Docket: 2012-1779(GST)G

BETWEEN:

FORD MOTOR COMPANY OF CANADA, LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on January 23, 2015 at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Robert G. Kreklewetz John G. Bassindale
Counsel for the Respondent:	Catherine M.G. McIntyre

ORDER

Having heard the Respondent's motion to strike portions of the Appellant's Amended Notice of Appeal pursuant to section 65 of the *Tax Court of Canada Rules (General Procedure)*;

IT IS ORDERED THAT:

1. The Respondent's motion is dismissed in accordance with the attached Reasons for Order.

2. The Respondent will be allowed 60 days from the date hereof to file its Reply to the Amended Notice of Appeal.

3. Costs of this motion are awarded to the Appellant, payable by the Respondent, in any event of the cause. If the parties cannot agree on

the amount of costs within 30 days, the parties are to have a further 30 days to make written submissions thereon.

Signed at Ottawa, Canada, this 18th day of February 2015.

"Patrick Boyle"

Boyle J.

Citation: 2015 TCC 39
Date: 20150218
Docket: 2012-1779(GST)G

BETWEEN:

FORD MOTOR COMPANY OF CANADA, LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Boyle J.

[1] In this motion the Respondent is challenging whether certain of the issues raised in the Appellant's Amended Notice of Appeal were issues identified in, and reasonably described in, the Appellant's Notice of Objection to the underlying assessment as required by the so-called "specified person" rules in sections 301 and 306.1 of the *Excise Tax Act* (the "*ETA*"). It is not disputed that Ford Canada is a specified person as defined in subsection 301(1) of the *ETA*.

[2] This is one of a number of similar motions brought by the Crown challenging notices of appeal filed by Ford Motor Company of Canada, Limited ("Ford Canada") and related Ford companies under the *ETA*. The other motions are being held in abeyance pending the decision in this case. This motion was brought prior to the Crown filing a Reply in response to the Amended Notice of Appeal.

[3] The specific issue to be decided on this motion is whether Ford Canada's Notice of Objection "reasonably describes each issue to be decided" as required by paragraph 301(1.2)(*a*). In this motion the Crown is not challenging whether Ford Canada's Notice of Objection complied with paragraph 301(1.2)(*b*) dealing with the quantum of each issue. The Crown's position with respect to compliance with paragraph 301(1.2)(*c*), which requires that the facts and reasons relied on be provided, is slightly more nuanced. The Crown is not in its motion disputing that a notice of appeal can include facts and reasons not provided in the notice of objection, however the Respondent maintains that the provision of additional facts

not set out in the notice of objection cannot be used to help determine whether the notice of objection identifies an issue and reasonably describes it for purposes of complying with paragraph 301(1.2)(*a*).

A. Facts

[4] The evidence in this motion went in by way of affidavits. The Respondent filed the Affidavit of Catherine Rissanen, a Litigation Officer with the Canada Revenue Agency ("CRA"), to establish that Ford Canada was a specified person. The Respondent also filed the Affidavit of Alan Seenan, the CRA Appeals Officer who had carriage of the Notice of Objection in question. The Appellant filed the affidavit of Barbara Hoffmann who is responsible for indirect tax compliance at Ford Canada.

The Amended Notice of Appeal:

[5] The impugned paragraphs of the Amended Notice of Appeal relate to two of the three matters raised in the Amended Notice of Appeal. The first is a claim for additional input tax credits ("ITCs") in the amount of $498,386 not claimed by Ford Canada when initially filing its returns. As described below, this amount is the remainder of subsequently identified unclaimed ITCs requested by Ford Canada during the audit net of what was allowed by CRA at the Objection stage.

[6] The second question involves Ford Canada's ability to revise the foreign exchange conversion methodology used by it in computing ITCs for its US$ denominated inputs from that used by it when initially filing its returns.

The Reassessment:

[7] The Notice of Reassessment in question is a single page. It is comprised principally of numbers alongside various summary descriptions of no more than four words. It states that "The details of your assessment are shown on the Statement of Audit Adjustments".

[8] Since a GST/HST Notice of Reassessment only provides a skeletal description and summary of the adjustments made in a reassessment, and a Statement of Audit Adjustments is a contemporaneous CRA document relating to and referred to in the reassessment, the Relevant Statement of Audit Adjustments

might often prove to be a useful and sensible document to review and consider as it would clarify how CRA chose to describe items upon reassessing that the taxpayer is responding to in its objection.

[9] I assume that it was simply not relevant in this particular case as the Appellant is not objecting to or appealing unfavourable adjustments made by the auditor, but favourable adjustments requested by the Appellant of the auditor for which the auditor did not make any reassessment.[1]

[10] The Notice of Reassessment indicates Ford Canada's "Net Tax Assessed" in the period was almost 2 billion dollars and that the "Total Adjustments for Assessment Period" was approximately $4,000,000. The adjustments are summarized as "Adjustments to GST/HST" approximately $500,000, "Adjustments to ITC" approximately $3,500,000, and "Adjustments to GEN" approximately $60,000.

The Notice of Objection:

[11] Ford Canada's Notice of Objection addresses these issues as follows:

> **1. Objection of denial of right to be audited to net tax[2]**
>
> **Facts and Background**
>
> Ford Motor Company of Canada, Limited (Ford) underwent a GST audit for the period October 1 1996 to June 30 1999. Before the audit was completed, Ford informed the auditor that we had discovered several areas where there were (1) unclaimed ITCs […] and (3) foreign exchange adjustments related to the audit period. Ford requested that these items be taken into consideration before the audit was completed and the Notice of Assessment was raised.
>
> A Notice of Assessment was issued without providing Ford an opportunity to review the final assessment amounts. Ford's request to include the items indicated above as part of the audit was not acted upon by the auditor – none of these items was included as an offset in the Notice of Assessment.

[1] The adjustments made by CRA in the reassessment objected to are described in paragraph 3 of the Seenan Affidavit.

[2] The reference to the right to be audited to net tax appears to be a reference to paragraph 64 of Justice D'Arcy's decision in *Welch v. The Queen*, 2010 TCC 449.

Unclaimed ITCs

Unclaimed ITCs related to taxable purchases made during the audit period totalled $760,195.71 and were not taken into consideration during the audit.

[…]

Foreign Exchange Adjustment

Many of Ford's expenditures were contracted in foreign currencies.

Before the audit was completed, Ford sought to adjust their foreign exchange conversion methodology to comply with ETA legislation, regulations, and policy statements. The value for consideration of foreign dollar ITCs was converted to Canadian currency using Bank of Canada rates on the day consideration for the supply was made. This resulted in additional ITCs of $1,095,712.24 for the audit period.

Reasons for Objection

[…]

Conclusion

Ford should have been given the opportunity to review the final audit adjustments before the Notice of Assessment was issued.

Section 296 clearly directs the Minister to assess the net tax of a taxpayer.

Section 296(2) clearly directs the Minister to take unclaimed ITCs into consideration. Section 296(2.1) directs the Minister to apply allowable rebates against the net tax amount. Section 159 and GST Memoranda 300-7-10 outline the options available to a taxpayer in determining the Canadian currency amount of a foreign currency transaction.

Ford's request that the unclaimed ITCs … and the Foreign Exchange Adjustments be taken into consideration in assessing the net tax amount should have been granted.

Relief Sought

Unclaimed ITCs

> Ford respectfully requests that the Minister take the allowable credits into account and reduce the assessed amount accordingly.
>
> […]
>
> Foreign Exchange Adjustments
>
> Ford respectfully requests that the foreign exchange conversion methodology be adjusted to comply with ETA legislation, regulations, and policy statements.

The Report on Objection:

[12] The Report on Objection was prepared by Mr. Seenan, the Appeals Officer, and signed off on by his Team Leader and the Chief of Appeals. This report describes the matters raised by Ford Canada in its Notice of Objection as follows:

> **(1) ISSUES RAISED BY OBJECTOR**
> a. Denial of right to be audited to net tax
> - Unclaimed Input Tax Credits of $760,195.71
> […]
> - Foreign Exchange Adjustment $1,095,712.24
> […]
>
> **(2) REVIEW OF EACH VALID ISSUE UNDER OBJECTION**
> **Part a: Unclaimed Credits**
> (I) BASIS OF (RE)ASSESSMENT
> (a) Facts
> 1. Unclaimed ITCs – Audit did not consider any unclaimed credits.
> […]
> 2. Foreign Exchange Adjustment – Audit did not consider this adjustment.
> […]
>
> (II) REASONS FOR OBJECTION
> (a) Facts
> 1. Ford Motor Company of Canada Limited ('Ford Motor') underwent a GST audit for the period October 1, 1996 to June 30, 1999. Before the audit was completed, Ford Motor informed the auditor that they had discovered several areas where there were unclaimed ITCs, […] and foreign exchange adjustments related to the audit period. Ford Motor requested that these items be taken into consideration before the audit was completed and a Notice of Assessment was raised.

A Notice of Assessment was issued without providing Ford an opportunity to review the final assessment amounts. Ford's request to include the items indicated as part of the audit was not acted upon by the auditor – none of these items were included as an offset in the Notice of Assessment.

2. Unclaimed ITCs – Unclaimed ITCs related to taxable purchases made during the audit period totalled $760,195.71 were not taken into consideration during the audit.

[…]

4. Foreign Exchange Adjustment – Many of Ford Motor's expenditures were contracted in foreign currencies. Before the audit was completed, Ford Motor sought to adjust their foreign exchange conversion methodology to comply with ETA legislation, regulations, and policy statements. The value for consideration of foreign dollar ITCs was converted to Canadian currency using Bank of Canada rates on the day consideration for the supply was made. This resulted in additional ITCs of $1,095,712,24 for the audit period.

   Ford Motor respectfully request that the foreign exchange conversion methodology be adjusted to comply with ETA legislation, regulations, and policy statements.

(III) APPEALS DECISION

(a) Facts

1. Unclaimed ITCs

   A referral was sent to the Audit Division of the Hamilton TSO to review the request to allow additional ITCs of $760,195.72. A review was done and the Audit Large File Section in the Hamilton TSO recommended allowing additional ITCs of $261,809.42. Adjustment discussed and agreed upon between Barbara Hoffmann at Ford Motor and Reg Owens/Kelle Patterson, CRA Hamilton Audit Division on April 28, 2004.

[…]

3. Foreign Exchange Adjustment

   A referral was sent to the Audit Division of the Hamilton TSO to review the request to allow an additional ITC for foreign exchange adjustment of $1,095,712.24. A review was done and the Audit Large File Section in the Hamilton TSO recommended allowing additional ITCs of $849,286.72.

   Audits explanation is as follows: The registrant records invoices received in US funds using a bookkeeping rate dictated by the US

head office. The ETA is very specific as to what the acceptable exchange rates are that can be used to translate the US to Canadian funds and what methods are acceptable. The rate being used by the registrant in their books and records is clearly unacceptable. Nevertheless, the auditor checked with Rulings and received an informal opinion that ITCs claimed do not have to correspond to the value posted in the books and records and the claim could not be denied for this reason.

Audit recommended to allow additional ITCs of $849,286.72. Adjustment discussed and agreed upon between Barbara Hoffmann at Ford Motor and Reg Owens/Kelle Patterson, CRA Hamilton Audit Division on April 28, 2004.

Appeals further reviewed this issue and recommends not to allow any additional ITCs based on the foreign conversions. FMCC is asking to retroactively change its method of converting foreign currency to Canadian currency. FMCC claimed an ITC on all of its foreign purchases.

In this case the conversion method originally used by FMCC to calculate an ITC is not in dispute and technically the Minister may accept the method used since is was used consistently.

It should be noted that it was FMCC who decided which rate it would use to convert its foreign transactions and the method FMCC used to convert its foreign transactions to Canadian currency was not challenged by CRA. It has been used consistently by FMCC for the past several years.

[…]

(b) Law

1. Unclaimed ITCs

Subsection 296(2) of the ETA allows for unclaimed credits. This subsection requires the Minister to take allowable unclaimed credits into account when assessing the net tax for the particular reporting period.

[…]

3. Foreign Exchange Adjustment

1. Section 159 of the ETA deals with situations where payment for a supply is expressed in foreign currency. For purposes of

> calculating any GST payable, the value of consideration is determined by reference to the Canadian dollar equivalent on the date consideration is payable. The section also permits the Minister to accept a different method of determining the exchange value currency.
>
> […]
>
> 2. Section 159 of the ETA reads,
> - Where the consideration for a supply is expressed in a foreign currency, the value of the consideration shall, for the purposes of this Part, be computed on the basis of the value of that foreign currency in Canadian currency on the day the tax is payable, or on such other day as is acceptable to the Minister.
>
> The ETA does not specifically state the source that *must* be used to translate foreign currency to Canadian currency, and the Minister is given the discretion to accept the conversion on a date other than the day the tax is payable.

[13] Paragraphs 3 through 5 refer to the Minister's delegation of powers, and to CRA publications dealing with acceptable exchange rates and foreign currency values. Paragraph 6 deals with the definition of "amount" in section 123 of the *ETA*. Paragraph 7 reproduces subsection 296(2) of the *ETA* dealing with unclaimed credits. This part ends with paragraph 8 which reads as follows:

> 8. Since the ITC on the property or services have already been claimed by the registrant subsection 296(2) does not apply and the Minister is not required to allow this additional credit.

CRA's Decision on Objection:

[14] CRA issued its decision on Ford Canada's objection by letter dated February 7, 2012. The Objection was allowed, in part, and the adjustments allowed are reflected in the further reassessments which form the basis of the Amended Notice of Appeal in this Court.

[15] The Decision on Objection addresses the two relevant matters as follows:

> The basis of your objection is as follows:

1) whether the unclaimed input tax credits in the amount of $760,195.71 should have been taken into consideration during the audit to reduce the net tax assessed

[…]

3) whether the retroactive change to the foreign exchange conversion methodology should have been taken into consideration during the audit to reduce the net tax assessed in the amount of $1,095,712.24

[…]

Issue No. 1:
You have requested that the Minister allow you additional input tax credits in the amount of $760,195.72. A review [of] the facts and documents submitted indicated that you are entitled to additional input tax credits in the amount of $261,809.42 which was agreed upon by your Frankie Fenton in her letter dated January 17, 2006. Therefore, the GST/HST return(s) will be adjusted accordingly. (See Schedule "A" attached).

Subsection 296(2) of the Excise Tax Act authorizes the Minister to take into account an allowable credit (i.e., an input tax credit or deduction that was not previously claimed by the person) when the Minister assesses the net tax of a person for a particular reporting period.

[…]

Issue No. 3:
Section 159 of the ETA states that, where the consideration for a supply is expressed in a foreign currency, the value of the consideration shall, for the purposes of this Part, be computed on the basis of the value of that foreign currency in Canadian currency on the day the tax is payable, or on such other day as is acceptable to the Minister.

The ETA does not specifically state the source that must be used to translate foreign currency to Canadian currency. However, Policy Statement P-222 states that to convert from foreign currency into Canadian currency for the purposes of Part IX of the ETA, a person may only use the rate of exchange from:

- the source used for an actual conversion;
- the source the person typically uses for actual conversions;
- a Canadian chartered bank;
- the Bank of Canada; or
- the rate provided by the Customs Branch of the Department for purposes of converting the value of duty of imported goods.

When a source other than the source used for an actual transaction is selected, that source must be used consistently and for a reasonable period of time (such as one year).

When converting foreign currency into Canadian dollar, Ford Motor Company of Canada, Limited used an exchange rate dictated by its US head office. This rate was never in dispute and was accepted by both Ford Motor Company of Canada, Limited and the Canada Revenue Agency.

Based on the foregoing facts and law, your request that the foreign exchange methodology be be (*sic*) adjusted to allow you additional input tax credits in the amount of $1,095,712.24 is disallowed.

The Seenan Affidavit:

[16] The relevant portions of the Seenan Affidavit are as follows:

4. The Appellant filed a Notice of Objection dated February 21, 2003. A copy of the Notice of Objection is attached hereto and marked as **Exhibit "B"** to this Affidavit.

5. At Objections the Appellant raised issues which may be summarized as follows:

Item	**Issue**
1)	whether the unclaimed ITCs in the amount of $760,195.71 should have been taken into consideration during the audit to reduce the net tax;
[…]	
3)	whether the retroactive change to the foreign exchange conversion methodology should have been taken into consideration to reduce the net tax assessed in the amount of $1,095,712.24;
[…]	

6. The Appellant provided additional information by letters dated June 8, 2005, January 17, 2006, August 30, 2011 and November 15, 2011. A copy of these letters are attached hereto and marked as Exhibits **"C"**, **"D"**, **"E"**, and **"F"** respectively to this Affidavit.

[17] I note that none of the letters referred to in paragraph 6 of the Seenan Affidavit included any additional information whatsoever regarding either the unclaimed ITC matter or the foreign exchange conversion matter. They all dealt with one or both of two separate matters identified in the Notice of Objection.

[18] The Seenan Affidavit continued:

> 7. During my review at Objections, I considered all of the issues raised by the Appellant in its Notice of Objection. A copy of the Report on Objection is attached hereto and marked as **Exhibit "G"** to this Affidavit.
>
> […]
>
> 9. By letter dated February 7, 2012, the Minister advised the Appellant that the amount of $260,809.42 was allowed with respect to the unclaimed ITCs (item 1 in the chart above) but that all of the remaining issues were confirmed. A copy of this letter is attached hereto and marked **Exhibit "H"** to this Affidavit.

B. The Law

[19] The relevant provisions of the GST/HST Legislation in the *ETA* provide:

301 [Notice of objection] -- **(1) Meaning of "specified person" --** Where an assessment is issued to a person in respect of net tax for a reporting period of the person, […] for the purposes of this section, the person is a "specified person " in respect of the assessment or a notice of objection to the assessment if	**301 (1) Personne déterminée --** Pour l'application du présent article, la personne à l'égard de laquelle est établie une cotisation au titre de la taxe nette pour sa période de déclaration, […] est une personne déterminée relativement à la cotisation ou à un avis d'opposition à celle-ci si, selon le cas :
[…]	[…]
(b) […] the person's threshold amounts, determined in accordance with subsection 249(1), exceed $6 million for both the person's fiscal year that includes the reporting period and the person's previous fiscal year.	b) […] le montant déterminant qui lui est applicable, déterminé en conformité avec le paragraphe 249(1), dépasse 6 000 000 $ pour son exercice qui comprend cette période ainsi que pour son exercice précédent.
(1.1) Objection to assessment -- Any	**(1.1) Opposition à la cotisation --** La

person who has been assessed and who objects to the assessment may, within ninety days after the day notice of the assessment is sent to the person, file with the Minister a notice of objection in the prescribed form and manner setting out the reasons for the objection and all relevant facts.

personne qui fait opposition à la cotisation établie à son égard peut, dans les 90 jours suivant le jour où l'avis de cotisation lui est envoyé, présenter au ministre un avis d'opposition, en la forme et selon les modalités déterminées par celui-ci, exposant les motifs de son opposition et tous les faits pertinents.

(1.2) Issue to be decided [must be specified] -- Where a person objects to an assessment in respect of which the person is a specified person, the notice of objection shall

(1.2) Question à trancher -- L'avis d'opposition que produit une personne qui est une personne déterminée relativement à une cotisation doit contenir les éléments suivants pour chaque question à trancher

(a) reasonably describe each issue to be decided;

a) une description suffisante;

(b) specify in respect of each issue the relief sought, expressed as the change in any amount that is relevant for the purposes of the assessment; and

b) le redressement demandé, sous la forme du montant qui représente le changement apporté à un montant à prendre en compte aux fins de la cotisation;

(c) provide the facts and reasons relied on by the person in respect of each issue.

c) les motifs et les faits sur lesquels se fonde la personne.

306.1 (1) Limitation on appeals to the Tax Court -- Despite sections 302 and 306, if a person to which subsection 301(1.2) or (1.21) applies has filed a notice of objection to an assessment, the person may appeal to the Tax Court to have the assessment vacated, or a reassessment made, only with respect to

306.1 (1) Restriction touchant les appels à la Cour canadienne de l'impôt -- Malgré les articles 302 et 306, la personne à laquelle le paragraphe 301(1.2) ou (1.21) s'applique qui produit un avis d'opposition à une cotisation ne peut interjeter appel devant la Cour canadienne de l'impôt pour faire annuler la cotisation, ou en faire établir une nouvelle, qu'à l'égard des questions suivantes :

(a) an issue in respect of which the person has complied with subsection

a) une question relativement à laquelle elle s'est conformée au paragraphe

301(1.2) or (1.21) in the notice, or […]	301(1.2) ou (1.21) dans l'avis, mais seulement à l'égard du redressement, tel qu'il est exposé dans l'avis, qu'elle demande relativement à cette question; [Je souligne.]
and, in the case of an issue described in paragraph (a), the person may so appeal only with respect to the relief sought in respect of the issue as specified by the person in the notice. [Emphasis added.]	

[20] The parallel provisions of the *Income Tax Act* (the "*ITA*") are found in sections 165 and 169. As some of the relevant jurisprudence considers the *ITA* provisions, they are set out below:

165(1.11) Objections by large corporations -- Where a corporation that was a large corporation in a taxation year (within the meaning assigned by subsection 225.1(8)) objects to an assessment under this Part for the year, the notice of objection shall	**165(1.11) Oppositions par les grandes sociétés --** Dans le cas où une société qui était une grande société au cours d'une année d'imposition, au sens du paragraphe 225.1(8), s'oppose à une cotisation établie en vertu de la présente partie pour l'année, l'avis d'opposition doit, à la fois :
(a) reasonably describe each issue to be decided;	a) donner une description suffisante de chaque question à trancher;
(b) specify in respect of each issue, the relief sought, expressed as the amount of a change in a balance (within the meaning assigned by subsection 152(4.4)) or a balance of undeducted outlays, expenses or other amounts of the corporation; and	b) préciser, pour chaque question, le redressement demandé, sous la forme du montant qui représente la modification d'un solde, au sens du paragraphe 152(4.4), ou d'un solde de dépenses ou autres montants non déduits applicable à la société;
(c) provide facts and reasons relied on by the corporation in respect of each	c) fournir, pour chaque question, les motifs et les faits sur lesquels se fonde

issue.	la société.
169(2.1) Limitation on appeals by large corporations -- Notwithstanding subsections (1) and (2), where a corporation that was a large corporation in a taxation year (within the meaning assigned by subsection 225.1(8)) served a notice of objection to an assessment under this Part for the year, the corporation may appeal to the Tax Court of Canada to have the assessment vacated or varied only with respect to	**169(2.1) Restrictions touchant l'appel d'une grande société** -- Malgré les paragraphes (1) et (2), la société qui était une grande société au cours d'une année d'imposition, au sens du paragraphe 225.1(8) et qui signifie un avis d'opposition à une cotisation établie en vertu de la présente partie pour l'année ne peut interjeter appel devant la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation qu'à l'égard des questions suivantes:
(a) an issue in respect of which the corporation has complied with subsection 165(1.11) in the notice, or	a) une question relativement à laquelle elle s'est conformée au paragraphe 165(1.11) dans l'avis, mais seulement à l'égard du redressement, tel qu'il est exposé dans l'avis, qu'elle demande relativement à cette question;
[…] and, in the case of an issue described in paragraph (a), the corporation may so appeal only with respect to the relief sought in respect of the issue as specified by the corporation in the notice.	

[21] The Technical Notes that accompanied the 1995 introduction of the *ITA* provisions provide:

> **165(1.11)-(1.14) Feb. 1995 TN**: Section 165 provides rules governing a taxpayer's right to object to an assessment or determination by the Minister of National Revenue of tax, interest, penalties and certain other amounts under the Act.
>
> New subsection 165(1.11) requires large corporations to reasonably describe the issues under dispute, to specify the amount of relief sought in respect of each issue, and to provide facts and reasons in support of the objection. In addition, under new subsections 165(1.13) and (1.14) only those issues and related relief set out in a valid notice of objection may be the subject of a further objection or an

appeal taken before the courts. New issues raised by Revenue Canada on a subsequent reassessment may be the subject of a separate objection, which will itself be required to satisfy the new requirements in section 165.

New subsection 165(1.11) provides a number of requirements for notices of objection served by large corporations. A corporation's notice of objection must comply with the requirements if the objection is from an assessment of a taxation year in which the corporation is a large corporation within the meaning of subsection 225.1(8). Under that provision, a corporation is a large corporation in a particular taxation year if tax under Part I.3 is payable by it for the particular year or if, at the end of the year, it is related to a corporation that is itself a large corporation.

Paragraph 165(1.11)(a) states that a corporation must reasonably describe each issue which is to be decided.

Paragraph 165(1.11)(b) requires a notice of objection to specify the relief sought by the taxpayer in respect of each issue in the notice. The relief sought may be expressed as a change in a "balance" of the taxpayer as defined in subsection 152(4.4), which includes references to a taxpayer's income, taxable income, taxable income earned in Canada, loss for the year, or the tax or any amount payable by the taxpayer for the year. The relief sought may also be expressed as a change in a balance of undeducted outlays, expenses or other amounts of the taxpayer. The provision is not intended to require a taxpayer to calculate all of the potential effects that interdependent or related issues may have on each other, but only that the relief sought in respect of a particular issue be quantified in isolation of any other issues in a notice of objection.

Paragraph 165(1.11)(c) requires a notice of objection to include a statement of facts and reasons which could be relied upon by a taxpayer. Additional facts or reasons may be raised by a taxpayer subsequent to the filing of a notice of objection.

Any notice of objection served before 1995 may be revised to meet the new requirements if the taxpayer submits the required information to a Chief of Appeals in a district office or taxation centre of the Department of National Revenue before March 1995.

New subsection 165(1.12) allows the Minister of National Revenue to request the taxpayer to specify the required information with respect to an issue where it was not specified in the notice of objection. If the taxpayer specifies the information in writing within 60 days of the request, it will be treated as having been specified in the notice of objection.

> New subsection 165(1.13) precludes large corporations from raising new issues or revising the relief sought with respect to an issue in an objection to an assessment made under subsection 165(3) except where the assessment was made pursuant to a notice of objection to another assessment made under any of the provisions or circumstances referred to in paragraph 165(1.1)(a). Subsection 165(1.1) already restricts objections to assessments made under any of the provisions or circumstances referred to in paragraph 165(1.1)(a).
>
> New subsection 165(1.14) provides that the limitation in subsection 165(1.13) does not apply to limit a taxpayer's right to object to a new issue raised for the first time by Revenue Canada in an assessment made under subsection 165(3).
>
> [Emphasis added.]

[22] In *Potash Corp. of Saskatchewan Inc.*, 2003 FCA 471 the Federal Court of Appeal considered the following portions of the paper "Draft Legislation on Income Tax Objections and Appeals" by R.M. Beith at the 1994 Annual Conference of the Canadian Tax Foundation:[3]

> 4 The Large Corporation Rules were enacted in 1995 to discourage large corporations from engaging in a full reconstruction of their income tax returns for a particular year, after the objection or appeal process had started, based on developing interpretations and the outcome of court decisions in litigation involving other taxpayers. The reasons for these subsections are well-stated by R. M. Beith in his paper entitled "Draft Legislation on Income Tax Objections and Appeals" as outlined in the Report of Proceedings of the Forty-Sixth Tax Conference, 1994 Conference Report (Toronto: Canadian Tax Foundation, 1995), 34:2.
>
> > One of the reasons for the legislation is to identify disputed issues much sooner so that a taxation year's ultimate tax liability can be determined in a timely way.
> >
> > Owing to the complexity of the law and the number of issues, for many years a number of large corporations have had some of their taxation years left open through outstanding notices of objection or appeals, so that they have been able to raise new issues based on emerging interpretations and the outcome of court decisions challenged by other taxpayers.

[3] Fellow long in the tooth tax weenies may have their memories further refreshed about the introduction of the large corporation rules upon reading David Sherman's commentary to *Telus* in the Appellant's Book of Authorities.

> Recently, a particular problem was identified by the auditor general and the Public Accounts Committee. A case dealing with the calculation of the "resource allowance" which was decided against the department, resulted in claims not only based on the particular facts decided by the court but in respect of a new issue concerning the calculation of the "resource allowance". These claims, both directly and indirectly from the court decision, involved significant amounts of tax and interests.
>
> In summary, it is essential that revenues be more predictable and therefore that potential liabilities be identified and resolved within a more reasonable time.

Simply put, Parliament wants the Minister of National Revenue (the Minister) to be able to assess at the earliest possible date both the nature and quantum of pending tax litigation and its potential fiscal impact.

[Emphasis added.]

[23] There have been several decisions from the Federal Court of Appeal and several from this Court considering these *ETA* or *ITA* restrictions. A Supreme Court of Canada leave application was turned down in *Potash*. An appeal is pending before the Federal Court of Appeal in another. A review of these decisions shows they are consistent, clear, logical and capable of being applied. From these existing decisions general conclusions and observations on the interpretation and on the application of the designated person/large corporation restrictions can be clearly identified.

Telus Communications:

[24] In *Telus Communications (Edmonton) Inc. v. Canada*, 2005 FCA 159 the taxpayer was a specified person and raised in its Notice of Appeal in the Tax Court of Canada the issue of due diligence with respect to automatic penalties under the *ETA* upon being assessed for additional net tax. The taxpayer's Objection did not mention the penalties assessed, although they would be automatically reduced to the extent Telus was successful on the merits of the issue(s) objected to. Telus' Objection was partially successful and it was reassessed. Telus filed a second Objection repeating the substantive grounds raised in the first Objection and requesting the remaining adjustments be vacated "along with the associated interest and penalties".

[25] In Telus' appeal before the Tax Court of Canada, the Crown moved to strike the amendments to the Notice of Appeal originally filed which added the issue of the due diligence defence to the penalties. The Crown had already filed its Reply to the Amended Notice of Appeal and the issue before the courts was whether the Crown was precluded from seeking to strike something to which it had already responded and joined issue with (sometimes referred to as pleading over). Justice O'Connor dismissed the Crown's motion on the basis that it was too late, the Crown having already joined issue. The Federal Court of Appeal reversed the trial judge. Justice Desjardins wrote for the Court:

> 17 I find that, notwithstanding the pleadings, the Tax Court, in an appeal involving a "specified person", has no jurisdiction to deal with an issue that was not properly raised in the notice of objection.
>
> 18 A person who is a "specified person" has the right to object to any or all assessment issues. In doing so, however, it must file a notice of objection which accords with the requirements of subsections 301(1.2) of the Act. That is, the issue must be reasonably described, it must be quantified, and it must be supported by a statement of facts and reasons.
>
> 19 A person who is a "specified person" may also object to a reassessment made by the Minister after considering the notice of objection, but only with respect to the issues raised in a prior notice of objection or new issues raised in a reassessment (subsections 301(1.4) and (1.5) of the Act).
>
> 20 Identical restrictions apply in the case of an appeal to the Tax Court. Under section 302 of the Act, a person cannot appeal unless he first serves the Minister with a notice of objection within the prescribed time limits. This right of appeal is further restricted for specified persons by subsection 306.1(1) of the Act in that the specified person may appeal to the Tax Court only with regard to an issue properly raised in its notice of objection and only with respect to the relief sought in respect of that issue as specified in the notice of objection. An issue is properly raised in a notice of objection only by complying with subsection 301(1.2) (subject to the exception in subsection 301(1.5) which has no application in this case).
>
> 21 In the case at bar, the issue of due diligence was never raised in any notice of objection. The respondent's request to vacate "associated interest and penalties", which was mentioned only in its notice of objection to the reassessment, was not a reference to the issue of due diligence but was consequential to the reduction of interest and penalty flowing from the requested

> reduction of the net tax adjustments. The respondent cannot therefore raise due diligence in its amended amended notice of appeal before the Tax Court.
>
> [Emphasis added.]

Potash Corporation:

[26] The taxpayer in *Potash* was a "large corporation" pursuing an *ITA* appeal. In its tax return for the year in question the corporation claimed amounts in respect of the "resource allowance" and "earned depletion". Under the *ITA* both resource allowance and earned depletion are determined by a formula that includes "resource profits". Resource profits are computed by a prescribed formula that involves many factual elements. The reassessments excluded a number of specific items/categories of income from the taxpayer's computation of resource profits and these were described by category, amount and taxation year in a schedule attached to the reassessments. In its objections the taxpayer described the specific items of miscellaneous income that it sought to have included in its resource profits because such income was related to and interconnected with the business of producing and marketing potash. The taxpayer's objections identified that this in turn directly affected the amounts of its resource allowance and earned depletion. The taxpayer described such miscellaneous income items using the same terms and amounts that the Minister of National Revenue (the "Minister") had used in the schedule to the reassessments.

[27] The taxpayer's Notice of Appeal in the Tax Court of Canada substantially repeated what was in the objections relating to the computation of resource profits, with the same particulars. Prior to the trial the taxpayer sought to amend its Notice of Appeal to add additional miscellaneous income items that it could also identify as having not been included by it in computing its resource profits in its returns.

[28] In this Court, Justice Beaubier allowed the motion to amend on the basis the new items of miscellaneous income satisfied the requirements of the large corporation rules.

[29] In reversing the trial judge Justice Malone wrote for the Federal Court of Appeal:

> 19 In this case the Judge commenced his statutory analysis from the position that the Large Corporation Rules should be interpreted strictly because they

"derogate from and restrict the broad ability of taxpayers to … appeal assessments". That was an incorrect approach. The Supreme Court of Canada has rejected the strict construction of taxation statutes, […]

[…]

In my view, the Judge's misapprehension of the proper interpretive approach led him to an erroneous conclusion on the question of what constituted a reasonable description of the issue. As a result, applying the correct interpretive approach, this court must determine what constitutes a reasonable description of the issue.

[…]

21 The Large Corporation Rules place further requirements on large corporations that object to an assessment by the Minister. The main issue in this case is the meaning to be given to the words "each issue" in the phrase "reasonably describe each issue to be decided" in paragraph 165(1.11)(a). In interpreting those words, the Judge wrote:

> The issue is the legal matter which the taxpayer contests with the CCRA. It is not required to be described exactly, but if it was, it could be expressed in section numbers of the Income Tax Act, or in words taken from or paraphrased from those sections.

22 I do not agree with this statement. While a large corporation is not required to describe the issue "exactly", as the Judge states, it is required to describe the issue "reasonably". What is reasonable will differ in each case and will depend on what degree of specificity is required to allow the Minster to know each issue to be decided.

23 In reassessing PCS, the Minister set out the precise items of income which were being disallowed as part of resource profits (see paragraph 8). In filing its notice of objection, PCS objected to the disallowance of these same items of income, describing them in the same fashion as the Minister. That complied with paragraph 165(1.11)(a) because it gave sufficient certainty as to what issues were then under objection.

24 Contrary to the Judge's suggestion, it would not have been reasonable to simply say that the computation of "Resource Allowance" or "resource profits" was in issue, without specifying the particular elements of that computation that required a determination by the Minister or the Tax Court, as the case may be. That level of generality would render the Large Corporation Rules meaningless, defeating the purpose of their enactment.

> 25 The Judge's interpretation of paragraph 165(1.11)(a) could stand only if the language of the provision unambiguously required it, which is not the case here. It follows that the Judge erred in granting leave to amend the notice of appeal to include the five items referred to above, and to make consequential amendments to the quantum of the relief sought.
>
> 26 I recognize that this is a harsh result for PCS, and a harsh rule for large corporations. A large corporation that discovers an error in an income tax return after it has filed a notice of objection or a notice of appeal may find itself barred from taking proceedings to compel the Minister to correct the error. However, that is the result that Parliament intended.
>
> 27 The Judge made a number of comments relating to the statutory requirement to specify an "amount" for each issue. If he had determined, as he should have done, that PCS is not entitled to include the five disputed items in the notice of appeal, there would have been no need to discuss quantification at all. Nor is it necessary for me to comment on it. I prefer to leave open the question of whether the obligation to "specify in respect of each issue, the relief sought, expressed as the amount of a change in a balance (within the meaning assigned by subsection 152(4.4)) or a balance of undeducted outlays, expenses or other amounts of the corporation" necessarily binds a large corporation to the stated amount, or a less favourable amount. It is arguable that there may be situations where an amendment to a notice of appeal could be permitted if the amendment goes only to quantum and does not entail the raising of a new issue.
>
> [Emphasis added.]

Bakorp:

[30] The taxpayer in *Bakorp Management Ltd. v. The Queen*, 2014 FCA 104 was a large corporation pursuing an *ITA* appeal. The Federal Court of Appeal upheld the decision of Mr. Justice Miller of this Court to dismiss Bakorp's appeal because it did not comply with the large corporation rules. In its objection the taxpayer's first paragraph is "Issue: 1. Share redemption proceeds added to income as a deemed dividend. Taxation year March 10, 1995. Adjustments to deemed dividend dollars ($25,332,237)." The trial judge treated that as describing a desired $25,000,000 reduction, being that portion of a deemed dividend that the reassessment removed from its 1995 income. The aggregate deemed dividend reported by the taxpayer in its 1995 return had been $53,000,000. The trial judge described the issue set out in the Notice of Appeal as the taxpayer accepting the reassessments reduction of $25,000,000 of the deemed dividend from 1995, but

instead now wanting the $28,000,000 balance of the deemed dividend to be removed from 1995 income. That is, in the objection the taxpayer sought to have all of the deemed dividend included in 1995 and objected to the Minister's exclusion of $25,000,000, whereas in the Notice of Appeal the taxpayer wanted to also have the $28,000,000 balance of the deemed dividend reported by it in 1995 removed.

[31] In upholding the trial judge Justice Webb writing for the Federal Court of Appeal first addressed the question of what is meant by "issue" in the large corporation rules. He did this following the textual, contextual and purposive approach set out by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 and he quoted from paragraph 4 of *Potash* dealing with the purpose of the large corporation rules.

[32] After quoting paragraphs 21 through 24 of *Potash* on what is required to reasonably describe an issue, Justice Webb continues:

> 28 A general statement or question related to an amount that is to be determined for the purposes of the Act that would not allow the Minister to determine what is actually in dispute will not be a sufficient description of the issue. The examples cited as inadequate descriptions of an issue are a description of the issue as the computation of resource allowance or resource profits. In a similar vein, Justice Jorré of the Tax Court of Canada in *Canadian Imperial Bank of Commerce v. The Queen*, [2013 GTC 55] 2013 TCC 170 in dealing with the corresponding provisions in the *Excise Tax Act*, R.S.C. 1985, c. E-15, stated that a general description of the issue as the correct amount of tax owing would not be sufficient.
>
> 29 Paragraph 165(1.11)(b) of the Act provides that, in relation to each issue, the relief sought must be specified as a change in the balance of the items listed. This means that the issue must be reasonably described in a manner that would result in such quantification as a specified amount. For example, describing an issue as the computation of resource profits would not be sufficient as it would not be possible to ascertain from this description the specific change in any balance that is being requested. If however, the particular element of the computation that is in dispute is reasonably described, then the effect that the resolution of the dispute would have on the income of the corporation is capable of being quantified.
>
> […]

31 Bakorp argued that since a notice of objection was served in relation to the reassessment of Part IV tax, Bakorp obviously did not agree with the adjustment made by the Minister. Bakorp argues that this part of the notice of objection should be interpreted as a submission by Bakorp that the issue to be decided was the correct amount of dividends that Bakorp had received in its 1995 taxation year. I do not agree that even if this paragraph could be so interpreted, that this would be an adequate description of the issue for the purposes of subsection 165(1.11) of the Act as it applies for the purposes of Part IV.

32 In this notice of objection, the issue is stated to be "share redemption proceeds added to income as a deemed dividend". This does not identify any question to be adjudicated but is a cursory statement of what has transpired. The table included in the first paragraph of the notice of objection simply lists the actual adjustments that were made to the deemed dividends that were considered to have been received for the purposes of Part IV in the various years listed. There is nothing in this paragraph to provide any hint of the element or elements of the computation of the amount of dividends received by Bakorp in 1995 for the purposes of Part IV of the Act that would require a determination by the Minister or the Tax Court of Canada nor is there anything in this paragraph to indicate whether Bakorp is disputing the adjustment to the Deemed Dividend for 1995 on the basis that the adjustment should have been greater or smaller.

33 A description of the issue as "the correct amount of dividends that Bakorp received in 1995" does not lead to any quantification of the change in any balance other than as a range from nil to $52,912,264 as the amount of the dividend that Bakorp received in its 1995 taxation year. This description of the issue does not indicate anything about the question that must be answered to resolve this dispute.

34 The purpose of subsection 165(1.11) of the Act would be frustrated if this satisfied the requirement of a reasonable description of the issue. In this case, the reassessment is under Part IV of the Act. Part IV only imposes a tax on certain corporations that have received dividends. In this case there is no dispute that Bakorp was a private corporation and that it was not connected with 968649 Ontario Limited at any time during Bakorp's 1995 taxation year. Therefore, the only matter that could arise in relation to Part IV tax for 1995 would be the amount of the dividends that Bakorp had received in its 1995 taxation year. If the issue is simply the correct amount of dividends that Bakorp had received in 1995, this would mean that subsection 165(1.11) of the Act (as it applies for the purposes of Part IV) does not impose any requirement on a large corporation other than the requirement to object. This would also not satisfy the purpose of allowing the Minister to know the nature and quantum of tax litigation at the earliest possible date.

35 When the notice of objection is read as a whole, it is clear that Bakorp was taking the position that it had filed its Part IV return correctly and hence Bakorp was submitting that it should be paying more Part IV tax than was reassessed by the Minister. In paragraph 13 of the notice of objection, Bakorp provided a reconciliation of how Bakorp had accounted for the redemption proceeds in filing its returns under the Act. In particular for its 1995 taxation year Bakorp stated that it had reported $52,912,264 as a deemed dividend on its T2S(3). It also seems clear that Bakorp was taking the position that amounts were to be reported as any questions or disputes related to the adjustments to the amount to be paid on the redemption of the shares were resolved. Therefore, the issue in respect of which Bakorp complied with the provisions of subsection 165(1.11) of the Act, was the issue of whether Bakorp was correct in concluding that it had received $52,912,264 in dividends in 1995 for the purposes of Part IV on the basis that any question or dispute in relation to such amount had then been resolved. In this case the quantification of the amount is part of the description of the issue.

36 Therefore, Bakorp was restricted to being able to only appeal in respect of this issue. However, this is not the issue that is raised in the notice of appeal. Paragraphs 13 to 16 of the notice of appeal are as follows:

> Part III – Issues
>
> 13. The issue with respect to the Assessment is whether the 1995 Receipt is properly taxable in the Appellant's 1995 Year.
>
> Part IV - Statutory Provisions
>
> 14. The appellant relies on, *inter alia*, section 3, subsections 84 (3) and 84 (7) of the ITA.
>
> Part V - Reasons Which the Appellant Intends to Submit
>
> 15. The Deemed Dividend, including the 1995 Receipt, was payable to the Appellant in the 1993 Year and, therefore, should be included in the Appellant's taxable income for the 1993 Year.
>
> 16. There is no basis under the ITA upon which the 1995 Receipt can be included in the Appellant's taxable income for the 1995 Year.

42 In my view, a reasonable description of the issue of the effect of subsection 84(3) of the Act on when dividends would be deemed to be received on a redemption of shares would have been a description that would have alerted the Minister to this legal argument related to the interpretation of subsection 84(3)

of the Act. This would mean something more than simply listing subsection 84(3) as one of the three provisions that would be relied upon. It is, however, clear that this issue arising as a result of this legal argument was not raised in the notice of objection that had been filed by Bakorp and that Bakorp was not relying on this issue in its notice of objection. If Bakorp's interpretation of the legal argument is correct and the full amount of the deemed dividend that was eventually paid was received by Bakorp in 1993 when the shares were redeemed (and I do not express any opinion on whether this argument is correct), the result would have been irreconcilable with the position that was taken by Bakorp in its notice of objection.

43 I agree with the Tax Court judge that the issue that Bakorp is attempting to raise in its notice of appeal is not an issue in respect of which Bakorp has complied with the provisions of subsection 165(1.11) of the Act.

Relief Sought

44 Although it is not necessary to dispose of the appeal to comment on the question of whether the relief sought in the notice of appeal is the same as the relief sought in the notice of objection, I would also agree with the Tax Court Judge that Bakorp is not seeking the same relief.

45 The relief that may be granted by a judge of the Tax Court on an appeal under the Act is limited. Under subsection 171(1) of the Act, if an appeal is allowed (which would be what Bakorp would be requesting), the Tax Court judge can only vacate the assessment, vary the assessment or refer the assessment back to the Minister for reconsideration and reassessment. The relief sought as referred to in subsection 169(2.1) of the Act cannot simply be a request in the notice of objection to refer the matter back to the Minister for reconsideration and reassessment. To hold that the restriction imposed by subsection 169(2.1) of the Act in relation to the relief sought would be satisfied as long as the taxpayer was still only asking to have the matter referred back to the Minister for reconsideration and reassessment would be meaningless in light of the limited options available to the Tax Court on an appeal. In the context of both subsections 169(2.1) and 165(1.11) of the Act, the reference to the relief sought in subsection 165(2.1) of the Act must be a reference to the specific relief sought as described for the purposes of subsection 165(1.11) of the Act. This would be consistent with the purpose of these provisions which was to allow "the Minister of National Revenue (the Minister) to be able to assess at the earliest possible date both the nature and quantum of pending tax litigation and its potential fiscal impact". Such purpose would be frustrated if the relief sought as described in subsection 169(2.1) of the Act was not the relief sought as described in subsection 165(1.11) of the Act.

> […]
>
> 48 It should be noted that in this case Bakorp attempted to change the issue under appeal and the remedy sought. It remains an open question, as noted in paragraph 27 of Potash Corporation of Saskatchewan, whether a large corporation would be allowed to change the amount specified as the remedy sought to an amount more favourable to such corporation if the issue remains unchanged. It would seem that a large corporation should be allowed, if the issue is not changed, to change the amount specified as the remedy sought to an amount that is less favourable to such corporation as this change would still be consistent with the purpose of the provisions.
>
> [Emphasis added.]

BC Transit:

[33] In *British Columbia Transit v. Canada*, 2006 TCC 437, Mr. Justice Miller had occasion to consider the *ITA*'s large corporation rules. BC Transit's Vancouver Skytrain system had been reorganized by British Columbia such that BC Transit leased its Skytrain system assets (which included subleasing leased Skytrain assets) to the Greater Vancouver Transportation Authority known as Translink for a nominal rent of $1.00 and Translink taking on BC Transit's property tax obligations. As part of the reorganization BC converted its loan to BC Transit to a "deferred capital contribution" which was reduced each year by a "Grant" in the amount of the amortization of the Skytrain assets for that year. BC Transit had claimed input tax credits on its Skytrain expenses which were reassessed and denied by CRA because BC Transit only received nominal consideration.

[34] The trial judge described the objection in paragraph 16:

> 16 The Minister reassessed the Appellant on December 17, 2001, denying the $3,472,040 credit. In February 2002, BC Transit filed a Notice of Objection prepared by its accountants, KPMG, objecting to the denial of the $3,472,040 ITCs. In the facts and reasons in the Notice of Objection, BC Transit outlined the annual grant from the Government, but made no mention of the property tax or subleases constituting consideration for the lease. BC Transit identified two issues:
>
> > (i) Did BC Transit use the Guideway (Skytrain) assets in the course of carrying on a commercial activity;

> (ii) Did BC Transit property compute "the basic tax content" ($120,766,598) in accordance with subsection 123(1) of the *Excise Tax Act*.
>
> [Emphasis added.]

[35] The Respondent argued that BC Transit could not ask the Court to consider the property tax or sublease payments to be part of the consideration for the lease as they were not raised in the objection. On this issue, Mr. Justice Miller wrote:

> 38 The Respondent argues that, as BC Transit did not raise as part of its facts and reasons in its Notice of Objection that consideration included the property tax and sublease payments, it has not complied with subsection 301(1.2) and is therefore precluded by section 306.1 from raising this at trial. The Respondent relies on the Federal Court of Appeal decision in *The Queen v. Potash Corporation of Saskatchewan Inc.* in which the Appellant sought to amend its Notice of Appeal. The Crown had argued in that case that the Large Corporation Rules *(the Income Tax Act* equivalent of the *Rules* before me) restrict the appeal to the Tax Court of Canada solely to the issues and relief raised in the Notice of Objection. Potash argued that the rules were mere procedural rules, and it was a reasonable exercise of the judge's discretion to amend the Notice of Appeal to allow the amendment to the Notice of Appeal. In not allowing the amendment, the Federal Court of Appeal concluded:
>
> > [29] The proposed amendments to the notice of appeal seek to include in the computation of resource profits in the four years under appeal five new items of income not described in the notice of objection and, as a consequence, seek to increase the amount of the resource allowance and earned depletion from the amount set out in the notices of objection. To permit PCS to amend its pleading in this way is contrary to the requirements in subsection 169(2.1).
>
> 39 In the case before me, the Respondent has identified BC Transit's failure as failing to provide any facts respecting the property tax and sublease payments, and failing to provide any reasons as to the "nominal consideration" issue in the Notice of Objection. It did not argue that there have been any failures with respect to the issue or to the relief sought.
>
> 40 I do not find the Respondent's argument persuasive. The *Potash* case was not about the lack of facts or reasons: it was about not allowing an increase in the amount at issue. There is no change to the amount at issue before me from what was set out in the Notice of Objection, nor has the issue changed. The issue has always been the entitlement to the ITCs. The Respondent is correct that the

property tax was not raised as part of the facts or reasons, but I find this is not fatal.

41 In the *Potash case*, the Court quoted comments from Mr. R.M. Beith, an official from Department of Finance, made at the 1994 Canadian Tax Foundation Conference:

[…]

42 This emphasizes that it is the issue and quantum that is of significance to the Minister, not the facts and reasons that the Respondent points to as the failure. It would prohibitively handcuff the large corporation to read these provisions as limiting the large corporation to only those facts identified at the Notice of Objection stage. That does not appear to be the thrust of the section as supported by Mr. Beith, nor the interpretation of this section by the Federal Court of Appeal in *Potash*. The very words of section 306.1 itself refer only to the issues and the relief. Interestingly, at the 1994 Tax Conference Mr. Beith went on to say this about paragraph 165(1.11)(*c*) (*Income Tax Act* equivalent to paragraph 301(1.2)*(c))*:

> This requirement is no different from what the law currently requires from all taxpayers. In addition, in contrast to the requirements with respect to issue and quantum, additional facts and reasons can be raised in appeals.

This is certainly a sensible point of view, and one which I adopt. I find BC Transit is not in breach of subsection 301(1.2) and, therefore, section 306.1 is not invoked. BC Transit is free to argue that property tax and sublease payments are facts that go to the consideration for the lease.

[Emphasis added.]

CIBC:

[36] In *Canadian Imperial Bank of Commerce v. Canada*, 2013 TCC 170 the taxpayer was a specified person and had filed an objection followed by a Notice of Appeal and an amended Notice of Appeal. The substantive dispute was related to CIBC's participation in the Aeroplan Program in which it made payments to Aeroplan on which it paid $45,000,000 of GST for which it later made a rebate claim.

[37] In the objection the taxpayer set out the issue as follows:

> The issue for determination is whether CIBC is entitled to the Rebate because it paid the amounts that are the subject of the Rebate in error as GST. This issue, in turn, requires a determination as to whether GST was exigible on the Subject Payments.[4]

[38] Part IV of the Amended Notice of Appeal read:

> IV. ISSUES TO BE DECIDED
>
> 15. The issue in this Appeal is whether the Aeroplan Payments were consideration for a taxable supply made by Aeroplan to CIBC or, instead, were:
>
> (A) consideration for Aeroplan's exempt supply of a financial service made to CIBC;
>
> (B) in the alternative, Aeroplan's share of the revenues from a joint venture, the Aeroplan Program; or
>
> (C) in the further alternative, consideration for Aeroplan's issuance or sale of a "gift certificate".

[39] The taxpayer sought to further amended its Amended Notice of Appeal to remove the references to the term joint venture and replace it with the concept of CIBC and Aeroplan sharing the responsibilities and revenues under the CIBC Aeroplan Program and jointly making a single supply to cardholders.

[40] The Respondent objected to the proposed amendments relying on the specified person rules. The Respondent argued that the proposed amendments dropping the joint venture would create a new issue, one of there having been no supply for the Subject Payments, and which was not reasonably described in the objection, and for which there were no facts or reasons provided for in the objection.

[41] Justice Jorré approached this issue as follows:

> 42 The merits of the respondent's submission turn on the following questions:

[4] I assume from the initial capitals that the term Rebate and Subject Payments were described and defined elsewhere in the objection.

> (a) What is the meaning of the word "issue" in the context of sections 301 and 306.1?
>
> (b) Has the appellant raised a new issue within the meaning of those sections?
>
> (c) If the appellant is not raising a new issue, did the appellant comply with paragraph 301(1.2)(c)?
>
> (d) Finally, if it turns out that new reasons are raised rather than new issues, and if the appellant has complied with paragraph 301(1.2)(c), at the appeal stage can the appellant provide further facts and reasons in support of its position in relation to the issues?

[42] After referring to the Oxford Encyclopaedic Dictionary definition of the word "issue", he continued:

> 46 The word "issue" also has a certain elastic quality.
>
> 47 At one level, the "issue" in an income tax appeal is whether the Minister has correctly assessed a particular amount of tax, interest and, if applicable, penalties. Similarly, in one sense, the issue in a GST appeal of a registrant is whether the Minister has assessed the correct amount of net tax, interest and, if applicable, penalties.
>
> 48 With reference to "each issue" in sections 301 and 306.1, it is clear on the face of the statute that issue has to be understood as being at a more detailed level than simply: Overall, how much tax is owing?[5]
>
> 49 At the other extreme, the word "issue" may refer to every disputed point of fact, procedure and law.
>
> 50 Clearly, "issue" cannot be understood at such a detailed level. [Footnote 7 omitted]: It would unduly limit the scope of "facts" and "reasons" and does not fit the scheme of the provisions. It would also be extremely difficult to comply with.
>
> 51 In the context of sections 301 and 306.1, the word "issue" has to be understood as referring to some intermediate level of detail which recognizes that not every disputed fact or reason is an issue.

[5] Paragraph 48 of Justice Jorré's reasons were commented on favourably by Justice Webb in the Federal Court of Appeal reasons in paragraph 28 of *Bakorp*, above.

> 52 While "issue" may not be susceptible of the precise definition in this context, guidance is available from the scheme of subsection 301(1.2) insofar as it requires that a taxpayer:
>
> > (*a*) reasonably describe each issue to be decided;
> >
> > (*b*) specify in respect of each issue the relief sought, expressed as the change in any amount that is relevant for the purposes of the assessment; and
> >
> > (*c*) provide the facts and reasons relied on by the person in respect of each issue.
>
> 53 It is clear from the section that "issues" are different from "facts" and from "reasons".
>
> 54 Paragraph (*b*) is interesting because it suggests that a particular "issue" will to some extent be tied to a particular financial impact in terms of the assessment.
>
> 55 While it may be that two distinct "issues" might coincidentally have the same quantitative impact, the fact that something which is alleged to be a different "issue" has exactly the same impact may well be an indicia that it is really the same "issue".
>
> [Emphasis added.]

[43] The trial judge next refers to passages from the Federal Court of Appeal in *Potash* and continued:

> 63 In *Potash Corporation*, there was an amendment to include entirely new amounts to the computation of the allowance, increasing the allowance.
>
> 64 Here, with or without the amendments, we are talking about the exact same amounts of GST paid on the same payments from the appellant to Aeroplan Limited Partnership and whether those particular payments are subject to GST.
>
> 65 What is being changed is part of the reasons and, possibly, part of the facts relied upon by the appellant. There is no change to the "issue" in the sense used by the sections in question.[Footnote 9 omitted]
>
> [Emphasis added.]

[44] The judge goes on to address the Respondent's reliance on *Telus* for support as follows:

> 71 In *Telus*, while success, in part or in whole, in the challenge to the net tax would necessarily bring about a reduction in the penalty to the same extent, if the appellant failed in its challenge to the net tax but succeeded on due diligence, the penalty would be eliminated even though the net tax remained unchanged. The due diligence defense clearly raises a new issue.
>
> 72 That situation is very different from the one here. Here, the "no supply" approach has the same consequence as the approach in subparagraphs 15(A) and (C) of the proposed second amended notice of appeal. Subparagraph (A), proposed subparagraph (B) and subparagraph (C) are all reasons in support of the issue raised in the preamble of paragraph 15, "whether the Aeroplan Payments were consideration for a taxable supply made by Aeroplan to CIBC".
>
> [Emphasis added.]

[45] The concluding paragraph of his analysis of what is an issue and when it is reasonably described reads:

> 83 I am of the view that the situation here is analogous to *BC Transit* in that what is raised here are additional reasons, not a new issue.
>
> [Emphasis added.]

[46] The judge then addresses the issue of facts and or reasons being added at the appeals stage that were not set out in the objection. He wrote:

> 84 There is no question that the notice of objection did provide facts and reasons in support of the appeal. Is an appellant who is a specified person precluded at the appeal stage from raising additional facts and reasons in support of any issue already raised?
>
> 85 I agree with Justice C. Miller of this Court who, in *BC Transit*, held that subsections 306.1(1) and 301(1.2) were not a bar to an amendment in circumstances where what had been shown was a failure with respect to providing all facts and reasons as opposed to a failure to state the issue and the relief sought in the objection.
>
> 86 This result is clear from the sections. They do not require that every reason invoked on appeal by an appellant be spelled out in the notice of objection. This is

> apparent from subsection 306.1(1) which says only that the appellant (i) must comply with subsection 301(1.2) and is limited to (ii) the issues raised and (iii) the relief sought; the subsection does not say the person is limited to the facts and reasons in the notice of objection.
>
> 87 As a result I am satisfied that the proposed amendments do not raise new issues contrary to subsection 306.1(1).[Footnote 16: Unfortunately there is probably no "bright line" between facts, reasons and issues. In some circumstances, it will be a judgment to be made in all the circumstances. For the purposes of this matter it is not necessary for me to answer the question whether there may be limited circumstances where the trial judge is better placed to decide such a question.]

[47] While not specified in either *BC Transit* or *CIBC*, the conclusions of Justices Miller and Jorré on adding new facts or reasons at the appeals stage are clearly also supported by the Technical Notes issued by the Department of Finance when the large corporation rules were added to the *ITA*.

Devon:

[48] The taxpayer in *Devon Canada Corp. v. Canada*, 2014 TCC 255 was a large corporation against whom the Respondent brought a motion to strike portions of its Notices of Appeal for not complying with the *ITA* large corporation rules. The tax dispute involved the deduction by the Appellant's predecessors of significant payments made to employees for the surrender of their purchase options, defined as Surrender Payments.[6]

[49] In his reasons allowing the motion only in part, Justice Graham wrote:

> 3 In its Notices of Appeal, Devon raises the following arguments:
>
> (a) Devon's primary argument is that the Surrender Payments are deductible as current expenses under subsection 9(1) of the *Income Tax Act*.

[6] Devon is currently under appeal to the Federal Court of Appeal by the largely successful Appellant. There is no cross-appeal by the Respondent. I have summarized it completely, however in the circumstances only those paragraphs dealing with the judge's approaches to identifying the issue in the objection and determining whether the later alternative arguments in the Notice of Appeal fall within that issue are relevant to the case before me.

(b) In the alternative, Devon argues that the Surrender Payments are eligible capital expenditures that, once added to cumulative eligible capital, would result in deductions pursuant to paragraph 20(1)(*b*). It further argues that, due to the fact that there were acquisitions of control of both of the predecessor companies during the taxation periods in which the Surrender Payments were made, subsection 111(5.2) applies to cause significant additional deductions of cumulative eligible capital.

(c) In the further alternative, Devon claims that the Surrender Payments are financing expenses deductible under paragraph 20(1)(*e*).

[…]

5 There are three questions that I must determine on this Motion.

(a) The first question I must determine is whether Devon reasonably described the issue or issues to be decided in its Notices of Objection.

(b) If I find that Devon reasonably described the issue or issues, then the second question that I must determine is whether Devon adequately described the relief sought in respect of that issue or issues in its Notices of Objection.

(c) If I find that Devon did not reasonably describe the issue or issues or did not adequately describe the relief sought, I must then consider an alterative argument raised by Devon. Devon argues that if the Minister confirms a reassessment on a basis that differs from the basis upon which the taxpayer objected, then the taxpayer may appeal to court in respect of that basis notwithstanding the restrictions in subsection 169(2.1).

Did Devon Reasonably Describe Each Issue or Issues to be Decided?

Summary of Devon's Position

6 Devon submits that there are two bases upon which it can be said to have reasonably described the issue or issues in its Notices of Objection.

7 Devon's principle (sic) argument is that the issue under objection / appeal is, and has always been, whether the Surrender Payments are deductible. Devon says that there are three different reasons why the Surrender Payments may be deductible (i.e. on current account under section 9; as part of cumulative eligible capital under paragraph 20(1)(*b*) and subsection 111(5.2); or as a financing expense under paragraph 20(1)(*e*)) but that the presence of those individual reasons does not change the overall issue of deductibility.

8 Devon's alternative argument is that, if its Notices of Objection did not reasonably describe the issue or issues, then the Minister's acceptance of a detailed supplemental memo (the "Supplemental Memo") from Devon during the objection process and the Minister's consideration and confirmation of the Notices of Objection on the basis of the arguments contained in the Supplemental Memo had the effect of amending Devon's Notices of Objection to include the arguments set out in the Supplemental Memo as issues.

Summary of the Respondent's Position

9 The Respondent's principle (sic) argument is that the three "reasons" described by Devon are, in fact, three separate issues and thus that Devon was required to comply with subsection 165(1.11) in respect of each of those issues.

10 The Respondent further submits that Devon's alternative argument must fail first because the Supplemental Memo cannot have amended the Notices of Objection because there is no mechanism in the *Income Tax Act* for making such an amendment and second because the actions of the Minister in accepting and considering the Supplemental Memo cannot override the restrictions of subsection 165(1.11).

[…]

13 Devon's Notices of Objection make no reference to paragraphs 20(1)(*b*) and (*e*) or subsection 111(5.2). The issue and statutory provisions are described as follows in one of the Notices of Objection:

> **ISSUE TO BE DECIDED**
>
> The issue to be decided is whether the Stock Option payment of $20,884,041 is a deductible business expense under section 9 and not denied by section 18 of the Act for [predecessor company's] February 11, 2001 tax year, thus reducing the taxable income by an amount of $15,663,031 ($20,884,041 less an associated resource allowance adjustment of $5,221,010).
>
> **STATUTORY PROVISIONS RELIED ON**
>
> [Predecessor company] relies on, *inter alia*, subsections 3, 9, and paragraph 20(1)(v.1) of the *Act*.

14 There is a similar description of the issue and statutory provisions in the other Notice of Objection.

15 In my view, the sole issue set out in the Notices of Objection is whether Devon can deduct the Surrender Payments. The Notices of Objection propose one reason why the deduction should be permitted but that does not preclude Devon from raising other reasons in its Notices of Appeal.

[…]

17 Having concluded that the sole issue has always been the deductibility of the Surrender Payments, I must now consider whether the alternative arguments put forward by Devon fall within that sole issue.

18 I will consider Devon's paragraph 20(1)(*e*) argument first. The Minister denied the deduction of the Surrender Payments on the basis that they were capital in nature and thus that paragraph 18(1)(*b*) precluded their deduction. Devon's primary argument is that paragraph 18(1)(*b*) does not apply because the Surrender Payments were on income account. Paragraph 20(1)(*e*) is an exception to paragraph 18(1)(*b*). It simply permits certain types of financing expenses to be deducted despite the fact that they would otherwise be on capital account. In essence, Devon's primary argument is that the Surrender Payments were on income account because that was their nature and its alternative argument is that they were on income account because paragraph 20(1)(*e*) says so. Devon's paragraph 20(1)(*e*) argument is therefore nothing more than an alternative reason why the Minister should permit the deduction of the Surrender Payments. There is nothing in the themes that have emerged from the caselaw that would cause me to question this conclusion. In fact, Devon's case falls squarely in line with the reasoning in the decisions in *Canadian Imperial Bank of Commerce* and *British Columbia Transit*.

19 I will now turn to Devon's paragraph 20(1)(*b*) and subsection 111(5.2) argument. If Devon were simply claiming a deduction in respect of the Surrender Payments under paragraph 20(1)(*b*), I would accept that no new issue was being raised for the same reasons that I reached that conclusion in respect of the paragraph 20(1)(*e*) argument as paragraph 20(1)(*b*) is simply another exception to paragraph 18(1)(*b*). However, this is not what Devon is doing. Devon is also claiming a deduction under subsection 111(5.2). That deduction is not optional. It must be claimed if certain preconditions are met. The preconditions have been met in Devon's case. As a result, if Devon convinced a trial judge that the Surrender Payments should be added to its cumulative eligible capital, subsection 111(5.2) would cause Devon to be entitled to a deduction in respect of other amounts in its cumulative eligible capital that are totally unrelated to the Surrender Payments. The Federal Court of Appeal was clear in Potash that there will be a new issue if a taxpayer attempts to deduct additional amounts even if those amounts fall within the same category of deductions. Based on the

foregoing, I find that Devon's paragraph 20(1)(*b*) and subsection 111(5.2) alternative argument is a new issue that cannot be raised at appeal.

20 In reaching this conclusion on the paragraph 20(1)(*b*) and subsection 111(5.2) argument, I have given consideration to Devon's submission that the Supplemental Memo had the effect of amending its Notices of Objection to include the argument. I do not accept Devon's position. There is no mechanism in the *Act* that would permit a large corporation to amend its Notice of Objection. Reading in such a mechanism would defeat the entire purpose of the large corporation rules.

Did Devon Adequately Describe the Relief Sought?

21 Having concluded that Devon reasonably described the sole issue in its Notices of Objection and that its section 9 and paragraph 20(1)(*e*) arguments were merely reasons, I must now consider whether Devon adequately described the relief sought. Paragraph 165(1.11)(*b*) requires a large corporation to specify the relief in respect of each issue, not in respect of each reason. However, the Respondent argues that because the relief sought would be different for each reason, Devon should nonetheless have specified that the issue itself could result in different potential relief.

22 Devon did not describe the relief sought in respect of its paragraph 20(1)(*e*) argument. Devon's Notices of Objection did not specify any relief other than allowing the deduction in full. The Respondent submits that the total relief sought under paragraph 20(1)(*e*) is greater than the relief sought under section 9 and that Devon should not be permitted to increase the amount of relief sought. Devon acknowledges that the relief sought under paragraph 20(1)(*e*) would be greater over a 5 year period but submits that the relief sought in the years in question is far less than the relief sought under its section 9 argument. Devon argues that the relief for the purposes of subsection 165(1.11) is the relief in the year in question, not the relief over time. I accept Devon's position on this point. I find that the relief sought under the paragraph 20(1)(*e*) argument is less than the relief sought under the section 9 argument.

23 In *Potash*, the Federal Court of Appeal implicitly accepted that if a certain amount of relief is specified in a Notice of Objection, a less favourable amount of relief is automatically included:

> ... I prefer to leave open the question of whether the obligation to "specify in respect of each issue, the relief sought, expressed as the amount of a change in a balance (within the meaning assigned by subsection 152(4.4)) or a balance of undeducted outlays, expenses or other amounts of the corporation" necessarily binds a large

> corporation to the stated amount, or a less favourable amount. It is arguable that there may be situations where an amendment to a notice of appeal could be permitted if the amendment goes only to quantum and does not entail the raising of a new issue. (emphasis added)

24 This approach is logical. If a large corporation's appeal involves numerous small expenses some of which may ultimately be allowed and some of which may not, it would be unreasonable to expect the large corporation to express its relief sought in its Notice of Objection on an expense-by-expense basis. It would seem to be sufficient if the large corporation simply stated the total relief sought; it being understood that the relief would decrease for every expense it was not permitted to deduct. Similarly, an absurd result would ensue if a large corporation were expected to express alternative relief in a valuation case. I cannot imagine that Parliament would have intended a large corporation to have to state that it would like $X of relief if a certain asset was valued at $4,000,000 (being the valuation favoured by the large corporation), $Y of relief if the asset was valued at $3,999,999, $Z of relief if the asset was valued at $3,999,998 and so on all the way down to whatever value the Minister believed the asset to be worth.

[…]

Devon's Alternative Argument

27 As set out above, Devon argues that if the Minister confirms a reassessment on a basis that differs from the basis upon which a large corporation objected, then the large corporation may appeal to court in respect of that new basis despite the restrictions in subsection 169(2.1). As I have concluded that Devon was in compliance with respect to its paragraph 20(1)(*e*) argument, I will only consider this alternative argument in respect of the paragraph 20(1)(*b*) and subsection 111(5.2) argument.

28 Parliament has contemplated a situation where the Minister assesses a large corporation in respect of certain issues, the large corporation objects to those issues and then the Minister reassesses the same year but adds new issues. Subsection 165(1.14) and paragraph 169(2.1)(*b*) together allow the large corporation to appeal to court in respect of the new issues despite the fact that those issues were not described in the original Notice of Objection.

29 There appears, however, to be a gap in the *Act* in the somewhat unlikely situation where the Minister assesses a large corporation in respect of certain issues, the large corporation objects to those issues and then the Minister confirms the assessment, but on an entirely different basis than the basis of the original assessment 12. I am unaware of anything in the Act that would specifically allow the large corporation to appeal on the basis of the new issues in this situation.

> 30 Devon submits that it is caught by the foregoing scenario. Devon says that, when the Minister confirmed the reassessments, the Minister relied on paragraph 20(1)(*b*) and subsection 111(5.2) as an alternative basis for the confirmation. Devon therefore asks me to address the perceived gap in the Act by effectively reading in to paragraph 169(2.1)(*b*) the ability for Devon to appeal in respect of any alternative issue relied upon by the Minister in confirming the reassessments.
>
> 31 While there may be an argument to be made for that type of relief in a different case, this is not an appropriate case to do so. This is not a case where the Minister has abandoned the original basis of assessment and substituted a new one. The Minister still maintains that its original basis of assessment is correct. The Minister merely added the additional explanation regarding paragraph 20(1)(*b*) and subsection 111(5.2) to address the points raised by Devon in the Supplemental Memo. In fact, the Notices of Confirmation only mention those provisions when describing the arguments raised by Devon. The stated reason for confirming the reassessments is paragraph 18(1)(*b*). While the Reports on Objection make it clear that the Minister considered Devon's argument, they in no way indicate that the Minister abandoned the Minister's original argument.
>
> [Emphasis added.]

C. Analysis

[50] There appears to be very little difference in the texts of the *ITA*'s large corporation rules and the *ETA*'s specified person rules. The differences do not appear at all material. There is no apparent reason to approach or apply the two sets of rules differently. There are cases decided under each set of rules with no discernible differences to the courts' approach, analysis or application.

[51] It can be noted that the English texts' requirement that each issue be reasonably described is expressed in the French version as each question to be settled must have a sufficient description. While the provisions do not themselves set out what it is that the description must be reasonable or sufficient enough to attain, the Federal Court of Appeal's decisions have settled this having regard to the purpose of the provisions.

[52] The two provisions in these rules, the mandatory provision applicable to the notice of objection and the restrictive provision applicable to appeals to the Court, are part of a single regime and should be read together. However, the provision applicable to the contents of the notice of objection is itself clearly mandatory in its own right. It need not only ever be a question of whether the issue in the notice of

appeal is the same as the issue in the notice of objection, though that is how a concern may most often present itself.

[53] Thus, it is possible that a Notice of Objection will not comply with the requirement to reasonably or sufficiently describe any issue or question, with the result that no issue whatsoever could be raised on appeal to the Court. That is essentially the Respondent's position on this motion. However, as is evidenced from Justice Webb's decision in *Bakorp*, a court can be expected to seek to find and identify the issue described in the objection having regard to the contents of the objection read as a whole, including references therein to the taxpayer's filings and to the issues in the reassessment, and having regard to the quantification of the issue therein.

[54] A taxpayer subject to the large corporation/specified person rules is not expected or required to describe the issue exactly, it is only required to describe it reasonably or sufficiently. What is reasonable will depend upon on each case's particular facts as it involves determining the degree of specificity needed for the Minister to know each issue to be decided. That may be done by referring to the disputed item(s) in the same fashion as the Minister did when reassessing or auditing, as that can be expected to give the Minister sufficient certainty of the issue objected to. It may be done by specifying the particular elements of a defined tax term that require determination by the Minister (*Potash*).

[55] A sufficient description of an issue is one that will allow the Minister to determine what is actually in dispute. A reasonable description of the issue will allow for the quantification of the effect that its resolution will have on the taxpayer. A reasonably described issue should satisfy the purpose of the provisions - that the Minister know the nature and quantum of disputed taxes at the objection stage. In particular circumstances, a reasonable description may require the taxpayer to commit to a particular interpretation or application of a provision in the *ITA* or the *ETA* (*Bakorp*).

[56] A description of an issue can be reasonable and sufficient even if it does not refer to all of the facts and reasons (*BC Transit*, *CIBC* and *Devon*).

[57] It is the Minister who needs to be able to understand the scope and quantum of the issue from its description in the notice of objection. The reader of a notice of objection who should reasonably be able to understand or recognize the particular

issue from the contents of the notice of objection is not the hypothetical reasonable Canadian, nor is it a Tax Court judge. It is the Minister, in the form of the CRA, a party with considerable pre-existing knowledge of which matters formed part of the reassessment objected to, and who in most cases has had communications with the taxpayer thereon.

[58] Applying this approach to the facts of this case, I am wholly satisfied that the two issues raised by the Appellant in the impugned paragraphs of its Amended Notice of Appeal are the same issues that were reasonably and sufficiently described by Ford Canada in its Notice of Objection.

[59] The evidence in this case wholly satisfies me that both objectively and subjectively the Minister should have and did understand from the Notice of Objection filed by the Appellant that these two specific issues which had been specifically raised during the audit which gave rise to the reassessment, were being objected to.

[60] The description of the unclaimed ITC issue from the Notice of Objection is set out above. It identifies this issue as relating to input tax credits on taxable purchases in the relevant period that had been identified as unclaimed and that had been requested by the Appellant of the CRA auditor to be allowed as a credit before reassessing net tax.[7]

[61] The description of the foreign exchange adjustment issue in the Notice of Objection is set out above. It identifies this issue as relating to the conversion into Canadian dollars of all of its foreign currency denominated supplied inputs in the period for purposes of computing its ITCs. It specifies the precise methodology Ford Canada sought to have used, and that this had been requested by the Appellant of the CRA auditor to be allowed as an additional credit before reassessing net tax.[8]

[62] The Notice of Objection describes Ford Canada's rights to have its unclaimed ITCs recognized and to use the appropriate foreign exchange conversion methodology in computing ITCs on foreign denominated inputs as part

[7] The audit request is confirmed in the Report on Objection.
[8] The audit request is also confirmed in the Report on Objection.

of its right to be audited to net tax.[9] It identifies a precise amount – to the penny – for each of these issues. It does not specifically describe each individual supplied input transaction for either of these issues.

[63] The unclaimed ITC issue description in the Notice of Objection identifies "ITCs" on "taxable supplies" as the element of "net tax" that needs to be determined. The foreign exchange adjustment issue description in the Notice of Objection also identifies "ITCs" on inputs supplied as the element of "net tax" that needs to be determined in the context of all of its non-Canadian dollar denominated inputs. These are very much comparable to the description of the issue in *BC Transit*, in *CIBC* and in *Devon*. They appear to clearly satisfy the Federal Court of Appeal's comments in paragraph 24 of *Potash*, above.

[64] These descriptions are also very comparable to the language of the reassessment being objected to which refers to "Net Tax Assessed" and "Adjustments to ITCs". In this particular case, the CRA would not have referenced the unclaimed ITC issue or the foreign exchange adjustment issue in its Statement of Audit Adjustments as no adjustment was made for them.

[65] These descriptions are also very comparable to the language of the Minister's Notice of Decision.

[66] According to the Notice of Objection, Ford Canada had informed the CRA auditor that the unclaimed ITCs and the foreign exchange adjustment had been identified and requested that they be taken into consideration before the audit was completed and the reassessment issued. This is confirmed in the Report on Objection.

[67] The Objection also says there was ongoing correspondence between Ford Canada and the CRA audit manager regarding Ford Canada's request that the unclaimed ITCs and the foreign exchange adjustment be taken into account in finalizing the audit. None of the evidence discloses how that was done.

[68] There may or may not have been a detailed listing of the underlying transactions provided at the audit stage. Ford Canada's audit stage request may or may not have referred to an aggregate amount of $760,195.71 or $1,095,712.24.

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[9] See footnote 2 re: *Welch*.

That is not in the evidence introduced by either party on this motion. However, the Seenan Affidavit attaches numerous letters CRA appeals received from Ford Canada after the Notice of Objection was filed. None of these provide additional information with respect to the unclaimed ITC matter or the foreign exchange adjustment. There is no evidence that Appeals requested or needed any additional information with respect to the unclaimed ITCs or the foreign exchange adjustment claimed in the Notice of Objection. In any event, on the facts of this particular case it is not necessary that a determinative list of each individual input transaction over the multi-year audit period for which Ford Canada had not yet claimed an ITC, or of all of Ford Canada's US dollar and other foreign denominated supply inputs over this period, have been provided at audit. That is beyond the level of reasonable and sufficient detail required in the description of an issue of the nature involved here. See Justice Jorré's comments in *CIBC* above. Such a requirement would, given the description of these two issues in Ford Canada's Notice of Objection, exceed what is required according to the Federal Court of Appeal decisions in *Potash* and *Bakorp*.

[69] In the Notice of Objection, Ford Canada specifies unclaimed ITCs of $760,195.71. Appeals allowed $261,809.42 of those in the further reassessments as described in the Notice of Decision. The entire remainder of what Ford Canada describes as unclaimed ITCs being $498,386, are claimed in the Amended Notice of Appeal. In the Amended Notice of Appeal, Ford Canada specifies additional ITCs of $1,095,712.24 in respect of the change in its foreign exchange conversion methodology. This is also the precise amount used by Ford Canada in describing the issue in its Amended Notice of Appeal.

[70] Most significantly, it is evident in this case from the Seenan Affidavit that the Appeals Officer having carriage of the Objection (i) could understand and summarize the issues raised in Ford Canada's Objection; (ii) did not seek additional information from Ford Canada relating to the unclaimed ITCs issue or the foreign exchange adjustment issue; and (iii) was able to consider these two issues and all of the others raised in the Objection and deal with them. He went on to write the Report on Objection and the Notice of Decision, and further reassessments followed. The Appeals Officer's Report on Objection indicates he referred the unclaimed ITCs of $760,195.71 to the Audit Division of the Hamilton Taxation Services office to be reviewed. This was done to a level of detail that resulted in further ITCs being allowed in the specific amount of $261,809.42. The

Notice of Decision says that this specific adjustment was allowed based upon "a review of the facts and documents" submitted.

[71] The Report on Objection indicates the Appeals Officer also referred the foreign exchange adjustment issue to the Audit Division of the Hamilton Tax Services office to review the additional ITC claim of $1,095,712.00. That audit review was done and recommended that the specific amount of $849,286.72 in additional ITCs be allowed as that would result from the use of the conversion rate method acceptable under the *ETA*. Appeals then further reviewed this issue and decided not to follow the recommendation received upon the conclusion of the Audit Division review requested on basis of legal principles, not the insufficiency of the information provided to CRA.

D. Conclusion

[72] For the foregoing reasons, the Respondent's motion to strike portions of the Appellant's Amended Notice of Appeal is dismissed and the Respondent will be allowed 60 days from the date hereof to file its Reply to the Amended Notice of Appeal.

[73] This appears to be a case of the Respondent trying opportunistically to use the large corporation/specified person rules, whose purpose and design are to protect and shield the fisc, as a sword against the taxpayer. This is also a case where there is no dispute about the factual evidence on the motion. The existing jurisprudence from this Court and the Federal Court of Appeal on the question involved in this motion of what is a reasonably described issue for purposes of the large corporation/specified person rules is quite clear, recent and consistent.

[74] In such circumstances, costs of this motion are awarded to the Appellant, payable by the Respondent in any event of the cause. If the parties cannot agree on the amount of costs within 30 days, the parties are to have a further 30 days to make written submissions thereon.

Signed at Ottawa, Canada, this 18th day of February 2015.

"Patrick Boyle"

Boyle J.

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COURT FILE NO.:	2012-1779(GST)G
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REASONS FOR ORDER BY:	The Honourable Justice Patrick Boyle
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APPEARANCES:

Counsel for the Appellant:	Robert G. Kreklewetz John G. Bassindale
Counsel for the Respondent:	Catherine M.G. McIntyre

COUNSEL OF RECORD:

For the Appellant:

Name:	Robert G. Kreklewetz John G. Bassindale
Firm:	Millar Kreklewetz LLP 24 Duncan Street, 3rd Floor Toronto, Ontario, M5V 2B8

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada