Tax Topics

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THE *HUSKY ENERGY* CASE[1] YOU MAY NOT BE ABLE TO HAVE YOUR CAKE AND EAT IT[2]

— David H. Sohmer, Spiegel Ryan, Montréal

Introduction

Husky was a publicly-traded Canadian-resident company which owned oil and gas properties in Canada. Two Barbadian companies ("Barbcos") owned and were the registered shareholders of 71.5% of Husky's outstanding shares. In order to reduce the rate of withholding tax on a proposed dividend, a plan was implemented whereby title to the shares would be vested in two Luxembourg companies ("Luxcos") without triggering taxable dispositions of the shares by the Barbcos. The plan relied on security lending agreements.

The Federal Court of Appeal ("FCA") held that the Luxcos were not the beneficial owners of the Husky shares (and therefore not the beneficial owners of the dividend), finding that "considering the circumstances, it is evident that the true legal relationship between the Luxcos and the Barbcos cannot be characterized as one between parties to a security lending agreement".

While the FCA did not explicitly characterize the resulting legal relationship, its reasoning reflects concern with the absence of the incidents of ownership typically associated with such arrangements.

The Security Lending Agreement and *Mutuum*

The relationship between the parties to a security lending agreement shares important features with the relationship between the parties to the civil law concept of a loan for consumption, also referred to as a simple loan, or by its Roman Law name, *mutuum*, even if the two are not strictly identical. This concept is reflected in the Civil Code of Québec and, to the extent that its functional elements have been absorbed into common law practice, the Québec Civil Code provisions offer a useful and succinct articulation of the governing principles applicable, in substance, across both legal traditions.

> **2314 .CCQ:** A simple loan is a contract by which the lender hands over a certain quantity of money or other property that is consumed by use to the borrower, who binds himself to return a like quantity of the same kind and quality to the lender after a certain time.

[1] *Canada v. Hutchison Whampoa Luxembourg Holdings S.À.R.L.*, 2025 DTC 5151 (FCA).

[2] Many thanks to the good friends who reviewed the many drafts of this article.

Wolters Kluwer

> **2327 .CCQ:** By simple loan, the borrower becomes the owner of the property loaned and he bears the risks of loss of the property from the time it is handed over to him.

The term "consumed by use" in the definition of a "simple loan" captures the notion of "*abusus*", that is the right to dispose of property, and subsumes the rights to use, transfer, or otherwise alienate the property, with the obligation limited to restoring an equivalent in kind and quality.

Short Selling and *Mutuum*

The transactions in a security lending agreement are commonly associated with short selling. When you borrow shares to short them, ownership of those shares is temporarily transferred to you (the borrower) so that you can sell them to a third party. Once sold you cannot return the exact same shares. Instead, you are only obligated to return the *same quantity* of the *same stock* to close out the position.

This practical ability to dispose of the securities is consistent with the transfer of ownership in a *mutuum*-type arrangement: the borrower is not required to return the same assets, but only equivalent ones.

The Transaction Did Not Contemplate a Sale to Third Parties

In the *Husky* case, however, the FCA placed significant weight on the absence of a realistic expectation that a disposition to third parties would occur. In particular, the primary circumstance that led the Court to conclude "that the true legal relationship between the Luxcos and the Barbcos cannot be characterized as one between parties to a security lending agreement" was that the vesting of ownership in the Luxcos was not for the purpose of executing a short sale:

> . . .to accept that the Barbcos agreed to allow the Luxcos to sell or lend 71.5% of Husky's shares, worth between $10.7 and $14.3 billion, to third parties to enable the latter to sell the shares would defy common sense.

In other words, the Court held that, even though the shares were of a kind capable of being consumed, the Luxcos never became true owners because the arrangement did not contemplate their effective disposition. As in the case of *mutuum*, it is the intention to consume or dispose of the property that underpins the full transfer of ownership to the borrower.

If the True Legal Relationship Was Not Like *Mutuum*, What Was It?

The Court did not expressly determine the precise legal characterization of the relationship between the Barbcos and the Luxcos, beyond concluding that it was not a true security lending arrangement. Given that the parties intended to transfer title while ensuring that the economic position of the Barbcos remained effectively unchanged, the arrangement may be viewed, at least functionally, as involving reciprocal obligations to transfer equivalent property and amounts compensating for dividends. In that sense, it is arguable that the structure resembles an exchange or barter: an asset is transferred in consideration for the obligation to return an equivalent asset at a later time, with dividends replicated through compensating payments.

The tax treatment of a barter is described in CRA Document 9334325:

> There are no specific provisions in the *Income Tax Act* which deal with bartering. Consequently, the general rules applying to the computation of income from business or property apply. Sales should be recorded at full sales price (i.e. the value of the barter plus cash if applicable) and similar purchases should be recorded at full purchase price.

The result of a non-*mutuum* (barter-type) characterization in the *Husky* case would have been that the Luxcos, having acquired the shares in exchange for reciprocal obligations, could plausibly have been regarded as the legal and beneficial owners of the shares for treaty purposes. In that event the Luxcos would have benefitted from the reduced withholding tax rate under the Luxembourg treaty, but only at the cost to the Barbcos of triggering a taxable disposition of their shares at the time of transfer.

From that perspective, the structure reflects a fundamental tension: it seeks to obtain the tax benefits of a genuine transfer of ownership while avoiding the tax consequences that would normally follow. A *mutuum* characterization resolves that tension by permitting a transfer of title without immediate realization, but only on the premise that the borrower assumes the full incidents of ownership, including the practical ability to dispose of the property.

The Court's analysis rejects that premise on the facts, finding that the Luxcos did not, in substance, enjoy the attributes of ownership typically associated with a securities lending arrangement. Rather than recharacterizing the arrangement as a disposition, with the resulting tax consequences for the Barbcos, the Court instead concluded that beneficial ownership of the dividends had not shifted.

In that sense, the decision can be understood as declining to give effect to the legal form for treaty purposes, without fully recharacterizing the transactions. This approach avoids addressing whether a taxable disposition occurred, while still denying the intended treaty benefit, and may be seen as a pragmatic resolution of a structure that does not fit within established legal categories.

Further Observations

It is interesting to note that a *mutuum*-focused analysis would have rendered much of the debate surrounding beneficial ownership in the context of treaty shopping less central by directing the inquiry to whether the borrower in fact acquired the essential attributes of ownership.

It may also be of interest to note that if the Barbcos filed tax returns for the relevant years, any attempt to re-assess the Barbcos may be statute-barred.

CURRENT ITEMS OF INTEREST

2026 Pre-Budget Consultations

The Government of Canada will deliver Budget 2026 this fall. On July 6, François-Philippe Champagne, Minister of Finance and National Revenue, announced the launch of pre-budget consultations. Canadians can take part in the consultation process until September 8, 2026, by visiting Canada.ca/yourbudget.

Recent Publications

The following publications were recently issued/updated:

- Following June's one-time payment, Canadians to start receiving first enriched quarterly Canada Groceries and Essentials Benefit payment today (resource.intelliconnect.ca/docmedia/attach/WKCA-TAL-DOCS-PHC/74/cch-news-2026-07-062550_fittracker.pdf);
- Panama Papers: Canada-wide arrest warrant issued for individual charged with tax evasion (www.newswire.ca/news-releases/panama-papers-canada-wide-arrest-warrant-issued-for-individual-charged-with-tax-evasion-826270400.html);
- RC4210, Canada Groceries and Essentials Benefit (www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4210/canada-groceries-essentials-benefit.html); and
- T4114, Canada Child Benefit and related federal, provincial, and territorial programs (resource.intelliconnect.ca/docmedia/attach/WKCA-TAL-DOCS-PHC/28/cch-news-2026-07-034407_fittracker.pdf).

INTERNATIONAL NEWS

EU Begins Levying Customs Duties on Low-Value Consignments

On July 1, 2026, the EU abolished the customs duty exemption for e-commerce packages worth less than €150 and introduced instead a new €3 customs duty charge on goods coming from third countries bought online and shipped directly to consumers.

The European Commission said,

> The €150 customs duty exemption was designed for an era of occasional online purchases and less digitalised customs systems. This no longer fits reality, and its removal corrects a long-standing structural imbalance for EU enterprises.

According to the Commission, in 2025 alone, 5.9 billion items in low value packages from third countries entered the EU market without paying customs duties. Every day, more than 16 million packages are cleared by customs to consumers in the EU. Low-value packages represent 97% of all imported items in the EU but they account for only 2% of the EU's import value. The Commission said:

> The exemption rule was routinely exploited through undervaluation of goods or artificially splitting orders into multiple parcels to remain below the €150 threshold. This measure restores fairness across importers, ensuring that EU retailers importing in bulk, and large-scale non-EU online operators compete under the same regulatory conditions.

Under the regime, duties are collected by the customs authorities from the platforms, or any other business involved in the sale and transportation of the imported goods.

In addition, importers will be required to declare product identifiers ("PIDs"). "The inclusion of PIDs improves risk management and control procedures, helping to enforce prohibitions and restrictions," the Commission said, adding:

> This will support authorities to more effectively detect non-compliant goods and expand controls beyond individual shipments, to cover all items presenting similar risks. This will apply on a voluntary basis from July 1, 2026, and will become mandatory as from November 2026.

The €3 customs duty is a transitional solution. From July 2028, the EU Customs Data Hub will become operational, applying normal customs duties based on the good's tariff classification, origin, and value, under existing/standard EU customs duty rules.

The measure is part of the larger EU Customs Reform, agreed on by the European Parliament and the Member States on March 26, 2026. The reform introduces several targeted measures for e-commerce. In addition to removing the customs duty exemption, it introduces a handling fee on goods imported into the EU, to compensate for the increasing costs for customs authorities. The amount of the fee will be determined in a delegated act and be based on the minimum costs customs authorities face when processing goods. The fee will be introduced no later than November 1, 2026.

US Launches New FATCA Solution for Overseas Filers

The US Internal Revenue Service ("IRS") has launched an alternative avenue for overseas filers to submit FATCA (Foreign Account Tax Compliance Act) information returns electronically through the International Data Exchange System ("IDES").

The new solution the IRS has developed is in response to filers being unable to access the Information Returns Intake System ("IRIS") due to the system's enhanced authentication requirements.

The long-standing FIRE (Filing Information Returns Electronically) system will be retired this calendar year, with IRIS becoming the platform for returns required to be filed electronically in 2027.

IRIS's stricter access and authentication requirements include the need for filers to have authorized users (individuals that are authorized by the entity as their responsible officers or authorized delegates) that have a US taxpayer identification number (Social Security Number ("SSN") or Individual Taxpayer Identification Number ("ITIN")), and identity verification through IRS-approved methods.

The new system is in response to issues that may be encountered by certain foreign filers, who may be unable to obtain an SSN or ITIN for their authorized users and therefore cannot complete the authentication process necessary to apply for or maintain a Transmitter Control Code ("TCC") required to submit information returns through these systems. As a result, affected filers may be forced to rely on third-party intermediaries or face challenges in meeting their filing obligations.

In response, the IRS is now offering a new Foreign Filer TCC Registration System, which will allow certain foreign filers to obtain a TCC and submit their information returns electronically through the IDES.

The IRS said:

> Filers of information returns with authorized users that have a US TIN [Taxpayer Identification Number], such as an SSN or ITIN, must not use the new Foreign Filer TCC Registration System. Instead, they are required to apply for a TCC through the IRIS Application for TCC and transmit the applicable information returns through IRIS.

Users of the Foreign Filer TCC Registration System are required to:

- Create a new Foreign Filer TCC account to receive a Foreign Filer ID;
- Complete registration to obtain a TCC Global Intermediary Identification Number ("GIIN");
- Request a TCC once the TCC GIIN is issued; and
- Enroll in IDES to transmit information returns electronically.

The IRS has released guidance in Publication 6167, Foreign Filer Transmitter Control Code (TCC) Registration - Quick Steps.

OECD Reviews Progress on MNE Responsible Business Conduct

The OECD has released a first global assessment of how responsible business conduct ("RBC") is being taken up in company practice and government policies.

The report reviews international adherence to the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct ("MNE Guidelines"), the main international standard for how companies and investors should address their impacts on people, the planet, and society, marking the 50th anniversary since their release.

It analyzes publicly disclosed information of the 10,000 largest listed companies globally and reviews government policies across 52 countries.

According to the OECD, more than two-thirds of the world's largest listed companies have committed to RBC, but implementation is lagging. The report also highlights how governments can help companies turn ambition into action.

It shows that while 69% of large listed companies have RBC policies and management systems in place, far fewer report taking action to identify and address adverse social and environmental impacts.

The Outlook shows that commitments related to corruption and greenhouse gas emissions are the most common, followed by commitments regarding forced labour, child labour, and human rights.

According to the report, 29 of 52 countries adhering to the MNE Guidelines use incentives to promote implementation of RBC standards by businesses. Incentives can vary significantly — for example, preferential terms for grants, loans, or other financial support based on RBC performance; tax credits or benefits; incentives linked to permitting, licensing, company registration, and other administrative processes; trade and investment facilitation services; and government-backed trademarks or labels.

Examples of countries offering tax incentives include: Canada, which offers investment tax credits for industrial decarbonization, reducing the cost of deploying technologies such as renewable energy, energy efficiency, or low-emissions hydrogen production; and the United Kingdom, which enables businesses to deduct up to 100% of the cost of certain low-emission assets such as zero-emission vehicles and charging infrastructure for electric vehicles from taxable profits in the year of purchase.

"Responsible business conduct is about making sure business activity improves people's lives and helps protect the planet," said OECD Secretary-General Mathias Cormann.

> The OECD Guidelines for Multinational Enterprises provide a global reference point, but while commitment is growing worldwide, implementation is lagging. Governments can and should help close that gap, with policies that incentivize and enable more responsible practices.

US IRS To Waive Penalties for Typically Compliant Taxpayers

The Internal Revenue Service ("IRS") has announced a new automatic process that will provide penalty relief to taxpayers with a history of filing and paying on time.

The new Automatic Exemption from Penalty will replace the long-standing First Time Abate administrative relief and is designed to simplify the process and reduce the burden for those with a timely compliance history, the IRS said.

"Automatic Exemption from Penalty reflects the IRS's commitment to making the payment of taxes owed simpler and more consistent," said IRS Chief Executive Officer Frank J. Bisignano. "By automatically applying penalty relief, the IRS recognizes that taxpayers who historically pay on time should not have to make a formal request for relief that is routinely granted."

The new Automatic Exemption from Penalty ("AEP") is a systemic administrative relief program expected to begin this summer. AEP applies to eligible original returns beginning with tax year 2025 and 2026 quarterly returns, as well as future tax periods.

Taxpayers qualify if they have a history of timely filing the return and paying any tax due in the three prior years (or 12 consecutive quarters for quarterly returns).

When taxpayers qualify, penalties are not assessed during processing for:

- Failure to file;
- Failure to pay; or
- Failure to deposit.

Not all returns are eligible for AEP. For example, information returns and returns that are filed only in response to specific transactions or infrequent events are generally not eligible (such as Form 706, the US Estate Tax Return, or Form 709, the Gift Tax Return).

The IRS will begin phasing out First Time Abate and transitioning to AEP during the summer of 2026. During this transition, some qualifying taxpayers may still receive penalty notices for eligible tax year 2025 and 2026 quarterly returns. Taxpayers who believe they qualify may contact the IRS to request First Time Abate. When implemented, AEP will be automatically applied.

EU Parliament Adopts Resolution on 28th Tax Regime Proposal

On July 9, 2026, the European Parliament adopted a Resolution setting out Parliament's position on the introduction of harmonized tax rules in the EU — the so-called "28th regime".

The Resolution will be forwarded to the Council and the Commission, ahead of negotiations between the EU Parliament and member states in the Council.

The proposals for a 28th tax regime are intended to simplify tax for cross-border businesses, and to begin to harmonize tax rules among EU member states, to boost the bloc's competitiveness. A study on the proposed regime was commissioned by the European Parliament's Subcommittee on Tax Matters.

The proposals set out in the study are intended to address issues faced by firms expanding across the Union, which typically face multiple corporate tax bases, divergent research and development incentives, different transfer pricing practices, heterogeneous value added tax ("VAT") procedures, and fragmented withholding tax relief systems. The result is higher compliance costs, legal uncertainty, double-taxation risk, and investment distortions.

The draft text proposes, among other ideas, a consolidated corporate tax base, standardized tax returns, and simplified VAT procedures.

Rather than proposing full harmonization however, the study proposes that a 28th tax regime would not impose a single European tax code or harmonize tax rates. "Rather, the regime should reduce legal uncertainty, simplify compliance, and improve interoperability between national systems, in a manner compatible with subsidiarity, proportionality, and the existing allocation of competences under the Treaties," the authors said.

The authors said:

> [The 28th regime's] value lies in an optional, targeted, and integrated framework that operates alongside national tax systems and addresses key areas of tax fragmentation, including withholding taxes, the corporate income tax base, loss relief, research and development incentives, and employee share-based remuneration.

The newly approved Resolution, among numerous other things:

- "Stresses the fact that taxation is in most cases an exclusive competence of the Member States," but notes "there is — particularly in terms of procedures — a space for further simplification or targeted harmonisation tackling different compliance regimes, complex and fragmented corporate tax treatment, reporting obligations and administrative barriers in the treatment of cross-border investment [. . .]";
- "Calls for the 28th regime initiative to be ambitious in its substance, including on taxation aspects, all the while fully respecting the Treaties [. . .]";
- "Stresses that the 28th regime should be established through a modular approach", noting "the proposed regulation establishing a corporate legal framework ('EU Inc.') is a first step onto which other modules can be added, including on taxation (tax module);"
- "Notes that for a tax module to be attainable under the existing Treaty framework, and where the applicable legislative procedure does not yield results, either an opt-in structure of the relevant legislation, or enhanced cooperation as a last resort, should be considered in order to address tax policy shortcomings; notes that tax policy remains subject to unanimity in the Council of the EU; is of the opinion that transitioning to the use of qualified majority voting is necessary in certain aspects of tax policy such as in the implementation of international agreements signed by all Member States, certain administrative procedures or legal definitions, in order to prevent unanimity from limiting regulatory harmonisation [. . .]; and notes that such a module should be designed as an optional, clear, and legally secure system, open to the accession of other Member States at any time, avoiding further fragmentation and ensuring the coherence of the single market;"
- "Emphasises that in order to avoid further complexity, the provisions of the 28th regime should be in line with any other major proposals of the Commission and relevant Organisation for Economic Co-operation and Development (OECD) guidelines regarding greater integration within the single market, namely in the field of taxation and applicable tax legislation, notably in EU anti-avoidance and anti-evasion frameworks, including the Anti-Tax Avoidance Directive(12) (ATAD)".

The Resolution says, as well as establishing a single consolidated corporate tax base for participating companies across the EU, "the tax module must not further limit the discretion of Member States to set corporate tax rates", and further stresses that "the 28th regime should prioritise genuine consolidation in order to ensure the effective cross-border offset of losses, thereby incentivising cross-border investment".

On the apportionment of corporate tax revenues under the common corporate tax base element, the Resolution proposes that "the consolidated tax base be appropriated among the Member States using a pre-agreed formula reflecting real economic activity, such as sales, labour, tangible assets and digital presence", to replace "complex intra-group transfer pricing disputes within the regime with a transparent allocation method in line with OECD guidelines".

Parliament has notably recommended that the tax module's scope be initially limited to a subset of companies, such as cross-border growth-oriented start-ups and scale-ups, noting these typically generate only limited corporate income tax revenues for Member States.

RECENT CASES

Loss Deduction Denied for Foreign Exchange Trading Due to Lack of Profit Motive

In late 2011, the Appellant began trading in foreign exchange forward contracts using a straddle-trading strategy, which generated a loss exceeding $22 million in 2011 and a nearly identical aggregate gain in 2012. The Appellant deducted approximately $9.6 million of the 2011 loss when computing income for that taxation year and claimed approximately $4.9 million of the remaining loss as a non-capital loss in the 2013 and 2014 taxation years. The Minister reassessed the Appellant's 2011 taxation year, denying the loss on the basis the trading activity constituted a sham, was not legally effective, and was not a source of income. On appeal, the Tax Court agreed the transactions were not a sham and were legally effective, but concluded Appellant's trading activity was not a source of income, as it was conducted in pursuit of loss rather than profit. The Tax Court therefore confirmed the Minister's reassessment and dismissed the Appellant's appeal, with only the 2011 reassessment in issue on appeal to the Federal Court of Appeal.

The Federal Court dismissed the appeal. The Court first rejected the Appellant's contention that its *Paletta Estate* case (2022 DTC 5057) resurrected the "reasonable expectation of profit" test for determining whether an activity is a source of income, relegating the "pursuit of profit" test to personal or hobby activities. "An intention to pursue profit and a reasonable expectation of profit are different concepts," and the former, not the latter, was necessary for an activity to be a source of income. The Court closely analyzed the concept of a source of income, concluding that *Paletta Estate* and its precedents preclude an activity pursued with no purpose other than loss from being a source of income. Finally, the Court found no reviewable error in the Tax Court's determination that the Appellant's activity was not undertaken in pursuit of profit, and thus losses from such activity were not deductible as being from a source of income.

¶52,000, *S. Robert Chad v. His Majesty the King*, 2026 DTC 5073

Taxpayer Liable for Advantage Tax Under TFSA Regime

Under section 207.01 of the *Income Tax Act* ("ITA"), an advantage is a benefit obtained from a transaction that is intended to artificially shift income into a tax-free savings account in order to exploit tax-free attributes. Under section 207.05, the liability is 100% of the advantage. However, under section 207.06, the CRA can waive or cancel all or part of the liability when it is just and equitable to do so. The Appellant was assessed under section 207.05 for five taxation years. After judicial review, the Minister cancelled a portion of the liability. The Appellant appealed this reassessment to the Tax Court, challenging the constitutionality of the liability. After the Federal Court of Appeal dismissed the initial constitutional challenge because not all relevant sections were included, the Appellant amended its appeal in the Tax Court to include sections 207.01, 207.05, and 207.06. The Tax Court dismissed the appeal, and the Appellant appealed that decision to the Federal Court of Appeal.

The Federal Court of Appeal dismissed the appeal. The Appellant argued: (a) that the advantage sections of the ITA imposed a penalty for which a due diligence defence is available, not a tax, and (b) that the Minister's discretion to set the amount waived vests the taxing power in them rather than Parliament. However, rejecting the Appellant's "pith and substance" approach, the Court applied a textual, contextual, and purposive analysis that demonstrated otherwise: the text refers to a tax — "tax" rather than "penalty" is used in similar anti-avoidance statutes that "do[] not smack of a penalty," and purposively there was no attempt to "redress some sort of moral opprobrium" as there would be with a penalty. The advantage provisions are not aimed at punishing fault but rather are aimed at preventing abuse. Finally, as to the constitutional issue, the Court followed the criterion established in its 2020 *Hunt* decision (2020 DTC 5063), holding the advantage provisions did not give the Minister authority to conduct a "standardless sweep" and thus did not impinge on Parliament's authority, expressed in those provisions, to regulate the rate of the advantage tax.

¶52,007, *Hunt v. The King*, 2026 DTC 5079

Gross Negligence Penalties Upheld

This appeal relates to the Appellant's 2007 taxation year. Around that time the Appellant was in the business of IT consulting. He had a diploma in business administration and was self-taught in respect of IT matters. The Appellant did not file his federal income tax return for 2007 on time and a request for filing a return was issued. An arbitrary assessment was then issued by the CRA. Ultimately the Appellant did file his 2007 federal income tax return at some point in 2011, which was assessed as filed. Some time before the end of June of 2011, the Appellant began discussions with DeMara Consulting Inc. ("DeMara") to assist with his taxation matters. DeMara engaged in some highly creative accounting on the Appellant's behalf and subsequently submitted "Request for Loss Carryback" forms with the CRA indicating a non-capital loss of $1,654,421.95 and a net capital loss of $839,679.50 in the Appellant's 2007 taxation year. A request to amend the Appellant's 2007 federal income tax return was also filed on behalf of the Appellant by DeMara. This amended return included a claim for interest expense of $1,679,359.99, which factored into a claim for a net business loss of $1,654,421.95, and resulted in a claim that total income for the year was a loss of $1,639,592.57. That return also claimed a capital loss of $1,679,359.00. A second request for an amended return was filed which made the same claims, but also included a number of T5008 slips that were fictitious. This amendment request also included a Request for Loss Carryback requesting a carryback of $65,635.00 to the 2004 taxation year, $55,186.00 to the 2005 taxation year, and $164,283.00 to the 2006 taxation year. Yet a third request (collectively, the "T1 Adjustment Requests") for an amended return for the Appellant's 2007 taxation year was filed and which appeared to contain the same items, including the fraudulent T5008s. None of the three requests was signed by the Appellant but were stamped by DeMara. The Minister ultimately imposed gross negligence penalties of $358,412.7 on the Appellant and he then appealed to the Tax Court.

The appeal was dismissed. A penalty under subsection 163(2) can be imposed only if three requirements are met. First, there must be a false statement or omission in a return, form, certificate, statement, or answer. Second, the person must have made or have participated in, assented to, or acquiesced in the making of that statement. Third, that making or participation must have been done knowingly or under circumstances amounting to gross negligence. Taking all the evidence into account, the Court determined that the Appellant was grossly negligent in participating in, assenting to, and acquiescing in the making of the false statements under consideration here. Where a penalty is assessed under section 163, the burden of establishing the facts justifying the assessment of the penalty is on the Minister. The Minister can only sustain the penalties if he puts before the Court some evidence to establish they have been correctly computed. The Court found the Respondent discharged this burden. The Court also found sufficient evidence to uphold the calculation of the subsection 163(2) penalty. Consequently, the appeal was dismissed.

¶52,006, *Burzuk v. The King*, 2026 DTC 1067

Refusal To Waive Excess TFSA Tax Unreasonable

This was an application for judicial review challenging a decision of the CRA refusing to waive tax assessed on excess contributions made to the Applicant's tax-free savings account ("TFSA") for the 2020, 2021, and 2022 taxation years, pursuant to subsection 207.06(1) of the *Income Tax Act*. The Applicant argued that the excess contributions resulted from a reasonable error and he had acted in good faith, relying in particular on advice received from his financial institution and his accountant, as well as on difficulties accessing his CRA "My Account" during the COVID-19 pandemic. The Applicant opened a TFSA in 2015 and made automatic monthly contributions after repeatedly confirming with his bank that he was not exceeding his contribution limit. In June 2020, the CRA sent him an electronic notification advising that a message was available in his "My Account", which in fact consisted of a TFSA educational letter informing him of excess contributions. However, the Applicant's account was locked, and despite several attempts, he was unable to unlock it due to his work obligations and the reduced availability of CRA services during the pandemic. As the notices of assessment were delivered exclusively through "My Account" and the Applicant continued to receive income tax refunds, he remained unaware of the issue until 2024. Once informed, he promptly withdrew the excess contributions and applied for a waiver of the related tax. The CRA rejected the waiver request and the subsequent second review, on the basis that the Applicant had been duly notified in 2020 by email notification and, under Canada's selfâssessment system, it was his responsibility to monitor TFSA contribution limits and review his tax notices.

The application for judicial review was granted. Applying the reasonableness standard articulated in *Vavilov*, the Court first acknowledged the prevailing jurisprudence interprets the concept of "reasonable error" restrictively and that good faith, ignorance of the law, or reliance on incorrect professional advice is generally insufficient to justify a waiver. However, the Court emphasized that exceptions exist where circumstances are beyond the taxpayer's control or where a third party acts contrary to the taxpayer's instructions. In this case, the Court found the CRA failed to adequately address a central argument raised by the Applicant, namely his reasonable expectation that important CRA communications would be delivered by means other than "My Account", to which he had no access, and the failure to analyze whether this situation could amount to a reasonable error comparable to those recognized in prior case law. The administrative reasons were found to be deficient, lacking transparency, and failing to provide an intelligible analysis of this determinative issue. Accordingly, the Court concluded that the CRA's decision was unreasonable.

¶52,009, *Abdelhafid v. AG of Canada*, 2026 DTC 5081

Quashing of Tax Appeal Upheld for Reassessment Issued Under Subsection 152(4.2)

The Appellant appealed a Tax Court order granting the Respondent's motion to quash his appeal from a 2023 reassessment concerning the 2016 taxation year. The Tax Court held that the reassessment had been issued under subsection 152(4.2) of the *Income Tax Act* after the expiry of the normal reassessment period, with the result that subsection 165(1.2) barred any objection. The Appellant argued the normal reassessment period had not commenced in 2018 because the original Notice of Assessment had not been properly mailed or received. The Appellant also argued that CRA communications indicating he could object to the reassessment created a legitimate expectation of objection right.

The appeal was dismissed. The Court held the applicable framework for determining whether a notice of assessment was mailed was the test established in *Mpamugo* (2017 DTC 5083 (FCA)). Under that framework, the taxpayer bears the burden of establishing on a balance of probabilities that the notice was not mailed, either because it was never sent or because it was sent to the wrong address through no fault of the taxpayer. The Court found no reviewable error in the Tax Court's conclusion that the Appellant's evidence concerning non-mailing and address issues lacked credibility. The Tax Court was entitled to assess credibility after reviewing the evidentiary record and reasonably concluded the Appellant likely became aware of the 2018 assessment no later than 2019. The Court further held that appellate intervention with factual findings required a palpable and overriding error, which had not been established. The Appellant's arguments primarily challenged the Tax Court's weighing of evidence, which did not justify appellate interference. With respect to procedural fairness and legitimate expectations, the Court held that erroneous information provided by CRA officials or references in the reassessment indicating objection rights could not create a substantive statutory right prohibited by subsection 165(1.2). The doctrine of legitimate expectations may affect procedural rights only and cannot override express statutory limits on appeal rights. Accordingly, the Court upheld the Tax Court's conclusion that the reassessment fell within subsection 152(4.2) and was therefore not subject to objection

¶52,010, *Siam v. The King*, 2026 DTC 5082

CRA Unreasonably Denied CERB Eligibility by Failing to Engage with Evidence

In 2019–2020, the Applicant worked as a long-term occasional teacher, meaning she worked 20% of a full-time week and sought to supplement her income through supply teaching. With the onset of the pandemic, the school board stopped occasional teaching and the Applicant applied for and received the Canada Emergency Response Benefit ("CERB") for four periods. The CRA denied her eligibility twice on the grounds that she earned more than $1,000 during the relevant periods and that her employment ended with the school year, not because of COVID; the Federal Court determined those decisions were unreasonable because they failed to engage with the Applicant's argument that the CRA should have used net income rather than gross income and her attempts to find work during the summer. However, upon remand the CRA again failed to engage, denying the Applicant's eligibility on the "exact same reasons". The Applicant again sought judicial review.

The Federal Court allowed the application. The Court commented acerbically on the CRA review: "While consistency is generally a virtue, it must be accompanied by reasons that are justified, intelligible, and transparent"— the hallmarks of reasonableness. The CRA review was insensitive to the text, context, and purpose of the CERB Act. First, the review did not engage with the Applicant's contention that the CRA should have used net income for its maximum income analysis. The Respondent stated it used gross income for consistency with the CERB Act's minimum income requirements, but "the Agent must do more than regurgitate the most recent policy statement in order to show that they were alive to the text, context, and purpose of the CERB Act." The CRA's conclusion that the Applicant's loss of work was due to the end of the school year was similar. Given her submissions regarding the reason for her unemployment, it was incumbent upon the CRA to consider whether COVID had prevented her from otherwise finding new work in the summer of 2020. The CRA's failure to do so was unreasonable.

¶52,008, *Matta v. AG of Canada*, 2026 DTC 5080

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