Docket: 2016-4114(IT)G

BETWEEN:

SHIFRA DRAZIN-BENDHEIM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on September 11, 2017 on common evidence
with Faiga Drazin-Joseph (2016-4113(IT)G)
at Montreal, Quebec.

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant:	Stéphanie Pépin
Counsel for the Respondent:	Simon Petit, in replacement of Vlad Zolia

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ORDER

In accordance with the attached Reasons for Order, the motion to strike is hereby dismissed with costs to the Respondent in any event of the cause.

Signed at Ottawa, Canada, this 12th day of February 2018.

"Guy Smith"

Smith J.

Citation: 2018 TCC 30
Date: 20180212
Docket: 2016-4114(IT)G

BETWEEN:

SHIFRA DRAZIN-BENDHEIM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Smith J.

I. Overview

[1] This matter involves a motion by the Appellant to strike certain portions of the Reply to the Notice of Appeal filed by the Respondent, the Minister of National Revenue (the “Minister”). The motion was heard on common evidence with the motion of the Appellant’s sister, Faiga Drazin-Joseph, in Court file No. 2016-4113(IT)G.

[2] The Appellant takes the position that some of the allegations contained in the Reply should be struck pursuant to Section 53 of the *Tax Court of Canada Rules* (*General Procedure*) (the “Rules), on the basis that they may prejudice or delay the fair hearing of the appeal, are scandalous, frivolous or vexatious, or are otherwise an abuse of process of the Court.

[3] The Appellant seeks to strike the underlined paragraphs of the Reply, namely:

> 17. In determining that the Appellant made a misrepresentation attributable to neglect, carelessness or willful default in filing her tax return for the 2005 taxation year, the Minister relied on the following facts:
>
> (a) All the facts mentioned at paragraph 16.
>
> (b) The Appellant voluntarily omitted to declare her profit as business income although she knew, or must have known, that the co-owners initial intention was to convert the Property in separate condominiums and offer these for sale at a profit.
>
> (…)
>
> 21. He submits that the Minister was allowed to assess the Appellant's 2005 taxation year as the Appellant made a misrepresentation that is attributable to neglect, carelessness or wilful default in filing her income tax return.
>
> 22. He submits that in fact, the Appellant voluntarily omitted to declare her profit as revenue although she knew, or must have known, that the co-owners initial intention was to convert the Property in separate condominiums and offer these for sale at a profit.

II. Background facts

[4] The Appellant is a non-resident of Canada. On August 15, 2002, she acquired a 5.25% interest in a rental property located in the City of Brossard, Quebec, in co-ownership with others, including three siblings, some of whom were residents of Canada.

[5] From 2002 to 2005, the Appellant elected under section 116 of the *Income Tax Act*, R.S.C., 1985, c. T-2 (the "Act") and paid Part 1 tax on her share of the net income. The property was sold and the Appellant reported a capital gain of $1,417,500 for the 2005 taxation year. She was assessed accordingly on May 8, 2006.

III. The audit process

[6] The disposition described above was the subject of an audit by the Canada Revenue Agency (the "CRA"). It wrote to the Appellant on April 9, 2010 to advise her of a proposed reassessment and to provide her with an opportunity to make

representations. The proposed adjustment letter indicated that "CRA considers the disposition of your property located at (…) as an Active Business".

[7] The Appellant's sister, who held an interest in the property and was also a non-resident of Canada, received a similar proposal letter. It appears from the motion material and the testimony heard at the hearing that the fair market value of the property was also an outstanding issue, although it is not relevant to this proceeding.

[8] In the context of the audit process, counsel for the Appellant wrote to the CRA indicating that the proposed reassessment was statute-barred as it was being made beyond the normal reassessment period that ended on May 8, 2009. Counsel specifically requested that the CRA explain the basis for the proposed reassessment and CRA responded by letter dated May 25, 2010 indicating that:

> [TRANSLATION] "With respect to your second enquiry relating to the statute-barred years, subparagraph 152(4)(*b*)(iii) of the ITA provides a supplementary delay of 3 years beyond the normal assessment period in circumstances where the transaction involved the taxpayer and a non-resident person with whom the taxpayer does not deal at arm's length".

[9] The issue of the fair market value was eventually resolved but the parties were unable to agree on the proposed reassessment, as described above. In a second proposed adjustment letter dated March 1, 2011, the CRA repeated its position that the proceeds of disposition should have been reported as active business income and a Notice of Reassessment issued accordingly on May 19, 2011.

[10] The Appellant filed a Notice of Objection in due course and the Minister issued a Notice of Confirmation on July 15, 2016.

IV. The pleadings

[11] The Appellant filed a Notice of Appeal and took the position that there were two issues, namely, whether the reassessment was issued beyond the Appellant's normal reassessment period and secondly, whether at all material times, the subject property was a capital asset.

[12] The Appellant also set out her understanding that in assessing beyond the normal reassessment period, the Minister was relying on subparagraph 152(4)(*b*)(iii) of the Act (as noted above) and took the position that this statutory provision was not applicable to the facts at hand since it dealt with a taxpayer who was involved in a transaction with a non-resident with whom the taxpayer was not dealing at arm's length. It was argued that the Appellant could not be both a "non-resident" and a "taxpayer" for the purposes of that provision.

[13] It is important to note that the Reply to the Notice of Appeal neither refers to nor mentions subparagraph 152(4)(*b*)(iii) of the Act. It simply notes "the issues to be decided and the statutory provisions as they are stated by the Appellant, as well as the reasons stated (…) but denies them as ill-founded in fact and in law". The assumptions of fact are set out in paragraph 16, followed by the impugned paragraphs 17, 21 and 22 or portions thereof, as reproduced above.

[14] The Appellant thereafter filed on Answer, paragraphs 4 to 7 of which are reproduced as follows:

> 4. The Appellant denies, as stated, the allegations contained in paragraphs 16f), 16i), 16j), 16n), 17a) and 17b) of the Reply to the Notice of Appeal.
>
> 5. The Appellant takes note of the statuary provisions and the issues to be decided as they are stated by the Respondent, as well as the reasons stated at paragraphs 21 and 22 of the Reply to the Notice of Appeal, but deny them as unfounded in fact and in laws.
>
> 6. Subsection [sic] 152(4)(*a*)(i) of the *Income Tax Act* addresses a misrepresentation of fact, as opposed to statement of law or mixed statement of fact and law.
>
> 7. The Appellant did not make any misrepresentation of facts that is attributable to neglect, carelessness or willful default in filing her income tax return for the 2005 taxation year: (…)

[15] Following the close of pleadings and upon agreement of both parties, the Court issued a timetable Order on May 17, 2017 which required, *inter alia*, that examinations for discovery be completed by September 15, 2017.

[16] The motion to strike was filed on August 31, 2017 and at the conclusion of the hearing, the Court issued an Interim Order suspending the timetable Oder until the final disposition of this matter.

V. The motion to strike

i) The evidence submitted

[17] The Respondent submitted the affidavit of Ms. Farah De Vito who was the appeals officer at the relevant time. She was not called as a witness and was not the subject of cross-examinations prior to or at the hearing of the motion.

[18] The Appellant submitted the affidavit of Mr. Pierre-Paul Persico, counsel with the law firm of Spiegel Sohmer Inc. He testified at the hearing and in examination in chief, explained his role in the audit process commencing shortly after the issuance of the first proposed adjustment letter of April 9, 2010, (while acknowledging that other lawyers were also involved). He indicated that the focus of the earlier discussions with the CRA was the issue of the fair market value of the subject premises and the liability of a numbered company.

[19] Mr. Persico indicated that he had several telephone conversations and meetings with Ms. Maryse Patenaude, the CRA auditor. With respect to the issue of the proposed reassessment of the Appellant, he understood that the CRA was not alleging fraud and would not be assessing gross negligence penalties. As noted above, he requested and obtained written confirmation from Ms. Patenaude in her letter of May 25, 2010 that CRA was relying on subparagraph 152(4)(*b*)(iii) of the Act.

[20] He also indicated that while there had been a mention of a "voluntary omission", he was very surprised to learn, upon reading the Reply that the Minister was now relying on the fact that there had been a misrepresentation attributable to willful default and not on the aforementioned provision of the Act.

[21] During cross-examinations, Mr. Persico acknowledged that neither the second proposed adjustment letter of May 9, 2011 nor the Notice of Reassessment referred to any statutory provision. He also acknowledged that prior to signing his affidavit, he had reviewed the Audit Report (Form T20-R1) prepared by Ms. Patenaude but not the Report on Objection (Form T401) nor the Memo to file

(Form T2020) containing Ms. De Vito's notes from June 2012 to June 2016. Mr. Persico acknowledged finally, that Ms. De Vito had raised the issue of a "voluntary omission" on at least a few occasions and that in her report she had referred to this as a supplementary ground of assessment.

ii) The Appellant's position

[22] As noted at the outset, the Appellant argues that the impugned paragraphs of the Reply should be struck on the basis that they may prejudice or delay the fair hearing of the appeal, are scandalous, frivolous or vexatious and an abuse of process of the Court since they raise a new basis for the reassessment.

[23] The Appellant finds support for her argument in paragraph 49(1)(d) of the Rules relating to the preparation of the Reply. One of the requirements is that the Minister must state "the findings or assumptions of fact made by the Minister when making the assessment".

[24] The Appellant argues that the Minister explicitly relied on subparagraph 152(4)(*b*)(iii) of the Act and that the Minister, having accepted the Appellant's argument that this provision was inapplicable, cannot after the fact take the position that the appropriate provision is subparagraph 152(4)(*a*)(i) which refers to a situation where a taxpayer has made "a misrepresentation that is attributable to neglect, carelessness or willful default".

[25] The Appellant argues that the Minister is precluded from advancing an alternate argument in respect of the Appellant's 2005 taxation year on the basis of subparagraph 152(4.01)(*a*)(i) of the Act and that the Minister cannot rely on subsection 152(9) to cure the defect. Both of these provisions are reproduced in the attached Schedule hereto.

iii) The Respondent's position

[26] The Respondent raises a preliminary objection based on a procedural issue and argues that it is improper to bring a motion to strike at this stage in the proceedings, notably after the close of pleadings and after the Appellant has agreed to a timetable Order.

[27] The Respondent adds that the Appellant cannot seek to strike provisions of the Reply to which it has already pleaded and addressed in the Answer, portions of which have been reproduced above.

[28] Moreover, the Respondent argues that whether the Minister exclusively relied on subparagraph 152(4)(*b*)(iii) of the Act or not, involves a factual determination that is best left to the trial judge. Despite the Appellant's understanding that the Minister was specifically relying on that provision, the Respondent argues that the evidence is equivocal at best and that counsel for the Appellant had been informed on several occasions that the Minister viewed the Appellant's failure to report the gain as business income, as a "voluntary omission".

[29] Finally, the Respondent argues that the Minister may, in any event, pursuant to subsection 152(9) of the Act, advance an alternate basis for the reassessment at any time up to the confirmation of the reassessment.

VI. Analysis

[30] The Appellant relies on Section 53 of the Rules, which provides as follows:

Striking out a Pleading or other Document	**Radiation d'un acte de procédure ou d'un autre document**
53 (1) The Court may, on its own initiative or on application by a party, 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	53 (1) La Cour peut, de son propre chef ou à la demande d'une partie, radier un acte de procédure ou tout autre document ou en supprimer des passages, en tout ou en partie, avec ou sans autorisation de le modifier parce que l'acte ou le document :
(a) may prejudice or delay the fair hearing of the appeal;	a) peut compromettre ou retarder l'instruction équitable de l'appel;
(b) is scandalous, frivolous or vexatious;	b) est scandaleux, frivole ou vexatoire;
(c) is an abuse of the process of	c) constitue un recours abusif à la

the Court; or	Cour;
(…)	[…]

[31] It is apparent that this provision does not explicitly or implicitly set out a delay or time period for the filing of a motion to strike.

[32] It is also noted that while pleadings may be amended "at any time before the close of pleadings" or with the "consent of all parties (…) or with leave of the court", as provided for in Section 54, Section 53 does not specifically address the issue or provide any real guidance.

[33] The Appellant argues that the Answer was filed to meet the thirty day deadline set out in Section 45 and that she waited for delivery of certain documents following an access to information request, prior to preparing and filing the motion to strike.

[34] The Respondent argues that it is too late and that it is not permissible to file a motion to strike after the close of pleadings and after the filing of an answer where "the party seeking to strike has already pleaded to the allegations contained in the impugned paragraphs", relying on *Proctor & Gamble Co. v. Nabisco Brands Ltd. (F.C.A.)*, [1985] F.C.J. No. 517 (QL); and *Dene Tsaa First Nation v. Canada*, [2001] F.C.J. No. 1177 (QL), at paras. 3-4.

[35] It must be remembered that the Appellant's initial argument was that the Reply did not comply with paragraph 49(1)(*d*) of the Rules in that it did not set out the actual "findings or assumptions of fact made by the Minister when making the assessment". If in fact that was the case, and this Court reaches no conclusion on the issue, then the Appellant is effectively alleging that the impugned paragraphs of the Reply are an "irregularity". Viewed from that perspective, the Court turns to Section 8 of the Rules which provides as follows:

Attacking Irregularity	**Irrégularité**
8. A motion to attack a proceeding or a step, document or direction in a proceeding for irregularity shall not be made,	8. La requête qui vise à contester, pour cause d'irrégularité, une instance ou une mesure prise, un document donné ou une directive rendue dans le cadre de celle-ci, ne peut être présentée, sauf avec l'autorisation de la Cour :
(a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity, or	a) après l'expiration d'un délai raisonnable après que l'auteur de la requête a pris ou aurait raisonnablement dû prendre connaissance de l'irrégularité, ou
(b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity,	b) si l'auteur de la requête a pris une autre mesure dans le cadre de l'instance après avoir pris connaissance de l'irrégularité.
except with leave of the Court.	

[36] This provision refers to "a motion to attack a proceeding or a step, document or direction in a proceeding (…)". Although a motion to strike is a distinct remedy, I find that it is captured by the broad language of this provision. While Section 53 does not expressly state when a motion to strike may be made, Section 8 provides some guidance as to when such motion "shall not be made".

[37] Paragraph 8(a) refers to "a reasonable time" after the moving party was made aware of the irregularity. In this instance, the Appellant's basic position was that she first realized that the Minister was relying on a "voluntary omission" and not on subparagraph 152(4)(*b*)(iii) of the Act, upon receipt of the Reply in February 2017. The motion to strike was filed six months later.

[38] Paragraph 8(b) refers to "any further step in the proceedings after obtaining knowledge of the irregularity". As noted above, the Appellant filed an Answer that addressed the impugned paragraphs of the Reply and thereafter consented to the timetable Order. I find that these were both fresh steps.

[39] I find support for this analysis in the decision of *Kulla v. The Queen*, 2005 TCC 136, where the Appellant sought to strike certain portions of the Respondent's Amended Reply, having previously served their list of documents and attended examinations for discovery. The Respondent raised the applicability of Section 8 of the Rules and Miller C. J. dismissed the motion on that basis indicating that:

> [6] I find the Appellants have waited too long and undertaken too many steps for this Court to grant it leave pursuant to Rule 8. I am satisfied that Rule 8 can apply to a motion brought pursuant to Rule 53; that is, that an application to strike out portions of pleadings is subject to what is called the fresh-step rule.
>
> [7] Justice Rip, in *Gee v. The Queen*, after referring to Rule 8, stated:
>
>> Where an applicant has delayed for as long as the appellant has in bringing a motion to strike or has taken fresh steps after being served with a pleading, I normally would reject the applicant's motion. ...
>
> Similarly, Justice Bowman, in *Imperial Oil Limited et al. v. The Queen*, indicated:
>
>> The "fresh-step" rule is one that has been part of the rules of practice and procedure in Canada and the United Kingdom for many years. There is a great deal of jurisprudence on what constitutes a fresh step but the rule is based on the view that if a party pleads over to a pleading this implies a waiver of an irregularity that might otherwise have been attacked. ...
>
> (…)

[40] Section 8 provides that a motion described therein may only be made "with leave of the court", clearly suggesting that it is discretionary, as confirmed by *Kossow v. The Queen*, 2009 FCA 83, paras. 17 and 18 (leave to appeal to the Supreme Court of Canada denied).

[41] It is apparent that the Appellant has not sought leave of the Court pursuant to Section 8. However, if the Court accepts that such a request has implicitly been made within the context of the motion to strike, the Court concludes that there are good reasons to decline to exercise that discretion.

[42] In particular, this Court is not prepared to grant leave pursuant to Section 8, given the nature of a motion to strike which was recently reviewed in *Gramiak v. The Queen*, 2013 TCC 383 (upheld by the Federal Court of Appeal at 2015 FCA 40). Rossiter C.J. indicated that:

> [30] The plain and obvious test has been longstanding and widely accepted in Canadian jurisprudence as the test for motions to strike. In *Sentinel Hill Productions (1999) Corporation, Robert Strother v. the Queen*, 2007 TCC 742, Bowman, C.J., provided a useful overview of the principles that govern the application of Rule 53:
>
>> [4] I shall begin by outlining what I believe are the principles to be applied on a motion to strike under Rule 53. There are many cases in which the matter has been considered both in this court and the Federal Court of Appeal. It is not necessary to quote from them all as the principles are well established.
>>
>>> (a) The facts as alleged in the impugned pleading must be taken as true subject to the limitations stated in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 at 455. It is not open to a party attacking a pleading under Rule 53 to challenge assertions of fact.
>>>
>>> (b) <u>To strike out a pleading or part of a pleading under Rule 53 it must be plain and obvious that the position has no hope of succeeding. The test is a stringent one and the power to strike out a pleading must be exercised with great care.</u> [Emphasis added]
>>>
>>> (c) <u>A motions judge should avoid usurping the function of the trial judge in making determinations of fact or relevancy. Such matters should be left to the judge who hears the evidence.</u> [Emphasis added]
>>>
>>> (d) Rule 53 and not Rule 58, is the appropriate rule on a motion to strike.
>
> [31] Chief Justice McLachlin wrote for the Supreme Court in *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42:
>
>> "This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause for

> action:... Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial."

Further:

> "...The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way - in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in the context of the law and the litigation process, the claim has no reasonable chance of succeeding."

[32] More recently, this Court applied the plain and obvious test in *Canadian Imperial Bank of Commerce v. R.*, 2011 TCC 568 ("*CIBC*").

> "Only if the position taken in the Reply is certain to fail because it contains a radical defect should the relevant portions of the Respondent's Reply be struck."

[43] Having reviewed the test for a motion to amend pleadings, Rossiter C.J. noted that “in contrast, the plain and obvious test applied to striking motions is significantly higher, more stringent, and the courts have ruled that striking pleadings is to be done only in the most exceptional cases” (para. 35).

[44] The Respondent rightfully argues that the Appellant cannot challenge assertions of fact in a motion to strike. Whether the Appellant has “made a misrepresentation attributable to neglect, carelessness or willful default” or whether she has done so “voluntarily” as set out in the impugned paragraphs, are all questions of fact which must be taken to be true for the purposes of this motion. Moreover, it is not up to this Court, in the context of a motion to strike to make findings of fact as to whether the reassessment was only based on subparagraph 152(4)(*b*)(iii). The Appellant’s own evidence at the hearing on this issue was inconclusive. As such, it cannot be said that it is plain and obvious that the Respondent’s position, as set out in the impugned paragraphs, has no hope of succeeding. These are all matters that are best left to the trial judge.

[45] There appears to be no basis to the argument that the impugned paragraphs are “an abuse of process of the court” or that they “may prejudice or delay the fair hearing of the appeal”. *Au contraire*, the Court is of the view that the evidence needs to be fully fleshed out and heard in its totality before a trial judge.

[46] As to the suggestion that the impugned paragraphs are “scandalous, frivolous or vexatious”, the matter was addressed in *Sentinel Hill 1999 Master Limited Partnership (Designated Member of) v. Canada*, 2007 TCC 748, where Bowman C.J. (as he then was) indicated that:

> (…) However much jurisprudence may surround the words "scandalous, frivolous or vexatious, or abuse of the process of the Court", they are nonetheless strong, emotionally charged and derogatory expressions denoting pleading that is patently and flagrantly without merit. Their application should be reserved for the plainest and most egregiously senseless assertions -- as for example in *William Shawn Davitt v. The Queen*, 2001 D.T.C. 702. Where senior and experienced counsel advances a proposition of fact or law in a pleading that merits serious consideration by a trial judge, it is at least presumptuous and at most insulting and offensive to force counsel to face the argument that the position is so lacking in merit that it does not even deserve to be considered by a trial judge. (…)

VII. Conclusion

[47] As a result of this analysis, the Court concludes that it is not necessary to address the questions as to whether the Minister is precluded from advancing an alternate basis for reassessment pursuant to subparagraph 152(4.01)(*a*)(i) or whether the Minister is entitled to do so pursuant to subsection 152(9). Those arguments and the case law relied upon by the respective parties, are best left to the trial judge.

[48] For all the foregoing reasons, the motion to strike is dismissed with costs to the Respondent in any event of the cause.

Signed at Ottawa, Canada, this 12th day of February 2018.

“Guy Smith”

Smith J.

SCHEDULE

Relevant Statutory Provision

Assessment and reassessment

152(4) 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

Cotisation et nouvelle cotisation

152(4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :

a) le contribuable ou la personne produisant la déclaration :

(i) soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,

(ii) soit a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période normale de nouvelle cotisation applicable au

in respect of the year;

(b) the assessment, reassessment or additional assessment is made before the day that is 3 years after the end of the normal reassessment period for the taxpayer in respect of the year and

(i) is required under subsection (6) or (6.1), or would be so required if the taxpayer had claimed an amount by filing the prescribed form referred to in the subsection on or before the day referred to in the subsection,

(ii) is made as a consequence of the assessment or reassessment pursuant to this paragraph or subsection 152(6) of tax payable by another taxpayer,

(iii) is made as a consequence of a transaction involving the taxpayer and a non-resident person with whom the taxpayer was not dealing at arm's length,

(…)

Extended period assessment

152(4.01) Notwithstanding subsections (4) and (5), an assessment, reassessment or additional assessment to which paragraph (4)(a), (b), (b.1), (b.3) or (c) applies in respect of a

contribuable pour l'année;

b) la cotisation est établie avant le jour qui suit de trois ans la fin de la période normale de nouvelle cotisation applicable au contribuable pour l'année et, selon le cas :

(i) est à établir en vertu du paragraphe (6) ou (6.1), ou le serait si le contribuable avait déduit une somme en présentant le formulaire prescrit visé à ce paragraphe au plus tard le jour mentionné à ce paragraphe,

(ii) est établie par suite de l'établissement, en application du présent paragraphe ou du paragraphe (6), d'une cotisation ou d'une nouvelle cotisation concernant l'impôt payable par un autre contribuable,

(iii) est établie par suite de la conclusion d'une opération entre le contribuable et une personne non résidente avec laquelle il avait un lien de dépendance,

[…]

Période de cotisation prolongée

512(4.01) Malgré les paragraphes (4) et (5), la cotisation, la nouvelle cotisation ou la cotisation supplémentaire à laquelle s'appliquent les alinéas (4)a), b), b.1), b.3) ou c) relativement

taxpayer for a taxation year may be made after the taxpayer's normal reassessment period in respect of the year to the extent that, but only to the extent that, it can reasonably be regarded as relating to,

à un contribuable pour une année d'imposition ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans la mesure où il est raisonnable de considérer qu'elle se rapporte à l'un des éléments suivants :

(a) where paragraph 152(4)(a) applies to the assessment, reassessment or additional assessment,

a) en cas d'application de l'alinéa (4)a):

(i) any misrepresentation made by the taxpayer or a person who filed the taxpayer's return of income for the year that is attributable to neglect, carelessness or wilful default or any fraud committed by the taxpayer or that person in filing the return or supplying any information under this Act, or

(i) une présentation erronée des faits par le contribuable ou par la personne ayant produit la déclaration de revenu de celui-ci pour l'année, effectuée par négligence, inattention ou omission volontaire ou attribuable à quelque fraude commise par le contribuable ou cette personne lors de la production de la déclaration ou de la communication de quelque renseignement sous le régime de la présente loi,

(ii) a matter specified in a waiver filed with the Minister in respect of the year;

(ii) une question précisée dans une renonciation présentée au ministre pour l'année;

(…)

[…]

Alternative basis for assessment

152(9) At any time after the normal reassessment period, the Minister may advance an alternative basis or argument — including that all or any portion of the income to which an amount relates was from a different source — in support of all or any

Nouveau fondement ou nouvel argument

152(9) Après l'expiration de la période normale de nouvelle cotisation, le ministre peut avancer un nouveau fondement ou un nouvel argument — y compris un fondement ou un argument selon lequel tout ou partie du revenu auquel une somme se

portion of the total amount determined on assessment to be payable or remittable by a taxpayer under this Act unless, on an appeal under this Act

(a) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and

(b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

(…)

rapporte provenait d'une autre source — à l'appui de tout ou partie de la somme totale qui est déterminée lors de l'établissement d'une cotisation comme étant à payer ou à verser par un contribuable en vertu de la présente loi, sauf si, sur appel interjeté en vertu de la présente loi :

a) d'une part, il existe des éléments de preuve que le contribuable n'est plus en mesure de produire sans l'autorisation du tribunal;

b) d'autre part, il ne convient pas que le tribunal ordonne la production des éléments de preuve dans les circonstances.

[…]

CITATION:	2018 TCC 30
COURT FILE NO.:	2016-4114(IT)G
STYLE OF CAUSE:	SHIFRA DRAZIN-BENDHEIM v. THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	September 11, 2017
REASONS FOR ORDER BY:	The Honourable Justice Guy R. Smith
DATE OF ORDER:	February 12, 2018

APPEARANCES:

Counsel for the Appellant:	Stéphanie Pépin
Counsel for the Respondent:	Simon Petit, Vlad Zolia

COUNSEL OF RECORD:

For the Appellant:

Name:	Stéphanie Pépin
Firm:	Spiegel Sohmer Inc.

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada