Tax Court of Canada | Cour canadienne de l'impôt

Docket: 2012-1087(IT)G

BETWEEN:

BIRCHCLIFF ENERGY LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on December 14, 2012, at Calgary, Alberta
By: The Honourable Justice Campbell J. Miller

Appearances:
Counsel for the Appellant: Patrick Lindsay
Counsel for the Respondent: Robert Carvalho

ORDER

WHEREAS the Appellant seeks an Order under Rule 52 of the *Tax Court of Canada Rules (General Procedure)* directing the Respondent to comply with a demand for particulars,

IT IS HEREBY ORDERED THAT the Respondent disclose to the Appellant what policy (object, spirit and purpose) underlying the 10 sections of the *Income Tax Act* in issue the assessor relied upon in making the assessment pursuant to section 245 of the *Income Tax Act*.

Costs shall be in the cause.

Signed at Ottawa, Canada, this 20th day of December 2012.

"Campbell J. Miller"

C. Miller J.

I HEREBY CERTIFY that the above document is a true copy of the original filed of record in the registry of the Tax Court of Canada.

Je CERTIFIE que le document ci-dessus est une copie conforme à l'original déposé au greffe de la Cour canadienne de l'impôt.

Dated / Fait le DEC 2 1 2012

For the Registrar / Pour le Greffier

Appeals Processing Clerk/Commis, Traitement des appels

Tax Court of Canada | Cour canadienne de l'impôt

Date: 20121220
Docket: 2012-1087(IT)G

BETWEEN:

[redacted]

BIRCHCLIFF ENERGY LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

C. Miller J.

[1] One of the issues in this case is whether the general anti-avoidance rules ("GAAR") found in section 245 of the *Income Tax Act* (the "*Act*") apply. The Appellant seeks an Order under Rule 52 of the *Tax Court of Canada Rules (General Procedure)*, directing the Respondent to comply with a demand for particulars. The Appellant sought particulars of the Minister of National Revenue's (the "Minister") allegations of abuse set out in paragraph 25 of the Reply, specifically demanding:

i) with respect to the allegation that 10 provisions of the *Act* were abused;

   a) the Minister's assumption of fact regarding the purpose of each provision;

   b) the Minister's assumption of fact regarding how such purpose was abused;

ii) with respect to the allegation that the *Act* as a whole was abused, the Minister's assumption of fact regarding how the *Act* as a whole was abused.

[2] Paragraph 25 of the Reply reads:

The Avoidance Transactions may reasonably be considered to have resulted directly or indirectly in a misuse of section 4, 9, 111, subsections 37(6.1), 87(2.1), 111(5) and 127(9.1), paragraphs 37(1)(h), 87(2)(1) and 111(1)(a) of the *Act* or an abuse having regard to the provisions of the *Act* read as a whole, all within the meaning of subsection 245(4) of the *Act*.

[3] It is also helpful to include assumption 17(s) of the Reply:

Through the series of transactions described above, the Appellant sought to avoid the acquisition control rules in the *Act* in order to utilize the tax pools of Veracel;

[4] Finally, it is useful to reproduce paragraph 18 of the Reply:

The Minister also relies on the following facts in support of the reassessments:

a) the following were avoidance transactions that resulted directly or indirectly, or were part of a series of transactions (the "Series") which resulted directly or indirectly, in tax benefits to the Appellant within the meaning of subsections 245(2) and 245(3) of the *Act*:

   i) the Plan of Arrangement, including

      a) the transfer of all assets of Veracel to a newly incorporated company;

      b) the terms and sale of the subscription receipts by Veracel;

      c) the creation and terms of the class B shares of Veracel;

      d) the exchange of subscription receipts for class B shares of Veracel; and

      e) the exchange of class B shares of Veracel for common shares of the Appellant;

   ii) the amalgamation of Veracel and the Predecessor to form the Appellant;

   (collectively, the "Avoidance Transactions")

b) such tax benefits were the reduction of the income tax payable by the Appellant and the increase in non-capital losses, SRED expenditures and ITC's available for carry forward;

c) none of the Avoidance Transactions on its own or as part of the Series could reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefits, within the meaning of subsection 245(3) of the *Act*;

d) the tax consequences to the Appellant that are reasonable in the circumstances to deny the tax benefits result by denying the Appellant the ability to utilize, for any taxation year subsequent to the amalgamation, the non-capital losses, SRED expenditures and ITC's of Veracel, in particular the Losses and Credits.

[5] The requirements of a reply are set forth in Rule 49:

49.(1) Subject to subsection (1.1), every reply shall state

(*a*) the facts that are admitted,
(*b*) the facts that are denied,
(*c*) the facts of which the respondent has no knowledge and puts in issue,
(*d*) the findings or assumptions of fact made by the Minister when making the assessment,
(*e*) any other material fact,
(*f*) the issues to be decided,
(*g*) the statutory provisions relied on,
(*h*) the reasons the respondent intends to rely on, and
(*i*) the relief sought.

Appellant's Argument

[6] The Appellant argues that, in making a GAAR assessment, the assessor must have assumed as a fact:

i) the object, spirit and purpose of the provisions of the *Act* (which I shall collectively refer to in these Reasons as the "Policy"); and

ii) an abuse of that Policy,

and based its assessment on those assumptions. Relying on the formulation articulated in *Johnston v. M.N.R.*[1] by Justice Rand that the Crown has a duty to fully disclose to the taxpayer the "precise findings of fact and rulings of law

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1 [1948] SCR 486.

which have given rise to the controversy", the Appellant argues that the particulars sought fall within this general principle. The Appellant suggests that the Policy is a question of historical fact referencing Justice Sharlow's comments in the *Canada v. Loewen*[2] case:

> The basis of any assessment is a matter of historical fact, and does not change. The basis of a reassessment normally includes the facts relating to the increased taxable income, as the Minister perceived those facts when the reassessment was made. It also includes the manner in which the Minister applied the facts to the relevant law when making the reassessment, and any conclusions of law that guided the application of the facts to the law.

[7] It is the Crown's reliance on the Policy that is the fact, not the Policy itself - more on that later.

[8] I was directed by the Appellant to a good summary of the role of pleadings found in the *Comtax Commodity Consultants Inc. v. The Queen*[3] decision:

> ...the purpose of particulars is to require a party to clarify the issues he had tried to raise by his pleading, so that the opposite party may be able to prepare for trial, by examination for discovery and otherwise.
>
> ... The object of particulars is to enable the party asking for them to know what case he had to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise.
>
> ...(1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved [...]
>
> (2) to prevent the other side from being taken by surprise at the trial
>
> (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial...
>
> (4) to limit the generality of the pleadings...
>
> (5) to limit and decide the issues to be tried, and as to which discovery is required...

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2 2004 FCA 146.

3 2007 TCC 305.

> (6) to tie the hands of the party so that he cannot without leave do into any matters not included...

[9] The Appellant maintains that knowing the Policy relied upon by the Crown and the alleged abuse of that Policy will:

i) Allow the Appellant to prepare for discoveries and trial knowing what abuse it is alleged to have committed, and knowing whether it is accused of a single abuse that offended all 10 provisions, or if the Minister instead assumed that more than one abuse occurred;

ii) Prevent the Appellant from being taken by surprise regarding what abuse(s) it is alleged to have committed; and

iii) Limit the generality of the Reply and thereby reduce the time and expense involved in the dispute.

[10] Finally, the Appellant argues there is a heightened obligation on the Minister to be specific when dealing with matters such as misconduct or negligence or misrepresentation: the Appellant includes misuse or abuse in such a category. The Appellant cites former Chief Justice Bowman in the *Ver v. Canada*[4] decision:

> [...] the reply to the Notice of Appeal is inadequate in a case of this type. Bald assertions that the Minister "assumed" a misrepresentation are inappropriate where the Minister must prove a misrepresentation. The precise misrepresentation alleged to have been made must be set out with particularity in the reply and proved with specificity.
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> Although the word "precise" does not appear in the text of this Court's Rule 49, there does need to be a precise statement of an alleged misrepresentation.

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4 [1995] TCJ No. 593.

Respondent's argument

[11] The Respondent argues that the Appellant is seeking particulars on conclusions of law, suggesting Policy is very much a conclusion of law, not fact. Including it in the assumptions of fact is misplaced and indeed would give the Crown an unfair advantage in that the Appellant would have to demolish such assumption. While I agree that the fact of the Policy does seem misplaced as an assumption, I am more concerned addressing the need for the Respondent to disclose upon what Policy the assessment was based. The Respondent points out that the problem for the Appellant is that, as Justice McArthur made clear in the *Commission scolaire de Victoriaville v. R*[5] case, particulars apply only to allegations of fact.

[12] The Respondent acknowledges that the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*[6] stated that it is for the Respondent to identify the Policy, but argues that that comment was not in the context of pleadings but was made under the heading "burden of proof", and simply has no bearing on drafting pleadings.

[13] The Respondent relies on the recent decision of Justice Campbell in *Mastronardi v. The Queen*[7] which dismissed a similar application, concluding:

> 36. At the pleadings stage, I do not believe that the Appellant is entitled to any other material facts except those that the Respondent has supplied. Some of the questions respecting paragraph 16 are an attempt to elicit legal argument and, if I directed that they be answered, I would in essence be requiring the Respondent to divulge its legal argument in respect to its understanding of the relevant legal provisions and how it intends to argue the purpose, object and spirit of these provisions as well as their potential misuse and abuse under section 245 of the *Act*. In fact, the Appellant in his submissions on this Motion stated that he was indeed looking for the identification of the extrinsic aids which demonstrate the object, spirit and purpose of the relevant provisions. ...
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> ...

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5 2006 TCC 8.

6 2005 SCC 54.

7 2010 TCC 57.

> 38. ... However, beyond this reason for denying the Appellant's request, I believe that the legislative facts which the Appellant seeks to obtain in these circumstances can be adduced in evidence and to order the Respondent to disclose the legislative facts at the pleadings stage would in essence amount to ordering the Respondent to disclose its interpretation of the law and its legal argument. This is never the intention of a Demand for Particulars at the stage of pleadings.

[14] Finally, the Respondent argues that practically the Appellant does not need the particulars sought, as the Crown can, at trial, argue that the Policy may indeed be something different from what the assessor may have thought. The Respondent also suggests that granting the order would be opening the door for Appellants to demand the Policy in every case requiring legislative interpretation.

Analysis

[15] GAAR is a unique piece of legislation in that it allows the Government to bypass 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. I do not accept the Crown's argument that requiring a disclosure in the pleadings of the Policy abused would be opening the doors for the Crown to have to explain its legal interpretation of any provision of the *Act*. The Supreme Court of Canada has made it clear the Crown must prove a Policy in GAAR cases: it is the integral starting point of a GAAR challenge. It is unlike any other provision of the *Act*. There is no slippery slope.

[16] I also reject the Crown's argument that because the Policy is a moving target (it is only the trial judge who will ultimately hear representations and make a ruling), that it serves no purpose to tell the other side at the pleading stage what the Government believed was the Policy upon which to base its assessment. I fail to see how this approach meets the objective of knowing the case to meet as early as possible. Yes, there may be twists and turns in the litigation and new arguments brought forward, but a wait and see attitude on a fundamental requirement of a GAAR challenge is not acceptable. There was a GAAR assessment, there was a basis for that assessment and there must therefore have been a determination that there was:

i) a tax benefit;

ii) an avoidance transaction;

iii) a Policy; and

iv) an abuse or misuse of that Policy.

[17] The Crown, in paragraph 18 of the Reply, identifies the tax benefits and the avoidance transactions, but then stops short of identifying the Policy or abuse, simply stating in paragraph 25 of the Reply that the avoidance transactions resulted in a misuse or abuse. This is not adequate.

[18] I agree with the Respondent that the Policy is not a fact and certainly not an assumption. I interpret the Appellant's request not for an assumption regarding the Policy, but the historical fact of what Policy the Crown actually relied upon. This is a different question than what is the Policy itself, which is a question of law, which will ultimately be determined by the Court. But, in a GAAR challenge why should a taxpayer not know what Policy the assessment was based upon? 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. This is not the legal argument Justice Campbell was concerned about in *Mastronardi*, nor is it a requirement that evidence supporting the Policy be set out in the pleadings. But surely the taxpayer is entitled in the pleadings to know the basis of the assessment. The Policy in effect stands as law in the place of the legislation. Even if not required to be part of other material facts (Rule 49(1)(*e*)) in the Reply, it could as readily be situated as part of the statutory provisions relied on (Rule 49(1)(*g*)), or as part of the reasons the Respondent intends to rely on. As part of a demand for particulars, however, I feel compelled to find it fall under "any other material fact".

[19] The Respondent went through each of the 10 provisions at issue and pointed out a commonality amongst them, being the use of a tax pool after the acquisition of control. This suggests a commonality of Policy that could be and should be readily spelled out for the taxpayer. The Appellant's request for the Policy of each provision, in this context, strikes me as overreaching. I would not expect or demand of the Minister a treatise on the Policy underlying section 4 or section 9, for example, in isolation of context. It is likely the Minister looked at these provisions collectively and relied on the policy gleaned from such collective view. I conclude that Policy must be disclosed to the Appellant in the Reply.

[20] Moving on to the request for particulars of an assumption of the abuse, clearly it is impossible to determine the abuse without knowing what it is that is allegedly

being abused. That is why disclosure of the Policy in the Reply, I find, is critical. Abuse, however, is not a question of fact either but is a determination to be made by the Court, having concluded what the Policy is and then whether the facts are such that they in some fashion abuse that Policy. This is a different kettle of fish than the Policy itself. If the Minister pleads all the facts assumed, not otherwise within the Minister's knowledge and pleads the Policy relied upon, what more need be laid out in the assumptions or other material facts. It is up to the Minister to make clear in the reasons how those facts lead to an abuse. It is not a reason in answer to the issue, was there an abuse, by simply stating there was an abuse, which is effectively all the Minister has said in paragraph 25. That is not a reason. The reason is because, putting it in terms of the Supreme Court of Canada in *Copthorne Holdings Ltd. v. R.*[8]:

i) the transaction achieves an outcome the statutory provision was intended to prevent;

ii) the transaction defeats the underlying rationale (policy); and

iii) the transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose (policy).

[21] What the Appellant wants is for the Respondent to identify precisely how the Policy was abused. The request is made on the presumption the Minister assumed how the Policy was abused as a fact. This makes no sense to me. The Minister did not assume how the Policy was abused as a fact. The Minister concluded, based on the Policy and the facts assumed, that there was an abuse, presumably in one or a combination of the three forms above. I cannot see how further particulars of facts can emanate from this interpretation.

[22] I conclude the Crown's reasons may not be as enlightening as they could be, but that deficiency does not justify a request of particulars of how the Policy was abused. The facts, both assumed and otherwise, surrounding the transaction or series of transactions should be clearly set out in the Reply. The Respondent has done this. I have concluded that the Respondent should also set out as a fact that the assessor relied on Policy, which likewise should be spelled out. It is then for the Respondent to connect the dots, I would suggest, in the Reasons section of the Reply as to how the transactions abuse the policy. There are no further facts to be disclosed. This element of the Appellant's request is not appropriate for a Demand for Particulars.

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8 2011 SCC 63.

[23] My impression is that the Appellant framed the demand as it did to enable it to get this additional information in a form of a quest for more facts. I am prepared to go along with this approach to get the Respondent to disclose the Policy relied upon by the Respondent, albeit in a somewhat convoluted manner (that is not the fact of the Policy but the fact the assessor relied on a certain Policy). Notwithstanding the Policy may be argued differently at trial, the Appellant is entitled to know the starting point. Once the Policy relied upon is disclosed, the nature of the abuse is a matter for each side to draw or deny from the facts of the transactions. The Respondent has certainly given some indication that the abuse relates to the acquisition of control, though this could be clearer in the pleadings, though not in the Facts section.

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

[25] Costs shall be in the cause.

Signed at Ottawa, Canada, this 20th day of December 2012.

"Campbell J. Miller"

C. Miller J.

COURT FILE NO.:	2012-1087(IT)G
STYLE OF CAUSE:	BIRCHCLIFF ENERGY LTD. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	December 14, 2012
REASONS FOR ORDER BY:	The Honourable Justice Campbell J. Miller
DATE OF ORDER:	December 20, 2012

APPEARANCES:

Counsel for the Appellant:	Patrick Lindsay
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