

FEDERAL COURT OF APPEAL

B E T W E E N :

TPINE LEASING CAPITAL CORPORATION

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
F I L E D	14-NOV-2022 Kyla Chisholm
TORONTO, ON	-1-

Appellant

and

HIS MAJESTY THE KING

Respondent

NOTICE OF APPEAL

(pursuant to subsection 27(1.1) of the *Federal Courts Act*)

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules, information concerning the local offices of the court and other necessary information may be obtained on request to the Administrator of this court at Ottawa (telephone 613-996-6795) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

November 14, 2022

Issued by:

"Mavis Griffith"

(Registry Officer)

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Counsel for the Respondent

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Order of the Honourable Justice Susan Wong of the Tax Court of Canada issued November 3, 2022 (the “Order”). The Order granted the respondent’s motion in Court File No. 2020-2040(IT)G, *TPine Leasing Capital Corporation v. His Majesty the King*, pursuant to *Rule 54 of the Tax Court of Canada Rules (General Procedure)* and subsection 152(9) of the *Income Tax Act* for leave to amend the reply to the notice of appeal to:

- a. set out an issue between the parties as whether the amount of tax assessed in the reassessment under appeal (the “Reassessment”) is too high;
- a1. include additional details with respect to the Reassessment; and
- b. raise the alternative argument pursuant to subsection 152(9) of the *Income Tax Act* in support of the Reassessment that the amount of tax assessed in the Reassessment is not too high because the Appellant is not entitled to claim both Cost of Goods sold and Capital Cost Allowance in respect of the same property.

THE APPELLANT ASKS that:

1. this Honourable Court allow the appeal;
2. this Honourable Court issue the Order the Tax Court should have issued dismissing the respondent’s motion for leave to amend the reply to the notice of appeal;
3. the Minister pay the appellant’s costs in this Honourable Court and the Tax Court of Canada; and
4. for such further and other relief as this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

The appellant

5. The appellant is in the business of loan and equipment financing and in the year in issue in its dispute securitized leases which it reported as a sale of leases receivable.
6. The appellant claimed capital cost allowance (“CCA”) on its leased trucks and trailers.
7. The appellant reported its securitization of lease receivables as revenue and deducted from that amount the net present value of the lease receivable as its cost of sales. It did not deduct the cost of any trucks or trailers in so doing.

The assessment in dispute

8. The Minister of National Revenue (the “Minister”) initially assessed the appellant’s 2015 taxation year by notice dated June 23, 2016.
9. The Minister reassessed the appellant by notice dated June 19, 2019, or within the normal reassessment period for the year.
10. In reassessing, the Minister, among other smaller adjustments not in issue in this appeal from the Order, disallowed the appellant’s deduction of CCA claimed on class 10 and 16 assets—trucks and trailers—and adjusted the appellant’s undepreciated capital cost balances.
11. The amount of disallowed CCA claim was \$5,887,282.

The Tax Court litigation

12. The pleadings closed on May 26, 2021, or 30 days following the filing of the April 27, 2021 reply.

13. The respondent pleaded that the issues in the appeal are whether the Minister: correctly denied CCA, correctly adjusted the appellant's class 10 and 16 UCC balances, correctly denied the denied expenses, which were defined as advertising and promotion, subcontract, fees, accounting and legal fees and interest expenses, and correctly levied gross negligence penalties.
14. The parties requested, and the Court ordered a timetable for the remaining steps in the litigation on January 27, 2021, which required, *inter alia*, the delivery of lists of documents on or before the date of the order, the exchange of documentary productions on or before January 31, 2022, completion of discovery examinations on or before April 19, 2022 and the communication with the Hearings Coordinator on or before October 28, 2022.
15. The parties exchanged and filed their lists of documents.

The respondent's motion for leave to amend

16. The respondent sought leave to amend her reply to:
 - a. plead to the Minister's initial allowance of the appellant's claimed cost of sales and plead that the Minister did not disallow that cost of sale (paras. 32 and 34);
 - b. change the pleading of the amount of cost of sales from \$17,901,764 to \$17,604,192 (para. 40(c.1));
 - c. add, under Issues to Be Decided:

In the alternative, if the Appellant is entitled to the Denied CCA, is the amount of tax assessed in the Reassessment too high because it allowed the Appellant a deduction for COGS for the Subject Equipment (para. 41.1

- d. add, under Statutory Provisions Relied on sections 10 and 54 of the *Act* (para. 42);
- e. add, under Grounds Relied on and Relief Sought:

- i. 44.1 The ultimate issue in any appeal to this Court is whether the amount of tax assessed is too high.
 - ii. 44.2 An alternative issue is therefore, if the Appellant remained the owner of the Subject Equipment, whether the tax assessed in the Reassessment is too high. It is not. The Reassessment allowed the Appellant's claimed COGS deduction of \$17,604,192 for the Subject Equipment. Pursuant to paragraph 18(1)(b) of the *Act* and paragraph 1102(1)(b) of the Regulations, the Appellant is not entitled to claim both COGS and CCA for the same property.
17. The respondent adduced no evidence on what transpired between April 27, 2021 and March 29, 2022 that necessitated the amendment of the reply.
18. The appellant's affiant in evidence adduced on the respondent's motion for leave to amend confirmed that, at all material times, the cost of tranches sold was the net present value of the payment stream, or in other words the net present value of the remaining portion of the lease receivables sold to CLE and that none of the accounts included any claim for the acquisition cost of any truck or trailer. The respondent's listed documents contain the trial balances for the subject year and the immediately preceding year. These trial balances identify and confirm the *quanta* and description of the appellant's cost of sales and no costs of goods sold for any truck or trailer.
19. The respondent did not examine the appellant's affiant and produced no affiant with knowledge of the facts, assessment, assessing history or procedure.
20. The appellant opposed the motion on the grounds that: the amendment is not permitted by the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), as amended (the "*Act*"), particularly subsections 152(3.1), 152(4), 152(5) and amended 152(9) of the *Act*; the amendment is not permitted by the *Tax Court Rules*, *Rules* 4, 8 and 54, and that there is no reasonable prospect of success on a realistic view of the proposed amendments.

The legislation and Rules

21. The *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), as amended (the “*Act*”) limits the Minister’s power to assess a taxation year to a finite period in subsections 152(4) and 152(3.1), or 3 years from the date of initial assessment on the facts at bar.
22. Subsection 152(5) of the *Act* prohibits the Minister from including an amount in computing a taxpayer’s income that was not included in computing that taxpayer’s income before the end of the normal reassessment period.
23. Only a taxpayer may appeal an assessment of tax: subsection 169(1) of the *Act*. The Minister may not appeal her own assessment as no appeal therefrom is provided for in the *Act*.
24. On an appeal from an assessment of tax, the Court may dispose of an appeal by dismissing it; or allowing it and vacating the assessment, varying the assessment or referring the assessment back to the Minister for reconsideration and reassessment: subsection 171(1) of the *Act*.
25. Subsection 152(9) of the *Act* permits the Minister to advance an alternative argument or basis in support of an assessment at any time after the normal reassessment period, subject to conditions.
26. Following the enactment of subsection 152(9) in 1999, the Tax Court and the Federal Court of Appeal limited the reach of subsection 152(9) to apply to only those transactions assessed prior to the expiration of the normal reassessment period and only those alternative arguments that did not result in an increase in the amount assessed.
27. This Court in *Anchor Pointe Energy Ltd. v. Her Majesty the Queen*, 2003 FCA 294 found the distinction between a new basis and a new argument to be semantic and held that what is objectionable is anything that increases tax payable from what would have been the case prior to the expiry of the normal reassessment period.

28. The 2015 amendments to subsection 152(9) of the *Act* amended the preamble thereof to include the words “basis or argument,” “including that all or any portion of the income to which an amount relates was from a different source” and “in support of all or any portion of the total amount determined on assessment to be payable or remittable by a taxpayer.”
29. The 2015 amendments did not displace, withdraw or limit the application of subsection 152(5) of the *Act* which prohibits the Minister from including in income an amount not included within the normal reassessment period, it is submitted.
30. The 2015 amendments did not grant the Minister a right to appeal her own assessment.
31. Any interpretation to the contrary does away with the limitation period in the *Act*, it is submitted.
32. *Rule 54* provides for the filing of an amended pleading with leave where the pleadings have closed.
33. *Rule 4* requires the rules of the Court to be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits.
34. *Rule 8* prohibits a motion to attack a step, document or direction in a proceeding after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity or if the moving party has taken any further step in a proceeding.

The Tax Court's decision

35. The Tax Court found that the conditions applicable to the application of subsection 152(9) were as articulated by this Court in *Walsh v. Her Majesty the Queen*, 2007 FCA 222 and include: the Minister cannot include transactions which did not form the basis of the reassessment; and 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.

36. The Tax Court found the 2015 amendment, applying to appeals instituted after December 15, 2016:

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.

37. The Tax Court found the proposed argument and associated amendments “fit squarely within both rule 54 and subsection 152(9)”, finding, *inter alia*,

[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.

...

[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. 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.

38. The appellant respectfully submits the Tax Court erred:
- a. in failing to find the respondent was prohibited by *Rule 8* from amending the reply;
 - b. in failing to find the amendments were not permitted by subsections 152(4), 152(3.1), 152(5) and amended 152(9) of the *Act*;
 - c. in failing to find the proposed amendment attacks a different transaction that necessitated the pleading of other facts to raise;
 - d. in failing to find the proposed amendment attacks a different deduction after the expiration of the normal reassessment period;
 - e. in failing to find the cost of sales deduction sought to be raised was not for trucks and trailers but for the net present value of leases receivable and the proposed amendment therefore had no reasonable prospect of success;
 - f. in allowing the Minister to appeal her own assessment; and
 - g. in granting the respondent's motion for leave to amend the reply to the notice of appeal.

39. *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), subsections 152(3.1), 152(4), 152(5) and 152(9).
40. *Tax Court of Canada Rules* (General Procedure), SOR/90-688a, *Rules* 4, 8 and 54.
41. Such other statutory provisions or rules as may be relevant.
42. The appellant requests that the Tax Court send a certified copy of the following material that is not in the possession of the appellant but is in the possession of that Court to the appellant and to the Registry: the documentary exhibits filed.

The appellant requests that the appeal be heard in Toronto, Ontario, in person or by remote or electronic means.

Dated at Toronto, this 14th day of November, 2022.



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Solicitors for the Appellant

Court File No.

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