



International Fiscal Association

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YIN SESSION IFA CANADA

LITIGATION AND SETTLEMENT CONFERENCES (LARGE CASES)

THE HONOURABLE JUSTICE ROBERT J. HOGAN – TAX COURT OF CANADA

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GENERAL OVERVIEW

- Benefits of settlement
 - Early resolution and tax certainty
 - Lowering costs in time and resources
- Results of Tax Court settlement conferences
 - Very high success rate
- Pragmatic problem-solving approach

LITIGATION TIMETABLE – GENERAL PROCEDURE

- Production of Documents
- Examination for Discovery
- Undertakings
- Hot Tubbing of Experts
(Rules 145(10), (11), (12),
(13) and (14))



ROLE OF CASE MANAGEMENT JUDGE VS. SETTLEMENT CONFERENCE JUDGE

- **Rule 126 (Case Management)**

- The Chief Justice has the ability, at any time on his or her own initiative or at the request of a party, to order an appeal or a group of appeals be subject to case management and may designate one or more judges to act as the case management judge.
- Role of case management judge:
 - to convene a case management conference for the purpose of establishing a timetable for the conduct of the appeal or group of appeals;
 - to manage the appeal process and deal with all issues that arise prior to the hearing including determining all pre-trial motions or arranging such motions to be heard by another judge; and
 - may not preside at the hearing of the appeal except with the consent of the parties.

ROLE OF CASE MANAGEMENT JUDGE VS. SETTLEMENT CONFERENCE JUDGE (CONT'D)

- **Rule 126.2 (Settlement Conferences)**

- The Court has the ability, at any time on its own initiative or at the request of a party, to direct that a settlement conference be held to consider the possibility of settling any or all of the issues.
- Role of settlement conference judge:
 - may offer views and suggest proposals;
 - can adjourn settlement conference and reconvene at a later date;
 - clarifies issues for trial if no settlement is reached; and
 - shall not be the trial judge and shall not communicate with the trial judge regarding anything that was said or done at the settlement conference

CAN THE CASE MANAGEMENT JUDGE ALSO ACT AS THE SETTLEMENT CONFERENCE JUDGE IN THE SAME CASE? IF SO, IN WHAT CIRCUMSTANCES?

- The case management judge is familiar with the issues and the appeal and therefore, may also be appointed the settlement conference judge by the Chief.
- If the settlement conference judge has detailed knowledge of the appeal (e.g. acting as case management judge), the parties are more likely to be influenced by the views of that judge relating to settlement.

CAN THE CASE MANAGEMENT JUDGE ALSO ACT AS THE SETTLEMENT CONFERENCE JUDGE IN THE SAME CASE? IF SO, IN WHAT CIRCUMSTANCES? (CONT'D)

- The Chief Justice does have the ability to assign a judge other than the case management judge to be the settlement conference judge. This could occur if the Chief Justice feels a certain Judge has more experience with the particular issue or if the parties request a specific judge.
- A request by a party for a specific judge will be taken into account by the Chief Justice, but may not be granted. There may be concern that a judge who is very knowledgeable on a particular subject and who is appointed the settlement conference judge would then be disqualified from presiding at the hearing.

CAN THE CASE MANAGEMENT JUDGE ALSO ACT AS THE SETTLEMENT CONFERENCE JUDGE IN THE SAME CASE? IF SO, IN WHAT CIRCUMSTANCES? (CONT'D)

- If a Rule 58 motion is heard, it will be heard by the case management judge. In these circumstances, the case management judge would likely not be appointed the settlement conference judge as the disposition of the Rule 58 motion may reveal the judge's pre-disposition to decide certain issues a particular way.
- If minutes of settlement are signed, the settlement conference judge would likely not hear any motions relating to whether a binding agreement was reached by the parties.

SCHEDULING A TAX COURT SETTLEMENT CONFERENCE – TAX COURT RULES AND PRACTICE DIRECTIONS

- **Rule 126.2 of the Tax Court of Canada Rules**

- The Court may direct that a settlement conference be held at the request of a party or on its own initiative.

PRACTICE NOTE 21

- A settlement conference will not be scheduled unless a written offer of settlement has been made between the parties and a written reply has been provided.
- It is easier to conduct a settlement conference and more conducive to reaching a settlement if an offer and reply have been exchanged by the parties. However, this requirement may be dispensed with if there is a reason the parties have not exchanged settlement offers.
- Both parties and a representative with full authority to settle the appeal must be present at all times during the settlement conference.
- Practice Note 21 is generally geared more towards situations where the parties request that a settlement conference be held.

IN WHAT CIRCUMSTANCES MAY IT BE APPROPRIATE TO DISPENSE WITH THE REQUIREMENT FOR A SETTLEMENT BRIEF?

- If the case management judge is also the settlement judge, he or she will be more familiar with the issues and the appeal and, therefore, it may be appropriate in such circumstance to dispense with the requirement for a settlement brief.

SETTLEMENT CONFERENCE BRIEF

•Rule 126.2(4)

- At least 14 days before the settlement conference, parties must serve and submit to the Court a settlement conference brief containing
 - A) an explanation of the party's theory of the case;
 - B) a statement of the material facts that the party expects to establish at the hearing of the appeal and how they will be established;
 - C) a statement of the issues to be determined at the hearing; and
 - D) a statement of the law and authorities that the party will rely on at the hearing of the appeal.

•Rule 126.2(5)

- A settlement conference brief shall not exceed 10 pages except with leave of the settlement conference judge, which may be applied for by informal communication with the Registry.

CASES SUITABLE FOR A SETTLEMENT CONFERENCE – (“BEST” VS. “WORST”)

“BEST” CASES

- Questions of fact or questions of mixed fact and law (provided there are no issues with documentation or credibility)
- Reassessments with multiple issues
- Issue and facts are unique or unusual

“WORST” CASES

- Questions of law
- Tax avoidance cases
- “All or nothing” issues (more difficult to achieve principled basis of settlement)

SETTLING ON A “PRINCIPLED BASIS” CASE LAW

Sood v MNR, 2015 FC 857

- Settlement must be based on a legal or factual basis.

SETTLING ON A “PRINCIPLED BASIS” CASE LAW (CONT’D)

Transalta Corporation v. The Queen, 2013 FCA 285

- Trial Judge accepted that the Minister could not accept the offer due to “legal disability” , *i.e.*, question was an “all-or-nothing” question for statutory interpretation

SETTLING ON A “PRINCIPLED BASIS” CASE LAW (CONT’D)

CIBC World Marktes Inc. v. The Queen, 2012 FCA 3

- Court followed *Galway* and *Cohen* in holding that the Minister could not have accepted CIBC’s settlement offer as the input tax credits at issue could only be allowed or rejected in their entirety
- Minister cannot agree to an assessment that is indefensible on the facts and the law

SETTLING ON A “PRINCIPLED BASIS” CASE LAW (CONT'D)

***Savics v. The Queen*, 2019 TCC 71 (under appeal to FCA)**

- Taxpayer entered into settlement with CRA that allowed him to claim deductions in 1997 and 1998 from limited partnership;
- Issue was whether the agreement precluded CRA from adding partnership gains to the taxpayer's income during the same period, where such action was not explicitly referred to in the agreement;
- Tax Court held that the settlement agreement permitted CRA to reassess to include gains in income;
- Correspondence with taxpayer suggested numerically that CRA's proposed adjustments included adding gains to income.

PREPARING FOR A SETTLEMENT CONFERENCE

Judge

- Parties are likely to give weight to the Judge's view when the Judge demonstrates that he or she has a good understanding of the material facts, issues and relevant law.

HOW JUSTICE HOGAN PREPARES FOR A SETTLEMENT CONFERENCE

1. Reads the pleadings
2. Considers all other relevant information in the file
3. Undertakes research before receiving settlement briefs
4. Identifies the factors that may influence the parties' decision-making
5. Reads the settlement briefs and accompanying case law
6. Prepares an overview of the likely outcome. This includes identifying the strengths and weaknesses of each of the parties' cases
7. Formulates realistic offers and counter offers

HOW TO PREPARE YOUR CLIENT FOR A SETTLEMENT CONFERENCE

- Develop a reasonable settlement position taking into account client's level of risk tolerance- consider what is possible and realistic in light of expectations of the taxpayer and the CRA
- Ensure that the client understands the mechanics of settlement including timing and other requirements (principled basis, etc.)
- Ensure client understands that he or she can discuss issues with settlement conference judge

HOW TO PREPARE YOUR CLIENT FOR A SETTLEMENT CONFERENCE (CONT'D)

- Ensure there is a representative of the client with the authority to settle in attendance. Generally, the instructing officer will attend a settlement conference on behalf of the CRA. An appeals officer, appeals manager or other senior official may also attend.
- In some cases, a party may need to consult a more senior person (either within the appellant or the CRA) who is not present before reaching a settlement. However, typically the representative of the party who is present at the settlement conference should be able to make a decision regarding settlement at the conference.

JUSTICE HOGAN'S APPROACH TO CHAIRING A SETTLEMENT CONFERENCE

- Get the parties to agree on an agenda
- Review the material facts with the group
- Quickly separate the parties
- Choose one of the parties to begin

JUSTICE HOGAN'S APPROACH TO CHAIRING A SETTLEMENT CONFERENCE (CONT'D)

- Provide to each party separately an overview of the weakness of their case if they proceed to trial
- Help the parties prepare offers and counter offers
- Present the offers and counter offers
- Reconvene the parties when an agreement in principle has been reached

DIFFERENT PERSPECTIVES ON REASONS TO SETTLE OR NOT – THE TAXPAYER

- Considerations to settle
 - Nature and age of the dispute- taxpayer wishes to put matter behind them
 - Chances/magnitude of success based on an analysis of facts, evidence, law and business issues
 - Costs of litigation/dispute resolution (professional costs and opportunity costs)
 - Risks (litigation, economic, reputational) outweigh the benefits
- Reasons for taxpayer not to settle
 - Likelihood of success is high
 - Taxpayer feels strongly that CRA's position should be challenged

DIFFERENT PERSPECTIVES ON REASONS TO SETTLE OR NOT – THE CROWN

- Considerations for CRA/DOJ
 - Chances of success (based on analysis of the facts, evidence, law)
 - Costs of litigation/dispute resolution in terms of time and resources
 - Nature and age of the dispute and impact
 - Consistency with fairness, objectivity and justifiability
 - Taxpayer's position is contrary to long-standing or published CRA policy or underlying rationale of provisions in play
 - Taxpayers in comparable circumstances treated consistently
 - Conditions for settling an issue are not reasonable

CONSENT JUDGMENT VS. SETTLEMENT AGREEMENT

• Consent Judgment

- Rule 170- when all parties have consented in writing to a judgment disposing of an appeal, the Court may;
 - a) grant the judgment sought without a hearing
 - b) direct a hearing
 - c) direct that written representations be filed
- Consent judgments require consent of both parties and are limited to taxation years that are the subject of the appeal before the Court
- Settlement is reflected in a Court order
- Minister must reassess in accordance with the Court's order pursuant to subsection 164(4.1) of the ITA

CONSENT JUDGMENT VS. SETTLEMENT AGREEMENT

• Minutes of Settlement

- Subsection 169(3) permits any taxation year to be reassessed with written consent of the taxpayer to settle a Tax Court appeal, even a year that is not under appeal
- Settlement agreements under subsection 169(3) of the Act require consent of both parties and provide greater flexibility as they allow Minister to reassess taxation years that are not before the Court.
- Minister must reassess in accordance with the settlement agreement; minutes of settlement facilitate a settlement without the need for the Court to approve the settlement and issue a judgment; terms of settlement are not public; taxpayer typically files Notice of Discontinuance of Tax Court appeal once reassessments are issued in accordance with the settlement.

DIFFERENT PERSPECTIVES OF THE CRA/DOJ AND TAXPAYER ON THE TWO METHODS

CRA/DOJ Perspective

- Consent judgments are viewed as the “default” approach by the DOJ unless there is a reason to prepare minutes of settlement (e.g., to include taxation years that are not before the Court, to include interest relief, etc.).
- However, a taxpayer’s preference for minutes of settlement would likely not be a deal-breaker.

Taxpayers’ Perspective

- Taxpayers generally prefer minutes of settlement due to their non-public nature and the ability to include taxation years that are not before the Court and greater detail regarding the issues that will be settled.



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Questions?