

TAX COURT AND FEDERAL COURT

For a first level of (external) appeal, which court is better suited – Tax Court of Canada or Federal Court, Trial Division?

The Tax Court currently has jurisdiction for appeals of a variety of taxation related matters, both under the *Income Tax Act* and other taxation statutes. It is also a court that has been able to implement informal procedures and other mechanisms for lower-cost resolution of disputes (those procedures would have to be adapted for cases involving charitable status, since the current criteria would not apply).

The Tax Court has traditionally not played the role of a superior court in terms of addressing issues of primarily common law (although it has applied the common law in its interpretations of statutory provisions).

The Federal Court, Trial Division, is also a statutory court, but has had extensive experience with common law applications as well as having had experience in ruling on entitlements and rights under statute. However, it has not traditionally had a role under taxation statutes. The Trial Division has also had experience with alternative dispute resolution and expedited processes, which could be adapted to the charities context.

An additional option that the Joint Regulatory Table may wish to consider is the use of decision-makers who are part of a court but not judges, such as prothonotaries in the Federal Court of Canada. Prothonotaries have certain limited powers, prescribed by statute. These powers include certain types of motions and actions not over \$50 000.

Commentators, when talking of reform, have generally referred to the Tax Court as an appropriate court.

The Ontario Law Reform Commission concluded as follows:

Two options for federal reform come readily to mind: a more robust internal administrative procedure within Revenue Canada or an appeal from the administrative decisions of Revenue Canada to the Tax Court, along the lines of an assessment appeal, which, in essence, is a trial *de novo*. Expertise is one important factor to take into consideration in making this choice. Expertise argues in favour of a tribunal devoted exclusively to the question of the definition of charity and applying the exclusively charitable test. This may imply a preference for some internal departmental procedure in the Charities Branch of the Registration Directorate. Nevertheless, reducing administrative costs, and accomplishing the other objectives of procedural fairness, openness, and generating a record might more easily be achieved by tying into an existing judicial institution. This suggests the Tax Court, or something higher in the judicial hierarchy. The Tax Court, moreover, would entail a less expensive

procedure for all involved. On balance, therefore, we prefer the option of placing the matter under the jurisdiction of the Tax Court, with the hope that a stronger body of case law and a certain expertise will develop over time. Revenue Canada's expertise would therefore be deployed only at the initial administrative stage of the registration and revocation processes, and only the contentious cases would go beyond that.

Patrick Monahan in *Federal Regulation of Charities* concludes as follows:

There is no doubt that the existing appeal procedure needs to be replaced. The issue is whether an appeal should be directed to the Tax Court of Canada or a separate administrative tribunal.... Further, the Tax Court of Canada has established a strong reputation in the tax community as an efficient, fair and independent adjudicator. The Tax Court would have the added advantage of being able to bring to bear its general expertise in tax matters to the resolution of disputed issues in the charity sector. An appeal to the Tax Court should be by way of a hearing *de novo* and should be subject to the Court's informal appeal procedure, at the option of the applicant.

Admittedly, there has been little analysis of the relative merits of each court. But, given the fact that charities registration is under the *Income Tax Act*, there would be a tendency to keep the Tax Court as the court of first level appeal for all matters under that statute.

Arguments can be made for either court, although intuitively the Tax Court has emerged as the more likely candidate.