Dockets: 2012-3093(IT)G
2012-3094(IT)G

BETWEEN:

2078970 ONTARIO INC., IN ITS CAPACITY AS DESIGNATED PARTNER OF LUX OPERATING LIMITED PARTNERSHIP,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent;

AND BETWEEN:

2078702 ONTARIO INC., IN ITS CAPACITY AS DESIGNATED PARTNER OF LUX INVESTOR LIMITED PARTNERSHIP,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on January 16, 2018 at Vancouver, British Columbia

Before: The Honourable Justice David E. Graham

Appearances:

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| Counsel for the Applicants: | David R. Davies<br>Shawn W. Tryon |
| Counsel for the Respondent: | Michael Taylor<br>Raj Grewal |

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**ORDER**

THIS COURT ORDERS THAT:

1. The question put to the Court pursuant to section 58 of the *Tax Court of Canada Rules (General Procedure)* is answered in the negative.

2. Costs are awarded to the Applicants for both stages of the application. Although there were two applications, the Applicants shall share one set of costs. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the Applicants shall have a further 30 days to file written submissions on costs and the Respondents shall have yet a further 30 days to file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the foregoing time limits, one set of costs shall be awarded to the Applicants as set out in the Tariff.

Signed at Ottawa, Canada, this 11th day of July 2018.

"David E. Graham"

Graham J.

Citation: 2018 TCC 141
Date: 20180711
Dockets: 2012-3093(IT)G
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2078702 ONTARIO INC., IN ITS CAPACITY AS DESIGNATED PARTNER OF LUX INVESTOR LIMITED PARTNERSHIP,

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## REASONS FOR ORDER

Graham J.

[1] The Lux Operating Limited Partnership and the Lux Investor Limited Partnership both filed information returns reporting business losses in their 2006, 2007 and 2008 fiscal periods.[1] The Minister of National Revenue concluded that neither partnership was a valid partnership. The Minister reached this conclusion based on her conclusion that the partnerships' members did not carry on business in common with a view to profit. Based on that conclusion, the Minister issued

[1] The structure of the partnerships and the underlying transactions were set out by Justice Visser in the first stage of the Rule 58 hearing (2017 TCC 173 at para. 4). There is no need to reproduce that information here.

Notices of Determination to the partnerships indicating that they had nil losses in the relevant fiscal periods.

[2] The Applicants argue that the Minister cannot issue a valid Notice of Determination if the Minister has concluded that the partnership in question does not exist. The Respondent disagrees.

[3] The validity of an assessment is different than its correctness. An assessment is invalid if it does not comply with the procedural provisions of the Act.[2] The provisions of the Act dealing with assessments apply equally to determinations.[3] Therefore, a determination is invalid if it does not comply with the procedural provisions of the Act.

[4] The Applicants have asked the court to make the following determination under section 58 of the *Tax Court of Canada Rules (General Procedure)* ("Rule 58"):

> Where the Minister has at all times concluded that no partnership existed, can the Minister issue a valid Notice of Determination in respect of that purported partnership under subsection 152(1.4) of the *Income Tax Act*?

[5] Technically speaking, Notices of Determination are issued under subsection 152(1.5) after the Minister has made a determination under subsection 152(1.4). Nothing turns on this. The question still remains whether the Minister can make a valid determination in the circumstances.

## A. Overview of the Legislation

[6] Before turning to the specific question to be determined, it is worthwhile to review the normal process under the Act for dealing with partnership income and losses.

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2 *Ereiser v. The Queen*, 2013 FCA 20; *The Queen v. Canadian Marconi Company*, 1991 CarswellNat 533 (FCA); and *Blackburn Radio Inc. v. The Queen*, 2012 TCC 255.

3 Subsection 152(1.2).

[7] Partnerships are, with rare exceptions, not persons and not liable to tax under the Act.[4] However, partnerships are required to file information returns in a prescribed form reporting their income or loss as if they were a person (*Income Tax Regulations*, section 229). The partners of the partnership then report their share of the partnership income or loss in their own tax returns (subsection 96(1)).

[8] The Minister has three years from the day that is the later of the day that the partnership return is due to be filed and the day that it is actually filed to dispute the income or loss reported in the information return (subsection 152(1.4)). If the Minister disagrees with the income or loss reported in the information return, the Minister has two options.

[9] The traditional, less efficient option is for the Minister to reassess each partner individually to adjust the partner's share of the partnership's income or loss. I will refer to this option as the "Traditional Process". Under the Traditional Process, if the partners disagree with the Minister's view of the partnership's income, they may individually object to and appeal from their reassessments. The Traditional Process was the only option available to the Minister prior to the introduction of subsection 152(1.4) and related provisions in 1998.

[10] The second, more streamlined option is for the Minister to determine the correct income or loss of the partnership (subsection 152(1.4)). I will refer to this option as the "Streamlined Process". The Streamlined Process has the advantage of resolving any dispute about the partnership's income or loss at the partnership level. If the Minister makes a determination under subsection 152(1.4), she then sends a Notice of Determination to the partnership and to each partner who was a member of the partnership during the relevant fiscal period (subsection 152(1.5)). The determination is binding on the Minister and each partner unless it is objected to or the Minister issues a subsequent redetermination (paragraph 152(1.7)(*a*)). The next steps in the Streamlined Process depend on whether the partnership wishes to dispute the determination or not. If the partnership decides not to dispute the determination, the Minister may then reassess the individual partners to give effect to the determination. Reassessment is an important step in the process because it is the partners, not the partnership, that pay tax. If the partnership decides to dispute

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[4] Subsection 102(2) makes partnerships persons for limited purposes and the SIFT rules subject partnerships to tax in certain circumstances. Neither of these provisions is relevant to the question before me.

the determination, the dispute proceeds through the usual process. The objection and appeal provisions normally applicable to assessments apply to determinations (subsection 152(1.2)). However, one partner, known as the designated partner, disputes the determination on behalf of all of the partners (subsection 165(1.15)). That partner is generally the partner who was designated for that purpose in the information return filed by the partnership. If the dispute is resolved in a way that results in a change in the partnership's income or loss, the Minister may reassess the individual partners to give effect to the outcome. Again, reassessment is an important step in the process because it is the partners, not the partnership, that pay tax.

[11] It is important to emphasize that the Traditional Process and the Streamlined Process both lead to the same result. The only difference is that, under the Streamlined Process, the objection or appeal is carried out collectively through the designated partner whereas under the Traditional Process it is carried out individually by each partner. Thus, while the Streamlined Process is generally more efficient for all parties, both processes allow the Minister to assess the correct tax and both processes ensure that partners have objection and appeal rights.

## B. Application to the Partnerships in Issue

[12] In the Applicants' case, the Lux Operating Limited Partnership and the Lux Investor Limited Partnership (together, the "Lux Partnerships") filed information returns reporting business losses. The Minister issued Notices of Determination. The Applicants, being the designated partners for the Lux Partnerships, objected to the determinations. When the Minister confirmed those determinations, the Applicants appealed to this Court.

[13] What sets the Applicants' case apart from the normal use of subsection 152(1.4) is the Minister's reason for making the determinations. The Minister did not simply determine that the Lux Partnerships had no losses. The Minister determined that the Lux Partnerships had no losses because the Minister concluded that the purported partners of the Lux Partnerships (the "Lux Partners") were not carrying on business in common with a view to profit and thus there were no partnerships.

## C. Parties' Positions

[14] The parties have different interpretations of how the process is supposed to work when the Minister concludes that a partnership did not exist.

[15] Both parties accept that, if the Minister concludes that a partnership did not exist, the Minister may use the Traditional Process to reassess the purported partners.

[16] The Applicants take the position that the Traditional Process is the only option available to the Minister. They argue that, once a conclusion has been reached that a partnership did not exist, the Streamlined Process is no longer available to the Minister. They submit that any Notice of Determination issued based on that conclusion is invalid. The Applicants say that the Minister can only determine a partnership's income to be nil if the Minister concludes that the partnership existed and that its revenue less its expenses equaled zero.

[17] The Respondent goes further. The Respondent says that the Minister can also determine a partnership's income to be nil if the Minister concludes that the partnership did not exist. The Respondent argues that the Minister's reason for making the determination does not form part of the determination. The Respondent takes the position that, when the Minister concludes that a partnership did not exist, the Minister still has the option of using the Streamlined Process. The Respondent argues that the Minister may, as she did in the Applicants' cases, simply issue a Notice of Determination stating that the income of the partnership was nil. In the alternative, the Respondent argues that the Minister may issue a Notice of Determination determining the non-existence of the partnership.

## D. Conclusion

[18] I find that the Applicants' interpretation is correct. If the Minister concludes that a partnership did not exist, the Minister cannot issue a Notice of Determination to the partnership. Her only choice is to reassess the purported partners individually under the Traditional Process. Any Notice of Determination issued to a partnership in these circumstances is invalid.

[19] The following textual, contextual and purposive analysis sets out the reasons for my conclusion.

## E. Belief vs. Conclusion

[20] Before turning to the textual, contextual and purposive analysis, I need to first address a question of terminology. Throughout the Respondent's submissions, counsel for the Respondent referred to the Minister's "belief" that the Lux Partnerships did not exist. Neither the word "belief" nor any version thereof is used in section 152. The only portion of section 152 that explicitly addresses the existence of a partnership is subsection 152(1.8). Subsection 152(1.8) describes what happens when the Minister or a court "concludes" that a partnership does not exist.

[21] The Respondent's use of the word "belief" to describe what Parliament has clearly labelled a conclusion unnecessarily clouds the issue before me. More importantly, the question that I have been asked to answer is whether the Minister can issue a valid Notice of Determination if the Minister has at all times concluded that no partnership existed. In the circumstances, examining whether believing is something less than concluding is a pointless exercise. The question before me presupposes that the Minister has reached a conclusion. For this reason, I will avoid referring to the Minister's beliefs in the rest of these Reasons for Order.

## F. Textual Analysis

[22] A textual analysis of subsection 152(1.4) reveals ambiguity in the meaning of the subsection.

[23] The full text of subsection 152(1.4) and of all of the other provisions referred to in these Reasons for Order is reproduced in Appendix "A". The relevant portion of subsection 152(1.4) states:

> The Minister may . . . determine any income or loss of [a] partnership for [a] fiscal period and any deduction or other amount, or any other matter, in respect of the partnership for the fiscal period that is relevant in determining the income, taxable income or taxable income earned in Canada of . . . any member of the partnership for any taxation year under this Part.

[24] The word "partnership" appears throughout subsection 152(1.4). Both parties say that the ordinary meaning of the word supports their position.

[25] The Applicants argue that the use of the word "partnership" throughout subsection 152(1.4) clearly indicates that the provision only applies to

partnerships. Thus, the Applicants submit that the subsection cannot be applied where the Minister has concluded that there was no partnership. The Applicants say that it would have been easy for Parliament to insert the phrase "or purported partnership" into subsection 152(1.4) if that had been its intention. They argue that the absence of that phrase indicates that the subsection only applies to actual partnerships.

[26] The Respondent emphasizes that partnerships do not cease to be partnerships simply because the Minister reaches a conclusion. The partners presumably continue to hold a different view. The Respondent refers to the Federal Court of Appeal's observation in *Sentinel Hill Productions IV Corp. v. The Queen* that the filing of a partnership information return "in effect constitutes a representation that the entity is in fact and law a partnership".[5] The Respondent says that whether a partnership existed or not is a question that will ultimately be determined by the courts, not the Minister. The Respondent submits that, until that happens, a partnership that claimed to have been a partnership should be treated as such for the purposes of the Act.

[27] The Respondent submits that there is nothing in the text of subsection 152(1.4) that prevents the Minister from making a determination that a partnership's income was nil if the Minister has concluded that the partnership did not exist. The Respondent argues that the Minister's reason for making the determination (i.e. her conclusion that the partners were not carrying on business in common with a view to profit) does not form part of the determination.

[28] The Applicants submit that it is too simplistic to say that the Minister simply determines that a partnership's income is nil and that her reason for doing so is irrelevant.

[29] I see merit in both parties' interpretations. The Respondent's assertion that a partnership did not cease to be a partnership just because the Minister concluded it was not a partnership is sound. If I were dealing with an assessment, the Respondent's interpretation would be correct. The Minister's conclusions could not be used to invalidate an assessment. However, a determination is not an assessment. A determination is an expression of the Minister's position. It is not a statement of fact, not an expression of the partnership's position and not a

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5 *Sentinel Hill Productions IV Corp. v. The Queen*, 2014 FCA 161 at para. 12.

prediction of the conclusion that a court may one day reach. Therefore, when making a determination, the Minister's view is not only relevant, but actually the only thing of relevance.

[30] If the Minister concludes that a partnership did not exist, she has done something different than determining that the partnership's income was nil. There is a significant difference between having $0 of income and being incapable of having income. Something that does not exist cannot have attributes. The fact that purported partners or the courts may disagree with the Minister's conclusion that a partnership did not exist does not change the fact that Minister did not determine that the partnership had no income, but rather concluded that it did not exist.

[31] The Respondent counters this argument with an alternative textual interpretation. The Respondent submits that the phrase "or any other matter, in respect of the partnership" in subsection 152(1.4) is broad enough to encompass the question of the partnership's existence. Thus, the Respondent submits, the Minister may simply determine that a partnership did not exist.[6]

[32] The Applicants counter that the "other matter" referred to in subsection 152(1.4) still has to be "in respect of the partnership". Thus, the Applicants say that if the Minister has concluded there is no partnership, there is still nothing that the other matter can be in respect of.

[33] I see merit in the Respondent's alternative position. The words "in respect of" are very broad.[7] I can see how they could capture the existence of a partnership. At the same time, the Applicants' interpretation is not inconsistent with the text.

[34] Overall, I find that there is ambiguity in the text of subsection 152(1.4). I prefer the Applicants' textual interpretation on the primary argument and the Respondent's textual interpretation on the alternative argument but there is

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6 I note that the notices of determination issued by the Minister to the Lux Partnerships clearly stated that the Lux Partnerships had nil income, not that they did not exist. However, I have been asked to answer a question of law. What the Minister actually did in the case of the Lux Partnerships is not relevant to that question.

7 *Nowegijick v. The Queen*, [1983] 1 SCR 29.

certainly room for both interpretations within the ordinary grammatical meaning of the subsection.

## G. Contextual Analysis

[35] The contextual analysis of the provisions related to subsection 152(1.4) strongly supports the Applicants' interpretation. I will deal with some minor contextual provisions before turning to the heart of the matter, namely subsections 152(1.7) and (1.8).

### (i) Subsections 152(1), (1.01), (1.1) and (1.11)

[36] Subsection 152(1.4) is not the only provision in section 152 involving determinations. Subsections 152(1.01), (1.1) and (1.11) and paragraphs 152(1)(*a*) and (*b*) all deal with other situations where the Minister makes determinations. These provisions highlight that determinations may be either mandatory or permissive. Determinations that the Minister makes as a result of a request by a taxpayer are mandatory.[8] The Minister has no choice but to make a determination and, in fact, is required to do so "with all due dispatch". By contrast, determinations that the Minister makes independently are permissive.[9] It is entirely up to the Minister whether she makes the determination or not.

[37] Subsection 152(1.4) falls into the permissive category. The fact that subsection 152(1.4) is permissive is important because it means that the Minister is not required to determine a partnership's income just because the partnership filed an information return. This fact is consistent with both parties' interpretations. However, from the Applicants' point of view, it certainly takes away much of the force of the Federal Court of Appeal's observations in *Sentinel Hill*. While the filing of a partnership information return certainly "constitutes a representation that the entity is in fact and law a partnership",[10] that representation does not impose any obligation on the Minister to do anything. If the Minister disagrees with the representation (i.e. if the Minister concludes the partnership did not exist), the Minister does not have to issue a determination.

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8 Subsections 152(1.01) and (1.1) and paragraphs 152(1)(*a*), 152(1)(*b*) and 152(1.11)(*a*).

9 Subsection 152(1.4) and paragraph 152(1.11)(*b*).

10 *Sentinel Hill*, *supra*.

(ii) Subsections 152(1), (4) and (7)

[38] Subsection 152(1) requires the Minister to assess a taxpayer after a return is filed. Subsection 152(7) allows the Minister to assess a taxpayer in the absence of a return. Subsection 152(4) allows the Minister to assess or reassess a taxpayer beyond the normal reassessment period in certain circumstances.

[39] The Minister can assess a person under these subsections even if the Minister has concluded that the person does not exist. *Antle v. The Queen*[11] is an example of this technique. *Antle* involved a transfer of shares from an individual to a trust and then to a third party. The Minister was of the view that the trust was not validly constituted and thus that the resulting capital gains belonged to the individual. However, to protect her position, the Minister assessed both the individual (on the basis that the trust was not validly constituted) and the trust (on the alternative basis that the trust was validly constituted). The Minister knew that only one of those assessments would stand but, by issuing both, ensured that her interests were protected. In the end, the courts concluded that the trust did not exist. As a result, the reassessment of the trust was vacated and the reassessment of the individual was upheld.

[40] It is tempting to say that if the Minister can reassess a person whom the Minister has concluded does not exist (albeit having made that conclusion in the course of assessing another taxpayer), then the Minister should be able to make a subsection 152(1.4) determination of the income of a partnership that the Minister has concluded does not exist. However, I am not persuaded by this logic. There is a significant difference between subsection 152(1), (4) or (7) assessments and a subsection 152(1.4) determination. The purpose of an assessment is to assess tax, penalties and interest. A subsection 152(1.4) determination does not assess tax, penalties or interest. It simply allows for the income or loss of a partnership to be determined in a streamlined manner.

[41] When issuing assessments, the Minister faces risks that are not present when making determinations. In *Antle*, if the Minister had not assessed both the trust and the individual, she would have run the risk of having assessed the wrong person. If the Minister only assessed the trust and the court had found that the trust had not

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[11] 2009 TCC 465; upheld by 2010 FCA 280; leave to appeal denied 2011 CarswellNat 5822; and motion to reconsider denial denied 2012 CarswellNat 183.

been validly constituted, the Minister would have been left with nothing. Similarly, if the Minister had only assessed the individual and the court had found that the trust had been validly constituted, the Minister would have been left with nothing.[12]

[42] The same risks are not present with subsection 152(1.4) determinations. Under subsection 152(1.4), the Minister is not choosing between assessing alternative persons. The Minister only ever assesses the partners. If they are partners, then the Minister assesses them and includes the partnership income or losses in their incomes. If they are not partners, the Minister still assesses them, this time to remove the income or losses from their incomes. All that subsection 152(1.4) does is streamline the assessment process.

[43] In summary, the Streamlined Process is not an assessment process. It is something very different. As a result, I do not find contextual comparisons to the subsection 152(1), (4) and (7) assessment processes useful. I am being asked how the Streamlined Process works. It is better to focus the contextual analysis on the provisions that relate to that process.

(iii) Subsections 152(1.2) and (1.9)

[44] While subsections 152(1.2) and (1.9) are part of the Streamlined Process, they do not shed any contextual light. Subsection 152(1.2) simply states that the standard objection and appeal provisions apply to determinations. Subsection 152(1.9) allows for a waiver of the normal determination period.

(iv) Subsections 152(1.5) and (1.6)

[45] The Applicants submit that subsections 152(1.5) and (1.6) support their interpretation. I disagree. I find that these subsections could support either party's interpretation.

[46] Subsection 152(1.5) states that if the Minister makes a determination under subsection 152(1.4), the Minister shall send a Notice of Determination to the partnership and the partners. The Applicants argue that it would be absurd if the

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[12] I acknowledge that there were alternative arguments that the Minister relied upon in *Antle*. I am ignoring them for illustrative purposes.

Minister were required to mail a Notice of Determination to a partnership that the Minister had concluded did not exist. I disagree. If Parliament intended the Minister to be able to issue a Notice of Determination concerning the existence of a partnership, then Parliament must have intended the notice to be mailed to someone. If Parliament envisioned that the Minister could not issue a Notice of Determination concerning the existence of a partnership, then the fact that Parliament required other Notices of Determination to be mailed to the partnership does not tell me anything about what Parliament intended to happen when no Notice of Determination could be issued.

[47] Subsection 152(1.6) states that a determination is not rendered invalid simply because one or more of the partners did not receive the Notice of Determination. I am unsure what value subsection 152(1.6) adds to the Streamlined Process since subsection 244(20) already deems anything sent to a partnership to have been provided to each partner. In any event, subsection 152(1.6) does not shed any contextual light on the issue before me. It is consistent with both parties' positions.

(v) Subsections 152(1.7) and (1.8)

[48] Subsections 152(1.7) and (1.8) are the key to the contextual analysis. They strongly support the Applicants' interpretation. I will briefly describe the subsections before analyzing them.

[49] Subsection 152(1.7) is the heart of the Streamlined Process. It sets out what happens after the Minister makes a determination. The following are the relevant portions of subsection 152(1.7):

> Where the Minister makes a determination under subsection (1.4) or a redetermination in respect of a partnership,
>
> > (a) subject to the rights of objection and appeal of the member of the partnership referred to in subsection 165(1.15) in respect of the determination or redetermination, the determination or redetermination is binding on the Minister and each member of the partnership for the purposes of calculating the income, taxable income or taxable income earned in Canada of . . . the members for any taxation year under this Part; and

> (b) notwithstanding subsections (4), (4.01), (4.1) and (5), the Minister may, before the end of the day that is one year after the day on which all rights of objection and appeal expire or are determined in respect of the determination or redetermination, assess the tax, interest, penalties or other amounts payable . . . in respect of any member of the partnership and any other taxpayer for any taxation year as may be necessary to give effect to the determination or redetermination or a decision of the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada.
>
> [Emphasis added.]

[50] In a normal situation where there is no dispute as to the existence of the partnership, subsection 152(1.7) has two effects. The first effect is to provide that, once all objection and appeal rights have expired, the resulting determination or redetermination is binding on both the Minister and the partners (paragraph 152(1.7)(*a*)). This binding effect is what makes the Streamlined Process streamlined. By making the final determination or redetermination binding, the Minister does not end up relitigating the same issue over and over for each partner.

[51] The second effect of subsection 152(1.7) is to give the Minister additional time to reassess the partners. A dispute under the Streamlined Process may take time and, during that time, the partners' normal reassessment periods may expire. There is no point in making the result of the Streamlined Process binding on the partners if the Minister cannot reassess them. Therefore, paragraph 152(1.7)(*b*) gives the Minister a year following the end of the relevant objection or appeal period to reassess the partners without having to prove that the partners made a misrepresentation attributable to carelessness, neglect or wilful default.

[52] The following are the relevant portions of subsection 152(1.8):

> Where, as a result of representations made to the Minister that a person was a member of a partnership in respect of a fiscal period, a determination is made under subsection (1.4) for the period and the Minister, the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada concludes at a subsequent time that the partnership did not exist for the period or that, throughout the period, the person was not a member of the partnership, the Minister may, notwithstanding subsections (4), (4.1) and (5), within one year after that subsequent time, assess the tax, interest, penalties or other amounts

> payable . . . by any taxpayer for any taxation year, but only to the extent that the assessment . . . can reasonably be regarded
>
> (a) as relating to any matter that was relevant in the making of the determination made under subsection (1.4);
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> (b) as resulting from the conclusion that the partnership did not exist for the period; or
>
> (c) as resulting from the conclusion that the person was, throughout the period, not a member of the partnership.
>
> [Emphasis added.]

[53] At first glance, subsection 152(1.8) appears to set out what happens if the Minister or a court concludes that a partnership did not exist.[13] That is not, however, what it does. Subsection 152(1.8) does not specify what is to happen when the Minister or a court reaches that conclusion. It simply extends the normal reassessment period to give the Minister time to reassess the purported partners following such a conclusion. Subsection 152(1.8) is neither part of the Streamlined Process nor part of the Traditional Process. At the same time, subsection 152(1.8) is not a third process. It is simply a way, in certain circumstances, to assist the Minister in moving from the Streamlined Process to the Traditional Process. If the normal reassessment periods for the purported partners have not yet expired, then the Minister does not need subsection 152(1.8) to move from the Streamlined Process to the Traditional Process. The Minister may simply reassess the purported partners under subsection 152(1). Subsection 152(1.8) only comes into play where the Streamlined Process has been started but is no longer applicable and the purported partners' normal reassessment periods have expired. It gives the Minister a year to switch from the Streamlined Process to the Traditional Process without having to worry about the purported partners' normal reassessment periods.

[54] There are three key preconditions that must be met for subsection 152(1.8) to apply. First, the Minister or a court must have concluded that a partnership did not exist. Second, a Notice of Determination must have previously been issued in respect of the partnership. Third, the conclusion must have been reached after the

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[13] Subsection 152(1.8) also deals with conclusions that a specific partner was not a member of the partnership. As those conclusions are not relevant to the question before me, I will not focus on them.

determination was issued. This third precondition is found in the phrase "concludes at a subsequent time".

[55] Subsections 152(1.7) and (1.8) strongly support the Applicants' interpretation. The Applicants' interpretation results in a system in which subsections 152(1.7) and (1.8) work harmoniously together. By contrast, the Respondent's interpretation requires me to accept that Parliament chose to:

(a) create redundancy in paragraphs 152(1.8)(*a*) and (*b*);

(b) unnecessarily introduce the word "concludes" into subsection 152(1.8) when it really meant to use the words "redetermines" and "decides";

(c) prevent subsection 152(1.8) from applying in circumstances where it logically would apply;

(d) create limitation periods under subsection 152(1.8) that ignored rights of appeal; and

(e) create redundant, yet contradictory, limitation periods under paragraph 152(1.7)(*b*) and subsection 152(1.8).

[56] I will discuss each of these problems separately.

**Why would Parliament make paragraphs 152(1.8)(a) and (b) redundant?**

[57] The first problem with the Respondent's interpretation is that it makes paragraphs 152(1.8)(*a*) and (*b*) redundant. In the Respondent's alternative textual argument, the Respondent argues that the phrase "any other matter in respect of the partnership" includes the question of whether the partnership exists. Paragraph 152(1.8)(*a*) allows the Minister to reassess tax that can reasonably be regarded "as relating to any matter that was relevant in the making of the determination". Under the Respondent's interpretation, the phrase "any matter" in paragraph 152(1.8)(*a*) would include the existence of the partnership. Yet paragraph 152(1.8)(*b*) already specifically allows the Minister to reassess tax that can reasonably be regarded "as resulting from the conclusion that the partnership did not exist". Why would Parliament have included paragraph 152(1.8)(*b*) if it added nothing new? If the

Minister's interpretation were correct, I would have expected paragraph 152(1.8)(*a*) to be placed at the end of the list of reasons to reassess and would have expected it to refer to "any other matter" in recognition of the fact that the existence of the partnership was already covered in paragraph 152(1.8)(*b*). The fact that subsection 152(1.8) is not drafted in this manner undermines the Respondent's interpretation.

**Why would Parliament unnecessarily use the word "concludes"?**

[58] The second problem with the Respondent's interpretation is that it requires me to accept that Parliament unnecessarily used the word "concludes" in subsection 152(1.8). Subsection 152(1.8) only applies if "the Minister, the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada concludes" that a partnership did not exist.

[59] The use of the word "concludes" is unusual. Nowhere else do the Act or the *Income Tax Regulations* refer to the Minister or the courts concluding anything. Subsection 152(1.7) refers to the Minister making a determination or redetermination and refers to courts making decisions. Why not use that same language in subsection 152(1.8)?

[60] Unfortunately, the Technical Notes that accompanied the introduction of subsection 152(1.8) do not provide any guidance. The Technical Notes state:[14]

> New subsection 152(1.8) will come into play where the Minister of National Revenue makes a determination at the partnership level but it is subsequently demonstrated that there is no partnership or that a taxpayer in respect of which an assessment or determination was made on the basis that the taxpayer was a member of the partnership is not, in fact, a member of the partnership.
>
> [Emphasis added.]

[61] The use of the word "demonstrated" is unhelpful. "Demonstrated" neither means "concludes", nor "redetermines" nor "decides". The French version of the Technical Notes uses the term "constate". This term is equally unhelpful.

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[14] Department of Finance, *Technical Notes Relating to the Income Tax Act*, December 1997.

[62] The Applicants say that Parliament chose to use the word "concludes" because concluding is something different than redetermining or deciding and Parliament wanted to be clear that something different was happening. I agree.

[63] Subsection 152(1.8) does not apply unless the Minister has already made a determination under subsection 152(1.4). Furthermore, subsection 152(1.8) requires that the conclusion made by the Minister or the courts must be made "at a subsequent time". That indicates that the conclusion must be something separate from the initial determination. It also indicates that the Minister must have changed her mind. In other words, when she made the initial determination she must have accepted that the partnership existed and she must now have reached a different conclusion.

[64] If the Minister had determined a partnership's income to be one amount, and now thought that she should have determined the income to be some other amount, the normal process would be for the Minister to issue a Notice of Redetermination reflecting that new income. If, as the Respondent argues, the Minister can make a redetermination if she has subsequently concluded that no partnership exists, then why does subsection 152(1.8) say the Minister "concludes" that a partnership did not exist rather than "makes a redetermination" that the partnership did not exist? The Respondent cannot provide a satisfactory answer to this question.

[65] Subsection 171(1) sets out the Tax Court's power to dispose of an appeal. The powers of the Federal Court of Appeal and the Supreme Court of Canada are the same. These courts have the power to either dismiss or allow an appeal from an assessment. As set out above, subsection 152(1.2) makes the provisions of the Act relating to appeals from assessments apply equally to appeals from subsection 152(1.4) determinations. Therefore, the courts also have the power to either dismiss or allow an appeal from a determination. If a court allows an appeal, the court may either vacate the determination or refer the determination back to the Minister for redetermination on a different basis. In subsection 152(1.7), Parliament used the word "decision" when referring to judgments of a court. Parliament also uses the words "decision" or "decisions" when referring to judgments of a court in subsections 118.1(11), 164(4.1), 171(4), 174(4.1), 223(7), 223.1(1), 225.1(3), 225.1(5), 231.7(5), 232(5), 232(14) and paragraph 191.2(1)(*b*). So why did Parliament choose to use the word "concludes" in subsection 152(1.8) instead of the more applicable word "decides"? The use of the word "concludes" suggests that, when dealing with the existence of a partnership, the courts are to do

something that they would not otherwise do ─ something outside of the courts' normal decision making process. If Notices of Determination or Redetermination cannot be issued when no partnership exists, then the courts cannot order the Minister to make a redetermination on the basis that no partnership exists. The courts have to be able to conclude that no partnership exists without ordering the Minister to make a redetermination. In these circumstances, it is understandable that Parliament would choose to use "concludes" rather than "decides".

[66] An example helps to illustrate this problem. Say a partnership filed an information return reporting a $100,000 loss. The Minister reviewed the return and made a determination that the partnership had a $95,000 loss. The partnership did not object. Subsequently, the Minister made a redetermination that the partnership had $1,000 in income. The Minister's alternative position was that the partnership did not exist. The partnership objected to the redetermination and then appealed to court. Now say that the court accepted the Minister's alternative argument and concluded that the partnership did not exist. If the Applicants are correct and the Minister cannot issue a Notice of Redetermination on the basis that partnership does not exist, then what is the court to order? The court cannot allow the appeal and order the Minister to issue a Notice of Redetermination. The court cannot allow the appeal and vacate the redetermination because the result would be that the original determination holding that the partnership existed and had a $95,000 loss would stand. If the court simply dismisses the appeal, the result would be that the redetermination stands and the partnership exists and has $1,000 of income. The Applicants argue that the use of the word "concludes" in subsection 152(1.8) implies that something different is supposed to happen. The Applicants say that the court is supposed to issue a judgment dismissing the appeal based on its conclusion that the partnership does not exist. But if that is the case, what happens to the redetermination? If it has not been vacated or replaced with another redetermination, is it not still binding on the partners under paragraph 152(1.7)(*a*)? The answer is "no". That is the beauty of the Applicants' interpretation. As set out above, paragraph 152(1.7)(*a*) binds "each member of the partnership". If a court has concluded that there is no partnership, then there is no one for paragraph 152(1.7)(*a*) to bind. All prior determinations and redeterminations simply become unenforceable.

[67] In summary, the Respondent is unable to explain why Parliament chose to use the word "concludes". More specifically, the Respondent is unable to explain why subsection 152(1.8) was not simply drafted as follows:

> Where, as a result of representations made to the Minister that a person was a member of a partnership in respect of a fiscal period, a determination is made under subsection (1.4) for the period and, at a subsequent time, the Minister makes a redetermination or~~,~~ the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada decides ~~concludes at a subsequent time~~ that the partnership did not exist . . .

[68] By contrast, the Applicants' interpretation provides a logical explanation for the use of the word "concludes".

[69] While I have found that the foregoing interpretation of "concludes" favours the Applicants' interpretation, I acknowledge that the interpretation leaves a number of questions unanswered. In particular, it is unclear when the Minister is permitted to reach a conclusion. Logically the Minister can reach a conclusion in situations where she would normally issue a Notice of Determination, a Notice of Redetermination or a Notice of Confirmation. The question is whether she can still reach a conclusion once a matter has been appealed to court or whether the ability to reach conclusions then shifts to the court? It is also unclear whether the normal reassessment period affects the Minister's ability to reach conclusions and, if so, whether that ability is affected by the normal reassessment period of the partnership or the normal reassessment periods of the partners? I can answer the Rule 58 question before me without answering these questions. In addition, I do not think that the answers to these questions would either strengthen or weaken either party's interpretation. Finally, it does not appear to me that answering these questions would help the parties to resolve the appeals. For all of these reasons, I will leave these questions to be answered in a different appeal.

## **Why would Parliament unnecessarily prevent subsection 152(1.8) from applying?**

[70] As set out above, the third problem with the Respondent's interpretation is that it unnecessarily prevents subsection 152(1.8) from applying when it logically should apply if the Respondent's interpretation were right. Subsection 152(1.8) is designed to allow the Minister to reassess purported partners after the normal assessment period. However, it only applies if the Minister has previously issued a Notice of Determination on the basis that the partnership existed. The Respondent was not able to provide me with a satisfactory explanation as to why Parliament would want to restrict the Minister in this manner. Why not allow the Minister to

take advantage of the extended reassessment period if the Minister reached the conclusion from the outset?

[71] Again, the logical answer is that it is because, as the Applicants argue, the Minister cannot make a determination that a partnership does not exist. Thus, there is no need to provide for what happens if the Minister makes such a determination. If the Minister concludes from the outset that the partnership does not exist, the Minister's only option is to reassess the partners directly. The only time that subsection 152(1.8) can ever come into play is if the Minister or a court comes to a different conclusion after the Minister has previously accepted the existence of a partnership and made a determination of its income.

**Why would Parliament create limitation periods that ignored rights of appeal?**

[72] As set out above, the fourth problem with the Respondent's interpretation is that it requires me to accept that Parliament created limitation periods under subsection 152(1.8) that ignored rights of appeal. Paragraph 152(1.7)(*b*) and subsection 152(1.8) both give the Minister the power to reassess after the normal reassessment period. They also both give the Minister one year to do so. However, the time that that one-year period starts differs between the two subsections. In paragraph 152(1.7)(*b*), the power starts after all objection and appeal periods have ended. By contrast, in subsection 152(1.8), the power starts once the Minister or a court "concludes" that the partnership does not exist. Subsection 152(1.8) makes no provision for an appeal of that conclusion. The Technical Notes make it clear that this difference in treatment was intentional:

> . . . the one year time limit for the Minister to assess the tax liability of . . . any taxpayer will start not after the day on which all rights of objection and appeal in respect of the determination made at the partnership level expired . . . (as it would otherwise be under new paragraph 152(1.7)(b)), but after the day where it is demonstrated that there is no partnership or that the taxpayer is not a member of the partnership.

[73] Why not wait until the partnership's rights of appeal are over? What if a court or a higher court had a different view? The Respondent has not provided a logical explanation of why subsection 152(1.8) would have been drafted in this manner when subsection 152(1.7) was not. The Applicants' answer is that it is because, once the Minister or a court has concluded that the partnership does not

exist, the underlying determination and redeterminations become unenforceable (since there are no longer any partners to bind) and, thus, there is no longer anything left to object to or appeal from. In essence, the collective objection and appeal rights of the partnership disappear as soon as there is a conclusion that the partnership did not exist. They are replaced by the individual objection and appeal rights of the purported partners. If a purported partner's relevant year still falls within the normal reassessment period, the Minister simply reassesses the purported partner and the objection and appeal process proceeds normally for each partner individually. If the purported partner's relevant year is beyond the normal reassessment period, the Minister relies on subsection 152(1.8) to reassess the purported partner. The purported partner may then follow the usual objection and appeal processes. In both cases the partners still maintain the ability to have a court (or a higher court) decide whether the partnership existed or not. All that is lost is the ability to do so collectively.

**Why would Parliament create redundant yet conflicting extended reassessment periods?**

[74] As set out above, the fifth problem with the Respondent's interpretation is that under that interpretation, the extended reassessment period in subsection 152(1.8) is potentially redundant with the extended reassessment period under paragraph 152(1.7)(*b*) and, at the same time, conflicts with that period. Paragraph 152(1.7)(*b*) gives the Minister an additional year following the end of the relevant objection or appeal period to reassess "any member of the partnership and any other taxpayer" without having to prove a misrepresentation attributable to carelessness, neglect or wilful default.

[75] The Respondent has argued in her textual analysis of subsection 152(1.4) that the word "partnership" includes a partnership that the Minister has concluded does not exist. Her argument is that, since a court may ultimately determine that the partnership exists, a partnership continues to be a partnership for the purposes of the Act until that happens. This interpretation leads to illogical results when either the Minister or a court concludes that a partnership did not exist. The following examples illustrate the problem.

[76] Under the Respondent's interpretation, if the Minister issues a Notice of Determination and then, on objection, concludes that the partnership did not exist and the purported partners do not dispute that conclusion, then no court will have

ruled that the partnership did not exist. Thus, under the Respondent's textual argument, the partnership would still have existed for the purposes of the Act. Since the partnership still existed, the purported partners would still be caught by the phrase "any member of the partnership" in paragraph 152(1.7)(*b*) and the Minister would therefore have an additional year to reassess them. That year would start 90 days after the Minister concluded that the partnership did not exist (i.e. at the end of the relevant appeal period). The problem is that subsection 152(1.8) already grants the Minister an additional year to reassess purported partners after she concludes that a partnership did not exist. However, that one-year period starts not 90 days after the Minister reaches her conclusion, but rather on the day that she reaches it.

[77] The Respondent has not explained why Parliament would have created a redundant, yet contradictory, extended assessment period. Why have a one-year period that starts immediately and another one-year period that starts in 90 days? What need would the Minister have for the extra 90 days? Furthermore, if, as the Respondent asserts, the partnership is able to appeal her conclusion to the Tax Court, what would become of any reassessments that were issued to the purported partners during the 90-day period? Presumably the purported partners would object and a multiplicity of proceedings would result. Why would Parliament have delayed one extended reassessment period to ensure that no appeal was launched and, at the same time, created a second extended reassessment period with no delay? The Respondent's interpretation offers no answers to these questions.

[78] The better explanation is that there is no redundancy between paragraph 152(1.7)(*b*) and subsection 152(1.8). Once the Minister concludes that a partnership does not exist, the partners are no longer partners and are thus not caught by paragraph 152(1.7)(*b*). The only extended reassessment period is the one under subsection 152(1.8). The partnership cannot appeal the Minister's conclusion so there is no need to delay reassessments of the purported partners by 90 days. The partners can be reassessed immediately and they can appeal the question of the existence of the partnership to court if they choose to do so.

[79] The foregoing example considered the redundancy resulting from the Respondent's interpretation if the Minister concludes that a partnership did not exist. The same problem would be present under the Respondent's interpretation if a court reaches that conclusion. The Respondent's textual argument is that a partnership only ceases to be a partnership when a court concludes that it is not a

partnership. In that case, under the Respondent's logic, once a court reached that conclusion, the partnership would no longer be a partnership for the purposes of the Act so the purported partners would not be caught by the phrase "any member of the partnership" in paragraph 152(1.7)(*b*). However, the extended reassessment period in paragraph 152(1.7)(*b*) is not limited to partners. It also catches "any other taxpayer". The Respondent argues that that phrase is broad enough to capture a purported partner. Thus, once again, the result would be redundant, yet contradictory, extended assessment periods. The Minister would have one year to reassess the purported partners under paragraph 152(1.7)(*b*) and one year to reassess them under subsection 152(1.8). One of the one-year periods would start once the appeal period to the Federal Court of Appeal had expired and the other one-year period would start immediately. The Respondent did not explain why Parliament would have created these conflicting periods.

[80] Again, the better explanation is that there is no redundancy. Parliament did not intend subsection 152(1.7) to apply once a court concludes that a partnership did not exist. The phrase "any other taxpayer" in paragraph 152(1.7)(*b*) was not intended to redundantly catch purported partners, but rather to catch other taxpayers who would indirectly be affected by a change in a partnership's income. For example, say a trust held an interest in a partnership and the trust flowed the losses of the partnership through to a beneficiary. If the Minister determined that the partnership had fewer losses, the Minister may need the extended reassessment period in paragraph 152(1.7)(*a*) to reassess not just the trust but also the beneficiary. A second example is set out in the Technical Notes that accompanied the introduction of subsection 152(1.7). Those notes used the phrase "any other affected taxpayer (such as a member's spouse)". Tax payable by a taxpayer's spouse may be affected by the taxpayer's income so an increase or decrease in the taxpayer's partnership income or loss pursuant to a determination may require a reassessment of the taxpayer's spouse.

[81] The Applicants' interpretation avoids the above redundancies and conflicting periods while still ensuring that beneficiaries of trusts, spouses and similar "other taxpayers" do not receive a windfall. The Minister can still reassess these other taxpayers because subsection 152(1.8) extends the reassessment period to cover "any taxpayer", not just purported partners.

**Summary of subsection 152(1.7) and (1.8) analysis**

[82] In summary, the Respondent's interpretation requires me to believe that Parliament intended to create a process with unnecessary redundancy, unnecessary language, unnecessary exclusions, unnecessary limitations and unnecessary contradictory provisions. By contrast, the Applicants' interpretation provides a logical explanation for subsections 152(1.7) and (1.8) that allows them to work together harmoniously.

(vi) Individual partners

[83] The question before me focuses on the existence or non-existence of a partnership. However, a lot of contextual understanding can be gained from looking at what happens if it is clear that a partnership existed but there is a dispute over whether a given partner was, in fact, a partner.

[84] If the Minister concludes that a particular partner was a partner and the partner disagrees, the Respondent's interpretation of subsection 152(1.4) would result in that partner being deprived of all objection and appeal rights. By contrast, the Applicants' interpretation ensures that those rights are preserved, not just for the individual partner but for all partners. A step-by-step example comparing the processes that would occur under the Applicants' and Respondent's interpretations is set out in Appendix "B". The example clearly demonstrates that the Respondent's interpretation would deprive individual partners of procedural fairness, a result that Parliament cannot have intended.

[85] Similarly, if the Minister concludes that a particular partner was not a partner and the partner disagrees, the Respondent's interpretation could result in a windfall to the remaining partners. By contrast, the Applicants' interpretation ensures that the correct amount of taxes is collected and that the remaining partners have the ability to dispute the outcome. A step-by-step example comparing the processes that would occur under the Applicants' and Respondent's interpretations is set out in Appendix "C". The example clearly demonstrates that the Respondent's interpretation would result in a windfall to the remaining partners, a result that Parliament cannot have intended.

(vii) Contextual conclusion

[86] Based on all of the foregoing, I find that the contextual analysis strongly supports the Applicants' interpretation of subsection 152(1.4).

## H. Purposive Analysis

[87] The purposive analysis also strongly supports the Applicants' interpretation.

[88] Subsections 152(1.4) to (1.9) were introduced in 1998. Looking at the provisions globally, there appear to be four key purposes to the provisions. The purposes are to:

(a) ensure that partners have their incomes or losses from partnerships assessed correctly;

(b) streamline the process of ultimately assessing or reassessing partners;

(c) ensure that the partners have full rights to object and appeal within that process; and

(d) bind the partners to the result of that process.

[89] All of these purposes are achieved under the Streamlined Process when the existence of a partnership is not at issue. The same is not entirely true if the Streamlined Process is used to determine the existence of a partnership. I will discuss each of these purposes in that latter context, although not in the above order.

### (i) Ensuring partners have their incomes and losses assessed correctly

[90] The first purpose of the provisions is to ensure that partners have their incomes and losses from partnerships assessed correctly. Both parties' interpretations of subsection 152(1.4) result in the first purpose being achieved. Under both interpretations, if a partnership did not exist, the purported partners are ultimately reassessed to remove the income or loss from the purported partnership.

[91] The Respondent says that the existence of a partnership is an issue that can only be correctly decided at a trial. I agree. However, the question before me is not whether that issue should be decided at trial, but rather whether that trial should be on an appeal from a Notice of Determination or on appeals from the reassessments

of the purported partners. Either way the issue will come to trial and can be correctly decided.

(ii) Ensuring partners have full rights of objection and appeal within the process

[92] The third purpose of the provisions is to ensure that partners have full rights of objection and appeal within the process. Both parties' interpretations of subsection 152(1.4) result in the third purpose being achieved when the existence of a partnership is in dispute. Under both interpretations, the partners have full objection and appeal rights. The only difference is that, under the Respondent's interpretation, they are collective rights exercised by the designated partner and, under the Applicants' interpretation, they are individual rights exercised by each partner.

(iii) Binding the partners to the result of the process

[93] The fourth purpose of the provisions is to bind partners to the result of the process. As set out above, binding the partners is the key to the Streamlined Process. If the partners are not bound, the process will not be streamlined. I find that the fourth purpose is not achieved with respect to the question of the existence of a partnership under either party's interpretation.

[94] Under the Applicants' interpretation it is entirely logical that partners would not be bound. The Applicants argue that the conclusion that a partnership does not exist is either something that happens in place of the Streamlined Process[15] or something that immediately removes the matter from the Streamlined Process.[16] Either way, since the outcome occurs outside the Streamlined Process, it is not surprising that streamlining is not achieved.

[95] By contrast, under the Respondent's interpretation there is no logical reason why partners would not always be bound. Why make the existence of a partnership something that can be determined under the Streamlined Process and then fail to make the outcome of the process binding? The Streamlined Process is only

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15 This would happen in the case of a conclusion reached by the Minister before a Notice of Determination is issued.

16 This would happen in the case of a conclusion reached by the Minister or a court after a Notice of Determination has been issued.

streamlined if the partners are bound. Yet, under the Respondent's interpretation partners would not always be bound. I say this for two reasons. First, under the Respondent's interpretation, partners are bound by a decision of the Minister but not bound by a decision of a court. Second, under the Respondent's interpretation, partners are not bound if the Minister has extended the normal reassessment period using subsection 152(1.8). These reasons are explained in detail below.

[96] The Respondent's interpretation leads to a bizarre outcome whereby partners are bound to a decision of the Minister but not bound by a decision of a court. As discussed above, paragraph 152(1.7)(*a*) is the heart of the Streamlined Process. It is the means by which the Minister and "each member of the partnership" are bound to the outcome of the Streamlined Process. The Respondent argues in her textual analysis that the word "partnership" includes a partnership that the Minister has concluded does not exist. Her argument is that, since a court may ultimately determine that the partnership exists, the partnership continues to be a partnership for the purposes of the Act until that happens. The Respondent's argument leads to an anomaly in the application of paragraph 152(1.7)(*a*). Under the Respondent's logic, if the Minister concludes that a partnership does not exist and the purported partners do not dispute that conclusion, then no court will have ruled that the partnership did not exist. Thus, the purported partners would still be caught by the phrase "each member of the partnership" in paragraph 152(1.7)(*a*) and would thus be bound by the conclusion that the partnership did not exist. However, bizarrely, if the purported partners appealed to court and the court agreed with the Minister and concluded that the partnership did not exist, then, pursuant to the Respondent's logic, because a court had now ruled on the issue, there would be no partnership for the purposes of the Act and thus paragraph 152(1.7)(*a*) could not bind "each member of the partnership" to the conclusion that the partnership did not exist. It is very difficult to imagine that Parliament would have intended to bind purported partners to a conclusion of the Minister but not to a conclusion of a court. If anything, one would expect the opposite to be true. The better explanation is that Parliament simply did not intend the conclusion that a partnership did not exist to be binding on anyone regardless of whether that conclusion was reached by the Minister or a court.

[97] The Respondent's interpretation also leads to a bizarre outcome whereby partners are not bound if the Minister uses subsection 152(1.8) to extend the

normal reassessment period.[17] Amendments to subsections 165(1.1) and 169(2) were made when the provisions in subsections 152(1.4) to (1.9) were introduced. Paragraphs 165(1.1)(*a*) and (*d*) and 169(2)(*a*) and (*d*) specifically contemplate purported partners objecting to and appealing from the conclusion that a partnership did not exist.[18] However, they only contemplate that happening if the Minister has used the extended reassessment period in subsection 152(1.8) to reassess the purported partners. Therefore, the Respondent's interpretation would require me to conclude that Parliament wanted purported partners to be bound under paragraph 152(1.7)(*a*) but not if subsection 152(1.8) had been used to reassess the purported partners. In other words, purported partners would be bound unless: (a) their tax year in question was outside the normal reassessment period; and (b) the Minister had initially concluded that the partnership existed and had issued a Notice of Determination on that basis but subsequently the Minister or a court had concluded that the partnership did not exist. I can see no reason why Parliament would choose to draw such a bizarre distinction.

[98] While I cannot understand why Parliament would choose the bizarre outcomes that arise under the Respondent's interpretation, I can understand why Parliament would choose, as is the case under the Applicants' interpretation, not to bind partners to a conclusion that a partnership did not exist. Partners dispute determinations through a designated partner. Since partners, in their business relationship, are able to bind each other, it is logical that a designated partner would be able to bind the rest of the partners in a litigation context. However, if a partnership does not exist, then what right does some person who was designated to represent the non-existent partnership have to conduct binding litigation on behalf of the purported partners?

[99] In summary, Parliament made the Streamlined Process binding. The fact that Parliament did not bind purported partners to conclusions as to the existence of a partnership strongly suggests that, as the Applicants contend, Parliament did not view such conclusions as being part of the Streamlined Process.

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[17] Note that the reference in subsection 169(2) to a "determination" is not a reference to a subsection 152(1.4) determination. It is a reference to a determination under subsection 152(1.8) of "an amount deemed to have been paid or to have been an overpayment under" Part I of the Act. An example of such an amount would be a child tax benefit.

[18] Paragraphs 165(1.1)(*d*) and 169(2)(*d*) cross-reference paragraph 152(1.8)(*b*) as being a permitted ground for objection and appeal.

(iv) Streamlining the process of ultimately assessing or reassessing partners

[100] The second purpose of the provisions is to streamline the assessment and reassessment of partners. The second purpose is frustrated under the Respondent's interpretation. The Respondent's interpretation compounds inefficiencies by prolonging the amount of time that the issue remains in litigation while gaining nothing from the outcome of that litigation. It is difficult to imagine that Parliament would have created a process whereby the existence of a partnership could be determined on a streamlined basis through a Notice of Determination but, at the same time, chosen to undermine that process by not making the outcome binding on the purported partners. The result is anything but streamlined. A determination is made and collectively litigated followed by a conclusion being reached that the partnership did not exist, followed by reassessments being made and then individually relitigated by the purported partners. This process is far less efficient than the Traditional Process. In fact, the further the partnership progresses in the litigation before the conclusion that the partnership does not exist is reached, the less efficient the process is.

[101] By contrast, the Applicants' interpretation ensures that the question of the existence of a partnership is dealt with efficiently. In a situation where the conclusion that a partnership does not exist is not reached until later in the process, inefficiencies are reduced by immediately removing the matter from the Streamlined Process. In a case where the Minister concludes from the outset that a partnership does not exist, the matter never even enters the Streamlined Process. It simply proceeds through the Traditional Process. While the Traditional Process is not efficient, it is more efficient than a non-binding trip through the Streamlined Process followed by a trip through the Traditional Process.

[102] Step-by-step examples comparing the processes that would occur under the Applicants' and Respondent's interpretations are set out in Appendices "D" and "E". Those examples clearly demonstrate that the Respondent's interpretation results in an overall litigation process that is anything but streamlined.

[103] The Respondent argues that the Applicants' interpretation frustrates the purpose of efficiency because it requires a different process depending on the reason why there was no income. The Respondent says that if there was no income because revenue less expenses equaled zero, then the Applicants' interpretation allows the Streamlined Process to be used, but if there was no income because the

partnership did not exist, then the Applicants' interpretation requires the Traditional Process to be used. The problem with the Respondent's argument is that it ignores the provisions of the Act. I acknowledge that the process would be more efficient if conclusions that a partnership did not exist were binding on purported partners. However, it is not the Applicants' interpretation that makes the process less efficient. It is Parliament's clear choice not to make conclusions that a partnership did not exist binding on the purported partners. The Respondent is, in essence, asking me to ignore Parliament's choice and design a better system. That is not my role.

[104] In summary, given the fact that Parliament chose not to make conclusions that a partnership did not exist binding on the purported partners, the Applicants' interpretation better addresses the goal of efficiency than the Respondent's alternative.

(v) Purposive conclusion

[105] Based on all of the foregoing, I find that the Applicants' interpretation is strongly supported by the purposive analysis. In particular, it ensures the process operates efficiently. By contrast, the Respondent's interpretation defeats the very efficiency that subsections 152(1.4) to (1.9) were introduced to achieve.

## I. Summary of Textual, Contextual and Purposive Analysis

[106] In summary, there is ambiguity in the text of subsection 152(1.4). The Applicants' interpretation is strongly supported by both the contextual and purposive analyses. The Applicants' interpretation provides a means by which subsections 152(1.7) and (1.8) work harmoniously and efficiently and by which the purpose behind the 1998 amendments to the Act is best achieved. Based on all of the foregoing, I find that the Applicants' interpretation is the better interpretation.

## J. Absurd Outcome?

[107] The Respondent argues that it is absurd that the Lux Partners have taken the position that the Lux Partnerships existed yet may succeed in having the underlying Notices of Determination declared invalid because the Minister concluded that the Lux Partnerships did not exist.

[108] I have been asked to answer a question of law. The Respondent's absurdity argument is focused on the circumstances of this case, not the law. My role is to interpret the legislation, not to achieve a particular result.[19]

[109] There is an unspoken subtext to the Respondent's absurdity argument. If I answer the question in the Applicants' favour, the Minister may now find it difficult to use the Traditional Process to reassess the Lux Partners. She may find that the losses in issue are now statute-barred and that she is unable to prove the facts necessary to show misrepresentations attributable to carelessness, neglect or wilful default. That would be a potential windfall to the Lux Partners. However, if it is a windfall, it will be a windfall that comes from the Minister's misunderstanding of the legislation, not from a flaw in the legislation. In other words, to the extent the outcome of the appeals is absurd, it is not because the Applicants' interpretation gives rise to absurd results. It is because the Minister did not understand the legislation.

[110] As set out above, subsection 152(1.4) is a permissive provision. The Minister never has to use it. The filing of a partnership information return does not force the Minister to issue a Notice of Determination. When the Minister concluded that the Lux Partnerships did not exist, she incorrectly chose to use the Streamlined Process. The choice was entirely hers. Had she used the Traditional Process, she would now be in a very different position.

## J. Sentinel Hill

[111] I feel I would be remiss if I did not address the decision of Justice Woods (as she then was) in *Sentinel Hill v. The Queen* and the Federal Court of Appeal decision upholding Justice Woods' decision.[20] Those decisions also involved an application under Rule 58 dealing with the existence of partnerships.

[112] A Rule 58 determination is a two-stage process. In the first stage, the court decides whether it is appropriate to answer the question. If the question passes the first stage, then, in the second stage, the court answers the question. *Sentinel Hill* never made it past the first stage. Justice Woods determined that the question posed was not raised by a pleading and would not dispose of the proceeding,

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19 *The Queen v. Cheema*, 2018 FCA 45.

20 2013 TCC 267 and 2014 FCA 161.

shorten the hearing or save costs. The Federal Court of Appeal upheld Justice Woods' decision.

[113] In the Applicants' case, stage one of the Rule 58 applications was considered by Justice Visser.[21] Justice Visser distinguished the question that I am required to answer from the question posed in *Sentinel Hill*. Justice Woods described the question before her as being "whether the Determinations should be vacated because the Minister is statute barred from issuing reassessments to partners."[22] Justice Woods concluded that "[t]he appellants seek to have the Determinations vacated on grounds that have nothing to do with whether the Determinations are incorrect or invalid".[23] Both Justice Woods' description of the question and her conclusion were upheld by the Federal Court of Appeal. As Justice Visser noted, the question I am required to answer "clearly only relates to procedural validity pursuant to subsection 152(1.4) of the Act, and only relates to the validity of the Notices of Determination issued to the partnerships, and importantly does not relate to assessments of the partners."[24]

[114] All this is to say that I feel I am not bound by the decisions in *Sentinel Hill*. The Federal Court of Appeal's comments on the workings of subsection 152(1.4) and (1.8) were made in *obiter* and in the context of what the Court understood to be a different question than the one before me.[25] Furthermore, the question posed in *Sentinel Hill* did not move to the second stage of the Rule 58 application. As a result, neither Justice Woods nor the Federal Court of Appeal had the benefit of the arguments concerning the textual, contextual and purposive analysis of the relevant provisions that the parties have provided to me.

## J. Determination of the Question

[115] Based on all of the foregoing, I would answer the question put to me as follows. The Minister may not issue a Notice of Determination in respect of a partnership if, at the time the Minister wants to issue the Notice of Determination, the Minister has concluded that the partnership did not exist in the period in

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21 2017 TCC 173.

22 *Sentinel Hill* (TCC), at para. 20. See also a similar description at para. 7.

23 *Sentinel Hill* (TCC), at para. 36.

24 2017 TCC 173, at para. 23.

25 *Sentinel Hill* (FCA), at paras. 12 and 13.

question. Any Notice of Determination issued in such circumstances would be invalid.

## K. Obiter

[116] The following analysis is *obiter*. It does not form part of my decision. I was not asked what might happen if the Minister issued an invalid Notice of Determination. I offer the following comments in the hope that they may assist the parties in moving forward on this matter.

[117] In my view, if the Minister concluded from the outset that a partnership did not exist but nonetheless issued a Notice of Determination, the Minister is not able to take advantage of the provisions of subsection 152(1.8) to reassess purported partners beyond the normal reassessment period. As discussed above, subsection 152(1.8) only applies if the Minister issued a Notice of Determination and, at a subsequent time, concluded that the partnership did not exist. In my view, in the foregoing circumstances, the preconditions would not be satisfied. An invalid Notice of Determination is, by definition, not valid and thus would not satisfy the first precondition. The second precondition would also not have been satisfied because the conclusion that the partnership was not a partnership would have been reached before the invalid Notice of Determination was issued, not, as required, "at a subsequent time".

[118] That said, as discussed above, subsection 152(1.8) is not the only means by which the Minister can reassess purported partners. It is simply a mechanism to extend the normal reassessment period in certain circumstances. While, in the above circumstances, the normal reassessment periods for the purported partners cannot be extended under subsection 152(1.8), that does not, in my view, prevent the Minister from arguing that those normal reassessment periods should be extended under paragraph 152(4)(*a*).

## L. Costs

[119] In Justice Visser's order dated September 7, 2017, he ordered that costs for the first stage of this Rule 58 application be determined by the judge who heard the second stage. Accordingly, I will set costs for both stages.

[120] I award costs to the Applicants for both stages of the Rule 58 application. Although there were two applications, the Applicants shall share one set of costs. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the Applicants shall have a further 30 days to file written submissions on costs and the Respondents shall have yet a further 30 days to file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the foregoing time limits, one set of costs shall be awarded to the Applicants as set out in the Tariff.

Signed at Ottawa, Canada, this 11th day of July 2018.

"David E. Graham"

Graham J.

## Appendix "A"

## Legislation

### Section 152

152(1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine

(*a*) the amount of refund, if any, to which the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year; or

(*b*) the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 122.9(2), 125.4(3), 125.5(3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.

152(1.01) The Minister shall, if an individual requests by prescribed form, determine with all due dispatch whether an amount is deductible, or would if this Act were read without reference to paragraph 118.3(1)(*c*) be deductible, under section 118.3 in computing the individual's tax payable under this Part for a taxation year and send a Notice of the Determination to the individual.

152(1.1) Where the Minister ascertains the amount of a taxpayer's non-capital loss, net capital loss, restricted farm loss, farm loss or limited partnership loss for a taxation year and the taxpayer has not reported that amount as such a loss in the taxpayer's return of income for that year, the Minister shall, at the request of the taxpayer, determine, with all due dispatch, the amount of the loss and shall send a Notice of Determination to the person by whom the return was filed.

152(1.11) Where at any time the Minister ascertains the tax consequences to a taxpayer by reason of subsection 245(2) with respect to a transaction, the Minister

(*a*) shall, in the case of a determination pursuant to subsection 245(8), or

(*b*) may, in any other case,

determine any amount that is relevant for the purposes of computing the income, taxable income or taxable income earned in Canada of, tax or other amount payable by, or amount refundable to, the taxpayer under this Act and, where such a determination is made, the Minister shall send to the taxpayer, with all due dispatch, a Notice of Determination stating the amount so determined.

152(1.2) Paragraphs 56(1)(*l*) and 60(*o*), this Division and Division J, as they relate to an assessment or a reassessment and to assessing or reassessing tax, apply, with any modifications that the circumstances require, to a determination or redetermination under subsection (1.01) and to a determination or redetermination of an amount under this Division or an amount deemed under section 122.61 to be an overpayment on account of a taxpayer's liability under this Part, except that

(*a*) subsections (1) and (2) do not apply to determinations made under subsections (1.01), (1.1) and (1.11);

(*b*) an original determination of a taxpayer's non-capital loss, net capital loss, restricted farm loss, farm loss or limited partnership loss for a taxation year may be made by the Minister only at the request of the taxpayer;

(*c*) subsection 164(4.1) does not apply to a determination made under subsection (1.4); and

(*d*) if the Minister determines the amount deemed by subsection 122.5(3) to have been paid by an individual for a taxation year to be nil, subsection (2) does not apply to the determination unless the individual requests a Notice of Determination from the Minister.

152(1.4) The Minister may, within 3 years after the day that is the later of

(*a*) the day on or before which a member of a partnership is, or but for subsection 220(2.1) would be, required under section 229 of the *Income Tax Regulations* to make an information return for a fiscal period of the partnership, and

(*b*) the day the return is filed,

determine any income or loss of the partnership for the fiscal period and any deduction or other amount, or any other matter, in respect of the partnership for the fiscal period that is relevant in determining the income, taxable income or taxable income earned in Canada of, tax or other amount payable by, or any amount refundable to or deemed to have been paid or to have been an overpayment by, any member of the partnership for any taxation year under this Part.

152(1.5) Where a determination is made under subsection (1.4) in respect of a partnership for a fiscal period, the Minister shall send a Notice of the Determination to the partnership and to each person who was a member of the partnership during the fiscal period.

152(1.6) No determination made under subsection (1.4) in respect of a partnership for a fiscal period is invalid solely because one or more persons who were members of the partnership during the period did not receive a Notice of the Determination.

152(1.7) Where the Minister makes a determination under subsection (1.4) or a redetermination in respect of a partnership,

(*a*) subject to the rights of objection and appeal of the member of the partnership referred to in subsection 165(1.15) in respect of the determination or redetermination, the determination or redetermination is binding on the Minister and each member of the partnership for the purposes of calculating the income, taxable income or taxable income earned in Canada of, tax or other amount payable by, or any amount refundable to or deemed to have been paid or

to have been an overpayment by, the members for any taxation year under this Part; and

(*b*) notwithstanding subsections (4), (4.01), (4.1) and (5), the Minister may, before the end of the day that is one year after the day on which all rights of objection and appeal expire or are determined in respect of the determination or redetermination, assess the tax, interest, penalties or other amounts payable and determine an amount deemed to have been paid or to have been an overpayment under this Part in respect of any member of the partnership and any other taxpayer for any taxation year as may be necessary to give effect to the determination or redetermination or a decision of the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada.

152(1.8) Where, as a result of representations made to the Minister that a person was a member of a partnership in respect of a fiscal period, a determination is made under subsection (1.4) for the period and the Minister, the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada concludes at a subsequent time that the partnership did not exist for the period or that, throughout the period, the person was not a member of the partnership, the Minister may, notwithstanding subsections (4), (4.1) and (5), within one year after that subsequent time, assess the tax, interest, penalties or other amounts payable, or determine an amount deemed to have been paid or to have been an overpayment under this Part, by any taxpayer for any taxation year, but only to the extent that the assessment or determination can reasonably be regarded

(*a*) as relating to any matter that was relevant in the making of the determination made under subsection (1.4);

(*b*) as resulting from the conclusion that the partnership did not exist for the period; or

(*c*) as resulting from the conclusion that the person was, throughout the period, not a member of the partnership.

152(1.9) A waiver in respect of the period during which the Minister may make a determination under subsection (1.4) in respect of a partnership for a fiscal period may be made by one member of the partnership if that member is

(*a*) designated for that purpose in the information return made under section 229 of the *Income Tax Regulations* for the fiscal period; or

(*b*) otherwise expressly authorized by the partnership to so act.

152(4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(*a*) the taxpayer or person filing the return

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or

(ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;

(*b*) the assessment, reassessment or additional assessment is made before the day that is 3 years after the end of the normal reassessment period for the taxpayer in respect of the year and

(i) is required pursuant to subsection (6) or would be so required if the taxpayer had claimed an amount by

filing the prescribed form referred to in that subsection on or before the day referred to therein,

(ii) is made as a consequence of the assessment or reassessment pursuant to this paragraph or subsection (6) of tax payable by another taxpayer,

(iii) is made as a consequence of a transaction involving the taxpayer and a non-resident person with whom the taxpayer was not dealing at arm's length,

(iii.1) is made, if the taxpayer is non-resident and carries on a business in Canada, as a consequence of

(A) an allocation by the taxpayer of revenues or expenses as amounts in respect of the Canadian business (other than revenues and expenses that relate solely to the Canadian business, that are recorded in the books of account of the Canadian business, and the documentation in support of which is kept in Canada), or

(B) a notional transaction between the taxpayer and its Canadian business, where the transaction is recognized for the purposes of the computation of an amount under this Act or an applicable tax treaty

(iv) is made as a consequence of a payment or reimbursement of any income or profits tax to or by the government of a country other than Canada or a government of a state, province or other political subdivision of any such country,

(v) is made as a consequence of a reduction under subsection 66(12.73) of an amount purported to be renounced under section 66, or

(vi) is made in order to give effect to the application of subsection 118.1(15) or 118.1(16);

(*c*) the taxpayer or person filing the return has filed with the Minister a waiver in prescribed form within the additional 3-year period referred to in paragraph (b); or

(*d*) as a consequence of a change in the allocation of the taxpayer's taxable income earned in a province as determined under the law of a province that provides rules similar to those prescribed for the purposes of section 124, an assessment, reassessment or additional assessment of tax for a taxation year payable by a corporation under a law of a province that imposes on the corporation a tax similar to the tax imposed under this Part (in this paragraph referred to as a "provincial reassessment") is made, and as a consequence of the provincial reassessment, an assessment, reassessment or additional assessment is made on or before the day that is one year after the later of

(i) the day on which the Minister is advised of the provincial reassessment, and

(ii) the day that is 90 days after the day of mailing of a notice of the provincial reassessment.

152(4.3) Notwithstanding subsections (4), (4.1) and (5), where the result of an assessment or a decision on an appeal is to change a particular balance of a taxpayer for a particular taxation year, the Minister may, or where the taxpayer so requests in writing, shall, before the later of the expiration of the normal reassessment period in respect of a subsequent taxation year and the end of the day that is one year after the day on which all rights of objection and appeal expire or are determined in respect of the particular year, reassess the tax, interest or penalties payable, or redetermine an amount deemed to have been paid or to have been an overpayment, under this Part by the taxpayer in respect of the subsequent taxation year, but only to the extent that the reassessment or

redetermination can reasonably be considered to relate to the change in the particular balance of the taxpayer for the particular year.

**Section 164**

164(4.1) Where the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada has, on the disposition of an appeal in respect of taxes, interest or a penalty payable under this Act by a taxpayer resident in Canada,

(*a*) referred an assessment back to the Minister for reconsideration and reassessment, or

(*b*) varied or vacated an assessment,

the Minister shall with all due dispatch, whether or not an appeal from the decision of the Court has been or may be instituted,

(*c*) where the assessment has been referred back to the Minister, reconsider the assessment and make a reassessment in accordance with the decision of the Court, unless otherwise directed in writing by the taxpayer, and

(*d*) refund any overpayment resulting from the variation, vacation or reassessment,

and the Minister may repay any tax, interest or penalties or surrender any security accepted therefor by the Minister to that taxpayer or any other taxpayer who has filed another objection or instituted another appeal if, having regard to the reasons given on the disposition of the appeal, the Minister is satisfied that it would be just and equitable to do so, but for greater certainty, the Minister may, in accordance with the provisions of this Act, the *Tax Court of Canada Act*, the *Federal Courts Act* or the *Supreme Court Act* as they relate to appeals from decisions of the Tax Court of Canada or the Federal Court of Appeal, appeal from the decision of the Court notwithstanding any variation or vacation of any assessment by the Court or any reassessment made by the Minister under paragraph 164(4.1)(*c*).

**Section 165**

165(1.1) Notwithstanding subsection (1), where at any time the Minister assesses tax, interest, penalties or other amounts payable under this Part by, or makes a determination in respect of, a taxpayer

(*a*) under subsection 67.5(2) or 152(1.8), subparagraph 152(4)(*b*)(i) or subsection 152(4.3) or (6), 161.1(7), 164(4.1), 220(3.4) or 245(8) or in accordance with an order of a court vacating, varying or restoring an assessment or referring the assessment back to the Minister for reconsideration and reassessment,

(b) under subsection (3) where the underlying objection relates to an assessment or a determination made under any of the provisions or circumstances referred to in paragraph (*a*), or

(c) under a provision of an Act of Parliament requiring an assessment to be made that, but for that provision, would not be made because of subsections 152(4) to (5),

the taxpayer may object to the assessment or determination within 90 days after the day of sending of the notice of assessment or determination, but only to the extent that the reasons for the objection can reasonably be regarded

(d) where the assessment or determination was made under subsection 152(1.8), as relating to any matter or conclusion specified in paragraph 152(1.8)(*a*), (*b*) or (*c*), and

(e) in any other case, as relating to any matter that gave rise to the assessment or determination

and that was not conclusively determined by the court, and this subsection shall not be read or construed as limiting the right of the taxpayer to object to an assessment or a determination issued or made before that time.

165(1.15) Notwithstanding subsection (1), where the Minister makes a determination under subsection 152(1.4) in respect of a fiscal period of a partnership, an objection in respect of the determination may be made only by one member of the partnership, and that member must be either

(*a*) designated for that purpose in the information return made under section 229 of the *Income Tax Regulations* for the fiscal period; or

(*b*) otherwise expressly authorized by the partnership to so act.

**Section 169**

169(2) Notwithstanding subsection (1), where at any time the Minister assesses tax, interest, penalties or other amounts payable under this Part by, or makes a determination in respect of, a taxpayer

(*a*) under subsection 67.5(2) or 152(1.8), subparagraph 152(4)(*b*)(i) or subsection 152(4.3) or (6), 164(4.1), 220(3.4) or 245(8) or in accordance with an order of a court vacating, varying or restoring the assessment or referring the assessment back to the Minister for reconsideration and reassessment,

(*b*) under subsection 165(3) where the underlying objection relates to an assessment or a determination made under any of the provisions or circumstances referred to in paragraph (*a*), or

(*c*) under a provision of an Act of Parliament requiring an assessment to be made that, but for that provision, would not be made because of subsections 152(4) to (5),

the taxpayer may appeal to the Tax Court of Canada within the time limit specified in subsection (1), but only to the extent that the reasons for the appeal can reasonably be regarded

(*d*) where the assessment or determination was made under subsection 152(1.8), as relating to any matter specified in paragraph 152(1.8)(*a*), (*b*) or (*c*), and

(*e*) in any other case, as relating to any matter that gave rise to the assessment or determination

and that was not conclusively determined by the Court, and this subsection shall not be read or construed as limiting the right of the taxpayer to appeal from an assessment or a determination issued or made before that time.

**Section 171**

171(1) The Tax Court of Canada may dispose of an appeal by

(*a*) dismissing it; or

(*b*) allowing it and

(i) vacating the assessment,

(ii) varying the assessment, or

(iii) referring the assessment back to the Minister for reconsideration and reassessment.

**Section 244**

244(20) For the purposes of this Act,

(*a*) a reference in any notice or other document to the firm name of a partnership shall be read as a reference to all the members thereof; and

(*b*) any notice or other document shall be deemed to have been provided to each member of a partnership if the notice or other document is mailed to, served on or otherwise sent to the partnership

(i) at its latest known address or place of business, or

(ii) at the latest known address

(A) where it is a limited partnership, of any member thereof whose liability as a member is not limited, or

(B) in any other case, of any member thereof.

## Appendix "B"

In this example, an individual claims not to have been a partner in a partnership. The example is broken down into two parts. The first part follows the steps that would occur under the Respondent's interpretation of the provisions. The second part follows the steps that would occur under the Applicants' interpretation of the provisions.

The Respondent's interpretation deprives the individual of any means by which to defend his position. By contrast, the Applicants' interpretation ensures that all partners have an equal opportunity to dispute the issue.

**Under the Respondent's Interpretation:**

1. A partnership files an information return reporting that it had $400,000 of income and that its partners were Mr. A, Mr. B, Mr. C and Mr. D. The information return designates Mr. A as the designated partner.

2. The Minister reviews the information return, determines that the partnership had $400,000 in income, concludes that the partners were as reported in the information return and issues a Notice of Determination in accordance with the return.

    - According to the Respondent's interpretation of subsection 152(1.4), a determination of "any other matter, in respect of the partnership" would include a conclusion of who the partners of the partnership were.

3. Pursuant to subsection 152(1.5), the partnership and each partner receive a copy of the Notice of Determination.

4. When Mr. D receives the Notice of Determination, he is shocked. He believes that he was not a partner in the partnership. Whereas Mr. A, Mr. B and Mr. C have each reported $100,000 in income from the partnership on their respective tax returns, Mr. D has not reported any income from the partnership.

5. Mr. A, Mr. B and Mr. C are all satisfied with the Notice of Determination since they believe that Mr. D was a partner. Since Mr. A, the designated partner, is satisfied with the Notice of Determination, he does not object to it. Although Mr. D is not satisfied with the Notice of Determination, he cannot file a notice of objection because he is not the designated partner (subsection 165(1.15)).

6. Ninety days after the Notice of Determination was issued, it becomes binding on the partners (paragraph 152(1.7)(*a*)).

7. The Minister reassesses Mr. D to include $100,000 in his income.

8. Mr. D objects to the reassessment on the basis that he was not a partner. The Minister points to paragraph 152(1.7)(*a*) and advises Mr. D that he is bound by the Notice of Determination. Mr. D is left with no avenue to dispute his reassessment. Furthermore, to the extent that Mr. D was not a partner, Mr. A, Mr. B and Mr. C have received a windfall by avoiding having to report Mr. D's share of the income.

**Under the Applicants' Interpretation:**

1. A partnership files an information return reporting that it had $400,000 of income and that its partners were Mr. A, Mr. B, Mr. C and Mr. D. The information return designates Mr. A as the designated partner.

2. The Minister reviews the information return, determines that the partnership had $400,000 in income and issues a Notice of Determination on that basis.

    - According to the Applicants' interpretation of subsection 152(1.4), a determination of "any other matter, in respect of the partnership" would not include a conclusion of who the partners of the partnership were.

3. Pursuant to subsection 152(1.5), the partnership and each partner receive a copy of the Notice of Determination.

4. When Mr. D receives the Notice of Determination, he is shocked. He believes that he was not a partner in the partnership. Whereas Mr. A, Mr. B and Mr. C have each reported $100,000 in income from the partnership on their respective tax returns, Mr. D has not reported any income from the partnership.

5. Mr. A, Mr. B and Mr. C are all satisfied with the Notice of Determination since they believe that Mr. D was a partner. Since Mr. A, the designated partner, is satisfied with the Notice of Determination, he does not object to it. Although Mr. D is not satisfied with the Notice of Determination, he cannot file a notice of objection because he is not the designated partner (subsection 165(1.15)).

6. Ninety days after the Notice of Determination was issued, it becomes binding on the partners (paragraph 152(1.7)(*a*)).

7. The Minister reassesses Mr. D to include $100,000 in his income.

8. Mr. D objects to the reassessment on the basis that he was not a partner. Since membership in a partnership is not something that can be determined under subsection 152(1.4) and thus not something to which Mr. D could be bound under paragraph 152(1.7)(*a*), Mr. D is able to proceed with his objection.

9. The Minister confirms Mr. D's objection.

10. Mr. D appeals to the Tax Court.

11. The Tax Court concludes that Mr. D was not a member of the partnership and issues a judgment ordering the Minister to reassess Mr. D to remove the $100,000 partnership income from his income.

12. Although the normal reassessment periods have now passed for the relevant taxation years for Mr. A, Mr. B and Mr. C, the Minister is still able to reassess them to add $33,333 (being their proportional share of the partnership income previously allocated to Mr. D) to each of their incomes.

- The ability to reassess after the normal reassessment period comes from subsection 152(1.8). The preconditions of subsection 152(1.8) are met. The Minister has issued a Notice of Determination on the basis that Mr. D was a partner and a court has subsequently concluded that Mr. D was not a partner. Thus, the Minister has an additional year from the date of that conclusion to reassess the "tax payable by . . . any taxpayer for any taxation year" so long as it can reasonably be regarded "as resulting from the conclusion that [Mr. D] was, throughout the period, not a member of the partnership". Because subsection 152(1.8) refers to "any taxpayer", the Minister is able to reassess Mr. A, Mr. B and Mr. C.

13. If Mr. A, Mr. B or Mr. C disagrees with their reassessments, they can object (subsection 165(1.1)) and appeal (subsection 169(2)) on the basis that Mr. D was a partner. They are, however, still bound under paragraph 152(1.7)(*a*) by the determination of the total amount of the partnership's income. In other words, they can dispute the allocation of the income to Mr. D but not the total amount of the partnership's income.

## Appendix "C"

In this example, the Minister concludes that an individual was not a partner in a partnership. The example is broken down into two parts. The first part follows the steps that would occur under the Respondent's interpretation of the provisions. The second part follows the steps that would occur under the Applicants' interpretation of the provisions.

The Respondent's interpretation leaves the Minister stuck with contradictory reassessments and results in a windfall to some of the partners. By contrast, the Applicants' interpretation ensures that the proper tax is collected while still ensuring that all partners have an equal opportunity to dispute the issue.

**Under the Respondent's Interpretation:**

1. A partnership files an information return reporting that it had $100,000 in losses and that its partners were Ms. W, Ms. X, Ms. Y and Ms. Z. The information return designates Ms. W as the designated partner.

2. The Minister reviews the information return, determines that the losses were $100,000 but concludes that Ms. Z was not a partner. The Minister issues a Notice of Determination on that basis.

    - According to the Respondent's interpretation of subsection 152(1.4), a determination of "any other matter, in respect of the partnership" would include a conclusion that Ms. Z was not a partner.

3. Pursuant to subsection 152(1.5), the partnership and each partner receive a copy of the Notice of Determination.

    - It is unclear whether the Minister would be required to send a copy of the Notice of Determination to Ms. Z since the Minister has concluded that Ms. Z was not a partner but, for the purposes of the example, assume that Ms. Z becomes aware of the Notice of Determination through some means or other.

4. When Ms. Z receives the Notice of Determination, she is shocked. She believes she was a partner and has claimed a $25,000 loss on her tax return on that basis.

5. Ms. W, Ms. X and Ms. Y are satisfied with the Notice of Determination, as they believe it will result in their shares of the losses for tax purposes being increased by their shares of the loss that Ms. Z has claimed. Since Ms. W, the designated partner, is satisfied with the Notice of Determination, she does not object to it. Although Ms. Z is not satisfied with the Notice of Determination, she cannot file a notice of objection because she is not the designated partner (subsection 165(1.15)).

6. Ninety days after the Notice of Determination was issued, it becomes binding on the Minister and Ms. W, Ms. X and Ms. Y (paragraph 152(1.7)(*a*)).

7. Ms. W, Ms. X and Ms. Y all file amended tax returns claiming their proportionate share of Ms. Z's loss. The Minister is bound by her determination and thus reassesses Ms. W, Ms. X and Ms. Y as filed.

8. The Minister reassesses Ms. Z to remove the loss from her income.

9. Ms. Z objects to the reassessment on the basis that she was a partner.

    - Since the determination was made on the basis that Ms. Z was not a partner, paragraph 152(1.7)(*a*) does not bind Ms. Z to the determination.

10. The Minister confirms the objection.

11. Ms. Z appeals to the Tax Court.

12. The Court concludes that Ms. Z was a partner and issues a judgment ordering the Minister to reassess Ms. Z to include her share of the partnership loss in her income.

13. The Minister would now like to reassess Ms. W, Ms. X and Ms. Y to remove the loss but is prevented from doing so by paragraph 152(1.7)(*a*),

which binds the Minister to her determination that Ms. W, Ms. X and Ms. Y were the only partners of the partnership. As a result, Ms. W, Ms. X and Ms. Y receive a windfall.

**Under the Applicants' Interpretation:**

1. A partnership files an information return reporting that it had $100,000 in losses and that its partners were Ms. W, Ms. X, Ms. Y and Ms. Z. The information return designates Ms. W as the designated partner.

2. The Minister reviews the information return, determines that the losses were $100,000 but concludes that Ms. Z was not a partner. The Minister issues a Notice of Determination on that basis.

    - According to the Applicants' interpretation of subsection 152(1.4), a determination of "any other matter, in respect of the partnership" would not include a conclusion that Ms. Z was not a partner.

3. Pursuant to subsection 152(1.5), the partnership and each partner receive a copy of the Notice of Determination.

    - It is unclear whether the Minister would be required to send a copy of the Notice of Determination to Ms. Z since the Minister has concluded that Ms. Z was not a partner but, for the purposes of the example, assume that Ms. Z becomes aware of the Notice of Determination through some means or other.

4. When Ms. Z receives the Notice of Determination, she is shocked. She believes she was a partner and has claimed a $25,000 loss on her tax return on that basis.

5. Ms. W, Ms. X and Ms. Y are satisfied with the Notice of Determination, as they believe it will result in their shares of the losses for tax purposes being increased by their shares of the loss that Ms. Z has claimed. Since Ms. W, the designated partner, is satisfied with the Notice of Determination, she does not object to it. Although Ms. Z is not satisfied with the Notice of

Determination, she cannot file a notice of objection because she is not the designated partner (subsection 165(1.15)).

6. Ninety days after the Notice of Determination was issued, it becomes binding on the Minister and Ms. W, Ms. X and Ms. Y (paragraph 152(1.7)(*a*)).

7. Ms. W, Ms. X and Ms. Y all file amended tax returns claiming their proportionate share of Ms. Z's loss. The Minister reassesses Ms. W, Ms. X and Ms. Y as filed.

8. The Minister reassesses Ms. Z to remove the loss from her income.

9. Ms. Z objects to the reassessment on the basis that she was a partner.

10. The Minister confirms the objection.

11. Ms. Z appeals to the Tax Court.

12. The Court concludes that Ms. Z was a partner and issues a judgment ordering the Minister to reassess Ms. Z to include her share of the partnership loss in her income.

13. Although the normal reassessment periods have now passed for the relevant taxation years for Ms. W, Ms. X and Ms. Y, the Minister is still able to reassess them to remove Ms. Z's share of the losses from their incomes.

    - The ability to reassess after the normal reassessment period comes from subsection 152(1.8). The preconditions of subsection 152(1.8) are met. The Minister has issued a Notice of Determination on the basis that Ms. Z was not a partner and a court has subsequently concluded that Ms. Z was a partner. Thus, the Minister has an additional year from the date of that conclusion to reassess the "tax payable by . . . any taxpayer for any taxation year" so long as it can reasonably be regarded "as resulting from the conclusion that [Ms. Z] was, throughout the period, not a member of the partnership". Because subsection 152(1.8) refers to

"any taxpayer", the Minister is able to reassess Ms. W, Ms. X and Ms. Y.

- Because the determination that the Minister issued determined only the loss of the partnership, not who the partners were, paragraph 152(1.7)(*a*) does not prevent the Minister from reallocating the losses among the partners.

14. If Ms. W, Ms. X or Ms. Y disagrees with their reassessments, they can object (subsection 165(1.1)) and appeal (subsection 169(2)) on the basis that Ms. Z was not a partner. They are, however, still bound under paragraph 152(1.7)(*a*) by the determination of the total amount of the partnership's loss. In other words, they can dispute the allocation of the loss to Ms. Z but not the total amount of the partnership's loss.

## Appendix "D"

In this example, the Minister concludes from the outset that a partnership did not exist. The partners dispute that conclusion. For the purpose of the example, assume that the Minister reached that conclusion within the normal reassessment period of both the partnership and the partners.

The example is broken down into two parts. The first part follows the steps that would occur under the Respondent's interpretation of the provisions. The second part follows the steps that would occur under the Applicants' interpretation of the provisions. Clearly, under the Respondent's interpretation, the Streamlined Process is anything but streamlined.

### Under the Respondent's Interpretation:

1. Having concluded that the partnership did not exist, the Minister issues a Notice of Determination either indicating that the partnership's income was nil or that it did not exist.

2. The designated partner of the partnership objects to the Notice of Determination on behalf of all of the partners (subsection 165(1.15)).

3. The Minister confirms the determination and issues a Notice of Confirmation (subsections 165(3) and 152(1.2)).

4. The designated partner appeals the determination to the Tax Court (subsections 169(1) and 152(1.2)).

5. The Tax Court issues a judgment dismissing the appeal and upholding the determination (subsections 171(1) and 152(1.2)).

    - As set out in paragraph 96, the conclusion is bizarrely not binding on the purported partners.

6. The Minister reassesses the purported partners to remove the partnership income or losses from their incomes on the basis that there was no partnership (subsection 152(1)).

7. Any purported partner who is unhappy with the original outcome in the Tax Court (perhaps because he or she does not feel the designated partner did a good job of representing his or her interests) objects to the reassessments (subsections 165(1)).

8. The Minister confirms the reassessments (subsection 165(3)).

9. Any purported partner who wishes to do so appeals to the Tax Court (subsection 169(1)).

10. The Tax Court hears the appeals and either dismisses or allows them (subsection 171(1)).

**Under the Applicants' Interpretation:**

1. Having concluded that the partnership did not exist, the Minister reassesses each purported partner to remove the partnership income or losses from their incomes on the basis that the partnership did not exist (subsection 152(1)).

2. If any purported partners disagrees with his or her reassessment, he or she files an objection (subsection 165(1)).

3. The Minister confirms the reassessments (subsection 165(3)).

4. Any purported partner who wishes to do so appeals to the Tax Court (subsection 169(1)).

5. The Tax Court hears the appeals and either dismisses or allows them (subsection 171(1)).

## Appendix "E"

In this example, the Minister initially concludes that a partnership exists but determines that its losses were much lower than claimed. The Minister issues a Notice of Determination to that effect. At the objection stage, the Minister changes her mind and concludes that the partnership did not exist. For the purpose of the example, assume that the Minister reaches that conclusion within the normal reassessment period of both the partnership and the partners.

The example is broken down into two parts. The first part follows the steps that would occur under the Respondent's interpretation of the provisions. The second part follows the steps that would occur under the Applicants' interpretation of the provisions. This example demonstrates that, even when the conclusion that a partnership did not exist is not reached immediately, the process supported by the Applicants' interpretation is still more efficient.

**Under the Respondent's Interpretation:**

1. The Minister issues a Notice of Determination reducing the losses claimed by the partnership (subsection 152(1.4)).

2. The designated partner of the partnership objects to the Notice of Determination on behalf of all of the partners (subsection 165(1.15)).

3. During the objection process, the Minister concludes that the partnership did not exist. Accordingly, she issues a Notice of Redetermination either indicating that the partnership's income was nil or that it did not exist.

4. The designated partner appeals the redetermination to the Tax Court (subsections 169(1) and 152(1.2)).

5. The Tax Court issues a judgment dismissing the appeal and upholding the redetermination (subsections 171(1) and 152(1.2)).

    - As set out in paragraph 96, the conclusion is bizarrely not binding on the purported partners

6. The Minister reassesses the purported partners to remove the partnership income or losses from their incomes on the basis that there was no partnership (subsection 152(1)).

7. Any purported partner who is unhappy with the outcome in the Tax Court (perhaps because he or she does not feel the designated partner did a good job of representing his or her interests) objects to his or her reassessment (subsection 165(1)).

8. The Minister confirms the reassessments (subsection 165(3)).

9. Any purported partner who wishes to do so appeals his or her reassessment to the Tax Court (subsection 169(1)).

10. The Tax Court hears the appeals and either dismisses or allows them (subsection 171(1)).

**Under the Applicants' Interpretation:**

1. The Minister issues a Notice of Determination reducing the losses claimed by the partnership (subsection 152(1.4)).

2. The designated partner of the partnership objects to the Notice of Determination on behalf of all of the partners (subsection 165(1.15)).

3. During the objection process, the Minister concludes that the partnership did not exist. Accordingly, she reassesses the purported partners to remove the partnership income or losses from their incomes on the basis that there was no partnership (subsection 152(1)).

4. Any purported partner who is unhappy with his or her reassessment objects (subsection 165(1)).

5. The Minister confirms the reassessments (subsection 165(3)).

6. Any purported partner who wishes to do so appeals his or her reassessment to the Tax Court (subsection 169(1)).

7. The Tax Court hears the appeals and either dismisses or allows them (subsection 171(1)).

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