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PRACTICE NOTE NO. 23

Preliminary Ruling Docket Procedure

In response to requests from counsel, the Tax Court of Canada is introducing a pilot project called the Preliminary Ruling Docket.

The Court recognizes that parties' costs increase with each step in the litigation process and that, in some appeals, parties may benefit from an expedited process which allows for a less expensive resolution of their dispute. The pilot project will determine whether a Preliminary Ruling Docket is an appropriate means to achieve this result.

Parties whose appeals are accepted into the Preliminary Ruling Docket will receive a non-binding preliminary ruling on their appeals from a Tax Court of Canada judge

The Court intends to operate the pilot project in Toronto and Vancouver for one year, commencing on January 1, 2020. Depending on the outcome of the pilot project, the Court will decide whether to make the Preliminary Ruling Docket, or an altered version thereof, permanent.

The procedure for the Preliminary Ruling Docket is attached.

Any questions or inquiries with respect to the application of the Preliminary Ruling Docket should be addressed to the Executive Legal Counsel of the Tax Court of Canada: sophie.matte@cas-satj.gc.ca

Dated this 12th day of December, 2019.

(Original signed by)

Eugene P. Rossiter

Chief Justice

The following are the principles and procedures which shall be used for the preliminary ruling docket:

1. Application: Parties wishing to obtain a preliminary ruling on an appeal may jointly apply to the Court in writing (a "Joint Application"). Joint Applications shall be brought within 120 days of the close of pleadings.
2. Contents of Joint Application: A Joint Application shall provide sufficient information to allow the Court to determine whether the appeal should be placed on the preliminary ruling docket. Such information shall include:
 - a. the reasons why the parties believe that a preliminary ruling hearing would be beneficial;
 - b. the parties' estimate of the length of the trial if the appeal were to proceed to trial;
 - c. the parties' estimate of the length of the preliminary ruling hearing;
 - d. the amount in issue (excluding interest) by taxation year or reporting period;
 - e. whether there are any related appeals;
 - f. the number of witnesses, if any, each party intends to call at the preliminary ruling hearing;
 - g. to the extent that a party wishes to call an expert witness at the preliminary ruling hearing, an explanation of the exceptional circumstances that would justify the Court granting leave for such a witness to be called; and

- h. a list of documents each party intends to submit at the preliminary ruling hearing and why they are relevant to the issue to be considered by the Court.
3. Acceptance: Upon receipt of a Joint Application, the Court shall determine whether it is appropriate for the appeal to be placed on the preliminary ruling docket and shall advise the parties accordingly. The determination will be based on such factors as the Court deems appropriate from time to time.
4. Minimum Criteria: Notwithstanding section 3, an appeal shall only be placed on the preliminary ruling docket if:
 - a. the trial of the appeal is expected to last more than two days;
 - b. the preliminary ruling hearing is expected to last no more than two days;
 - c. both parties are represented by counsel;
 - d. the appeal is a general procedure appeal;
 - e. the appeal only involves questions of fact or of mixed fact and law;
 - f. in the case of an appeal under the Income Tax Act, either:
 - i. the aggregate amount of all amounts in issue is greater than \$25,000 and less than or equal to \$300,000 per taxation year; or
 - ii. the amount of the loss that is determined under subsection 152(1.1) of the Income Tax Act and that is in issue is greater than \$50,000 and less than or equal to \$600,000 per taxation year; and
 - g. in the case of an appeal under Part IX of the Excise Tax Act, the amount in dispute is greater than \$50,000 and less than or equal to \$300,000 per reporting period.
5. Related Appeals: Notwithstanding section 4, an appeal (the "Related Appeal") may be placed on the preliminary ruling docket to be heard on common evidence with another appeal (the "Primary Appeal") if:
 - a. the Primary Appeal meets the criteria in section 4;
 - b. the appellant in the Primary Appeal is the same as the appellant in the Related Appeal or is related to the appellant in the Related Appeal;
 - c. the issues in the Primary Appeal and the Related Appeal are related;
 - d. counsel for the appellant in the Primary Appeal is the same as counsel for the appellant in the Related Appeal;
 - e. the Related Appeal only involves questions of fact or of mixed fact and law; and
 - f. a preliminary ruling hearing held for the Primary Appeal and the Related Appeal on common evidence is expected to last no more than two days.
6. No Discovery: There shall be no examination for discovery or compelled discovery of documents for the preliminary ruling hearing.
7. Documentary Evidence: Unless the Court otherwise directs, no party may rely upon documentary evidence at the preliminary ruling hearing unless a copy of that evidence has been provided to the other party at least 30 days prior to the preliminary ruling hearing.
8. Expert Evidence: No expert evidence shall be introduced at the preliminary ruling hearing without leave of the Court. Such leave will only be granted in exceptional circumstances.
9. Pre-Hearing Brief: Each party shall serve and file a pre-hearing brief at least 15 days prior to the preliminary ruling hearing. The pre-hearing brief shall not exceed 20 pages and shall set out the facts, issues, law and analysis that the party intends to rely upon at the preliminary ruling hearing.
10. Rules of Evidence: Notwithstanding the provisions of the Act under which the appeal arises, the Court shall not be bound by any legal or technical rules of evidence in conducting the preliminary ruling hearing.
11. Length of Hearing: A preliminary ruling hearing shall not last more than two days.
12. Preliminary Ruling: The preliminary ruling judge shall issue the preliminary ruling within 60 days of the completion of the preliminary ruling hearing. The preliminary ruling judge may issue the

- preliminary ruling orally or in writing.
13. Response to Preliminary Ruling: Within 30 days after the preliminary ruling judge issues the preliminary ruling, the parties shall either:
 - a. file a consent to judgment agreeing to settle the appeal without costs in accordance with the relief established by the preliminary ruling; or
 - b. jointly advise the Court in writing that one or both of the parties does not accept the preliminary ruling and submit mutually agreeable time periods for the completion of the additional steps in the litigation.
 14. Effect of Rejection of Preliminary Ruling: If either party does not accept the preliminary ruling:
 - a. the preliminary ruling judge shall not:
 - i. preside at the hearing of the appeal;
 - ii. participate in the appeal in any manner in the future; or
 - iii. communicate with any judge involved with the appeal concerning anything that was said or done at the preliminary ruling hearing;
 - b. subject to sections 16 and 17, the parties shall not disclose anything that occurred at the preliminary ruling hearing to any judge involved with the appeal; and
 - c. subject to sections 16 and 17, the following shall be sealed and shall not be made available to anyone, other than the parties, without an order of the Court
 - i. all documents relating to the preliminary ruling hearing;
 - ii. the transcript of the preliminary ruling hearing;
 - iii. if the preliminary ruling was issued in writing, the preliminary ruling; and
 - iv. if the preliminary ruling was issued orally, the transcript of the preliminary ruling.
 15. Costs if Both Parties Reject the Preliminary Ruling: If both parties do not accept the preliminary ruling, there shall be no costs awarded to either party in respect of the preliminary ruling.
 16. Costs if Only One Party Rejects the Preliminary Ruling: If one party does not accept the preliminary ruling and the other party does:
 - a. for the purposes of section 147 of the Tax Court of Canada Rules (General Procedure), the preliminary ruling shall be deemed to have been a written settlement offer served on the non-accepting party by the accepting party 30 days after the preliminary ruling was issued; and
 - b. the restrictions in subsections 14(b) and (c) shall not apply for the purpose of assessing costs.
 17. Use of Transcript to Impeach: Notwithstanding subsections 14(b) and (c), subject to the provisions of the Canada Evidence Act, the evidence given by a witness at a preliminary ruling hearing may be used for the purpose of impeaching the testimony of the witness in the same manner as any previous inconsistent statement by that witness.