tax notes international
Volume 69, Number 3 ■ January 21, 2013

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Reprinted from *Tax Notes Int'l*, January 21, 2013, p. 238

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COUNTRY DIGEST

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A December ruling by the Tax Court of Canada in *Birchcliff Energy Ltd. v. The Queen*, 2012-1087(IT)G, sets an important precedent that compels Canadian tax authorities to provide greater disclosure in the pleadings they file when litigating a case under the general antiavoidance rule in section 245 of the Income Tax Act.

Under the GAAR, the minister of national revenue has the power to override the normal operation of the ITA and redetermine the tax consequences of transactions that are found to abuse or misuse one or more provisions of the ITA or other relevant enactments, or the enactments as a whole. This extraordinary power is to be exercised only if the revenue minister proves the existence of a tax policy containing such provisions and establishes that the policy was abused.

Most GAAR litigation focuses on whether the tax policy that is alleged to have been abused exists, and if so, whether it was in fact abused by the transactions in question. Despite that focus, the revenue minister historically has not identified the relevant tax policy in the documentation that it files with the courts in GAAR litigation.

In *Birchcliff*, the taxpayer was reassessed on the basis that the transactions at issue abused 10 separate sections of the ITA. The Canada Revenue Agency followed its usual practice when preparing the notice of reassessment to the taxpayer and its notice of reply for the Tax Court of Canada and did not identify any tax policy that was allegedly abused.

The taxpayer requested disclosure of the tax policy that was allegedly abused. Its request was denied and the taxpayer filed a motion before the Tax Court of Canada to compel disclosure by the CRA.

The taxpayer argued that the tax policy must be disclosed for several reasons:

- the revenue minister must necessarily have determined that a tax policy exists, and was abused, in order to reassess the taxpayer under the GAAR;
- the Tax Court rules require disclosure of ''the findings or assumptions of fact made by the Minister when making the assessment,'' as well as ''any other material fact'';
- disclosure of the tax policy in the pleadings would allow the taxpayer to know the accusations it is facing, avoid surprises, and efficiently prepare for discoveries and trial; and
- a heightened disclosure obligation exists when there is an allegation of wrongdoing, such as abuse.

The CRA disputed the motion, arguing that the issue of whether a tax policy exists is a question of law that should not be set out in pleadings.

The Tax Court noted that ''GAAR is a unique piece of legislation in that it allows the Government to bypass the provisions of the Act based on an abuse of Policy, a Policy that it is up to the Crown to prove, and then impose whatever consequences it deems reasonable.''[1]

As such, the argument that granting the taxpayer's request for disclosure would impose an intolerable burden on the Crown was invalid, in the Tax Court's view. Simply alleging the presence of an abuse and not identifying the policy that has been abused is ''not adequate,'' it said.

In ruling for the taxpayer, the Tax Court said:

> in a GAAR challenge why should a taxpayer not know what Policy the assessment was based on? Given the significant open-ended consequences of a GAAR ruling, and given the Supreme Court of Canada's direction to the Government to prove the Policy, I conclude it is imperative that the Court's Reply set out as a material fact, not an assumption, but the fact the Minister relied upon x or y policy underlying the legislative provisions at play in the case. . . .
>
> I order that the Respondent disclose what Policy the assessor relied upon in making the assessment as a material fact. This does not bind the Respondent. There will be, as in any GAAR litigation, a

[1]The object, spirit, and purpose of relevant provisions are collectively referred to by the Tax Court as ''policy.''

significant massaging of the issues and the argument, with the ultimate aim of ensuring at trial there are no surprises.

As a result of this ruling, the CRA now can be compelled in GAAR litigation to disclose what it assumes to be the object, spirit, and purpose of the relevant provisions that were allegedly abused or misused by the taxpayer's actions.

While it is open to the Crown during the course of the litigation to allege the existence of a different object, spirit, or purpose than the one relied on in making the reassessment, that variation in its reasoning will now be transparent and the courts may question the strength of the CRA's arguments in situations in which it has changed the policy it says has been contravened.

Early disclosure by the Crown of the object, spirit, or purpose relied on in making the reassessment will greatly facilitate the taxpayer's preparation for pretrial discoveries of the Crown and drafting of the court documentation setting out the taxpayer's legal arguments as to why no abuse or misuse occurred. In *Birchcliff*, the Tax Court has elevated the standard to which the Crown will be held in applying the extraordinary remedy of the GAAR. ◆

♦ *Steve Suarez, Borden Ladner Gervais LLP, Toronto*