A-542-96

CORAM: THE CHIEF JUSTICE
MARCEAU J.A.
HEALD D.J.

BETWEEN:

OWEN HOLDINGS LTD.

Appellant
(Respondent by Cross-Appeal)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant by Cross-Appeal)

REASONS FOR JUDGMENT

MARCEAU J.A.

This appeal and cross-appeal arise from a ruling made by a Tax Court of Canada judge on a motion for an order requiring the Crown to produce documents for discovery in the course of the appellant's appeal proceedings against a reassessment by the Minister of National Revenue of its 1992 income tax liability.

The underlying action concerns a disallowance by the Minister of the appellant's claim under subsection 85(5.1) and paragraph 69(5)(d) of the Income Tax Act for a loss transferred from a related corporation. The Minister disallowed the loss claim on the basis of section 245 of the Act, and particularly subsection 245(2), the general anti-avoidance provision. In its appeal from the Minister's decision, the appellant argues that section 245 of the Act is unconstitutionally vague, and therefore of no force or effect, and that, in any case, the Minister erred in finding that subsection (2) applied to the facts of its claim.

After having itself provided disclosure of its proposed list of documents in compliance with the Tax Court of Canada (General procedure) Rule 82, the appellant, through counsel, requested the Crown to make discovery on a list of documents comprising, inter alia, the following categories:

> (i)all reports, memoranda, notes, e-mails, etc. ("reports") leading up to the drafting of GAAR [s. 245], including all drafts of the Explanatory Notes to GAAR and any reports relating to those Explanatory Notes;
>
> (ii)all reports leading up to the drafting of subsection 85(5.1) and paragraphs 69(5)(d) and 88(1)(d);
>
> ...
>
> (v)all reports leading up to the drafting of the following documents on the Appellant's List: 5, 6, 7, 8, 9, 11, 14, 19, 20, 22, 36, 37, 38, 46, 65, 189 (to the extent it deals with loss transfers between related parties), 190, 191, 193, 213, 214;
>
> (vi)all reports relating to testimony by various Finance officials before the Commons and Senate Committees relating to GAAR (Appellant's List /15, 28, 29, 31);
>
> ...
>
> (ix)any Advance Rulings or Technical Interpretations issued to any other taxpayer concerning the application of GAAR in the context of a transfer of property with an inherent loss to a related party (see subsection 241(3) and Ouellet v. The Queen, 94 D.T.C. 1315 (TCC));

The Crown did not include in its list all the documents requested, so the appellant brought the motion that gave rise to the order, the validity of which is disputed before us by both parties. The learned Tax Court judge refused to order production of

the documents in categories (i), (ii), (v) and (vi), hence the appeal, but he ordered production of the documents in category (ix), hence the cross-appeal.

The Appeal

With respect to the appeal, counsel for the appellant argues that the judge erred in holding that only documents which are relevant, that is to say which may advance the appellant's case or damage that of the respondent, should be disclosed. Rule 82(1),[1] counsel says, uses the phrase "relating to" not "relevant to," a basic distinction clearly confirmed and acted upon by this Court in Canada (Attorney-General) v. Bassermann.[2] At this stage, submits counsel, relevance should be of no concern; a "semblance of relevance," if necessary, should suffice, an abuse of process being the only thing to be avoided.

We indicated at the hearing that we disagreed with counsel's argument. Although obviously not synonyms, the words "relating" and "relevant" do not have entirely separate and distinct meanings. "Relating to" in Rule 82(1) necessarily imparts an element of relevance, otherwise, the parties would have licence to enter into extensive and futile fishing expeditions that would achieve no productive goal but would waste judicial resources. The well established principles that give rise to the relatively low relevance threshold at the stage of discovery, as opposed to the higher threshold that will be required at trial for the admission of evidence, are well known. We simply do not believe that the Tax Court ever had the intention of abandoning those principles

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[1]Rule 82(1) reads as follows:

> **82.** (1) The parties may agree or, in the absence of agreement, either party may apply to the Court for a judgment directing that each party shall file and serve on each other party a list of all the documents which are or have been in that party's possession, control or power relating to any matter in question between or among them in the appeal.
>
> [my emphasis]

[2](1994), 114 D.L.R. (4th) 104.

any more than this Court could have had such an intention when, in 1990, it changed the word "related" to "relevant" in revising its corresponding provisions, namely subsections (1) and (2)(a) of Rule 448.[3] It is our opinion, therefore, that the learned Tax Court judge adopted the proper approach and his findings with respect to the documents in categories (i), (ii), (v) and (vi) should not be disturbed. His assessment that those documents, which did not tend to establish "legislative facts" but rather set forth the "opinions of writers," were so remotely related to the issues in controversy that they could not lead to a line of inquiry that could be of any use to the appellant, appears to us to be perfectly sound. The appeal will therefore be dismissed.

The Cross-Appeal

The cross-appeal against the order to produce advance rulings and technical interpretations, referred to in category (ix), is more complex.

There is first a preliminary point raised by the appellant cross-respondent based on subsection 241(6) of the Act which reads as follows:

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[3]Subsections (1) and (2)(a) of Rule 448 read thus today:

> **448.** (1) Every party to an action shall file an affidavit of documents and serve it on every other party to the action within 30 days from the close of pleadings or such other period as the parties agree or the Court orders.
>
> (2) An affidavit of documents (Form 19) shall contain
> (a) separate lists and sufficient descriptions of all documents relevant to any matter in issue that
> (i) are in the possession, power or control of the party and for which no privilege is claimed,
> (ii) are or were in the possession, power or control of the party and for which privilege is claimed,
> (iii) were but are no longer in the possession, power or control of the party and for which no privilege is claimed, and
> (iv) the party believes are in the possession, power or control of a person who is not a party to the action; ...

Before 1990, the provision read as follows:

> **448.** (1) The Court may order any party to an action to make and file and serve on any other party a list of the documents that are or have been in his possession, custody or power relating to any matter in question in the cause or matter (Form 20), and may at the same time or subsequently order him to make and file an affidavit verifying such a list (Form 21) and to serve a copy thereof on the other party.

> **241.** (6) An order or direction that is made in the course of or in connection with any legal proceedings and that requires an official or authorized person to give or produce evidence relating to any taxpayer information may, by notice served on all interested parties, be appealed forthwith by the Minister or by the person against whom the order or direction is made to
> (a) ...
> (b) the Federal Court of Appeal, in the case of an order or direction made by a court or other tribunal established by or pursuant to the laws of Canada.

Counsel submits that notice to the taxpayers to whom the advance rulings and technical interpretations were issued was a pre-condition to the validity of the appeal proceedings. I simply do not agree. The Tax Court judge provided specifically that names and other personal details respecting taxpayers should be removed from the documents to be disclosed. It follows that taxpayers cannot be affected by the order or the appeal: there is no confidentiality to be waived and all interested parties are before the Court.

Category (ix) in the appellant's motion grouped together advance rulings and technical interpretations, and the learned Tax Court judge considered them together. He ordered their production on the basis that they could all be used by the appellant to show that the Minister had, in the past, applied section 245 of the Act contrary to the way he applied it to the appellant's situation, which demonstration could tend to advance the appellant's case.

There is, as was explained to us, a basic difference between an advance ruling and a technical interpretation. While the former is applicable to proposed transactions considered in the context of the factual situation of a particular taxpayer, the latter focuses on specific problems of interpretation relating most often to words, clauses or sentences in a provision. This difference, in my view, requires that the validity of the Tax Court judge's basis for ordering production be verified separately with respect to each group. It is certainly not as binding precedents that the appellant may use any of these documents. It is well established that they have no binding legal effect, as this Court had occasion to repeat recently in Minister of National Revenue v. Ford

Motor Company of Canada, Limited.[4] What the appellant may do with these documents is establish a certain inconsistency in the Minister's interpretation and application of the provision. Perhaps this can be accomplished using the technical interpretations which are relatively simple and to the point; by comparison, however, it appears to me that this could be almost impossible to do using advance rulings, given the difficulties in establishing similarities between different and complex factual situations. The possible relevance of the advance rulings, if any, is too problematic and remote to satisfy the requirement of Rule 82(1). I believe, with respect, that the learned Tax Court judge should not have ordered production of these documents.

This being the case, I, of course, do not have to deal with the motion of the respondent to add evidence relating to the costs of producing the advance rulings.

I would, therefore, allow the cross-appeal as it concerns the advance rulings but dismiss it with respect to the technical interpretations.

"Louis Marceau"
J.A.

"I concur.
Darrel V. Heald, D.J."

[4]Unreported (April 25, 1997), Court file n° A-613-84.

A-542-96

CORAM: THE CHIEF JUSTICE
MARCEAU J.A.
HEALD D.J.

B E T W E E N :

OWEN HOLDINGS LTD.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

THE CHIEF JUSTICE

I have had the privilege of reading the reasons for judgment proposed to be delivered by my brother, Marceau J.A. in these proceedings. I agree with him that the appeal should be dismissed for the reasons that he has given. I also agree with his disposition of the preliminary point raised by the appellant (respondent by cross-appeal) in the cross-appeal, and with his reasons.

I am unable to agree, however, that the cross-appeal should be dismissed with respect to technical interpretations. In my respectful view, the cross-appeal should be allowed both with respect to disclosure of advance rulings and with respect to technical interpretations. My reasons follow.

Analysis

Test for production of documents

The appellant's (respondent by cross-appeal) entitlement to the documents described in category (ix), that is, advance rulings and technical interpretations, turns on the interpretation of the disclosure obligation imposed by subsection 82(1) of the Tax Court Rules:

> *List of Documents (Full Disclosure)*
> 82. (1) The parties may agree or, in the absence of agreement, either party may apply to the Court for a judgment directing that each party shall file and serve on each other party a list of all the documents which are or have been in that party's possession, control or power ***relating to any matter in question*** between or among them in the appeal.
>
> [emphasis added]

The appellant contended before us that the Tax Court Judge erred by adopting a relevancy test for production of documents under Rule 82(1). It was argued, on the basis of the decision of this Court in *Canada v. Basserman*,[5] that "relevance" was not the test for production of documents. Rather, it was urged, the words "relating to a matter in question" connote a different and broader scope than the common law concept of "relevancy".

In *Basserman*, this Court addressed the scope of the words "relating to" in the context of discovery of documents. Mahoney J.A. held for the Court:

> In *Nowegijick v. Canada* ... Dickson J., as he then was, delivered the judgment and, at p.200, said:
>
> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to", or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject-matters.
>
> It seems to me that "relating to" are words of comparable scope.
>
> In my opinion, the words "relating to any matter in question" in the rules are broad enough to support the order made and the words "relating to the matter within the scope of this proceeding" in the order are broad enough to require production of the third party tax returns in issue. It is not necessary that they be relevant to any issue to be resolved in the litigation, only that they relate

[5](1994), 114 D.L.R. (4th) 104 (F.C.A.).

> to a matter in question. The appellant's submissions to us as to their potential relevance are simply not to the point at this stage.[6]

Thus "relating to a matter in question" encompasses a broader range of documents than does the common law concept of relevancy. The words of Rule 82(1) require production of a broad spectrum of documents which "relate to" the main action. However, these words are not so broad as to dispense entirely with all requirements of relevance.

Ontario Rules 30.02(1) and (2) use virtually identical wording to that of Tax Court Rule 82(1): they subject all documents "relating to any matter in issue" to discovery. In *Discovery Law, Practice and Procedure*, the authors note that the phrase "relating to any matter in issue" simply requires that the concept of relevance be defined generously at the discovery stage:

> Pursuant to the above subrules [Ontario Rules 30.02(1) and (2)], all documents "relating to any matter in issue" are subject to discovery. The authorities are very clear that relevance is the only test by which to judge whether a document should be disclosed and produced. ...
>
> Note, however, that relevance in the discovery process is not to be confused with admissibility for evidentiary purposes. In the discovery process, everything is relevant which bears upon any issue raised by the pleadings. The authorities indicate that precise rules cannot be laid down at the discovery stage as to what is or is not relevant to the issues pleaded. If the documents have "a semblance of relevancy", they will be declared producible, leaving it to the trial judge to make the determination of relevance at trial.[7]

The standard under Rule 82(1) for production of documents is the same as that for posing questions on discovery. Holmested & Watson, in *Ontario Civil Procedure* note in their commentary on Rule 31.06(1), which, as noted above, also uses the phrase "relating to":

> While clearly irrelevant matters may not be inquired into, ***relevancy must be determined by the pleadings construed with fair latitude.*** The court should not be called upon to conduct a minute investigation as to the relevance of each question and where the questions are ***broadly related*** to the issues raised, they should be answered. The tendency is to broaden discovery and the "right to interrogate is not confined to the facts directly in issue, but extends to any facts

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[6] *Ibid* at 107.

[7] Fred Cass *et al*. (Toronto: Carswell, 1993) at 9, 11.

> the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue".[8]
>
> [emphasis added; citations omitted]

Thus the phrase "relating to any matter in question" requires that, at the discovery stage, relevancy must be construed generously, or with fair latitude. Nonetheless, "semblance of relevancy" should not be interpreted so broadly that it allows one party to engage in a fishing expedition, or simply harass the other.[9] A semblance of relevancy exists only where the documents sought ***may*** lead the party seeking discovery to a train of inquiry which ***may*** directly or indirectly advance its case or damage that of its adversary.[10] Thus the Tax Court Judge adopted the correct standard for production of documents under Rule 82(1).

Application to the documents in category (ix)

The Tax Court Judge, then, would have been correct in ordering production of the technical interpretations and unpublished advance rulings if those documents might have led the appellant to a train of inquiry which might advance its case or damage that of the respondent. In this case, however, neither the technical interpretations nor the advance rulings were capable of assisting the appellant in this way.

Relevance must be assessed in light of the issues raised by the appellant in its pleadings. The appellant alleges that the documents in category (ix) constitute ***administrative interpretations*** which "relate to" its alternative argument

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[8]Cited in *Shell Canada Ltd. v. R.*, [1994] 1 C.T.C. 2208 at 2213.

[9]See, *e.g. Ikea Ltd. v. Ikea Design Ltd., supra* at 325-27; *Kay v. Posluns* (1989), 71 O.R. (2d) 238 at 244 (H.C.).

[10]See *Boxer v. Reesor* (1983), 43 B.C.L.R. 352 (S.C.), approved in *Everest & Jennings Canadian Ltd. v. Invacare Corp.*, [1984] 1 F.C. 856 (C.A.); *Compagnie Financière du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 (C.A.).

that the Minister misinterpreted section 245 when he found that the appellant's loss transfer was an avoidance transaction.

Administrative interpretations can be admissible as aids to statutory interpretation. Administrative interpretations can form part of the legislative history, that is, they can illuminate the legislative context, purpose and background.[11] Administrative interpretations such as departmental policy and practice,[12] Department of National Revenue interpretation bulletins,[13] and technical notes[14] have all been admitted as aids to the interpretation of statutory ambiguity.

However, it is not every comment, opinion, memorandum, departmental report or e-mail produced in the context of departmental interpretation of section 245 that is admissible as an aid to its interpretation. It should be recalled that administrative interpretations may be referred to only to illuminate the meaning of the legislative text. Intra-departmental memoranda and opinions of individual departmental officials do not reflect the intention of Parliament in enacting the section.

Technical interpretations and unpublished advance rulings are not published by the Department for the general guidance of taxpayers. Thus they are of no assistance in the proper interpretation of a legislative provision.

Moreover, technical interpretations, like the documents in categories (i), (ii), (v) and (vi), do not represent administrative interpretations by the

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[11] *Harel v. Quebec (Deputy Minister of Revenue)*, [1978] 1 S.C.R. 851 at 858-59.

[12] *Ibid*; *Fibreco Pulp Inc. v. R.*, 95 D.T.C. 5412 (F.C.A.).

[13] *Bryden v. Employment and Immigration Commission*, [1982] 1 S.C.R. 443 at 450; *Nowegijick v. R.*, [1983] 1 S.C.R. 29 at 37; *Mattabi Mines Ltd. v. Ontario (M.R.)*, [1988] 2 S.C.R. 175 at 195.

[14] *The Queen v. Ast* (February 12, 1997), File A-431-92 (F.C.A.); *Maritime Telegraph and Telephone Company v. The Queen* (1992), 1 C.T.C. 264 (F.C.A.); *Glaxo Wellcome Inc. v. The Queen*, [1996] 1 C.T.C. 2904 (T.C.C.).

Department. Technical interpretations are issued by a particular departmental official in respect of hypothetical questions posed by a particular taxpayer. Unlike advance rulings, which this Court has recently held to be irrelevant to the tax liability of another taxpayer,[15] technical interpretations do not purport to represent the position of the Department of National Revenue. They are signed by and attributed to a particular departmental employee. Moreover, they are issued subject to the following caveat:

> Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the Department.[16]

It is clear to me, then, that a particular technical interpretation is not endorsed by the Department of National Revenue. I have some considerable difficulty, therefore, understanding how a non-binding, unpublished statement of one departmental official, in respect of a hypothetical question posed by a particular taxpayer, which never purpoted to represent the position of the department, is an "administrative interpretation" which is relevant to the interpretation or application of a legislative provision of another taxpayer. The words of Christie A.C.J.T.C. in *Shell Canada Ltd. v. The Queen*, though in a different context, are apposite:

> To my mind the phrase "administrative practice", in the context referred to and in relation to the proceedings at hand, must be taken to mean a practice promulgated by someone at National Revenue authorized to do so and which employees thereof are generally expected to follow and apply in the administration and enforcement of that portion or portions of the Act with which the practice is concerned. It does not include *ad hoc* decisions pertaining to particular cases.[17]

Technical interpretations are not "administrative interpretations" which reflect on the proper interpretation of a particular taxing provision. Thus the technical interpretations of section 245 which the appellant seeks are not capable of assisting its case or damaging that of the respondent. The Tax Court Judge, then, erred in ordering their production.

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[15] See *Ford, infra*.

[16] See, *e.g.* (29 January 1997), Revenue Canada Technical Interpretation No. 9634945, "Donations to non-profit organization".

[17] *Supra* at 2228.

Like technical interpretations, advance rulings are not required or recognized by the *Act*, but constitute an administrative service which the Department provides at the request of particular taxpayers. Each advance ruling is issued for the guidance of a particular individual taxpayer in respect of a specific proposed transaction. As the appellant points out, the Department is free to discontinue issuing advance rulings at any time. Further, and more importantly, when advance rulings are published, they are typically accompanied by the following caveat:

> Income Tax Rulings are published for the general information of taxpayers but are considered to be binding on the Department only in respect of the taxpayer to whom the ruling was given.[18]

In *Minister of National Revenue v. Ford Motor Company Ltd.*,[19] which was rendered after the decision of the Tax Court Judge in this case, this Court held that ministerial decisions as to the tax liability of other taxpayers cannot affect the tax liability of any taxpayer in a particular case:

> Finally, we wish to comment on the issue of whether the Minister's treatment of other importers under the Act is relevant to evaluating the Minister's exercise of discretion in this case. The cross-appellant submits that the Minister's failure to properly exercise his discretion is evidenced by his differential treatment of similarly situated importers such as Chrysler Canada and American Motors Canada in his administration of paragraph 2(1)(f) ...
>
> ... we find that, whatever the similarities or dissimilarities between Ford Canada and its importing competitors, the Minister's treatment of other taxpayers cannot be determinative of the tax liability of Ford Canada. The reasons which support this finding are amply expressed in the decision of the Associate Chief Justice on the interlocutory application in these proceedings:
>
> The activities of other automotive manufacturers and the defendant's treatment of those manufacturers is of no relevance to the plaintiff's action. No matter how similar the activities of two businesses, if one company can frame its dispute in such a way as to make another company's affairs relevant, the result would be chaos. In each individual case the plaintiff must prove that it meets the requirement of the legislation. Here, if the plaintiff establishes that its manufacturing activities fall within the definition in s.2(1)(f), then it will be

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[18] See, *e.g.* TR-1, Advance Rulings par. 88,001; ATR-2, Advance Rulings par. 90,502.

[19] (25 April 1997), File No. A-613-94 (F.C.A.).

> entitled to the consideration provided in s.26.1 for "similar goods". That entitlement does not flow from the fact that other automotive manufacturers have received it but rather from the fact that the plaintiff meets the requirements in the legislation.[20]

A taxpayer's entitlement to a benefit or deduction under the *Act* cannot be established on the basis that another similarly situated taxpayer received it, but only on the basis that the *Act* establishes the taxpayer's entitlement. Since a taxpayer is not entitled to rely on treatment of another taxpayer to establish eligibility for a tax benefit, similar treatment of similarly situated taxpayers is irrelevant to the appellant's claim that the Minister erred in finding that the appellant's loss transfer fell within the scope of subsection 245(2) of the *Act*. Thus the disclosure of unpublished advance rulings would not tend to assist the appellant's case or damage that of the respondent. The Tax Court Judge therefore erred in ordering that they be produced.

On the facts of this appeal, the appellant's entitlement to the deduction under subsections 85(5.1) and paragraph 69(5)(d) of the *Act* did not and could not be affected by the unpublished advance rulings or technical interpretations whose disclosure the appellant seeks. Thus these documents cannot be relevant to the appellant's alternative claim that the Minster was wrong to have applied section 245 to the loss transfer at issue in the main action.

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[20] *Ibid* at 24-26, per Linden and McDonald JJ.A.

Conclusion

For these reasons, I would allow the cross-appeal with costs and set aside the order of the Tax Court Judge.

"Julius A. Isaac"

C.J.

A-542-96

CORAM: THE CHIEF JUSTICE
MARCEAU J.A.
HEALD D.J.

BETWEEN:

OWEN HOLDINGS LTD.

Appellant

(Respondent by Cross-Appeal)

- and -

HER MAJESTY THE QUEEN

Respondent

(Appellant by Cross-Appeal)

Heard at Vancouver, British Columbia, on Thursday, June 19, 1997.

Judgment rendered at Ottawa, Ontario, on Thursday, July 17, 1997.

REASONS FOR JUDGMENT BY: **MARCEAU J.A.**

CONCURRED IN BY: **HEALD D.J.**

REASONS DISSENTING IN PART BY: **THE CHIEF JUSTICE**

IN THE FEDERAL COURT OF APPEAL

A-542-96

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