

Docket: 2009-2247(IT)G

BETWEEN:

SENTINEL HILL PRODUCTIONS IV CORPORATION,  
in its capacity as designated member of  
Sentinel Hill No. 207 Limited Partnership,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-2248(IT)G

AND BETWEEN:

SENTINEL HILL PRODUCTIONS IV CORPORATION,  
in its capacity as designated member of  
SHAAE (2001) Master Limited Partnership,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Applications heard on June 4, 2013 at Toronto, Ontario

By: The Honourable Justice Judith M. Woods

Appearances:

Counsel for the Appellants: Yves St-Cyr  
Mark Jadd

Counsel for the Respondent: Robert Carvalho  
Ifeyani Nwachukwu

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**ORDER**

Upon application by the appellants to have a question determined pursuant to section 58 of the *Tax Court of Canada Rules (General Procedure)*, the applications are dismissed. The respondent is entitled to its costs with respect to the applications, with one set of counsel fees for both.

Signed at Winnipeg, Manitoba this 27th day of August 2013.

“J. M. Woods”

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Woods J.

Citation: 2013 TCC 267  
Date: 20130827  
Docket: 2009-2247(IT)G

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### **REASONS FOR ORDER**

Woods J.

[1] This matter relates to applications by the appellants for the determination of a question pursuant to paragraph 58(1)(a) of the *Tax Court of Canada Rules (General Procedure)*. The respondent submits that it is not appropriate that the question be determined under this procedure. These are my reasons concerning this issue.

[2] Subsection 58(1) of the *Rules* provides:

58. (1) A party may apply to the Court,

(a) for the determination, before hearing, of a question of law, a question of fact or a question of mixed law and fact raised by a pleading in a proceeding where the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, or

(b) to strike out a pleading because it discloses no reasonable grounds for appeal or for opposing the appeal,

and the Court may grant judgment accordingly.

[3] The main focus of this preliminary proceeding is to determine whether the conditions set out in paragraph 58(1)(a) have been satisfied. These are:

(a) that the proposed question is raised by a pleading, and

(b) that the determination of the question may dispose of all or part of the appeal, substantially shorten the hearing, or result in a substantial saving of costs.

[4] For the interest of readers, a previous motion in these appeals was heard by the case management judge, Rip C.J. (*Strother et al v The Queen*, 2011 TCC 251).

### The Proposed Question

[5] The question that the appellants seek to have determined (the “Proposed Question”) is reproduced below from a letter to the Court dated February 12, 2013:

Whether the notices of determination (“Partnership Determinations”) issued under subsection 152(1.4) of the *Income Tax Act* (“ITA”) should be vacated and the appeals consequently allowed (subparagraph 170(1)(b)(i), of the ITA) since the Minister concluded at a subsequent time (on or prior to March 31, 2010), after the time the Partnership Determinations were issued, that Sentinel Hill No. 207 Limited Partnership and SHAAE (2001) Master Limited Partnership (the “Partnerships”) and the 72 other limited partnerships did not exist for the fiscal years ended December 31, 2001 and December 31, 2002 (the “Periods”).

[6] It is also useful to reproduce the grounds for the Proposed Question as set out in the notices of motion.

(a) On March 29, 2005 and March 30, 2005, the Minister issued notices of determination to the Partnership pursuant to subsection 152(1.4) of the Act;

(b) The reply to the notice of appeal and the amended reply to the notice of appeal filed by the Respondent clearly confirmed that, prior to filing the reply to the notice of appeal and the amended reply to the notice of appeal, the Minister had concluded that the Partnership did not exist for the Periods;

(c) It was confirmed during the course of examination for discovery of Mr. Duff that the reply to the notice of appeal and the amended reply to the notice of appeal accurately reflected the Minister's position that the Partnership did not exist for the Periods;

(d) Once the Minister had concluded that the Partnership did not exist for the Periods, the Minister was permitted in accordance with subsection 152(1.8) of the Act to issue notices of reassessment to the members of the Partnership in lieu of the notices of determination issued to the Partnership provided that such notices of reassessment were issued within one year of such conclusion; and

(e) Since the Minister had concluded that the Partnership did not exist for the Periods on or before the date that the reply to the notice of appeal or amended reply to the notice of appeal was filed, more than one year has elapsed since the Minister made such conclusion, and therefore, the Minister is no longer entitled to (i) proceed further pursuant to the notices of determination issued to the Partnership or (ii) issue any notices of reassessment to the members of the Partnership.

[7] The excerpt above clarifies that the focus of the Proposed Question is on whether the Minister of National Revenue is now statute barred from issuing reassessments to partners by virtue of subsection 152(1.8) of the *Income Tax Act*.

### Background

[8] The legislative provisions referred to below are reproduced in an Appendix.

[9] Sentinel Hill No. 207 Limited Partnership and SHAAE (2001) Master Limited Partnership (the "Partnerships") reported business losses in information returns for their 2001 and 2002 fiscal years.

[10] In March 2005, the Minister disallowed the business losses by making determinations of partnership income or loss pursuant to subsection 152(1.4) of the *Act* (the "Determinations").

[11] The Determinations are subject to an objection and appeal procedure that is

similar to the procedure applicable to assessments (s. 152(1.2) of the *Act*). The process must be conducted by a single partner (s. 165(1.15) of the *Act*).

[12] These appeals have been instituted by Sentinel Hill Productions IV Corporation pursuant to these provisions.

[13] Following the issuance of a determination of partnership income or loss, the partners of the partnership may be reassessed beyond the normal limitation period pursuant to subsections 152(1.7) and (1.8) of the *Act*, subject to the limitations set out in those provisions.

#### Position of the appellants

[14] The issue in this preliminary inquiry is whether the Proposed Question should be set down for hearing. The appellants submit that this is an appropriate matter for s. 58(1)(a) because it makes no sense for the Minister to issue the Determinations on the assumption that partnerships existed and then to take the position in the replies that the Partnerships did not exist.

[15] As for the conditions in s. 58(1)(a), it is first submitted that the Proposed Question is raised by a pleading because the replies state that the Minister concluded that the Partnerships did not exist. Second, it is submitted that the determination of the Proposed Question may dispose of the appeals in their entirety because the appellants are asking that the determinations be vacated.

#### Position of the respondent

[16] The respondent submits that the Proposed Question should not be scheduled for hearing because it does not satisfy either of the conditions in s. 58(1)(a).

[17] With respect to the requirement that the question be raised by the pleadings, the respondent submits that this condition is not satisfied because the only issue raised by the pleadings is the correctness of the Determinations. The Proposed Question relates to whether possible future reassessments of partners are statute barred, which has nothing to do with the correctness of the Determinations.

[18] As for whether the Proposed Question may dispose of all or part of the proceedings, shorten the hearing, or save costs, the respondent submits that this requirement is not satisfied because the Proposed Question is so lacking in merit that it accomplishes none of these.

[19] The appellants are requesting that the Court vacate the Determinations because the Minister is now statute barred from reassessing the partners. It is submitted that this is beyond the jurisdiction of the Court which is limited to determining the correctness of the Determinations.

## Discussion

### *Nature of the Proposed Question*

[20] I begin by examining the Proposed Question. The question asks that the Determinations be vacated because the Minister concluded, on or prior to March 31, 2010, that the Partnerships did not exist. The essential issue is whether the Determinations should be vacated because the Minister is statute barred from issuing reassessments to partners.

[21] It is important to note that the Proposed Question does not ask the Court to make a finding regarding the existence of the Partnerships. This matter is in dispute between the parties. The focus is simply on whether the Minister concluded that the Partnerships did not exist.

[22] The appellants rely on s. 152(1.8) below.

**(1.8) Time to assess** - Where, as a result of representations made to the Minister that a person was a member of a partnership in respect of a fiscal period, a determination is made under subsection (1.4) for the period and the Minister, the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada concludes at a subsequent time that the partnership did not exist for the period or that, throughout the period, the person was not a member of the partnership, the Minister may, notwithstanding subsections (4), (4.1) and (5), within one year after that subsequent time, assess the tax, interest, penalties or other amounts payable, or determine an amount deemed to have been paid or to have been an overpayment under this Part, by any taxpayer for any taxation year, but only to the extent that the assessment or determination can reasonably be regarded

(a) as relating to any matter that was relevant in the making of the determination made under subsection (1.4);

(b) as resulting from the conclusion that the partnership did not exist for the period; or

(c) as resulting from the conclusion that the person was, throughout the

period, not a member of the partnership.

(Emphasis added)

[23] According to the appellants, s. 152(1.8) limits the time for reassessing the partners to March of 2011 at the latest. This is one year after the filing of the replies that denied the existence of the Partnerships. The Minister had taken a contrary position at the time the Determinations were made.

[24] I would also comment that the Proposed Question appears to involve several possible issues, some of which are mentioned below.

- (a) Does the one-year time period in s. 152(1.8) start to run from the date that the Minister concludes there is no partnership even if a court reaches the same conclusion at a later time?
- (b) Is the time limit for reassessing partners affected by s. 152(1.7)?
- (c) Is the Minister's position that the Partnerships did not exist a "conclusion" for purposes of s. 152(1.8)?
- (d) Assuming that reassessments of the partners are now statute barred, are these proper grounds to vacate the Determinations?

[25] I turn now to the two conditions that must be satisfied for purposes of s. 58(1)(a).

*Is the Proposed Question raised by a pleading?*

[26] The first condition is that the Proposed Question must be raised by a pleading.

[27] The appellants acknowledge that the Proposed Question is not raised as an issue in a pleading, but they submit that it is sufficient that the question is referred to in a pleading. The appellants submit that the condition is satisfied because the replies state the Minister's conclusion that the Partnerships did not exist.

[28] I disagree with this interpretation of the "by a pleading" requirement. In my view, s. 58(1)(a) contemplates that a pleading raise the issue that is the subject of the proposed question.

[29] In this case, the Proposed Question raises issues of whether reassessments of

partners are now statute barred, and whether the Determinations should therefore be vacated. Neither of these are raised as issues in the pleadings.

[30] The appellants submit that the phrase “by a pleading” is broader than “in a pleading” and that it is not necessary that the Proposed Question be raised as an issue in a pleading.

[31] I do not agree. A purposive interpretation of s. 58(1)(a) suggests that the Proposed Question must be properly raised as an issue in the pleading. For reasons of fairness, issues in an appeal are generally limited to those that are raised in the pleadings. The language used in paragraph 58(1)(a) ensures that this principle is not by-passed by bringing a motion under this provision. It is not an appropriate use of s. 58(1)(a) to raise a new issue through this procedure.

*May the Proposed Question dispose of the proceeding?*

[32] Paragraph 58(1)(a) also requires that the Proposed Question may dispose of the proceeding, shorten the hearing, or save costs.

[33] I would first comment on a submission made orally by counsel for the appellants that it is nonsense for the respondent to argue that the Partnerships did not exist because it is contrary to the Determinations. The argument appears to be that the Minister is in effect appealing his own determinations.

[34] The problem with this submission is that it has nothing to do with the Proposed Question. The Proposed Question raises a statute bar issue that is entirely different from the issue of whether the respondent’s position does not support the Determinations. Whether the Minister is appealing his own determinations is not relevant to the Proposed Question.

[35] Turning to whether the Proposed Question may dispose of the proceeding in its entirety, I agree with the respondent that the Proposed Question is so lacking in merit that it will not dispose of the hearing.

[36] The appellants seek to have the Determinations vacated on grounds that have nothing to do with whether the Determinations are incorrect or invalid. This is contrary to well-established principles on which this Court may vacate assessments.

[37] The circumstances in which this Court may vacate an assessment were recently summarized by Sharlow J.A. in *Ereiser v The Queen*, 2013 FCA 20, at para

21, 22:

[21] Mr. Ereiser is seeking from the Tax Court of Canada an order vacating the reassessments under appeal. That is the appropriate remedy in an income tax appeal for an assessment (including a reassessment) that is found not to be valid, or that is found not to be correct. I use the term valid to describe an assessment made in compliance with the procedural provisions of the *Income Tax Act*, and correct to describe an assessment in which the amount of tax assessed is based on the applicable provisions of the *Income Tax Act*, correctly interpreted and applied to the relevant facts.

[22] The procedural provisions of the *Income Tax Act* include those relating to statutory limitation periods. Generally, those provisions deprive the Minister of the legal authority to assess tax after the expiry of a certain period of time - the period defined in the *Income Tax Act* as the "normal reassessment period" - unless a statutory exception applies.

[38] The appeal process for partnership determinations is the same as for assessments "with such modifications as the circumstances require" (s. 152(1.2)).

[39] It is not appropriate to depart from the well-established principles cited in *Ereiser* in respect of determinations of partnership income or loss. The circumstances do not require it, and to do so would be contrary to the scheme of the *Act*.

[40] The *Act* contemplates a separate objection and/or appeal procedure for every determination and assessment. The Proposed Question seeks to challenge the validity of reassessments of partners that have not been issued and which may never be issued. The proper procedure for this issue is to dispute the validity of the reassessments if and when they are issued.

[41] The appellants may be suggesting that the relief sought is appropriate because it would save the expense of a complicated trial. It may be that these appeals could be moot if subsequent reassessments of partners are statute barred. However, this is not a circumstance that requires a modification to the well-established principles described in *Ereiser*.

[42] For these reasons, I am of the view that the Proposed Question has no reasonable chance of success, and therefore it does not satisfy the condition in s. 58(1)(a) that it may dispose of the proceeding, shorten the hearing, or save costs.

Conclusion

[43] I would conclude that it is not appropriate that the Proposed Question be set down for hearing.

[44] The respondent shall have its costs with respect to this proceeding, with one set of counsel fees for both matters.

Signed at Winnipeg, Manitoba this 27th day of August 2013.

“J. M. Woods”

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Woods J.

**APPENDIX**

**Relevant legislative provisions**

**152. (1.2) Provisions applicable** - Paragraphs 56(1)(1) and 60(o), this Division and Division J, as they relate to an assessment or a reassessment and to assessing or reassessing tax, apply, with such modifications as the circumstances require, to a determination or redetermination of an amount under this Division or an amount deemed under section 122.61 or 126.1 to be an overpayment on account of a taxpayer's liability under this Part, except that

(a) subsections (1) and (2) do not apply to determinations made under subsections (1.1) and (1.11);

(b) an original determination of a taxpayer's non-capital loss, net capital loss, restricted farm loss, farm loss or limited partnership loss for a taxation year may be made by the Minister only at the request of the taxpayer; and

(c) subsection 164(4.1) does not apply to a determination made under subsection (1.4).

[...]

**(1.4) Determination in respect of a partnership** - The Minister may, within 3 years after the day that is the later of

(a) the day on or before which a member of a partnership is, or but for subsection 220(2.1) would be, required under section 229 of the *Income Tax Regulations* to make an information return for a fiscal period of the partnership, and

(b) the day the return is filed,

determine any income or loss of the partnership for the fiscal period and any deduction or other amount, or any other matter, in respect of the partnership for the fiscal period that is relevant in determining the income, taxable income or taxable income earned in Canada of, tax or other amount payable by, or any amount refundable to or deemed to have been paid or to have been an overpayment by, any member of the partnership for any taxation year under this Part.

[...]

**(1.7) Binding effect of determination** - Where the Minister makes a determination under subsection (1.4) or a redetermination in respect of a partnership,

(a) subject to the rights of objection and appeal of the member of the partnership referred to in subsection 165(1.15) in respect of the determination or redetermination, the determination or redetermination is binding on the Minister and each member of the partnership for the purposes of calculating the income, taxable income or taxable income earned in Canada of, tax or other amount payable by, or any amount refundable to or deemed to have been paid or to have been an overpayment by, the members for any taxation year under this Part; and

(b) notwithstanding subsections (4), (4.01), (4.1) and (5), the Minister may, before the end of the day that is one year after the day on which all rights of objection and appeal expire or are determined in respect of the determination or redetermination, assess the tax, interest, penalties or other amounts payable and determine an amount deemed to have been paid or to have been an overpayment under this Part in respect of any member of the partnership and any other taxpayer for any taxation year as may be necessary to give effect to the determination or redetermination or a decision of the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada.

**(1.8) Time to assess** - Where, as a result of representations made to the Minister that a person was a member of a partnership in respect of a fiscal period, a determination is made under subsection (1.4) for the period and the Minister, the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada concludes at a subsequent time that the partnership did not exist for the period or that, throughout the period, the person was not a member of the partnership, the Minister may, notwithstanding subsections (4), (4.1) and (5), within one year after that subsequent time, assess the tax, interest, penalties or other amounts payable, or determine an amount deemed to have been paid or to have been an overpayment under this Part, by any taxpayer for any taxation year, but only to the extent that the assessment or determination can reasonably be regarded

(a) as relating to any matter that was relevant in the making of the determination made under subsection (1.4);

(b) as resulting from the conclusion that the partnership did not exist for the period; or

(c) as resulting from the conclusion that the person was, throughout the period, not a member of the partnership.

**152. (4) Assessment and reassessment [limitation period]** - The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(a) the taxpayer or person filing the return

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or

(ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;

[...]

**165. (1.15) Partnership** - Notwithstanding subsection (1), where the Minister makes a determination under subsection 152(1.4) in respect of a fiscal period of a partnership, an objection in respect of the determination may be made only by one member of the partnership, and that member must be either

(a) designated for that purpose in the information return made under section 229 of the *Income Tax Regulations* for the fiscal period; or

(b) otherwise expressly authorized by the partnership to so act.

CITATION: 2013 TCC 267

COURT FILE NOS.: 2009-2247(IT)G;  
2009-2248(IT)G

STYLES OF CAUSE: SENTINEL HILL PRODUCTIONS IV  
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PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 4, 2013

REASONS FOR ORDER BY: The Honourable Justice J.M. Woods

DATE OF ORDER: August 27, 2013

APPEARANCES:

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