Docket: 2020-2040(IT)G

BETWEEN:

TPINE LEASING CAPITAL CORPORATION,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard on September 1, 2022 at Toronto, Ontario

Before: The Honourable Justice Susan Wong

Appearances:

Counsel for the Appellant: Leigh Somerville Taylor

Counsel for the Respondent: Jason Stober

ORDER

WHEREAS the Respondent filed a motion to amend the reply to the notice of appeal, relying on section 54 of the *Tax Court of Canada Rules (General Procedure)* and subsection 152(9) of the *Income Tax Act*;

AND WHEREAS the Court's records show that the Respondent filed a reply and an amended reply on April 27, 2021, so the present motion seeks to amend the amended reply;

AND UPON reading the motion materials filed, and upon hearing submissions from counsel for both parties;

NOW THEREFORE IT IS ORDERED that the Respondent's motion is granted as follows:

a. The Respondent is at liberty to amend the amended reply in accordance with appendix A of the amended notice of motion.

b. The Respondent shall file and serve the amended amended reply within 30 days of the date of this order.

c. The Appellant may file and serve an answer to the amended amended reply within ten days of service of the amended amended reply.

d. The January 27, 2022 timetable order is set aside and within 60 days of the date of this order, the parties shall submit a new joint timetable for completion of the remaining litigation steps for the Court's consideration.

e. Costs fixed at $1000 shall be payable to the Respondent forthwith and in any event of the cause.

Signed at Ottawa, Canada, this 3rd day of November 2022.

"Susan Wong"

Wong J.

Citation: 2022 TCC 134
Date: 20221103
Docket: 2020-2040(IT)G

BETWEEN:

TPINE LEASING CAPITAL CORPORATION,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Wong J.

Introduction/Overview

[1] The respondent brings a motion to amend the reply to the notice of appeal, relying on section 54 of the *Tax Court of Canada Rules (General Procedure)* and subsection 152(9) of the *Income Tax Act*.

[2] Based on the parties' respective pleadings filed to date, it is a motion to amend the amended reply to the fresh-as-amended notice of appeal. The respondent filed his original reply on April 27, 2021, and later that day, filed a corrected reply which the registry identified as an amended reply to the amended notice of appeal. While the respondent's correction was essentially aesthetic, it was a change made to a filed document so the registry's nomenclature is accurate.

Legal framework

[3] Section 54 of the Rules is the general provision for amending pleadings. It provides that after the close of pleadings, a party may amend with either consent of all other parties or with leave of the Court. Where the Court grants leave, it may also impose such terms as are just.

[4] In *Pomeroy Acquireco Ltd.*,[1] the Federal Court of Appeal recently reiterated some of the guiding principles previously set out in *Canderel*[2] with respect to the amendment of pleadings, specifically:

a. The decision whether to allow an amendment to a pleading is discretionary.[3]

b. It is a controlling principle that an amendment should be allowed at any stage if it helps determine the real questions in controversy between the parties, provided that:

   i. it would not result in an injustice not compensable in costs; and

   ii. it would serve the interests of justice.[4]

c. Significant consideration should be given to amendments that further the trial court's ability to determine the questions in controversy.[5]

d. It is an overarching criterion as to whether the amendments would further the interests of justice.[6]

e. Consideration should be given to whether the amendments will ensure clarity and certainty at trial.[7]

[5] Subsection 152(9) of the Act is the provision permitting the Minister of National Revenue to advance an alternative basis or argument on appeal, providing that two prohibitive conditions are absent. The specific wording is important and reads as follows:

> **152. (9) Alternative basis for assessment –** 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 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.

[6] The introductory portion of subsection 152(9) was amended in 2016 to apply to appeals instituted after December 15, 2016. [8] The amendment seems to have expanded or clarified the scope of alternative bases or arguments which may be made by the Minister. Specifically, the change focuses on source-based issues so the distinction between the previous and current wording is not relevant to the present motion.

[7] In *Walsh*,[9] the Federal Court of Appeal said that the following conditions apply with respect to subsection 152(9):

a. the Minister cannot include transactions which did not form the basis of the reassessment;

b. the Minister's right to present an alternative argument in support of an assessment is subject to paragraphs 152(9)(a) and (b), which address prejudice to the taxpayer; and

c. the Minister cannot use the subsection to reassess outside the time limitations in subsection 152(4) or to collect tax exceeding the amount in the assessment being appealed.[10]

Procedural background

[8] The appellant is in the business of loan and equipment financing, as well as the sale of lease receivables and equipment.[11]

[9] On June 19, 2019, the Minister of National Revenue reassessed the appellant's 2015 taxation year to, among other things:[12]

a. disallow certain business expenses;

b. disallow capital cost allowance ("CCA":) with respect to Class 10 and Class 16 property;

c. reduce undepreciated capital cost balances for Class 10 and Class 16 property; and

d. levy a gross negligence penalty under subsection 163(2) of the Act.

[10] On November 30, 2020, the Minister further reassessed to disallow the carryback of certain non-capital losses from 2017.[13]

[11] The appellant filed its initial appeal in response to the June 19, 2019 reassessment and then amended its appeal following the November 30, 2020 reassessment, as permitted by subsection 165(7). The respondent's reply and amended reply to the fresh-as-amended notice of appeal were both filed in April 2021.

[12] The Court issued a litigation timetable order on January 27, 2022, and the parties have filed and served their respective lists of documents. They had not commenced examinations for discovery and encountered an impasse when the respondent sought the appellant's consent to amend the amended reply.

Proposed amendments

[13] The respondent's proposed amendments introduce and support the argument that in disallowing the appellant's CCA deduction, the Minister upheld the appellant's deduction for cost of goods sold ("COGS"). The respondent says the appellant cannot deduct CCA and COGS with respect to the same property. He says that in reassessing the appellant to uphold the COGS deduction and disallow CCA, the appellant received the more favourable deduction, i.e. as opposed to upholding the deduction for CCA and disallowing the COGS.[14]

[14] I would summarize the proposed amendments[15] as follows:

a. paragraph 32 – sets out the amounts of the COGS and CCA deductions claimed by the appellant and allowed by the Minister when she initially assessed as filed;

b. paragraph 34 – in summarizing the June 19, 2019 reassessment, adds the statement that the Minister did not adjust the COGS deduction;

c. paragraph 40(c.1) – explains that the Minister incorrectly assumed the appellant's COGS deduction to be $17,901,764 and states that the correct figure is $17,604,192;

d. paragraph 41.1 – adds the alternative issue/question as to whether the reassessment is too high if the appellant is ultimately entitled to the disallowed CCA but received the COGS deduction instead;

e. paragraph 42 – inserts sections 10 and 54 to the list of statutory provisions relied upon;

f. paragraph 44.1 – a statement that the ultimate issue in any tax appeal is whether the amount of assessed tax is too high;

g. paragraph 44.2 – an argument that the amount of assessed tax is not too high because the appellant cannot deduct both CCA and COGS for the same property, and the Minister's reassessment gave the appellant the more favourable (COGS) deduction.

[15] The appellant has not consented to any of the proposed amendments.

Discussion and analysis

[16] The respondent's proposed new argument and the associated amendments fit squarely within both Rule 54 and subsection 152(9). In many ways, the proposed argument is not new and is already embedded in the reply and the June 19, 2019 reassessment under appeal.

[17] For example, the proposed amendment to paragraph 32 clarifies that when the Minister initially assessed, she assessed as filed and sets out the CCA and COGS deductions claimed by the appellant. The proposed amendment to paragraph 34 clarifies that in reassessing, she did not adjust the COGS deduction.

[18] I expect that even without the proposed amendments, the respondent likely would be within his right to bring evidence that in disallowing the CCA deduction, the Minister did not adjust the COGS deduction. Even if not expressly stated in the reply, it would be relevant that she considered only one deduction to be permissible for the same property and that she reassessed to allow the more favourable deduction, i.e. the reasoning is related.

[19] The proposed amendment to paragraph 40(c.1) is particularly benign because it only proposes to clarify the amount of the appellant's claimed COGS deduction and refers to an assumption already in the reply.

[20] The alternative issue/argument as framed in proposed new paragraphs 41.1, 44.1 and 44.2 states that the Minister's reassessment to disallow the CCA deduction is more favourable to the appellant than disallowing the COGS deduction (and upholding the CCA) would have been. In other words, even if the appellant is found

to be entitled to the CCA deduction, the existing reassessment is more favourable and the Court cannot put the taxpayer in a worse position.[16] It is a consideration in every appeal as to whether the Court's decision puts the taxpayer in a worse position but in the circumstances, it is better for both the trier of fact and the appellant to have this argument expressly laid out than for the argument to remain underlying.

[21] I cannot see that the appellant would need to adduce additional evidence or that the additional evidence (if any) would no longer be available. The proposed new argument is based on the existing facts and is predominantly legal in nature.

[22] Pleadings generally focus on what has been disallowed (and is now disputed) and to the extent that something is not mentioned, it is implied that what is not mentioned is not relevant and/or not disputed. The proposed amendments reduce the need to assume or infer that which is not there, and help ensure clarity and certainty at the eventual hearing. They also reduce possible prejudice to the appellant by giving notice of the respondent's specific arguments. These effects further the interests of justice -- including natural justice and procedural fairness -- and make the questions in controversy clearer.

Conclusion

[23] The respondent's motion is granted as follows:

a. The respondent is at liberty to amend the amended reply in accordance with appendix A of the amended notice of motion.

b. The respondent shall file and serve the amended amended reply within 30 days of the date of this order.

c. The appellant may file and serve an answer to the amended amended reply within ten days of service of the amended amended reply.

d. The January 27, 2022 timetable order is set aside and within 60 days of the date of this order, the parties shall submit a new joint timetable for completion of the remaining litigation steps for the Court's consideration.

e. Costs fixed at $1000 shall be payable to the respondent forthwith and in any event of the cause.

Signed at Ottawa, Canada, this 3rd day of November 2022.

"Susan Wong"

Wong J.

CITATION:	2022 TCC 134
COURT FILE NO.:	2020-2040(IT)G
STYLE OF CAUSE:	TPINE Leasing Capital Corporation v. His Majesty the King
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 1, 2022
REASONS FOR ORDER BY:	The Honourable Justice Susan Wong
DATE OF ORDER:	November 3, 2022

APPEARANCES:

Counsel for the Appellant:	Leigh Somerville Taylor
Counsel for the Respondent:	Jason Stober

COUNSEL OF RECORD:

For the Appellant:

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For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada

[1] *Canada v. Pomeroy Acquireco Ltd.*, 2021 FCA 187
[2] *Her Majesty the Queen v. Canderel Limited*, 1993 CarswellNat 949 at paragraph 10 (FCAD)
[3] *Canada v. Pomeroy Acquireco Ltd.*, 2021 FCA 187 at paragraph 2
[4] *Canada v. Pomeroy Acquireco Ltd.*, 2021 FCA 187 at paragraph 4
[5] *Canada v. Pomeroy Acquireco Ltd.*, 2021 FCA 187 at paragraph 4
[6] *Canada v. Pomeroy Acquireco Ltd.*, 2021 FCA 187 at paragraph 13
[7] *Canada v. Pomeroy Acquireco Ltd.*, 2021 FCA 187 at paragraph 14
[8] *Budget Implementation Act, 2016, No. 2*, SC 2016, chapter 12, section 55
[9] *Walsh v. Canada*, 2007 FCA 222
[10] *Walsh v. Canada*, 2007 FCA 222 at paragraph 18
[11] Fresh as amended notice of appeal at paragraphs 14 to 17; Amended reply to notice of appeal at paragraph 38.5
[12] Fresh as amended notice of appeal at paragraphs 3, 4, 5, and 7; Amended reply to notice of appeal at paragraph 34
[13] Fresh as amended notice of appeal at paragraphs 6 and 8; Amended reply to notice of appeal at paragraphs 5 and 37
[14] Respondent's fresh as amended written submissions at paragraph 8 (Respondent's fresh as amended motion record)
[15] Respondent's fresh as amended written submissions at paragraph 8 (Respondent's fresh as amended motion record)
[16] *Harris v. Minister of National Revenue*, [1964] CTC 562 at paragraph 17 (Exchequer Court of Canada), affirmed on other grounds in [1966] SCR 489