THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

July 18, 2012

Via email: ConsultationsTCC-CCI@fin.gc.ca

Tax Policy Branch – Court Caseload Consultation
Finance Canada
140 O'Connor Street
Ottawa, ON K1A 0G5

Dear Colleagues:

Re: Caseload Management of the Tax Court of Canada

We are writing on behalf of the Taxation Law Section and the Commodity Tax, Customs and Trade Section of the Canadian Bar Association (the CBA Tax Sections), in response to the government's proposals of June 8, 2012 to improve the caseload management of the Tax Court of Canada (TCC). The government suggestions have the goal of:

- Updating the monetary limits for access to the informal appeal procedure, providing taxpayers with greater access to a simplified and cost-effective judicial process and enabling a better balance in the TCC's caseload. Under this proposal, a taxpayer could elect to proceed by way of Informal Procedure where the aggregate of all amounts in issue in an income tax appeal is equal to or less than $25,000 (or where a loss does not exceed $50,000). Also, under a new monetary limit for GST/HST appeals, an appeal involving an amount in dispute in excess of $50,000 would be required to proceed by way of the General Procedure.

- Allowing the TCC to dispose of issues raised in an appeal of an assessment separately, so that some issues can be resolved independently from others and to allow the Minister of National Revenue to give effect to the decision of the Court in respect of those discrete issues.

- Permitting the TCC to hear a question affecting a group of two or more taxpayers that arises out of substantially similar transactions, and providing that the resulting judicial determination is binding across the group.

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. Members of the CBA Tax Sections advise on all aspects of law dealing with income tax and commodity tax and appear before

the TCC. The CBA Sections also participate on the TCC's Bench and Bar Committee (TCCBBC), a forum to discuss practice issues of mutual concern with the TCC. We welcome the opportunity to comment on the government proposals and trust that you will find our comments helpful.

Several members of the CBA Tax Sections and the CBA members on the TCCBBC generally participated in discussions concerning this submission and contributed to its preparation, in particular:

Peter Aprile (ATX Law LLP)
Glenn Ernst (Goodmans LLP)
David Graham (Koffman Kalef LLP)
Robert McCue (Bennett Jones LLP)
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Informal Procedure Appeals

The *Tax Court of Canada Act* (*TCC Act*) permits Informal Procedure appeals. The *TCC Act* currently restricts access to the Informal Procedure, to $12,000 in tax or $24,000 in losses. The government proposes to increase the limits to $25,000 in tax and $50,000 in losses, with a possible further increase by regulation to $50,000 in tax or $100,000 in losses. In addition, the government proposes to limit discoveries to cases involving $50,000 in tax, an increase from $25,000.

For GST/HST appeals, the Informal Procedure is the default rule. The government proposes to introduce a $50,000 limit, so that GST/HST appeals involving more than that would be under the General Procedure.

We agree that the $12,000 limit should be increased to $25,000. However, we have the following comments on the proposals.

First, the TCC has stated on a number of occasions that it has difficulty dealing with unrepresented litigants, whose understanding of the facts, issues and law is often limited. In discussions with members of the Court, it appears that one of the difficulties is that the Court is not provided with any basic information about the case beyond what is in the Notice of Appeal and the Reply, which are often not well-drafted. This stems from the decision in *Sandra Gernhart v. Her Majesty the Queen*, 99 DTC 5749 (FCA), where the Court of Appeal held that section 176 of the *Income Tax Act* was unconstitutional.

We recommend that the *TCC Act* be amended to provide that:

- the Minister of National Revenue (the Minister), on filing a Reply in a matter in which the taxpayer is not represented by legal counsel, must cause to be transmitted to the TCC and the Appellant, copies of all returns, notices of assessment, notices of objection and notifications, if any, that are relevant to the appeal; and

- the transmitted material will not become part of the file for that appeal and will not be subject to inspection by a member of the public except to the extent, if any, to which all or part of that material is adduced as evidence before the TCC in that appeal.

We believe this will serve the dual purpose of meeting the concern in *Gernhart* about confidentiality while still permitting the TCC to have access to the material to be able to familiarize itself with the background to the case.

Second, we recommend that the regulations not permit the limit to be raised to $50,000 without public consultation of the type being held for this proposal. We are concerned that raising the limit will have the result of allowing more unrepresented litigants to appeal their own cases, contrary to what we understand to be the desire of the Tax Court.

Third, with respect to discoveries, we see no reason why the monetary limit for that rule should be different than the limits for Informal Procedure cases. To avoid confusion and provide consistency, we recommend that the discovery limit remain at $25,000, to match the new Informal Procedure limit, and if the limit is raised (after public consultation) to $50,000, it be raised in tandem for both rules.

Fourth, for GST/HST Appeals, we agree it is proper to have a similar limit as for income tax appeals.

Fifth, under section 25 of the *Tax Court of Canada Rules (General Procedure)* (General Procedure Rules), an appellant may appeal assessments for different taxation years in one Notice of Appeal. While there is no similar Informal Procedure rule, the practice of the Tax Court is to allow one Notice of Appeal to be filed in respect of several taxation years. Under the decision in *Maier v. The Queen*, [1994] TCJ No. 1260, the Informal Procedure limit applies on a per taxation year basis, regardless of how much money is involved in the Notice of Appeal considered as a whole. We suggest the following:

- the Informal Procedure Rules should be clarified by adding a Rule similar to Rule 25 of the General Procedure Rules;

- section 2.1 of the *TCC Act* should be clarified to encapsulate the principle in *Maier*; and

- GST cases should be governed by the *Maier* principle, so that if one is appealing several GST reassessments each of which is under $25,000, the fact that only one Notice of Appeal is filed should not automatically mean that the case is heard in the General Procedure.

Process to Obtain a *Pro-Tanto* Judgment

The government proposes to amend section 171 of the *Income Tax Act* (and, we presume, Part IX of the *Excise Tax Act* and any other similar legislation) to add subsection 171(2), allowing the TCC to dispose of a particular issue in an appeal separately (a "*pro-tanto* judgment"), but only when both parties to the appeal consent in writing.

We suggest that the phrase "with the consent in writing of the parties to the appeal" be deleted from the opening words of proposed subsection 171(2). In our view, either party to the appeal should be able to bring a motion (which could be on consent) for a *pro-tanto* judgment, or the TCC itself may consider that a particular issue could be disposed of separately (in which case we suggest that the TCC should invite representations from the parties). In our view, a motion would allow the TCC to make a determination, based on the motion record and on hearing the parties (if necessary), that a particular issue can be disposed of separately and that doing so will not cause prejudice to either party and will be more convenient and less time-consuming and expensive than having all issues considered together.

Our proposal envisions that the General Procedure Rules would be amended to include a provision permitting a party to apply to the TCC for bifurcation of an appeal, so that it can make an appropriate order to deal with all of the pre-hearing steps as well as the hearing of the particular issue for which a *pro-tanto* judgment is sought as if it were a separate appeal. This new provision would replace section 170.1 of the Rules.

In addition, the present wording of the pro-tanto judgment provision suggests that the parties must consent to the disposition of the separate issue not just to the issue being dealt with separately. Accordingly, we suggest that subsection 171(2) be revised to read as follows:

> (2) If an appeal raises more than one issue, the Tax Court of Canada may, on application, dispose of one or more issues (in this subsection and subsection
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> (2.1) the "separate issues") without disposing of all of the issues raised by the appeal.
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> (2.1) The Tax Court of Canada may dispose of a separate issue by
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> > (a) dismissing the appeal . . .[same as the current version of paragraphs 171(2)(a) and (b)]

Pro-Tanto Judgments and Collections Restrictions

The collection restrictions in section 225.1(3) of the *Income Tax Act* currently restrict the Minister from taking various collection actions "before the day of mailing of a copy of the decision of the Court to the taxpayer". We can foresee issues arising for both taxpayers and the Minister when a *pro-tanto* judgment is issued. Collections Officers may decide that a decision in respect of one issue under the *pro-tanto* rules would remove collection restrictions in respect of all issues for the reassessment. Similarly, taxpayers may argue that, because a final decision has not been issued in respect of the full reassessment, no collection is possible. Presumably neither of these situations would be the intended outcome. For that reason, we suggest that section 225.1(3) be amended to clarify that the collections restrictions are only lifted in respect of the specific issue that has been resolved by the *pro-tanto* judgment.

Pro-Tanto Judgments and Refunds

Section 164(4.1) of the *Income Tax Act* requires the Minister to pay refunds to taxpayers following "the disposition of an appeal". We suggest that the section be amended to align with the above proposed amendments to section 225.1(3). In other words, in the case of a *pro-tanto* judgment, just as the Minister should be able to collect the taxes relating to the resolved issue if the judgment is in the Minister's favour, the Minister should similarly be required to refund the taxes relating to the resolved issue if the judgment is in the taxpayer's favour.

Pro-Tanto Judgments and Objections / Appeals

A decision on a *pro-tanto* judgment will often result in a reassessment being issued in respect of a taxation year for which there are still issues under appeal at the TCC. The Explanatory Notes say that the intention is that a taxpayer will not have to file a Notice of Objection or a Notice of Appeal in order to keep his or her appeal in respect of the remaining issues for that year open. We suggest that section 165(7) of the *Income Tax Act* and section 302 of the *Excise Tax Act* be amended to reflect that intention. Similar amendments would have to be made to section 27 of the *Federal Courts Act.*

Pro-Tanto Judgments and New Evidence

We would like to emphasize the importance of ensuring that issues that are severed pursuant to the *pro-tanto* rule are not only legally distinct issues but also factually distinct issues. We are concerned that if severed issues are not factually distinct, a situation could arise where a decision has been rendered on a *pro-tanto* judgment and new evidence later arises in the TCC hearing of the remaining issues that conflicts with the evidence upon which the *pro-tanto* judgment has been issued.

Pro-Tanto Judgments and Appeals to the Federal Court of Appeal

We can picture a situation arising where a *pro-tanto* judgment is appealed to the Federal Court of Appeal and, subsequently, a judgment on the remaining issues is also appealed to the Federal Court of Appeal. We suggest that consideration be given to amending the *Federal Courts Rules* to allow for the consolidation of such appeals in appropriate circumstances.

Common Questions

In recent years, the TCC has seen an increase in the number of appeals where issues and facts common to two or more taxpayers are repeatedly litigated.

The Minister may apply to the TCC under section 174 of the *Income Tax Act* to determine questions arising out of "one and the same transaction or occurrence or series of transactions or occurrences" which are common to the assessment of two or more taxpayers.

The government proposes to amend the *Income Tax Act* (and, we presume, *Excise Tax Act*) to allow the Minister to apply to the TCC to hear a question arising out of identical or substantially similar transactions and cause the resulting judicial determination to be binding across the group. The proposed measure would allow the TCC to bind taxpayers whose income tax filings raise issues identical or substantially similar to a lead court case. The questions put before the TCC would be restricted to the common issues, allowing other issues to be dealt with independently.

The Crown, and any taxpayer who has filed an appeal from an assessment in the TCC, could appeal the determination to the FCA. Any other taxpayers named in the determination could appeal a determination of the substantive question, only if they were granted leave by a judge of the FCA.

Taxpayers bound by the determination by the TCC would also be bound by a subsequent decision of the FCA. We presume similar rules would apply at the Supreme Court of Canada level.

The government also proposes that the *Income Tax Act* (and *Excise Tax Act*) be amended to specify that the Minister can serve notice of the application by way of regular mail or may seek direction from the TCC on alternate means of service.

With regret, we cannot agree with these proposals. Although taxpayers may have a similar question arising out of similar facts, the facts may not be identical among all of them, and seemingly minor factual differences may be important to the final outcome of the case. Further, the taxpayer listed as the lead case may be self-represented, or not well represented, or initially represented by counsel but then dismisses that counsel. Or the lead taxpayer may decide to settle or give up on the litigation, leaving the other taxpayers to start all over again with another test case. In essence, this proposal would bind all taxpayers to contribute to a test case fund to pay counsel over whom they have no choice and no control, to protect their own interests.

While we are sympathetic to the government's and the TCC's concerns over "large-case" situations, we do not believe that taxpayers should be co-opted into what is effectively class action tax litigation for which they will inevitably be required to pay the legal fees, without being able to accept or decline to be part of the class, when the facts and issues may not be the same for each taxpayer even though the broad outline of facts and issues is the same.

To be clear, if a process could be designed whereby taxpayers could agree to join a class at their option, we could agree in principle with that idea.

Having said that, and in the event that our view of the matter is not adopted, we strongly suggest that the Minister not have the sole right to initiate the process. It is vital that either an Appellant, the Minister or the Court of its own motion, be able to initiate the process of determining questions arising out of "one and the same transaction or occurrence or series of transactions or occurrences" which are common to the assessment of two or more taxpayers.

We trust that our comments will be useful in the government's review of the proposals.

Yours truly,

(original signed by Tamra Thomson for Darcy D. Moch, Craig M. McDougall, and David E. Spiro)

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