Some 2019
Tax Cases of Interest

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Some preliminary points…

- All these cases are in my Notes in PITA 57th ed. (in stock March 2019) [pre-July cases are in the 56th]
- TCC>FCA for Tax Court appeals (of assessments); FC>FCA for judicial review of CRA discretion
- Don't overlook QCCQ and QCCA cases as an occasional source of interpretation (parallel Quebec law)
- If you're stuck on an ITA interpretation or practice issue — check PITA Notes or email me (ds@davidsherman.ca)

I — Income and deductions
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I — Income and deductions

- Personal income and expenses
- Interest income
- Interest expense
- Business income and expenses
- Section 55

Personal income and expenses

5(1) employment income: tips

- *Xia*, 2019 TCC 30 (under appeal to FCA). Casino tips pooled and divided by the employees were taxable *[not new]*

Personal income and expenses:

8(1)(b) employment deduction for legal fees

- *Kurnik*, 2019 TCC 206: deduction **was allowed** for legal fees paid to settle suit against K's family trust because it was related to his suit for salary
- *Dauphin*, 2019 TCC 93: Montreal city councilor paid lawyers for services relating to searches of his home and office as part of police investigation into city administration. **No deduction** allowed
- *Barrett*, 2019 TCC 228: fees paid for an oppression remedy action were not sufficiently connected with B's employment to be deductible. **No deduction**

Personal income and expenses:

18(12) home office expenses

- *Hébert*, 2019 TCC 266, para. 29: **lawn and garden care qualifies for deduction**, since needed to keep the house looking nice for clients (earlier case *Andreone*, 2005 TCC 24 had said outside maintenance costs were non-deductible as they would be needed anyway and did not enhance the business's income-generating potential)

Personal income and expenses:
56(1)(a) pension income

- *Rasmussen*, 2019 TCC 124: payments from the **Australian government employees' "QSuper" fund** were taxable and not exempted by treaty, including a "tax-free component" that would not be taxed in Australia

Personal income and expenses:
62(1) moving expenses

- *Ellaway*, 2019 TCC 118: **move *to* Canada does not qualify** (under 248(1)“eligible relocation”) if the taxpayer was non-resident *[not new]*

Personal income and expenses:
9(2) business losses

- *Renaud*, 2019 FCA 154: professor's **part-time law practice** with no attempt to make a profit was personal, not commercial so losses disallowed
- *Robinson*, 2019 TCC 181: losses from efforts to **"commercialize innovation"** might have been allowed, but were denied because the expenses were capital (18(1)(b))

Personal income and expenses:
103(1) partnership allocation

- *Aquilini*, 2019 TCC 132: **partnership allocations provided distorted returns**, so either 103(1) or 103(1.1) applied to reallocate the income (103(1.1) does not need a tax avoidance purpose to apply: para. 65])

Interest income

12(1)(c)

- *Plains Midstream*, 2019 FCA 57, para. 90: "Symmetry is the essence of interest ... **an amount is not interest if it does not have the character of interest to b**oth the recipient and the payer"
- TCC decision (2017 TCC 207) included detailed discussion of the history and purpose of 16(1) [blended interest/capital payments]

Interest expense

20(1)(c)

- *Gervais Auto*, 2019 QCCQ 5894: **10% interest paid to GA's shareholders was denied beyond 7.89%**, as the company's CPAs had determined that a commercial rate was 7.89%-12.39% (and notably, the company was not using its 3.125% bank credit line)

Interest expense

20(1)(c)

- *Black*, 2019 TCC 135: Conrad Black's **payment of a damage award was held to be a interest-bearing loan to his company** that was jointly liable with him, so interest was deductible (income need not actually be earned as long as the purpose test is met: para. 143)
- **Purpose requirement of a "direct link"** between the borrowed money and an eligible use (*Shell Canada*, [1999] 4 C.T.C. 313 (SCC)) was met
- **Binding oral agreement had been reached on essential terms** (see PITA Notes to 169(1) under *Rectification* about "reducing an agreement to writing")

Interest expense

20(1)(c), 20.1

- *Moras,* 2019 TCC 111: **interest deduction was allowed where M ceased carrying on business** but continued to pay interest on his line of credit
- 20.1 is often missed!

Business income and expenses

12(1)(x) income inclusion for "assistance"

- *PCI Géomatics*, 2019 QCCQ 2688: Industry Canada loan that was repayable only if revenues increased **was not a "forgivable loan",** so no income inclusion

Business income and expenses

18(1)(b) capital expenses — no deduction

- *Voyer*, 2019 TCC 221, para. 31: **compensation paid to clients by a securities broker** for losses on bad investments were capital expenses, as they were to preserve his reputation and customer base

Section 55

55(5) — Safe income

- *626468 New Brunswick*, 2019 FCA 306: **Safe income is computed after deducting corporate income tax** ultimately payable on the income

II — SR&ED investment tax credits

- Main determinative issue in dispute, in practice, is **“technological uncertainty**” (TU)

II — SR&ED investment tax credits:
SR&ED found, ITCs allowed

- *A & D Precision*, 2019 TCC 48 (double wheel roll grinding machine; full spectrum versatile horizontal lathes)
- *CRL Engineering*, 2019 TCC 65 (Ph.Ds developing system to provide real-time on-board status for public transit buses)
- *Béton Mobile*, 2019 TCC 278 (concrete mixing projects: 6 of 14 projects had TU)

II — SR&ED investment tax credits:
SR&ED not found, no ITCs

- *Concept Danat*, 2019 TCC 32 (laser-printing clothing: no TU)
- *A & D Precision*, 2019 TCC 48 (full spectrum versatile horizontal lathes: one qualified, but no TU in developing smaller versions)
- *Laforest Marketing*, 2019 TCC 45 (Spray Catcher water mist collector: no TU as techniques used were known to the industry)
- *Exxonmobil*, 2019 TCC 108 (purpose of drilling well was to find oil, not to validate methodology for reservoir connectivity)
- *Clevor Technologies*, 2019 TCC 166 (project management software: routine engineering, no TU)
- *Kam-Press*, 2019 TCC 246 (under appeal to FCA) (memorial niche for funeral urns: trial and error, no TU)
- *Béton Mobile*, 2019 TCC 278 (concrete mixing projects: 8 of 14 projects had no TU)

II — SR&ED investment tax credits: additional points

- *Concept Danat*, 2019 TCC 32, para. 53: An SR&ED claim requires "an **accurate record of hours worked**" (not an estimate)
- *Kam-Press*, 2019 TCC 246, para. 25: Determation of whether there was SR&ED is a **question of law; expert witnesses can assist the Court but are not determinative** or necessary

III — International

FATCA (ss. 263-269)

- *Deegan (Highton)*, 2019 FC 960 (under appeal to FCA): the **Canada-US FATCA Agreement does not violate the *Charter of Rights*** as unreasonable seizure of financial information from US persons, or by discriminating on the basis of national origin
- Similar *Hillis (Deegan)* case (2015 FC 1082) was already under appeal to the FCA: FC found no violation of the Canada-US tax treaty or of section 241 (i.e., the non-constitutional issues)
- The appeals will be heard together (no date scheduled yet)

III — International

128.1(1): whether corporation became resident in Canada

- *Landbouwbedrijf Backx*, 2019 FCA 310: TCC had held that LB **was already resident in Canada (under "central management and control"), so 128.1(1)(c) did not apply** in the year LB claimed. The FCA sent the decision back to the TCC because the TCC had based its decision on LB not having "ceased to be resident in the Netherlands"; presumably the TCC must now specify that LB *was already resident in Canada*, regardless of its status in the Netherlands. (The FCA also ordered the TCC to consider whether the Canada-Netherlands treaty applied.)
- **CRA's acceptance of a filing position for some years is not binding for other years**: para. 14.

III — International

Form T1135 [233.3(3)]: penalty for non-filing (162(7))

- *Moore*, 2019 TCC 141: M worked for GE Canada and, under stock option plan, acquired shares in U.S. parent corp. Once total cost exceeded $100,000 in 2015, he was required to file a T1135, but the CRA Guide was unclear about this. M **voluntarily disclosed with his 2016 return his non-filing for 2015**. The Tax Court cancelled the penalty based on **"due diligence"**.

III — International

Canada-US tax treaty Art. V:9

9. Subject to paragraph 3, where an enterprise of a Contracting State provides services in the other Contracting State, if that enterprise is found not to have a permanent establishment in that other State by virtue of the preceding paragraphs of this Article, that enterprise shall be deemed to provide those services through a permanent establishment in that other State if and only if:

(a) those services are performed in that other State by an individual who is present in that other State for a period or periods aggregating 183 days or more in any twelve-month period, and, during that period or periods, more than 50 percent of the gross active business revenues of the enterprise consists of income derived from the services performed in that other State by that individual; or

(b) the services are provided in that other State for an aggregate of 183 days or more in any twelve-month period with respect to the same or connected project for customers who are either residents of that other State or who maintain a permanent establishment in that other State and the services are provided in respect of that permanent establishment.

- Para. 9(a) applied in *Wolf*, 2019 FCA 283

IV — GAAR

GAAR (245(2)) applied

- *Gladwin Realty*, 2019 TCC 62 (under appeal to FCA): misuse of 40(3.1), 40(3.12) and the **pre-2011 Capital Dividend Account rules** via partnership distribution to inflate CDA with offsetting gains and losses
- *Birchcliff Energy*, 2019 FCA 151 (leave to appeal denied by SCC Nov. 14, 2019): **avoiding 256(7)(b)(ii**) deemed change in control by having Lossco issue subscription receipts to trigger 256(7)(b)(iii)(B) before amalgamation *[same result earlier at 2015 TCC 232 but that decision was nullified at 2017 FCA 89 as issued by the wrong Tax Court judge]*

IV — GAAR

GAAR (245(2)) did not apply

- *Deans Knight*, 2019 TCC 76 (under appeal by Crown to FCA): **pre-256.1** loss trading — selling corp's unused losses and credits to a **third party taking 35% votes but 79% of equity**, which was not "control" at the time
- Right to *sell* shares to Mco did not give Mco a right to *buy* those shares (and 256(8) did not apply) — paras. 49-62

IV — GAAR

Discovery in a GAAR appeal

- *Madison Pacific [MP Western]*, 2019 FCA 19: draft documents prepared during audit should be disclosed, as they "inform the Minister's mental process": para. 12; but **no "fishing expedition" allowed for correspondence between CRA and Finance** on loss trading
- *Total Energy*, 2019 TCC 112 (under appeal to FCA): similar to *MP Western*; fishing expedition not allowed
- Determining policy for GAAR is a "question of law" for which current government documents may be irrelevant and inadmissible [both *Madison* and *Total Energy*]

V — Personal credits

118.2(2) medical expenses

- *Chen*, 2019 TCC 192: 118.2(2)(o) might have covered **harvesting stem cells** from a newborn's umbilical cord, but a doctor's letter saying "all patients are advised to do this" did not meet the "prescribed" test.

V — Personal credits

118.3 and 118.4 disability tax credit (DTC)

(Cases are always fact-dependent)

- *Green*, 2019 TCC 74: **severe anxiety disorder** qualified
- *Connolly,* 2019 TCC 160: cumulative effect of **fibromyalgia, rheumatoid arthritis and other conditions** qualified once they became severe enough

- *Laing*, 2019 TCC 267: **bipolar disorder plus irritable bowel syndrome** did not qualify

V — Personal credits

118.041 home accessibility tax credit (HATC)

- *Patrie*, 2019 TCC 276: "rickety" stairs to the back garden were replaced with a **new deck, stairs and railing**, to allow Mrs. P access to the garden. This qualified as increasing her access to the "eligible dwelling"; and the **HATC was allowed even though the work increased the home's value**, since the purpose was to allow Mrs. P access to the garden, not to increase the home's value

V — Personal credits

122.61 Child Tax Benefit (Canada Child Benefit)

- **"Shared custody"** allows the CCB to be split: 122.6"shared-custody parent", 122.61(1.1).
- *Lavrinenko*, 2019 FCA 51 and *Morrissey*, 2019 FCA 56: "Near equal" means only up to 55-45%. (Overrules prior case law)
- August 29, 2019 draft legislation will change the rule so that **anything up to 60-40 will qualify, or "approximately equal"** (which Finance Technical Notes say might apply if the intent is to be near-equal but due to illness or summer vacation the split is 62-38 in a given month). The change will be retroactive to July 2011.

VI — Charities

Charity registration refused

- Categories to qualify as a charity (judge-made law) are religion, education, relief of poverty, and "other purposes beneficial to the community"
- *Church of Atheism*, 2019 FCA 296: **atheism is not a religion**, as it lacks "a particular and comprehensive system of doctrine and observances"
- [Applicant likely could have gone under "education" but I suspect they wanted to make a point]
- Refusing to register a charity does not interfere with its members' *Charter* rights more than trivially or insubstantially: para. 16

VI — Charities

Charity registration revoked (168(3))

- *Ark Angel Foundation*, 2019 FCA 21: **failure to support a director's consulting services provided to the charity** meant its records were insufficient
- *Many Mansions*, 2019 FCA 189: inadequate records; and **pastor used charity's meeting room** 3 times for his personal business

VI — Charities

Charity registration suspended (188.2)

- *Promised Land Ministries*, 2019 TCC 145: charity suspended for 1 year because, despite being warned, it **did not get receipts for money spent in countries with "cash economies"**. It could have used a notebook in which the individual receiving funds could sign a receipt.

VII — Donations and gifting schemes

Donation shelters

- **Donation shelters always fail**, either on valuation or because there was no "impoverishment" and thus no gift
- *Markou*, 2019 FCA 299: **McKellar/Trinity** leveraged donations; interconnected transactions, no gift
- *Abreo*, 2019 TCC 122: **software donated** to National Children's Burn Society
- *Miller*, 2019 TCC 204: **Global Learning Gift Initiative**: cash portion of "donation" denied *[same as earlier cases]*
- *Kaul (Roher)*, 2019 TCC 17 (FCA appeal dismissed Dec. 16, 2019): **Artistic Ideas** — art valuations rejected as unreliable
- *Eusebe*, 2018 TCC 254: **Universal Donation Program**

VII — Donations and gifting schemes

What is a donation?

- *Fonds de solidarité*, 2018 TCC 3 (aff'd on other grounds 2019 FCA 36): $9m **payment to the local town to invest in something to replace a failed paper plant** was held not to be a donation under the Quebec *Civil Code*, because it relieved the donor of an obligation to invest the funds in another project
- Might or might not apply in common-law provinces but it was a very specific fact situation anyway

VII — Donations and gifting schemes

Cultural property donations

- Property certified as cultural property:
  - On donation to qualifying institution, no capital gain (39(1)(a)(i.1))
  - Export restrictions under *Cultural Property Export and Import Act*
- *Heffel Gallery*, 2019 FCA 82 (reversing the FC): **"national importance" for cultural property applies to foreign works** (FC had said only Canadian works)
- **2019 amendment to 39(1)(a)(i.1) removed the "national importance requirement** to be eligible for the tax-free gain
- Since *Heffel Gallery* FC was overturned, no real change; there was a short period, now gone, where foreign cultural property could be exported without government control

VII — Donations and gifting schemes

Ecological property donations

- *Yellow Point*, 2019 TCC 178: the **ecological gift was made when the property was transferred**, not the next year when it was designated as ecological property.

VIII — Assessments, Objections, Appeals

Overpayment by CRA under void reassessment

- *984274 Alberta*, 2019 TCC 85, paras. 63-78: payment of reassessment that proved void (assessed late based on invalid waiver) was not "overpayment", so 164(1) and 164(3.1) did not apply, and a refund CRA paid was paid in error (not a refund under any ITA provision) and not recoverable via 160.1
- An out-of-time assessment is void even if not objected to: para. 49
- Waiver valid only if filed by reassessment deadline: para. 43 *[not new]*
- If a reassessment is vacated or is found void, the previous assessment is reinstated: para. 52 *[not new]*
- For 169(3) reassessment following a settlement, Minister may reassess "with the consent in writing of the taxpayer" — this applies only to the parties to the appeal, not to another party that signs the settlement: paras. 20, 60.

VIII — Assessments, Objections, Appeals

”Determination” of partnership income

- *Tedesco*, 2019 FCA 235: CRA assessed partners of a limited partnership to deny losses, and issued a **Notice of Determination to the LP**. The LP appealed but then filed a Notice of Discontinuance. The FCA (reversing *Stewart*, 2018 TCC 75) held the partners could continue their appeals.

VIII — Assessments, Objections, Appeals

152(4)(a) Late reassessment due to carelessness

- *Prima Properties*, 2019 TCC 4, para. 46: it was **not negligent for a corp relying on its accountant not to know about a "highly technical provision** of the Act" that even CRA at trial was unclear about (obscure GST rules re residential property) [so the assessment was statute-barred]
- *Strum*, 2019 TCC 167, para. 11: carelessness in claiming certain personal expenses as business was enough **to open up reassessment of *all* claimed expenses**

VIII — Assessments, Objections, Appeals

165(1) Objection filing deadline

- *Kirschke*, 2019 TCC 68: K **had told CRA about her address change for income tax, but not for GST/HST** (that account was inactive, with nil returns). The GST/HST assessment was held not validly mailed, so the **objection deadline had not expired** and she could validly object.

VIII — Assessments, Objections, Appeals

165(7) Appeal already filed, reassessment issued

- *Stone*, 2019 TCC 253: CRA reassessed S to reduce tax by a small amount after he filed his appeal. He did not **amend his appeal to be from the new assessment**. The Court did so on its "own motion" (paras. 73, 76) to let the appeal continue.

VIII — Assessments, Objections, Appeals

169(2.2), (3) Appeal settlements

- *Wiegers*, 2019 TCC 260: the Court **cannot order CRA to re-make an expired settlement offer** *[not new]*
- *Savics*, 2019 TCC 71 (under appeal to FCA): CRA and S reached a settlement allowing deductions on the basis that certain limited partnerships did exist; CRA's assessment of a later-year capital gain was a **"consequential adjustment" (of the existence of the LPs) per the settlement**, so 169(2.2) applied and S could not appeal

IX — CRA administration

231.1 — Audits

- *Cameco Corp.*, 2019 FCA 67, paras. 20-21: The **right to audit does not entitle CRA to compel oral interviews** (but left open the question of whether 231.1(1)(d) provides an "independent power to compel attendance and answer questions")
- CRA accepts this decision (and did not seek leave to appeal), but notes ominously: "Refusal to participate in oral interviews ... indicates a lack of openness and transparency, and potentially a higher risk of non-compliance", and that declining interviews **can lead CRA to make "assumptions** about the nature of the taxpayer's business activities" (tinyurl.com/cra-cameco)

IX — CRA administration

231.1 — Audits

- Brooks, 2019 FCA 293: **CRA conduct in the audit is irrelevant when appealing** *[not new, but something many accountants don't realize]*
- *Prince*, 2019 FC 348, para. 21 and *Chekosky*, 2019 FC 841, para. 26 : **audit proposal letter is not a "decision" that the Federal Court can review**

IX — CRA administration

231.1 — Audits

- *Ghazi*, 2019 FC 860: **failed attempt to force CRA to change auditors** due to alleged bias: FC has no jurisdiction since assessment can be appealed to Tax Court
- *Contra:* *Valero Energy*, 2019 FC 319: **FC has jurisdiction to stop audit** of Reg. 105 non-withholding on payments to international shipping companies (never before enforced by CRA)
- *Safe Workforce*, 2019 FC 645: **Court refused to strike application for injunction to prevent CRA from finalizing audit** before Access to Information disclosure released, but also refused interlocutory injunction (so assessment could be issued)

IX — CRA administration

231.2 Requirements for Information (RFIs), 231.7 compliance orders

- *1068754 Alberta [Bitton Trust]*, 2019 SCC 37, **Revenu Québec could validly send an RFI to National Bank's Calgary branch** at which a Quebec taxpayer had an account, as the bank carried on business in Quebec.
- *Roofmart*, 2019 FC 506 (under appeal to FCA): like *Rona*, **building supplies company had to disclose its "contractor" customers** *[this will give CRA great info for audits]*
- *Friedman*, 2019 FC 1583, **RFIs were validly directed** to the Fs, not their corporations, and there was no evidence of criminal investigation
- *Ciciarelli [Cicarelli] (Montana)*, 2019 FC 900: **compliance order to "provide" documents was amended to add "deliver"**; given C&M's "extraordinary" non-cooperation over 5 years, it was insufficient to simply make 30 boxes of documents available for CRA inspection

IX — CRA administration

Corruption

- **Montreal and Laval TSO corruption investigations** by RCMP: “Operation Coche” (tinyurl.com/cra-corrup1, tinyurl.com/cra-corrup2); “Operation Critique”
- *Bruno*, 2019 QCCS 65, para. 20
- *Accurso (Bruno)*, 2019 QCCQ 3705: investigation into CRA corruption did not change nature of audit
- *Iammarone*, 2019 QCCQ 7836: jail term of 2 years less a day for auditor accepting bribe to “fix” an audit

X — Judicial review in Federal Court

220(3.1) interest waiver

- *Loyer (Succession)*, 2019 FC 1528: in refusing Taxpayer Relief, CRA failed to consider agreement taxpayer had reached with Revenu Québec to waive penalties.

X — Judicial review in Federal Court

Vavilov case

- Federal Court has jurisdiction where there's no appeal possible to the Tax Court, e.g. CRA decision refusing waiver of interest
- Test is "**reasonableness**" of CRA's decision, not "correctness"
- ***Vavilov* has rewritten the "reasonableness" test** (as per below)

X — Judicial review in Federal Court

Vavilov case

- *Vavilov:* "administrative decision makers *[i.e., CRA]* must **adopt a culture of justification** and demonstrate that their exercise of delegated public power can be justified" (para. 14).
- The Court must ensure the "**decision as a whole is transparent, intelligible and justified**" (para. 15).
- The Court does not ask what decision it would have made, ascertain the range of possible conclusions, conduct a new analysis or seek the correct solution; but must consider only whether CRA's decision, including both rationale and outcome, was **unreasonable** (para. 83).

X — Judicial review in Federal Court

Vavilov case

- *Vavilov:* Two fundamental flaws that can render a decision unreasonable (para. 101) are a "**failure of rationality internal to the reasoning process**" (e.g. irrational chain of analysis, or if the reasons in conjunction with the record do not make it possible to understand the reasoning on a critical point, or exhibit clear logical fallacies: paras. 103-104) and "when a decision is in some respect **untenable in light of the relevant factual and legal constraints**", taking into account the governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before CRA and facts of which CRA may take notice, the parties' submissions, CRA past practices and decisions, and the decision's potential impact on the taxpayer (para. 106).

X — Judicial review in Federal Court

Vavilov case

- *Vavilov:* Furthermore, **CRA must consider the evidentiary record and the general factual matrix**, and its decision must be reasonable in light of them (para. 126). Whether a particular decision is **consistent with past CRA decisions** is also a constraint the court should consider (para. 131). Finally, individuals are entitled to **greater procedural protection when the decision involves potentially significant personal impact** or harm, including threatening one's "livelihood" (para. 133), and if the impact is severe, CRA's reasons must explain why the decision best reflects the *legislature's* intention *[this new factor will likely be cited in applications under 220(3.1): note that there is relatively little information about Parliament's intention on introducing 220(3.1) in 1991]*.

X — Judicial review in Federal Court

Vavilov case

- *Vavilov:* Successful judicial review normally means sending the matter back to the CRA for a new decision; but the **Federal Court may order a result** if a particular outcome is "inevitable" (para. 142)

XI — Lawsuits

Failed lawsuits against CRA or RQ

- *Gordon*, 2019 FC 853: SR&ED advisors who backdated documents to inflate ITCs were charged with fraud; the Crown stayed the charges. **Their lawsuit for malicious prosecution** was resoundingly dismissed, as CRA had ample grounds to prosecute. Later at 2019 FC 1348: $675,000 costs award to Crown.
- *Naples Pizza*, 2019 QCCS 710: 3-year Quebec **time limit for suing Revenu Québec for assessing GST started when auditor issued the assessment**, not when the company won its Tax Court appeal *[conflicts with case law from other provinces]*

XII — Registered Plans

147.1(12) — pension plan revocation

- *Mammone*, 2019 FCA 45: CRA issued a revocation notice in 2013, purporting to revoke M's plan effective 2009, but failed to wait the full 30 days from the notice of intent. CRA then assessed M for 2009 (in 2013). In 2017, CRA validly **revoked the plan effective 2009**. The FCA overturned the 2013 assessment, as the facts justifying it did not exist in 2013.

XII — Registered Plans

204.1(4) — RRSP overcontribution tax waiver

- *Connolly*, 2019 FCA 161: **CRA's refusal to waive the overcontribution tax was upheld** as reasonable. The Court said that CRA's guidelines are unreasonably restrictive, but on the facts no waiver was justified
- *Roy*, 2019 TCC 50: **CRA waiver under 204.1(4) did not disentitle R from deducting the excess** as he built up new contribution room in later years

XII — Registered Plans

207.06(1) — TFSA overcontribution tax waiver

- *Gekas*, 2019 FC 1031: it was **unreasonable for CRA not to waive the penalty** where TFSA overcontributions were caused by the **financial institution's mistakes**
- *Weldegebriel*, 2019 FC 1565: Canadian Forces member whose address kept changing did not receive overcontribution notices, as he repeatedly failed to advise CRA of address changes. CRA's **refusal to waive the overcontribution tax was upheld**

XII — Registered Plans

RRSP fraud

- *Stewart*, 2019 TCC 22: 146(9) and pre-2011 146(10) did not apply to impose tax where **119 defrauded taxpayers' RRSPs bought worthless mortgages**, as the amount paid was fair market value

XII — Registered Plans

T207.01(1)"advantage" — TFSA game-playing

- *Louie*, 2019 FCA 255 (leave to appeal to SCC requested): Subpara. (b)(i) applied to **swap transactions** (before 2011 amendments, using the market daily low price going into the TFSA and the high coming out, turning $5,000 in Jan. 2009 into $206,000 at year-end), even before (b)(iii) applied.
- Later years' gains (due to market increases) from $206,000 were also caught as **"indirectly" attributabl**e to the 2009 swaps

XIII — Remission Orders

(Financial Administration Act)

- No Federal Court judicial-review application (of CRA refusal to recommend a remission order) **has *ever* succeeded**. New examples from 2019:
  - *Fink*, 2019 FCA 276: *SDL Optics* remission was only for a riskier stock *purchase* plan. CRA refused to recommend remission for a stock *option* plan, where shares drop in value and capital loss cannot be deducted against stock option employment benefit
  - *Deshaies*, 2019 FCA 300
  - *Escape Trailer*, 2019 FC 31
  - *Boivin*, 2019 FC 210
  - *Internorth*, 2019 FC 574
- ***Vavilov* may affect this by requiring more specific reasons**

XIV — Trusts — Supreme Court of Canada cases

- *SA v. Metro Vancouver Housing*, 2019 SCC 4: **Henson trust beneficiary**, who was also a co-trustee, had only "a 'mere hope' that the trustees will exercise their discretion in a manner favourable to her", so her **interest in the trust was valued at nil** for purposes of a rent subsidy application.
- Case did not mention tax but may be applicable to tax law
- *Yared v. Karam*, 2019 SCC 62: a **"right to confer use" of property**, for Quebec family law, included a settlor's right through a trust (where he could add himself as beneficiary).

XV — Miscellaneous

Partnership for illegal acts in Quebec

- *Raposo*, 2019 FCA 208: **partnership formed to carry on illegal acts** (selling drugs) was **void under Quebec law**, so its members were not partners and not liable for its GST liabilities (even though this is not the law in other provinces)

XV — Miscellaneous

Sham transactions

- *Paletta*, 2019 TCC 205, para. 127-247: **film investment**. Fox had pre-agreed to exercise option to repurchase film so this was a **sham**, and as a **"tax shelter**" under ITC 237.1(6) for which deductions were denied

XV — Miscellaneous

125(7)"specified investment business"

- *1717398 Ontario [Lost Forest Park]*, 2019 TCC 183: **campground for RVs and mobile homes was specified investment business** — not sufficiently "active" like a hotel, even though many services were provide beyond campground rentals

XV — Miscellaneous

127(9)"qualified property" (for investment tax credits)

- *Stark International*, 2019 TCC 248, para. 78: It is the purchaser's intention **at time of acquisition** that counts (citing earlier cases).
- Equipment whose *initial* 10 months' use was processing a customer's oil was held to be intended to process oil for sale

XV — Miscellaneous

160(1) liability based on transfer from 227.1-liable director

- *Colitto*, 2019 TCC 88) (rejecting previous cases *Filippazzo*, *Pliskow* and *Sheck*), the wife of a **director who transferred property to her before 227.1(2) was satisfied** (requiring CRA to prove the debt is not collectible from the corporation) was not liable under 160(1)
- Case is under appeal by Crown to FCA — might be overturned, given that it makes 2-step 160(1) impossible to satisfy and conflicts with earlier cases

XV — Miscellaneous

160(1) liability from a 55(3) butterfly

- *Eyeball Networks*, 2019 TCC 150: **160(1) applied to a 55(3)(a) butterfly** with cross-cancellation of promissory notes (one valuable, one worthless), so CRA could collect Oldco's unpaid tax debt from Newco

XV — Miscellaneous

163.2 third-party penalty

- *Glatt*, 2019 FC 738: CRA settled an appeal by conceding the penalty did not apply. CRA was ordered to **pay interest on refunding G's $1m payment of the third-party penalty**. The "reassessment" cancelling the penalty triggered 164(3) and thus interest (CRA argued it was merely a "notice of refund" and did not apply to any taxation year)

XV — Miscellaneous

184(3) Part III tax on wrongly-declared capital dividend

- The Short Cut Method is an administrative practice allowing a corp that has filed an excessive election to treat the excess as a taxable dividend without requiring assessment and reversal of Part III tax or the Reg. 2106 documentation. CRA generally allows it if it is "appropriate".
- *Morissette*, 2019 TCC 103: company **made the Short Cut election** to avoid Part III tax, but **also appealed the assessment**, claiming the excess really *was* a capital dividend. The appeal was allowed to proceed to trial

XV — Miscellaneous

256(2.1) — corps associated where no business reason for separate existence

- *Jencal Holdings*, 2019 TCC 16: **256(2.1) applied** — insufficient evidence as to reasons for corp's separate existence
- *Prairielane Holdings*, 2019 TCC 157: **256(2.1) did not apply** — corps were stacked to *defer* tax, not to access the small business deduction for 1 year. Owners apparently did not realize the deduction would multiply. *[the "dumb client" defence?]*

XV — Miscellaneous

256(5.1) — *de facto* control (for CCPC definition)

- *CO2 Solution*, 2019 TCC 286: public corp Pco created trust (with Pco's directors as trustees) to own R&Dco. Pco also had right to control R&Dco through trust deed. Each of these meant there **Pco had *de facto* control over R&Dco**, so R&Dco was not a CCPC

XV — Miscellaneous

Reg. 1106(1)“excluded production” for film credit

- *Productions GFP (III*), 2019 FC 1613: CRA/CAVCO decision that a **production with a game show component was ineligible**, was held reasonable (CAVCO provided preliminary approval, then changed its mind on seeing final production). *[Might be different result since Vavilov?]*