Federal Court  Cour fédérale

Date: 20130529

Docket: T-788-11

Citation: 2013 FC 572

BETWEEN:

TELETECH CANADA, INC.

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT

MACTAVISH J.

[1] TeleTech Canada Inc. (TeleTech Canada) is seeking judicial review of what it says is the continuing refusal of the Canada Revenue Agency [CRA] to provide it with relief from double taxation, allegedly in breach of the CRA's obligations under articles IX and XXVI of the *Convention between Canada and the United States of America with respect to Taxes on Income and on Capital*, 26 September 1980, Can. T.S. 1984 No. 15, as implemented by the *Canada-United States Tax Convention Act*, 1984, S.C. 1984, c. 20.

[2] In its application, TeleTech Canada seeks an order of *mandamus* compelling the CRA to accept its application for competent authority consideration and to provide the company with relief from double taxation under Article IX of the Treaty by submitting the matter to binding arbitration, pursuant to the provisions of Article XXVI of the Treaty.

[3] For the reasons that follow, I have concluded that there has been no "continuing refusal" on the part of the CRA. Rather, two discrete decisions were made by the CRA in relation to TeleTech Canada's requests for relief from double-taxation, neither of which has been directly challenged by the company. I have further concluded that TeleTech Canada has not established that it is entitled to an order of *mandamus*, with the result that the application will be dismissed.

The *Canada-United States Tax Convention*

[4] In order to put this matter into context, it is necessary to first have some understanding of the *Canada-United States Tax Convention* [the Treaty]. The Treaty aims to shield taxpayers in the United States and Canada from double taxation. Both countries have designated "competent authorities" to deal with claims arising under the Treaty. In Canada, the competent authority is the CRA, whereas in the United States it is the Internal Revenue Service [IRS].

[5] When a tax adjustment under the Treaty "is made or to be made" by either the CRA or the IRS, the competent authority of the other contracting state is to make a corresponding adjustment if it agrees with the first adjustment, and it was notified of the first adjustment "within six years from the end of the taxable year to which the first-mentioned adjustment relates" or, failing compliance

with the notification period, if the case is not statute-barred: Article IX (3). The relevant provisions of the Treaty are attached as an appendix to this decision.

[6] In the event that the six-year notification period lapses without the above-mentioned notice being given, the competent authority of the state which "made or is to make" the first adjustment may nevertheless provide relief from double taxation: Article IX (4).

[7] The Treaty also provides for a Mutual Agreement Procedure [MAP] in situations where the actions of Canada and/or the US result in taxation that is not in accordance with the Treaty. The affected taxpayer is to present its case to the competent authority of the State in which it resides. The taxpayer and the competent authority then attempt to resolve the case by mutual agreement, if the prerequisites for the MAP, including timely notification, are met: Article XXVI (1) through (5).

[8] If the competent authorities are unable to reach a "complete agreement", the case will then be referred to arbitration: Article XXVI (6) and (7). Arbitration will not, however, be available if a taxpayer's request for competent authority assistance has been denied by the CRA or IRS, or if either competent authority ceases to provide assistance.

Background

[9] TeleTech Canada is a wholly owned subsidiary of an American company known as TeleTech Holdings Inc. (TeleTech US). The two corporations will be referred to collectively in these reasons as "the companies".

[10] The companies are in the call-centre business. Following a corporate restructuring in 2000, the companies reduced their Canadian client base, and TeleTech Canada became a subcontractor of TeleTech US, with TeleTech US providing administrative services to its Canadian counterpart. The applicant and the respondent do not agree with respect to the nature and value of these administrative services, and this disagreement is at the root of the transfer pricing issue between the parties.

[11] After the restructuring, accounting staff at TeleTech US prepared financial records for both companies for the 2000-02 taxation years. However, TeleTech Canada asserts that as a result of internal accounting errors, income and expenses were improperly allocated as between the two companies, and the companies' financial records failed to properly reflect the new corporate structure.

[12] TeleTech Canada states that as a result of these errors, its profits for the 2000, 2001 and 2002 taxation years were "dramatically overstated" in its financial statements and those of TeleTech US were "dramatically understated". These accounting errors were then incorporated into the companies' respective filings with the CRA and the IRS for the taxation years in question.

[13] In 2003, TeleTech US commissioned an accounting firm (KPMG) to examine how the companies should be reporting amounts earned under contracts for the companies' services (the "transfer pricing study"). TeleTech Canada contends that the transfer pricing study revealed that it had greatly over-reported its income for Canadian taxation purposes, and that TeleTech US had

correspondingly under-reported its income for US tax purposes. The companies then took steps to bring their past tax filings into compliance with Canadian and American tax laws.

[14] Before reviewing the steps taken by the companies to revise their tax filings, it should be noted that the respondent does not agree with the conclusions of the transfer pricing study, nor does it accept that the companies' original tax filings for 2000-2002 did not comply with the applicable tax laws.

[15] The first step taken by the companies to rectify the situation was for KPMG to send a letter to the CRA on May 5, 2004, on TeleTech Canada's behalf, requesting a downward adjustment to TeleTech Canada's operating profits for the 2000-02 taxation years. In a similar vein, TeleTech US filed amended tax returns with the IRS to increase its income for these tax years by the same amount as the decrease sought by TeleTech Canada.

[16] In March of 2006, TeleTech Canada withdrew its request for the downward adjustment. It says that it did so because it believed it would be unable to pursue relief from double taxation under the Treaty as long as its adjustment request remained outstanding.

[17] At the same time, TeleTech US filed a request under the Treaty with the IRS seeking relief from alleged double taxation for the 2000-02 taxation years in the amount of $38.3 million (USD). This request was based upon the filing of TeleTech US' amended tax returns. While it is not clear from the record what the position of the IRS was with respect to this request, it does not appear that the IRS accepted TeleTech US' request for competent authority assistance at this time.

TeleTech Canada's First Request & Denial Letter

[18] By letter dated May 11, 2006, TeleTech Canada filed a request with the CRA for competent authority assistance, seeking relief from alleged double taxation under the Treaty (the First Request). The amounts and tax years referenced in this First Request corresponded to the amounts and tax years referred to in TeleTech US' March, 2006 request to the IRS. Had TeleTech Canada's request been accepted, it says that it would have resulted in a refund being paid by the CRA to TeleTech Canada in an amount somewhere between $10-12 million (USD).

[19] The respondent submits that, as of 2006, the companies had not been subject to double taxation because neither the CRA nor the IRS had taken any action that had resulted in double taxation. The respondent notes that in its request to the IRS, TeleTech US had itself stated that it did not know whether its amended tax returns had been processed, and that it had not been contacted by the IRS for an audit of the amended returns.

[20] By letter dated November 10, 2006 (the First Denial Letter), the CRA advised TeleTech Canada that it "was unable to accommodate your request for competent authority consideration". Referring to Information Circular 71-17R5, the CRA stated that "one of the prerequisites that must exist to request competent authority consideration is an action by one or both governments that will result…in taxation not in accordance with the [Treaty]". The letter goes on to observe that "[i]n most cases, such an action is an adjustment to, or a formal written proposal to adjust, income related to a transaction to which the Canadian taxpayer is a party".

[21] Insofar as TeleTech Canada's situation was concerned, the CRA observed that "the tax authorities in Canada and the United States have not taken any action that has resulted in taxation not in accordance with the [Treaty]", noting that "[t]he only actions that [have] been taken have been initiated by TeleTech Canada Inc. and TeleTech Holdings, Inc." As a result, the CRA stated that it could not accept TeleTech Canada's request for competent authority consideration.

[22] The First Denial Letter concludes by stating that "We will reconsider our position in the event of future compliance activity that may be initiated by either the Canada Revenue Agency or the Internal Revenue Service".

[23] TeleTech Canada did not seek judicial review of this decision, nor does the record reveal any further communication between the company and the CRA at this time.

[24] On December 13, 2006, the CRA received a letter (dated November 7, 2006) from a Deputy Commissioner at the IRS which advised that the IRS had "ultimately assessed" the amended tax returns filed by TeleTech US for the 2000-02 taxation years and concluded that "the actions taken by both [the IRS and the CRA] have resulted in taxation that is not in accordance with … the Treaty". The letter invited the CRA to participate in a MAP pursuant to Article XXVI of the Treaty.

[25] The companies were not aware of this letter at the time that it was sent, and only learned of its existence when it was produced in the context if this application for judicial review.

[26] No response from the CRA to the IRS' November 7, 2006 letter has been produced, and it does not appear that there was any further consideration of TeleTech Canada's request for competent authority assistance at that time. Indeed, it appears that the CRA closed its file with respect to this matter.

[27] In July of 2008, following an audit of TeleTech US' amended tax returns, the IRS made adjustments to TeleTech US' 2001 and 2002 tax returns. TeleTech US' gross income was increased by $6,682,092 (USD) for 2001 and by $4,557,138 (USD) for 2002, for a total increase of $11,239,230 (USD). The IRS disallowed TeleTech US' claim for unreported gross income in the amount of $19,772,389 (USD) for 2001, and its claims for the 2000 tax year were disallowed in their entirety. The 2000 tax year is not in issue in this application.

[28] In the wake of the conclusion of the audit, TeleTech US submitted another request for competent authority assistance with the IRS. This request took the form of a letter dated August 27, 2009.

[29] However, neither TeleTech US nor TeleTech Canada informed the CRA of the results of the IRS audit at this time, nor did TeleTech Canada renew its request for competent authority assistance. Indeed, it was only some 18 months later that TeleTech Canada finally advised the CRA of the results of the IRS audit of TeleTech US, making submissions as to the implications that this allegedly had for potential double taxation.

[30] The respondent states that even if TeleTech Canada had acted promptly to inform the CRA of the results of the IRS audit, by the summer of 2008, it was already too late for TeleTech Canada to give notice under the Treaty with respect to its 2001 tax year as the six-year notice period provided for under Article IX (3)(b) of the Treaty had expired. The respondent further notes that no real explanation has been provided for TeleTech Canada's failure to provide notice of the alleged double taxation for its 2002 taxation year in the summer of 2008.

TeleTech Canada's Second Request & Denial Letter

[31] By letter dated December 17, 2009, the companies sent the CRA a "Supplemental Request for Competent Authority Assistance under the U.S.-Canada Income Tax Treaty" (the Second Request). This document advised the CRA of the outcome of the 2008 IRS audit of TeleTech US, and sought relief from the double taxation allegedly resulting from the adjustments that had been made to TeleTech US' income by the IRS for the 2001 and 2002 taxation years. This was the first time that the companies had contacted the CRA after the 2008 IRS audit, although it appears that the IRS was itself in contact with the CRA in this regard in October of 2009.

[32] After receiving TeleTech Canada's Second Request, the CRA opened a new file and assigned a new analyst to the case.

[33] After months had passed without a response to its December 17, 2009 letter, and believing that the CRA was refusing to consider its Second Request, TeleTech Canada commenced this application for judicial review on May 11, 2011, seeking an order of *mandamus* to compel the CRA to accept its application for competent authority consideration pursuant to Article IX of the Treaty.

However, on the consent of the parties, the application was held in abeyance pending the CRA's determination of the Second Request.

[34] By letter dated June 9, 2011 (the "Second Denial Letter"), the CRA noted that "one of the prerequisites" that had to exist in order for a taxpayer to seek competent authority consideration was government action that resulted or would result in double taxation. The letter goes on to state that the absence of such action had led the CRA to inform TeleTech Canada in 2006 that its First Request for competent authority assistance had not been accepted, that the CRA had not acknowledged receipt of a competent authority request at that time, and that it had not acknowledged receipt of notice for the purposes of the Treaty.

[35] The Second Denial Letter also stated that the CRA had first received notification of the government action in this case through the IRS' October 5, 2009 letter. As such, the CRA was unable to provide TeleTech Canada with "correlative relief" as it had not received notification of the "U.S. initiated adjustments" within the six-year period provided for under Articles XI or XXVI of the Treaty (that is, within six years from the end of the taxation years in issue, namely 2001 and 2002).

[36] Finally, the Second Denial Letter stated that TeleTech Canada's tax returns were "also statute barred from reassessment".

[37] The Letter concluded by advising TeleTech Canada that it considered the case to be closed. The receipt of this letter by TeleTech Canada then led to the reactivation of this application for judicial review.

The Subject-Matter of this Application

[38] It should be noted that TeleTech Canada's Notice of Application does not seek judicial review of either the First or Second Denial Letters. Rather, it refers to the CRA's "continuing refusal" to accept its application for competent authority consideration and to provide it with relief from double taxation under Article IX of the Treaty.

[39] The Notice of Application further states that TeleTech Canada is seeking an order of *mandamus* to compel the CRA to accept its application for competent authority consideration pursuant to Article IX of the Treaty. It also seeks an order compelling the CRA to provide relief from double taxation by submitting the matter to binding arbitration, pursuant to the provisions of Article XXVI of the Treaty.

Issues

[40] TeleTech Canada and the respondent frame the issues raised by the application for judicial review differently. In my view, the dispositive issues can be summarized as follows:

1. Did the CRA engage in a continuing course of conduct or does the application for judicial review relate to discrete decisions?

2. Is it now open to TeleTech Canada to argue that the CRA erred in requiring, as a prerequisite to relief, government action resulting in taxation not in accordance with the Treaty, and in finding that there had been no such action?

3. Is *mandamus* available to TeleTech Canada in the circumstances of this case?

4. What is the effect of the IRS' November 7, 2006 letter?

1. *Did the CRA engage in a Continuing Course of Conduct or does the Application for Judicial Review Relate to Discrete Decisions?*

[41] In examining TeleTech Canada's application for judicial review, the first issue to consider is the respondent's contention that the application does not involve a continuing course of action on the part of the CRA. According to the respondent, what is in issue are two discrete decisions, neither of which have been challenged, and both of which were subject to the 30-day time limit for judicial review of a decision set out in subsection 18.1 (2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[42] TeleTech Canada does not accept that the CRA has made two decisions (in 2006 and again in 2011) rejecting its requests for Treaty assistance. Instead, it describes the CRA's actions as a "continuing refusal to consider" its request. As such, it seeks to have this Court issue a *mandamus* order to force the CRA to accept its application for competent authority consideration and to provide it with relief from double taxation by submitting the matter to binding arbitration.

[43] TeleTech Canada argues that it does not seek to attack any specific "decisions" of the CRA, but, rather, to compel the performance of a public duty owed to it through an order of *mandamus*. I do not accept this argument.

[44] In *Krause v. Canada*, [1999] 2 F.C. 476, [1999] F.C.J. No. 179, the Federal Court of Appeal had to consider whether the governmental actions in issue in that case were "decisions" within the meaning of the *Federal Courts Act*, and thus subject to the 30-day limitation, or whether they constituted a continuing course of conduct to which the 30-day rule did not apply.

[45] The applicants in *Krause* took issue with the fact that in certain fiscal years, the responsible Ministers had failed to credit the Public Service and Canadian Forces superannuation accounts with amounts allegedly required to be credited pursuant to pension legislation.

[46] The Federal Court of Appeal held that the 30 day time limit only applied where an application for judicial review was "in respect of a decision or order". Subsection 18.1(1) of the *Federal Court Act* (the predecessor to the current *Federal Courts Act*), permitted "anyone directly affected by *the matter* in respect of which relief is sought" to bring an application for judicial review (my emphasis). The Court went on to observe that the term 'matter' "embraces not only a 'decision or order', but any matter in respect of which a remedy may be available under Federal Court Act, section 18".

[47] The Court agreed that the applicants in *Krause* were not attacking a "decision", but rather that they were seeking "to compel performance of public duties [and] prevent continued failure to perform such duties". The Court observed that while a policy decision had been made years before not to follow certain recommendations of the Canadian Institute of Chartered Accountants, what the applicants were challenging was the ongoing implementation of that decision in each successive

fiscal year. As such, the Court held that there was no 30 day limit preventing the applicants from seeking relief.

[48] In this case, the First Denial Letter issued on November 10, 2006 was clearly an identifiable "decision" based upon the facts as they stood in 2006: contrast with *Truehope Nutritional Support v. Canada (Attorney General)*, 2004 FC 658, [2004] F.C.J. No. 806; see also *Servier Canada Inc. v. Canada (Minister of Health)*, 2007 FC 196, [2007] F.C.J. No. 277 at para. 17. As such, it was subject to the 30 day time limit for the commencement of an application for judicial review set out in subsection 18.1 (2) of the *Federal Courts Act*.

[49] The fact that the First Denial Letter concludes with the statement that "[w]e will reconsider our position in the event of future compliance activity that may be initiated by either the Canada Revenue Agency or the Internal Revenue Service" does not make the First Denial Letter any less a "decision" subject to the 30 day time limit.

[50] Indeed, the jurisprudence is clear that where a decision is reconsidered based upon new facts and submissions and a fresh exercise of discretion, it will result in a new decision which will itself be subject to timely judicial review: *Dumbrava v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1238, 101 F.T.R. 230 at para. 15. The possibility of reconsideration does not, however, extend the time in which to challenge the original decision: *Didone v. Sakno*, 2003 FC 1530, [2003] F.C.J. No. 1945, aff'd 2005 FCA 62, [2005] F.C.J. No. 296; *Pomfret v. Canada (Attorney General)*, 2008 FC 1219, [2008] F.C.J. No. 1535; *Moresby*

Explorers Ltd. v. Gwaii Haanas National Park Reserve, [2000] F.C.J. No. 1944, 101 A.C.W.S. (3d) 664.

[51] The CRA clearly considered TeleTech Canada's First Request, and rejected it. As a consequence, I am satisfied that the CRA's First Denial Letter was a final decision in relation to the First Request, and not merely a step in a continuing course of conduct. If TeleTech Canada was not happy with this decision, it was open to the company to commence an application for judicial review of the decision. It chose not to do so.

2. *Is it Now Open to TeleTech Canada to Argue that the CRA Erred in Requiring Government Action Resulting in Taxation not in Accordance with the Treaty and in Finding that there had been no Such Action?*

[52] TeleTech Canada argues before me that the CRA erred in requiring, as a prerequisite to competent authority consideration, that there be government action resulting in taxation not in accordance with the Treaty.

[53] TeleTech Canada contends that the CRA also erred in finding that there had been no government action resulting in taxation not in accordance with the Treaty at the time of the company's May, 2006 request for competent authority consideration. According to TeleTech Canada, adjustments initiated by a taxpayer, such as the filing of amended tax returns in the United States, should suffice to trigger an obligation on the part of the CRA to accept a request for competent authority consideration.

[54] Having failed to seek timely judicial review of CRA's First Denial Letter, that decision is now final, and TeleTech Canada should not now be permitted to launch a collateral attack on the CRA's 2006 determination that an action by one or both governments that will result in taxation not in accordance with the Treaty is a prerequisite for a request for competent authority consideration.

[55] A 'collateral attack' is "an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment": *R. v. Wilson*, [1983] 2 S.C.R. 594, [1983] S.C.J. No. 88 at 599. In accordance with the prohibition on collateral attacks, parties will not be permitted to question an order made by a court of competent jurisdiction in any proceeding other than the appeal process applicable to the order: *Wilson* at 599. See also *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44 at para 20; *British Colombia Workers' Compensation Board v British Columbia (Human Rights Tribunal)*, 2011 SCC 52 at para. 28.

[56] For the same reason, having failed to challenge the First Denial Letter, TeleTech Canada should not now be permitted to challenge the CRA's finding that, as of November, 2006, neither the Canadian nor the American tax authorities had taken any action that had resulted in taxation not in accordance with the Treaty, with the result that the CRA was unable to accept TeleTech Canada's request for competent authority consideration.

3. Is *Mandamus* Available to TeleTech Canada in the Circumstances of this Case?

[57] In considering whether it would be appropriate for this Court to make an order of *mandamus* compelling the CRA to accept TeleTech Canada's application for competent authority consideration

and submit the matter to binding arbitration, it is important to keep in mind the sequence of events leading up to, and following the commencement of this application.

[58] This application for judicial review was commenced on May 5, 2011, after TeleTech Canada submitted its Second Request on December 17, 2009, and before the CRA issued its Second Denial Letter on June 9, 2011.

[59] To the extent that TeleTech Canada seeks to compel the CRA to make a decision in relation to its Second Request, the application is now clearly moot. TeleTech Canada received a decision from the CRA in relation to its Second Request, and it was open to the company to challenge that decision by way of judicial review if it was not satisfied with the result. It did not do so, nor did TeleTech Canada apply to amend its Notice of Application in this case to seek judicial review of the Second Denial Letter.

[60] However, TeleTech Canada was not just seeking *a decision* with respect to its Second Request in its Notice of Application, it was seeking *a specific decision* in that regard. That is, what TeleTech Canada was seeking was an order compelling the CRA to accept its request for competent authority consideration and submit the case to arbitration.

[61] First of all, the Courts will not generally make an order of *mandamus* to compel a decision maker to make a particular decision where the decision-making power is discretionary in nature: *Re O'Grady and Whyte*, [1983] 1 F.C. 719; 138 D.L.R. (3d) 167 at 169 (FCA); *Herzig v. Canada (Industry)*, 2002 FCA 36, [2002] F.C.J. No. 127 at para. 17; *Schwarz Hospitality Group Ltd. v.*

Canada (Minister of Canadian Heritage), 2001 FCT 112, [2001] F.C.J. No. 263 at paras. 33-34. Such is the case here: see Articles IX (1) and (3) of the Treaty, and paragraph 64 of the CRA Information Circular which specifically provides that "[t]he granting of relief is at the discretion of the competent authority".

[62] It is, moreover, evident that TeleTech Canada does not have a clear right to have its case referred to arbitration under Article XXVI of the Treaty as it has not met a number of the preconditions for arbitration.

[63] As a consequence, TeleTech Canada's application for an order of *mandamus* is dismissed.

4. *What is the Effect of the IRS' November 7, 2006 Letter?*

[64] The final issue to be addressed is what, if any, effect should be given to the IRS' November 7, 2006 Letter. This issue was not addressed by TeleTech Canada in its Notice of Application, as the company was not aware of the existence of the letter at the time that this proceeding was commenced. It was, however, addressed in TeleTech Canada's memorandum of fact and law and was argued at some length by both sides during the course of the hearing. As a consequence, I am prepared to exercise my discretion and deal with the issue.

[65] It will be recalled that in its November 10, 2006 First Denial Letter, the CRA concluded its decision by informing TeleTech Canada that it would "reconsider our position in the event of future compliance activity that may be initiated by either the Canada Revenue Agency or the Internal Revenue Service". It is noteworthy that the CRA did not specify how it was to be provided with

notice of "future compliance activity" on the part of the Internal Revenue Service, or who was to provide the CRA with such notice.

[66] It will also be recalled that within approximately one month of having issued its First Denial Letter, the CRA received the letter from a Deputy Commissioner at the IRS (which was dated November 7, 2006 but was not received until December 13, 2006). This letter informed the CRA that the IRS had "ultimately assessed" the amended tax returns filed by TeleTech US for the 2000-02 taxation years, and that it had concluded that "the actions taken by both [the IRS and the CRA] have resulted in taxation that is not in accordance with … the Treaty". The letter also invited the CRA to participate in a MAP pursuant to Article XXVI of the Treaty.

[67] The IRS letter was not provided to either of the companies, and it appears that they were not aware that the letter had been sent by the IRS to the CRA. Nor were the companies aware of the contents of the letter until the record was produced in connection with this Application.

[68] Despite the fact that the CRA had informed TeleTech Canada that it would reconsider its position in the event that there was future compliance activity on the part of the IRS, it does not appear that there was any further consideration of TeleTech Canada's request for competent authority assistance at that time. No response to the IRS' November 7, 2006 letter has been produced, and it appears that the CRA simply closed its file with respect to this matter.

[69] Counsel for the respondent speculated as to possible reasons for the CRA's failure to act on the information provided by the IRS in 2006, pointing to what she says were factual errors in the

letter. However, counsel fairly conceded that no evidence has been provided to explain why the CRA did not reconsider its position in light of the new information received from the IRS.

[70] TeleTech Canada has not argued that there was a breach of procedural fairness in this matter, or that the CRA's November 6, 2006 First Denial Letter created a legitimate expectation on its part as to the process that would be followed in relation to its request for competent authority consideration.

[71] Rather, what TeleTech Canada argues is that even if it was not entitled to competent authority consideration at the time of the CRA's First Denial Letter in November of 2006, the CRA had clearly been made aware that there had been government action that has resulted in taxation not in accordance with the Treaty by the time it received the IRS letter in December of that year. As a result, that the CRA's finding that there had not been timely notice as set out in its Second Denial Letter on June 9, 2011 was clearly unreasonable.

[72] However, once again, TeleTech Canada is attempting to collaterally attack a CRA decision that it has not directly challenged by way of judicial review. As a consequence, I am not prepared to give effect to this argument.

[73] Before concluding, I would note that the companies are not necessarily left without a remedy for the alleged double taxation in this case. It may still be open to TeleTech US to seek relief from the IRS under the provisions of Article IX (4) of the Treaty. This provides that "In the event that the six-year notification period lapses without the above-mentioned notice being given,

the competent authority of the state which 'made or is to make' the first adjustment may nevertheless provide relief from double taxation".

Conclusion

[74] For these reasons, TeleTech Canada's application is dismissed. In accordance with the agreement of counsel, the parties shall have 30 days in which to provide brief written submissions on the question of costs, following which an order shall issue.

"Anne L. Mactavish"
Judge

Ottawa, Ontario
May 29, 2013

APPENDIX

***Convention between Canada and the United States of America with respect to Taxes on Income and on Capital*, 26 September 1980, Can. T.S. 1984 No. 15**

ARTICLE III

General Definitions

1. For the purposes of this Convention, unless the context otherwise requires: […]

(g) the term "competent authority" means:

(i) in the case of Canada, the Minister of National Revenue or his authorized representative; and

(ii) in the case of the United States, the Secretary of the Treasury or his delegate;

[…]

ARTICLE IX

Related Persons

1. Where a person in a Contracting State and a person in the other Contracting State are related and where the arrangements between them differ from those which would be made between unrelated persons, each State may adjust the amount of the income, loss or tax payable to reflect the income, deductions, credits or allowances which would, but for those arrangements, have been taken into account in computing such income, loss or tax.

2. For the purposes of this Article, a person shall be deemed to be related to another person if either person participates directly or

ARTICLE III

Définitions générales

1. Au sens de la présente Convention, à moins que le contexte n'exige une interprétation différente: […]

g) L'expression « autorité compétente » désigne:

(i) en ce qui concerne le Canada, le ministre du Revenu national ou son représentant autorisé; et

(ii) en ce qui concerne les États-Unis, le secrétaire au Trésor ou son représentant;

[…]

ARTICLE IX

Personnes liées

1. Lorsqu'une personne dans un État contractant et une personne dans l'autre État contractant sont liées et lorsque les arrangements entre elles diffèrent de ceux qui seraient convenus entre des personnes non liées, chaque État peut ajuster le montant des revenus, pertes ou impôts exigibles de façon à refléter les revenus, déductions, crédits ou allégements qui, sans ces arrangements, auraient été pris en considération dans le calcul de ces revenus, pertes ou impôts.

2. Au sens du présent article, une personne est considérée comme liée à une autre personne si elle participe directement ou

indirectly in the management or control of the other, or if any third person or persons participate directly or indirectly in the management or control of both.

indirectement à la direction ou au contrôle de l'autre ou si une ou plusieurs tierces personnes participent directement ou indirectement à la direction ou au contrôle des deux personnes.

3. Where an adjustment is made or to be made by a Contracting State in accordance with paragraph 1, the other Contracting State shall (notwithstanding any time or procedural limitations in the domestic law of that other State) make a corresponding adjustment to the income, loss or tax of the related person in that other State if:

3. Lorsqu'un ajustement est fait, ou est à faire, par un État contractant conformément au paragraphe 1, l'autre État contractant procède (nonobstant toute restriction relative aux délais ou à la procédure du droit interne de cet autre État) à un ajustement correspondant des revenus, pertes ou impôts de la personne liée dans cet autre État si:

(a) it agrees with the first-mentioned adjustment; and

a) Il est d'accord avec le premier ajustement; et

(b) within six years from the end of the taxable year to which the first-mentioned adjustment relates, the competent authority of the other State has been notified of the first-mentioned adjustment. The competent authorities, however, may agree to consider cases where the corresponding adjustment would not otherwise be barred by any time or procedural limitations in the other State, even if the notification is not made within the six-year period.

b) L'autorité compétente de l'autre État a été avisée du premier ajustement dans un délai de six ans à compter de la fin de l'année d'imposition à laquelle le premier ajustement est relié. Toutefois, l'autorité compétente peut accepter d'examiner les cas où l'ajustement correspondant ne serait pas autrement prescrit en vertu des délais ou empêché par la procédure du droit interne dans l'autre État, même si l'avis n'a pas été donné dans le délai de six ans.

4. In the event that the notification referred to in paragraph 3 is not given within the time period referred to therein, and the competent authorities have not agreed to otherwise consider the case in accordance with paragraph 3(b), the competent authority of the Contracting State which has made or is to make the first-mentioned adjustment may provide relief from double taxation where appropriate.

4. Si l'avis visé au paragraphe 3 n'est pas donné dans les délais visés audit paragraphe et si l'autorité compétente n'a pas accepté d'examiner le cas conformément au paragraphe 3b), l'autorité compétente de l'État contractant qui a fait, ou va faire, le premier ajustement peut éviter la double imposition lorsque le cas s'y prête.

5. The provisions of paragraphs 3 and 4 shall not apply in the case of fraud, willful default or neglect or gross negligence.

5. Les dispositions des paragraphes 3 et 4 ne s'appliquent pas en cas de fraude, d'omission volontaire ou de négligence ou de faute lourde.

[…]

ARTICLE XXVI

Mutual Agreement Procedure

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case in writing to the competent authority of the Contracting State of which he is a resident or, if he is a resident of neither Contracting State, of which he is a national.

2. The competent authority of the Contracting State to which the case has been presented shall endeavor, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Except where the provisions of Article IX (Related Persons) apply, any agreement reached shall be implemented notwithstanding any time or other procedural limitations in the domestic law of the Contracting States, provided that the competent authority of the other Contracting State has received notification that such a case exists within six years from the end of the taxable year to which the case relates.

3. The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. In particular, the competent

[…]

ARTICLE XXVI

Procédure amiable

1. Lorsqu'une personne estime que les mesures prises par un État contractant ou par les deux États contractants entraînent ou entraîneront pour elle une imposition non conforme aux dispositions de la présente Convention, elle peut, indépendamment des recours prévus par le droit interne de ces États, soumettre son cas par écrit à l'autorité compétente de l'État contractant dont elle est un résident ou, si elle n'est pas un résident d'aucun des États contractants, à celle de l'État contractant dont elle possède la nationalité.

2. L'autorité compétente de l'État contractant à qui le cas a été soumis s'efforce, si la réclamation lui paraît fondée et si elle n'est pas elle-même en mesure d'y apporter une solution satisfaisante, de résoudre le cas par voie d'accord amiable avec l'autorité compétente de l'autre État contractant, en vue d'éviter une imposition non conforme à la Convention. Sauf lorsque les dispositions de l'article IX (Personnes liées) s'appliquent, l'accord est appliqué quels que soient les restrictions relatives au temps ou à la procédure prévues par le droit interne des États contractants pourvu que l'autorité compétente de l'autre État contractant ait reçu, dans un délai de six ans à compter de la fin de l'année d'imposition à laquelle le cas s'applique, avis q'un tel cas existe.

3. Les autorités compétentes des États contractants s'efforcent, par voie d'accord amiable, de résoudre les difficultés ou de dissiper les doutes auxquels peuvent donner lieu l'interprétation ou l'application de la

authorities of the Contracting States may agree:

(a) to the same attribution of profits to a resident of a Contracting State and its permanent establishment situated in the other Contracting State;

(b) to the same allocation of income, deductions, credits or allowances between persons;

(c) to the same determination of the source, and the same characterization, of particular items of income;

(d) to a common meaning of any term used in the Convention;

(e) to the elimination of double taxation with respect to income distributed by an estate or trust;

(f) to the elimination of double taxation with respect to a partnership;

(g) to provide relief from double taxation resulting from the application of the estate tax imposed by the United States or the Canadian tax as a result of a distribution or disposition of property by a trust that is a qualified domestic trust within the meaning of section 2056A of the *Internal Revenue Code*, or is described in subsection 70(6) of the *Income Tax Act* or is treated as such under paragraph 5 of Article XXIX B (Taxes Imposed by Reason of Death), in cases where no relief is otherwise available; or

Convention. En particulier, les autorités compétentes des États contractants peuvent parvenir à un accord:

a) Pour que les bénéfices revenant à un résident d'un État contractant et à son établissement stable situé dans l'autre État contractant soient imputés d'une manière identique;

b) Pour que les revenus, déductions, crédits ou allocations revenant à des personnes soient attribués d'une manière identique;

c) Pour que la source d'éléments spécifiques de revenu et la nature de ces éléments soient déterminées d'une manière identique;

d) Pour que tout terme utilisé dans la Convention ait un sens commun;

e) Pour l'élimination de la double imposition à l'égard des revenus distribués par une succession ou une fiducie;

f) Pour l'élimination de la double imposition à l'égard d'une société de personnes;

g) Pour l'élimination de la double imposition résultant de l'application de l'impôt sur les successions perçu par les États-Unis ou de l'impôt canadien en raison d'une distribution ou disposition de biens par une fiducie qui est une fiducie américaine admissible (qualified domestic trust) au sens de l'article 2056A de l'Internal Revenue Code ou une fiducie visée par le paragraphe 70(6) de la Loi de l'impôt sur le revenu, ou qui est traitée comme telle en vertu du paragraphe 5 de l'article XXIX B (Impôts perçus en cas de décès), dans le cas où

aucun allégement n'est par ailleurs disponible; ou

(h) to increases in any dollar amounts referred to in the Convention to reflect monetary or economic developments.

h) Pour augmenter tout montant exprimé en dollars visé dans la Convention de façon à refléter l'évolution économique ou monétaire.

They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

Elles peuvent aussi se concerter en vue d'éliminer la double imposition dans les cas non prévus par la Convention.

4. Each of the Contracting States will endeavor to collect on behalf of the other Contracting State such amounts as may be necessary to ensure that relief granted by the Convention from taxation imposed by that other State does not enure to the benefit of persons not entitled thereto. However, nothing in this paragraph shall be construed as imposing on either of the Contracting States the obligation to carry out administrative measures of a different nature from those used in the collection of its own tax or which would be contrary to its public policy (ordre public).

4. Chacun des États contractants s'efforcera de percevoir pour le compte de l'autre État contractant les montants nécessaires afin d'assurer que les allégements d'impôt accordés dans cet autre État conformément à la Convention ne s'appliquent pas au bénéfice de personnes qui n'y ont pas droit. Toutefois, aucune disposition du présent paragraphe ne peut être interprétée comme imposant à l'un ou l'autre État contractant l'obligation de prendre des dispositions administratives de nature différente de celles utilisées pour la perception de ses propres impôts ou contraires à l'ordre public dans cet État.

5. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.

5. Les autorités compétentes des États contractants peuvent communiquer directement entre elles en vue de parvenir à un accord comme il est indiqué aux paragraphes précédents.

6. Where, pursuant to a mutual agreement procedure under this Article, the competent authorities have endeavored but are unable to reach a complete agreement in a case, the case shall be resolved through arbitration conducted in the manner prescribed by, and subject to, the requirements of paragraph 7 and any rules or procedures agreed upon by the Contracting States by notes to be exchanged through diplomatic channels, if:

6. Lorsque, conformément à une procédure amiable aux termes du présent article, les autorités compétentes ont tenté, sans succès, d’en arriver à un accord complet dans une affaire, cette affaire est résolue par arbitrage de la manière indiquée au paragraphe 7, et sous réserve des exigences de ce paragraphe, et aux règles ou aux procédures convenues entre les États contractants par échanges de notes diplomatiques si

(*a*) Tax returns have been filed with at least one of the Contracting States with respect to the taxable years at issue in the case;

(*b*) The case:

(i) Is a case that:

(A) Involves the application of one or more Articles that the competent authorities have agreed in an exchange of notes shall be the subject of arbitration; and

(B) Is not a particular case that the competent authorities agree, before the date on which arbitration proceedings would otherwise have begun, is not suitable for determination by arbitration; or

(ii) Is a particular case that the competent authorities agree is suitable for determination by arbitration; and

(*c*) All concerned persons agree according to the provisions of subparagraph 7(*d*).

7. For the purposes of paragraph 6 and this paragraph, the following rules and definitions shall apply:

(*a*) The term "concerned person" means the presenter of a case to a competent authority for consideration under this Article and all other persons, if any, whose tax liability to either Contracting State may be directly affected by a mutual agreement arising from that consideration;

a) Des déclarations de revenus ont été produites dans au moins un État contractant à l'égard des années d'imposition en cause;

b) L'affaire est, selon le cas :

(i) une affaire qui

(A) concerne l'application d'au moins un article qui est soumis à l'arbitrage conformément à des notes échangées entre les autorités compétentes, et

(B) n'est pas, comme le déterminent les autorités compétentes avant la date à laquelle des procédures d'arbitrage auraient autrement débuté, une affaire qui ne peut être déterminée par arbitrage,

(ii) une affaire particulière qui peut être déterminée par arbitrage selon les autorités compétentes;

c) Toutes les personnes concernées s'entendent selon les dispositions de l'alinéa *d*) du paragraphe 7.

7. Aux fins du paragraphe 6 et du présent paragraphe, les règles et les définitions suivantes s'appliquent :

a) L'expression « personne concernée » désigne la personne qui présente une affaire à une autorité compétente aux fins d'examen aux termes du présent article et toutes les autres personnes, le cas échéant, dont l'impôt à payer à l'un ou l'autre des États contractants peut être directement touché par un accord amiable découlant de cet examen;

(*b*) The "commencement date" for a case is the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities;

b) La « date de début » d'une affaire est la date la plus rapprochée à laquelle les renseignements requis pour lancer un examen approfondi en vue d'un accord amiable ont été reçus par les autorités compétentes des deux États contractants;

(*c*) Arbitration proceedings in a case shall begin on the later of:

c) Les procédures d'arbitrage dans une affaire commencent à la plus éloignée des dates suivantes :

(i) Two years after the commencement date of that case, unless both competent authorities have previously agreed to a different date, and

(i) la date qui suit de deux ans la date de début de cette affaire, sauf si les autorités compétentes des deux États contractants se sont déjà entendues sur une autre date;

(ii) The earliest date upon which the agreement required by subparagraph (*d*) has been received by both competent authorities;

(ii) la date la plus rapprochée à laquelle l'entente exigée à l'alinéa *d*) a été reçue par les autorités compétentes des deux États contractants;

(*d*) The concerned person(s), and their authorized representatives or agents, must agree prior to the beginning of arbitration proceedings not to disclose to any other person any information received during the course of the arbitration proceeding from either Contracting State or the arbitration board, other than the determination of such board;

d) Les personnes concernées, ainsi que leurs mandataires ou représentants autorisés, doivent s'entendre avant le début des procédures d'arbitrage pour ne divulguer à personne les renseignements reçus dans le cadre des procédures d'arbitrage de l'un ou l'autre des États contractants ou de la commission d'arbitrage, sauf la détermination de cette commission;

(*e*) Unless a concerned person does not accept the determination of an arbitration board, the determination shall constitute a resolution by mutual agreement under this Article and shall be binding on both Contracting States with respect to that case; and

e) Sauf si une personne concernée n'accepte pas la détermination d'une commission d'arbitrage, la détermination constitue une résolution par accord amiable aux termes du présent article et elle lie les deux États contractants à l'égard de cette affaire;

(*f*) For purposes of an arbitration proceeding under paragraph 6 and this paragraph, the members of the arbitration board and their staffs shall be considered "persons or authorities" to whom information may be

f) Aux fins d'une procédure d'arbitrage menée aux termes du paragraphe 6 et du présent paragraphe, les membres de la commission d'arbitrage et les membres de leur personnel sont considérés comme des

disclosed under Article XXVII (Exchange of Information) of this Convention.

« personnes ou des autorités » à qui des renseignements peuvent être divulgués aux termes de l'article XXVII (Échange de renseignements) de la présente Convention.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-788-11
STYLE OF CAUSE:	TELETECH CANADA, INC. v. MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 20, 2013
REASONS FOR JUDGMENT:	MACTAVISH J.
DATED:	May 29, 2013

APPEARANCES:

Salvador M. Borraccia Mark Tonkovich	FOR THE APPLICANT
Naomi Goldstein Jasmeen Mann	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BAKER & McKENZIE LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
WILLIAM F. PENTNEY Deputy Attorney General of Canada	FOR THE RESPONDENT