et al. v. The Queen* [1982] 2 F.C. 445 the issue was whether or not the Federal Court had jurisdiction to award prejudgment interest against the Crown in an action for breach of trust. Collier, J. stated at page 448:
>
> > . . .this is a statutory Court. Its jurisdiction, in respect of the subject-matter of claims, and over persons, and its jurisdiction in respect of the remedies and other relief it can grant, must be found in existing federal statute or federal common law: *McNamara Construction (Western) Ltd. et al. v. The Queen*, (1977), 75 D.L.R. (3d) 273 at pp. 276-7, [1977] 2 S.C.R. 654 at p. 658, 13 N.R. 181.

[38] Counsel for the appellants urged the Court to dismiss the motion and to permit the appeal of the individual appellants to survive despite the lack of compliance with

the relevant provisions of the *ETA*. Counsel stated the terms of the agreement between Directors and the Minister – through CRA – were unambiguous. Unfortunately, the manner in which subsequent events unfolded would leave them unable to challenge the appropriateness of their payment if this motion is granted.

[39] There is no doubt that "the law of unintended consequences" applies in this case. It is not within my bailiwick to fashion a remedy to the wrong alleged by the appellants which is fortunate because it has been 53 years since I studied contracts in first-year law and I am not eager to revisit attacks of migraine headaches brought on by struggling to comprehend fully the doctrine of mutual mistake. However, there may be a forum capable of granting equitable relief to the individual appellants rooted in contract or other ground.

[40] In support of the contention that this Court was the proper forum to deal with the issue of actual liability on the part of the individual appellants, counsel relied on the decision by Décary J.A. in *Canada v Roitman*, 2006 FCA 266, concerning the respective jurisdiction of the Federal Court and the Tax Court of Canada with respect to income tax assessments. The facts are set forth in paragraphs 3 to 11, inclusive, of the judgment as follows:

> 3 The Minister of National Revenue (the "Minister") disallowed certain claims for expenses. Mr. Roitman and Gold Seal objected to the reassessments of their 2000, 2001 and 2002 taxation years and provided the Minister with submissions in support of their position.
>
> 4 The Minister accepted the submissions in part and responded with a settlement proposal. He advised Mr. Roitman that, if he did not agree with the settlement proposal, the Minister would confirm the assessment and Mr. Roitman could then pursue the issue in the Tax Court of Canada. At all material times Mr. Roitman and Gold Seal were represented in the settlement negotiations by a chartered accountant.
>
> 5 On December 23, 2004, both Mr. Roitman and Gold Seal accepted the Minister's settlement proposal. They signed a settlement agreement whereby the Minister would reassess Mr. Roitman and Gold Seal in accordance with the Minister's proposed settlement.
>
> 6 In signing the agreement, Mr. Roitman and Gold Seal acknowledged that they were "familiar with subsections 165(1.2) and 169(2.2) of the *Income Tax Act*" and that they understood that in accepting the proposal, they "will be precluded from filing an objection or an appeal under the *Income Tax Act*" (A.B. p. 81).

> 7 Mr. Roitman was reassessed in accordance with the terms of the settlement agreement on January 24, 2005. Pursuant to those terms, Mr. Roitman filed no objection to the reassessment.
>
> 8 On June 15, 2005, Mr. Roitman filed the Statement of Claim which is at issue in this appeal.
>
> 9 The Statement of Claim identifies the claim as a Proposed Class Action. Mr. Roitman, "on his own behalf and on behalf of all class members", seeks damages against Her Majesty the Queen "joined herein as a representative of the Federal Government of Canada and more specifically the Canada Customs and Revenue Agency (the "Agency")". Mr. Roitman alleges that in reassessing him, the Crown engaged in "deliberate conduct ... to deny ... the plaintiff the benefit of the law". The damages sought are "damages for misfeasance in public office", "special damages, including costs of defending the proposed income tax assessments and in prosecuting the civil income tax appeal" and "punitive, exemplary and aggravated damages".
>
> 10 On August 2, 2005, the Crown filed a Statement of Defence.
>
> 11 On August 26, 2005, the Crown filed a motion pursuant to Rule 221 of the *Federal Court Rules*, 1998 (the "Rules") on the ground that the Statement of Claim was immaterial, redundant, scandalous, frivolous and vexatious, and was otherwise an abuse of the process of the Court. The Crown argued, essentially, that the Statement of Claim was to be struck out because in effect it challenges the legality of assessments of income tax by the Minister, a matter which is exclusively within the jurisdiction of the Tax Court of Canada and with respect to which, in any event, Mr. Roitman had waived his right to object and appeal.

[41] In the course of concluding the motion to strike the Statement of Claim was warranted, Décary J.A. at paragraphs 18 to 20, inclusive, stated:

> 18 Counsel for Mr. Roitman all but conceded at the hearing that the claim could go nowhere unless the notice of reassessment is found to be wrong in law, as well as the result of the unlawful exercise of the Minister's statutory authority. His position is that the Minister does not have the right to knowingly misinterpret the law, which, the argument goes, is precisely what the Minister did in not applying the teaching of this Court in *Franklin*. Counsel also confirmed that no fraud was alleged and that the Statement of Claim does not refer to, or seek to set aside, the settlement agreement or the waiver of the taxpayer's right to file an objection or an appeal.
>
> Jurisdiction of the Federal Court and of the Tax Court of Canada
>
> 19 Subsection 152(8) of the *Income Tax Act* deems an assessment to be valid and binding unless varied or vacated in accordance with the appeal process under

> the Act. The Tax Court has exclusive jurisdiction to determine the correctness of tax assessments. This exclusive jurisdiction is established by a combination of ss. 152(8) and 169 of the *Income Tax Act*, s. 12 of the *Tax Court of Canada Act* and ss. 18, 18.1 and 18.5 of the *Federal Courts Act*.
>
> 20 It is settled law that the Federal Court does not have jurisdiction to award damages or grant any other relief that is sought on the basis of an invalid reassessment of tax unless the reassessment has been overturned by the Tax Court. To do so would be to permit a collateral attack on the correctness of an assessment. . . .

[42] However, in *Roitman*, there had been an assessment issued by the Minister as noted by Décary J.A. at paragraph 24:

> 24 In the case at bar, the income tax assessment in issue is an assessment of Mr. Roitman's own tax liability. The true ground for the relief sought is the allegation that the assessment is contrary to the alleged teaching of this Court in *Franklin*. The damages are in reality sought on the basis of an invalid reassessment made on the basis of a wrong interpretation of the law. For all practical purposes, then, it is the very legality or correctness in law of the notice of reassessment which is at issue. This, clearly, is a matter within the exclusive jurisdiction of the Tax Court of Canada.

[43] It is not because the circumstances before me are novel that drives the result. In a recent case in British Columbia – *Rosemari Surakka as the personal representative of Lisa Cheryl Dudley v Minister of Public Safety and Solicitor General of the Province of British Columbia, District of Mission, and Attorney General of Canada*, 2013 BCSC 1005, Madam Justice H. Holmes heard an application under the relevant rule by way of motion to strike the claim and dismiss the action. Surakka was seeking a declaration under s. 24(1) of the *Charter* that her deceased daughter was deprived of her right to life and security of the person, as protected by s. 7 as a result of failures in the responses of the Royal Canadian Mounted Police officers to reports of gunshots heard.

[44] Justice Holmes dismissed the application and in the course of her analysis referred to certain decisions issued by the Supreme Court of Canada. At paragraphs 38 to 43, inclusive, Justice Holmes stated:

> 38 As I have already noted, a claim will only be struck under Rule 9-5(1) if, assuming the facts pleaded to be true, it is plain and obvious that the claim has no reasonable prospect of success. As the Supreme Court of Canada explained in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at paras. 19-

20, the power to strike thus serves as a valuable housekeeping measure that unclutters the proceedings by weeding out the hopeless claims:

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> This promotes two goods - efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be - on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

39 The Court cautioned, at para. 21, that the power to strike must nonetheless be used with care, because it has the potential to stifle developments in the law:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in Donoghue v. Stevenson. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.
>
> [Emphasis added.]

> 40 In my view, the plaintiff's claim is precisely the type of novel but arguable claim that should survive a motion to strike on a generous approach.
>
> 41 As the plaintiff herself recognizes, her claim cannot succeed in the face of *Wilson Estate* and *Stinson Estate*. However, she articulates a reasoned and coherent basis for a reconsideration of those authorities, drawing from subsequent developments in Canadian law and international human rights law.
>
> 42 It is therefore not plain and obvious that her claim has no reasonable prospect of success.
>
> 43 I reach this conclusion only in the context of the present application that the plaintiff's claim be struck. At a later stage and with a more developed factual context another judge may conclude that the claim cannot succeed, whether for reasons of fact or of law.

[45] In the within proceeding, it is not a matter of seeking an expanded interpretation of a potential right within the broad terms of the *Charter*. Instead, the question is whether there has been compliance with the statutory requirements of relevant provisions in the *ETA* that the jurisprudence defines as comprising a mandatory condition precedent to a valid appeal under that legislation from an assessment to persons as defined therein. It is unfortunate that the individual appellants' reservation - by written agreement - of the right to challenge the legal basis for the payment to CRA remains -from their perspective - a wrong seeking a remedy.

[46] Rule 53(3)(b) permits the respondent to apply to the Court to have an appeal dismissed on the ground " a condition precedent to instituting a valid appeal has not been met."

[47] As noted earlier in these Reasons, Salisbury has no valid right of appeal to the assessment issued against it by the Minister pursuant to the relevant provisions of the *ETA*. Despite the unusual circumstances relevant to this proceeding, the individual appellants must suffer the same fate as the corporation in that their appeal is also not valid because the statutory condition precedent has not been met.

[48] The respondent's motion is granted with costs and the appeal of Salisbury and the individual appellants is hereby quashed. In the event the term " dismissed" is preferred to conform with the Rule, then, it is hereby dismissed. In my view, an appeal must be quashed when void *ab initio* such as when a condition precedent has not been met, whereas another appeal may exist initially even though dismissed for various reasons at a subsequent stage in the process either before or after trial.

Signed at Sidney, British Columbia, this 23rd day of July 2013.

"D.W. Rowe"

Rowe D.J.

CITATION:	2013 TCC 236
COURT FILE NO.:	2010-1565(GST)G
STYLE OF CAUSE:	SALISBURY HOUSE OF CANADA LTD., EARL JOEL BARISH, LORNE SAIFER, HARRIS LIONTAS AND HERSH WOLCH AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	May 31, 2013
REASONS FOR JUDGMENT BY:	The Honourable D.W. Rowe, Deputy Judge
DATE OF JUDGMENT:	July 23, 2013

APPEARANCES:

Counsel for the Appellants:	Barry L. Gorlick, Q.C.
Counsel for the Respondent:	Denyse Coté and Penny Piper

COUNSEL OF RECORD:

For the Appellants:

Name:	Barry L. Gorlick, Q.C.
Firm:	Monk Goodwin LLP Winnipeg, Manitoba

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada