Docket: 2014-844(IT)G

BETWEEN:

AITCHISON PROFESSIONAL CORPORATION,

Applicant (Appellant),

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on November 21, 2016, at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

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| Counsel for the Applicant (Appellant): | Adrienne K. Woodyard,<br>David C. Nathanson, Q.C. |
| Counsel for the Respondent: | Samantha Hurst |

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ORDER FOR DETERMINATION PURSUANT TO RULE 58 OF THE *TAX COURT OF CANADA RULES (GENERAL PROCEDURE)*

The application for an order enabling a Determination pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)* is dismissed. The Parties shall proceed to trial without having to address the issue of the valuation of property which shall be addressed at a later date to be determined by the trial judge. If the Parties determine they do not require the bifurcation of the trial, they shall advise the Court in writing at least 30 days prior to the trial date. Costs of this application to the Respondent.

Signed at Ottawa, Canada, this 1st day of December 2016.

"Campbell J. Miller"

C. Miller J.

Citation: 2016 TCC 281
Date: 20161201
Docket: 2014-844(IT)G

BETWEEN:

AITCHISON PROFESSIONAL CORPORATION,

Applicant (Appellant),

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR ORDER

C. Miller J.

[1] Aitchison Professional Corporation, the Appellant ("Applicant"), seeks a Determination before hearing pursuant to Rule 58 of the *Tax Court of Canada (General Procedure) Rules* (the "Rules"). Such an application is a two-stage process. First, a judge determines if the questions for Determination are appropriate to be determined. Second is the Determination itself. This is the first stage of the procedure.

[2] Rule 58 reads as follows:

> 58(1) On application by a party, the Court may grant an order that a question of law, fact or mixed law and fact raised in a pleading or a question as to the admissibility of any evidence be determined before the hearing.
>
> (2) On the application, the Court may grant an order if it appears that the determination of the question before the hearing may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs.
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> (3) An order that is granted under subsection (1) shall
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> (a) state the question to be determined before the hearing;

> (b) give directions relating to the determination of the question, including directions as to the evidence to be given — orally or otherwise — and as to the service and filing of documents;
>
> (c) fix time limits for the service and filing of a factum consisting of a concise statement of facts and law;
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> (d) fix the time and place for the hearing of the question; and
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> (e) give any other direction that the Court considers appropriate.

[3] The questions, which the Applicant submits are questions of law, for determination are:

a) whether between 2007 and 2010, James Aitchison transferred to the Applicant a right to invoice for his legal services; and

b) if so, whether such a right constitutes "property", within the meaning of subsection 248(1) of the *Income Tax Act* (collectively, the "Questions").

[4] By Notice of Assessment dated January 26, 2012 (the "Assessment"), the Minister of National Revenue (the "Minister") assessed tax against the Applicant in the amount of $2,097,770 pursuant to subsection 160(1) of the *Income Tax Act* (the "*Act*").

[5] In making the Assessment, the Minister assumed that James Aitchison had made a transfer to the Applicant of "property", within the meaning of subsection 248(1) of the *Act*, in an amount exceeding $2,000,000. The "property" that the Minister assumes James Aitchison transferred to the Applicant is "the right to invoice for legal services" between January 1, 2007 and September 30, 2010.

[6] The Applicant suggests the following key facts underlying the Questions are not in dispute:

> a) The Applicant is a professional corporation incorporated under the laws of Ontario in 2003 and was established for the purpose of practising law in Ontario;
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> b) The Applicant's directors and shareholders consist of James Aitchison and his daughters, Kelly and Laurie Aitchison, all three of whom are barristers and solicitors licensed to practice law in Ontario;

c) Between 2007 and 2010, Kelly, Laurie and James Aitchison performed legal services for the Applicant, and the Applicant invoiced and collected fees relating to those legal services, but paid no dividends and either no or nominal wages and salary to James Aitchison;

d) A portion of the fees collected by the Applicant throughout this period was attributable exclusively to legal services performed by James Aitchison (the "JA Fees"), which the Minister has assumed exceeded $3 million;

e) The amount of $2,097,770 is the lesser of (a) the amount that the Minister alleges the Applicant to have received from James Aitchison and (b) the amount owed by James Aitchison on account of tax, interest, CPP contributions and penalties;

f) In making the Assessment, the Minister assumed, *inter alia*, that

   (i) the clients in respect of whom James Aitchison performed legal services were clients of the Applicant;

   (ii) nevertheless, it was James Aitchison, and not the Applicant, who had the "right to invoice" these clients;

   (iii) James Aitchison transferred the "right to invoice" for his legal services between January 1, 2007 and September 30, 2010 to the Applicant;

   (iv) James Aitchison's "right to invoice" was "property", within the meaning of subsection 248(1) of the Act; and

   (v) the fair market value of that "property" was equal to the amount of the JA Fees collected by the Applicant between 2007 and 2010.

[7] The Respondent, in her submissions, refers to Mr. Aitchison's arrangement "of not being paid" as unusual, and links it to the fact that since 1992 Mr. Aitchison has paid no federal income tax, and as of 2007 was over $2,000,000 in debt to the Minister. This, notwithstanding that, according to the Applicant's financial records, Mr. Aitchison generated revenues of $911,391, $750,249, $847,108 and $701,926 in 2007 to 2010 respectively.

[8] Both Parties acknowledged the Questions were raised in the pleadings. Therefore, in accordance with Rule 58, the Court must consider whether the Determination may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs.

[9] The Applicant suggests there are two elements to the first question identified in paragraph 3(a): is there an innate right to invoice of any lawyer who renders services through a professional corporation; if so, can such a right be transferred? Both elements are questions of law according to the Applicant. The Applicant also represents that the second question, whether the right to invoice is property for purposes of subsection 248(1) of the *Act*, is also a question of law.

[10] If either question is answered in the negative, the Applicant maintains that would dispose of the Appeal. If they are both answered positively, the Applicant's position is that only the issue of the value of property would be left to be adjudicated, which could likely lead to a settlement rather than trial. The Applicant pointed out that the valuation issue could prove lengthy as it would require expert evidence. If there was no Rule 58 determination, the Applicant is concerned about having to incur the time and expense to address the valuation issue at the time of the trial.

[11] The Applicant suggested that a Determination could proceed by affidavit evidence as it need only cover the key facts identified above.

[12] The Respondent's position was that only if the Questions were answered negatively would the trial be shortened. I disagree with this assessment and prefer the Applicant's view that either response could shorten the trial. The difficulty I have, however, is whether the Determination itself would be any shorter than a trial. Certainly, if it proceeded by affidavit evidence, that would be the case, but is limiting the Determination's process to affidavit evidence the appropriate process? I do not believe so.

[13] It is in this regard that the Respondent urged me to consider the following relevant factors:

a) What type of questions is the Applicant asking to have determined;

b) What kind of evidence will need to be considered if a *Rule* 58 motion is allowed and are factual issues in dispute;

c) What is the proposed procedure; and

d) Will a *Rule* 58 motion result in prejudice to either Party.

[14] With respect to the type of questions, the Respondent submits they are questions of mixed fact and law and not just questions of law.

[15] I agree with the Respondent. The question of whether there is a transfer is only determinable by a full examination of the factual circumstances surrounding the Applicant's arrangement with Mr. Aitchison. Just by way of example, it strikes me how invoicing was handled would be significant. Also, what were the intentions of the Applicant and Mr. Aitchison? More than the key facts identified by the Applicant need to be flushed out. This is best handled through the normal course of examination and cross-examination. This alone is sufficient for me to rule against a Determination solely based on affidavit evidence. Having reached that conclusion, then it strikes me that a Determination based on *viva voce* evidence involves the same time and expense as a trial. The exception, as noted by the Applicant, is that the Determination would not address the valuation issue. But, that is readily handled by simply bifurcating the trial.

[16] I find further support for the view that a full hearing is required to address the Questions in comments of the Federal Court of Appeal in the case of *Manrell v Canada*,[1] where the Court addresses the concept of property:

> 24. Professor Ziff, in Principles of Property Law, 3rd ed. (Scarborough: Carswell, 2000), says this about property at page 2:
>
> > Property is sometimes referred to as a bundle of rights. This simple metaphor provides one helpful way to explore the core concept. It reveals that property is not a thing, but a right, or better, a collection of rights (over things) enforceable against others. Explained another way, the term property signifies a set of relationships among people that concern claims to tangible and intangible items. [Underlining added.]
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> 25. It is implicit in this notion of "property" that "property" must have or entail some exclusive right to make a claim against someone else. A general right to do something that anyone can do, or a right that belongs to everyone, is not the "property" of anyone. In this case, the only thing that Mr. Manrell had before he signed the non-competition agreement that he did not have afterward was the right he shares with everyone to carry on a business. Whatever it was that Mr. Manrell gave up when he signed that agreement, it was not "property" within the ordinary meaning of that word.

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[1] 2003 FCA 128.

[17] Establishing the set of relationships, as Professor Ziff puts it, can only be fully and fairly determined with the benefit of examination and cross-examination of the key players. I do not agree with the Applicant that a limited number of key facts would be sufficient for a court to properly resolve this issue between the Parties.

[18] I concur with the Respondent that the Questions raise "numerous factual underpinnings", many of which the Respondent suggests are in dispute, such as:

> (a) whether Mr. Aitchison or the appellant was retained by his/its clients;
>
> (b) whether Mr. Aitchison held an exclusive right to invoice for his legal services, which he could assign or transfer;
>
> (c) whether the Law Society of Upper Canada's licensing regulations provide any limitations on invoicing for legal services;
>
> (d) whether the appellant's income statements are true and accurate; and
>
> (e) whether the appellant's invoices are true and accurate.

[19] While I do not believe I am prone to quoting my own reasons, I did set out my views on Rule 58 Determinations in *HSBC Bank Canada v R.*[2] I repeat them.

> 10. Mr. Kroft also urges me to consider this provision in light of what he describes is an objective of the Tax Court of Canada Rules to find ways to resolve issues without the need for trial. He points out our new rules on pre-hearing and settlement conferences as examples of this thrust. While I agree with the sentiment, I remain of the view that a Determination is not a substitute for trial. This is a view expressed in the case of Carma Developers Ltd. v. H.M.Q..[1] The Appellant claims this request is not made as an alternative to trial, yet does acknowledge that both sides may need to call evidence at the Determination.
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> 11. Case law has also established that on a Determination there should be no dispute as to the facts underpinning the questions of law to be answered. The Appellant placed considerable emphasis on the changes in 2004 to Rule 58 which extended Determinations on questions of law to Determinations of fact or mixed fact and law as well, suggesting the Rule now specifically contemplates that a Determination of questions of law may first require a Determination of facts. That sounds very much to me like a trial.
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> …

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[2] 2011 TCC 37.

> 13. …The Appellant invites the Respondent to call evidence at the Determination. Notwithstanding the new wording of Rule 58, I do not agree that calling such evidence at a Determination of the 12 questions of law before me is in order. The CDIC issue as framed in the Reply is a question of fact: was there the necessary purpose to incur the fee to produce income. Interestingly, the Appellant has framed its question for Determination as a question of law – is the fee to the parents deductible vis-à-vis the deposit liabilities insured by CDIC. The answer to the legal question can only be determined by answering the factual question, and that notwithstanding the new wording of Rule 58, is a finding so fundamental to the overall appeal that only a full-blown trial with all the benefits of trial rules and procedures is the appropriate place for such an adjudication.
>
> 14. …This goes to the very heart of what a trial judge, with all the evidentiary rules and procedures at his or her disposal, is to hear. No, I find the Appellant's request for the resolution of the CDIC issue is an attempt to bifurcate the trial, with the result a Motion's Judge may be forced to reach conclusions on facts which should, and must, go to trial for a fair hearing, and to reach those conclusions without the benefit of the evidentiary protections afforded to both sides at a trial. I simply have not been convinced that the parties can reach into this complicated mass of documents and surrounding circumstances and pluck out only those facts that are necessary to answer the CDIC issue. It simply cannot work.

[20] I agree with the Respondent that the issue raised by this assessment is a novel one and, as such, a full hearing would best serve the interests of justice in possibly establishing a precedent. I disagree with the Applicant's view that it is unnecessary to look beyond the complete legislative regime (*Business Corporations Act* and the *Law Society Act*) to ascertain the relationship. The Court needs to know all the circumstances.

[21] It remains to be determined whether unnecessary time and expense would result from requiring evidence, expert or otherwise, to deal with the valuation issue coincidentally with the rest of the trial. The Applicant argues that this could involve considerable time and expense, necessitating expert evidence, given the complexity. Frankly, I do not see the valuation issue being that complex. The Respondent values the "right to invoice" equal to the amount of the invoices themselves, taking no account even of tax owing on such amounts. I would have thought that the Parties, without excessive energy, might address this between them without requiring expert help.

[22] I agree with the Respondent's view that their approach to the Applicant's and Mr. Aitchison's tax position is novel and complex. This is not, I respectfully

suggest, due to any great complexity with respect to the value, but is with respect to the concept of property itself, what are rights and what is transferable.

[23] I am prepared to bifurcate the trial and allow the Parties to proceed to trial without addressing the valuation issue. It will be left to the trial judge to set timelines for hearing the valuation issue, if that ultimately proves necessary. If both Parties decide that they do not require the bifurcation then they are to advise the Court at least 30 days prior to the date set for trial. Costs of this Motion to the Respondent.

Signed at Ottawa, Canada, this 1st day of December 2016.

"Campbell J. Miller"

C. Miller J.

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| CITATION: | 2016 TCC 281 |
| COURT FILE NO.: | 2014-844(IT)G |
| STYLE OF CAUSE: | AITCHISON PROFESSIONAL CORPORATION AND HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Toronto, Ontario |
| DATE OF HEARING: | November 21, 2016 |
| REASONS FOR ORDER BY: | The Honourable Justice Campbell J. Miller |
| DATE OF ORDER: | December 1, 2016 |

APPEARANCES:

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| Counsel for the Applicant (Appellant): | Adrienne K. Woodyard,<br>David C. Nathanson, Q.C. |
| Counsel for the Respondent: | Samantha Hurst |

COUNSEL OF RECORD:

For the Applicant (Appellant):

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|---|---|
| Name: | Adrienne K. Woodyard, David C. Nathanson, Q.C. |
| Firm: | DLA Piper (Canada) LLP |

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| For the Respondent: | William F. Pentney<br>Deputy Attorney General of Canada<br>Ottawa, Canada |