

BETWEEN: Docket: 2008-3859(IT)G  
RAYMOND WONG,  
Appellant,  
and  
HER MAJESTY THE QUEEN,  
Respondent,

BETWEEN: Docket: 2008-3883(IT)G  
BOB DING BOR MA,  
Appellant,  
and  
HER MAJESTY THE QUEEN,  
Respondent,

BETWEEN: Docket: 2008-3885(IT)G  
395047 B.C. Ltd.,  
Appellant,  
and  
HER MAJESTY THE QUEEN,  
Respondent.

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Motion heard on March 4, 2010 at Calgary, Alberta

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant: Dan Misutka  
Counsel for the Respondent: Belinda Schmid

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**ORDER**

The motion is dismissed with costs to the Respondent in accordance with the attached Reasons.

Signed at Ottawa, Canada, this 24<sup>th</sup> day of March 2010.

“V.A. Miller”

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V.A. Miller, J.

Citation: 2010TCC171  
Date: 20100324  
Docket: 2008-3859(IT)G

BETWEEN:

RAYMOND WONG,

Appellant,

and

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BOB DING BOR MA,

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Docket: 2008-3885(IT)G

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395047 B.C. Ltd.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**REASONS FOR ORDER**

V.A. Miller, J.

[1] The Appellants have made an application pursuant to paragraph 58(1)(a) of the *Tax Court Rules (General Procedure)* for the determination of questions of law. This is the first step in that two step process.

[2] The issues raised in the Notices of Motion are: (1) whether the questions can appropriately be decided under *Rule 58*; (2) whether the Information from the BC Court which set out the charges against the Appellants, the transcript of the testimony of Raymond Wong given in the proceeding in the BC Court, and the Reasons for Judgment of the BC Court, constitute evidence within the meaning of *Rule 58(2)*; and, (3) whether the Appellants can adduce affidavit evidence at the second step of the hearing of this motion.

[3] The relevant portions of *Rule 58* read:

**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.

(2) No evidence is admissible on an application,

*a)* under paragraph (1)(a), except with leave of the Court or (on consent of the parties, or

*b)* under paragraph (1)(b).

[4] The questions posed by the Appellants are:

a) Whether issue estoppel applies to prevent the Appellants from being put to the proof of facts and issues related to the accurate reporting of the income of 395047 B.C. Ltd. (the “Corporation”) for the 1997, 1998, 1999 and 2000 taxation years, (the “Years in Issue”) such facts and issues having been already

determined in a related proceeding in the B.C. Provincial Court (the “BC Court”); and,

- b) Whether putting the Appellants to the proof of facts and issues related to the accurate reporting of the income of the Corporation for the Years in Issue, where such facts and issues have already been determined in a related proceeding in the BC Court, would amount to an abuse of process.

[5] The Appellants have relied on the following statements in bringing this motion:

- a) The Respondent concluded that the Appellants earned amounts of unreported income in the Years in Issue from the operation of a Boston Pizza restaurant in Cranbrook, British Columbia.
- b) The Respondent reassessed the Appellants for the unreported income that was purported to have been earned by the Corporation in the Years in Issue.
- c) The determination of the accurate amount of income earned by the Corporation in the Years in Issue is the central issue underlying the Appellants’ appeals of the reassessments before this court.
- d) The determination of the accurate amount of income earned by the Corporation in the Years in Issue was also a central issue in the related criminal proceedings in the BC Court, whereupon the Appellants were acquitted of charges of income tax evasion, filing false income tax returns and GST evasion.
- e) In the course of acquitting the Appellants of the above noted charges the BC Court determined that the Crown had failed to prove that the Corporation had misstated its revenues in filing its income tax and GST returns for the Years in Issue.

[6] In the Notice of Motion, the Appellants stated that, in support of the application, they also intended to rely on:

- a) Various paragraphs in the Notice of Appeal and the Reply to Notice of Appeal;
- b) The Information, Reasons for Judgment of the BC Court, the transcripts attached to the affidavit of Robert Sawers; and,

- c) The facts deposed to in the affidavit of Robert Sawers.

[7] Robert Sawers was counsel for Bob Ding Bor Ma at the criminal prosecution in the BC Court. His affidavit, which was filed with the Notice of Motion, contained the Information and the Reasons for Judgment of the BC Court. It did not contain the transcript of those proceedings. At the hearing before me, counsel for the Appellants withdrew the request to use a portion of the transcript from the criminal prosecution.

[8] I have decided, in the exercise of my discretion, that a Rule 58 motion is not appropriate in the circumstances of these appeals. My reasons are as follows.

[9] It is not obvious that the issues which were before the BC Court are the same as those which are before this court. The income tax issues in the criminal proceeding was whether the Applicants unlawfully made, participated in, assented to or acquiesced in the making of false or deceptive revenue statements in the 1997, 1998, 1999 and 2000 income tax returns for the Corporation so that the Appellants wilfully evaded or attempted to evade tax in the amount of \$51,000. In the BC Court it was the Crown's position that the unreported income totalled \$390,705 for the Years in Issue.

[10] The issues before this court as raised by the pleadings are:

*Notice of Appeal*

- a) Whether this Court should apply the principles of issue estoppel to prevent the Respondent from re-trying the facts and issues already determined by the BC Court;
- b) Whether, in the alternative, it would amount to an abuse of this Court process for the Respondent to require this Court to reconsider the facts and issues already determined by the BC Court;
- c) In the event the merits of the appeal are to heard by this Court, whether the Appellants failed to report amounts of income in any of the Years in Issue; and,
- d) In the event the merits of the appeal are to be heard by this Court, whether the Minister erred in assessing penalties pursuant to subsection 163(2) of the *Income Tax Act* (the "Act").

*Reply to Notice of Appeal*

- a) Whether the Corporate Appellant failed to report income in the amounts of \$57,641, \$155,666, \$119,790 and \$123,988 in the 1997, 1998, 1999, and 2000 taxation years respectively. The Minister of National Revenue (the “Minister”) has assumed that the Corporation failed to report income in the amount of \$457,085 in the Years in Issue;
- b) Whether the individual Appellants failed to report income in the amounts of \$24,614, \$55,436, \$63,475, \$66,529, and \$32,118 in the 1997, 1998, 1999, and 2000 taxation years respectively;
- c) Whether the Minister properly assessed gross negligence penalties with respect to the Appellants’ unreported income in 1997, 1998, 1999 and 2000 taxation years; and
- d) Whether issue estoppel prevents the Minister from reassessing the Appellants for the Years in Issue and from assessing gross negligence penalties.

[11] I am not satisfied that there are no material facts in dispute between the parties. As an example, it is the Appellants’ position that the accurate amount of income earned by them in the Years in Issue has been finally determined in the BC Court. The Reasons for Judgment from the criminal prosecution do not support this assertion. I note from those Reasons for Judgment that the Crown did not lead evidence on the amount of tax it alleged was evaded and Carlgren J., who presided at the hearing, found that the amount of tax evaded and the amount of income underreported were mere surpluses to the charges laid. He stated:

I will convict if I’m satisfied of all essential ingredients of each count, without regard for whether the Crown has proven the specific amounts alleged in counts 17 and 22.<sup>1</sup>

[12] The focus of the BC Court with respect to the charges was whether the Corporation misstated revenues, and if it did, whether there was intent to evade taxes.

[13] At the criminal prosecution, there were records which the Crown was not permitted to introduce. Based on the evidence before him, Carlgren J. found that he was not satisfied beyond a reasonable doubt that the revenue amounts alleged by the Crown were any more reasonable than those submitted by the Appellants.

[14] At the hearing of these appeals, the Tax Court Judge will be in the best position to determine the admissibility of the evidence and the relevant weight to be

assigned to that evidence. The issues under appeal will be decided on a balance of probabilities, a completely different standard than was used by the BC Court.

[15] The BC case is not conclusive of the issues that will be before the Tax Court.

[16] For these reasons the application is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 24<sup>th</sup> day of March 2010.

“V.A. Miller”

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V.A. Miller, J.

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<sup>1</sup> *R. v. 395047 B.C. Ltd., Bob Ding Bor Ma and Raymond Wong*, File No. 21815, p.14



CITATION: 2010TCC171

COURT FILE NO.: 2008-3859(IT)G  
2008-3883(IT)G  
2008-3885(IT)G

STYLE OF CAUSE: RAYMOND WONG AND THE QUEEN  
BOB DING BOR MA AND THE QUEEN  
395047 B.C. LTD. AND THE QUEEN

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: March 4, 2010

REASONS FOR ORDER BY: The Honourable Justice Valerie Miller

DATE OF ORDER: March 24, 2010

APPEARANCES:

Counsel for the Appellant: Dan Misutka  
Counsel for the Respondent: Belinda Schmid

COUNSEL OF RECORD:

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