Federal Court of Appeal  Cour d'appel fédérale

Date: 20210409

Docket: A-451-19

Citation: 2021 FCA 68

CORAM: **WEBB J.A.**
NEAR J.A.
RENNIE J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CHR INVESTMENT CORPORATION

Respondent

Heard by online video conference hosted by the registry on February 4, 2021.

Judgment delivered at Ottawa, Ontario, on April 9, 2021.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The issue in this appeal is whether the Crown should be obligated to respond to six undertaking requests made during the discovery examination of the representative of the Crown. The Tax Court of Canada concluded that the Crown should be required to produce the requested documents (if they exist) (2020 TCC 17). The Crown has appealed that Order.

[2] For the reasons that follow, I would allow the appeal.

I. Background

[3] As a result of a reorganization completed in 2008, CHR Investment Corporation (CHR) acquired certain carryover amounts (non-capital losses and scientific research and experimental development (SR&ED) expenditures) that had been incurred by another corporation. CHR claimed these carryover amounts in its 2009 to 2013 taxation years. The Minister of National Revenue (Minister) reassessed CHR for these years to deny the amounts claimed on the basis that the general anti-avoidance rule (GAAR) as set out in section 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) applied.

[4] CHR appealed the reassessments to the Tax Court. CHR has conceded that it had received a tax benefit and that there was an avoidance transaction. Therefore, the only issue that will be in dispute in the appeal to the Tax Court will be whether the avoidance transaction was an abuse of the provisions of the Act.

[5] The issue in this appeal arises as a result of certain requests made by CHR during the discovery examination of the Crown's representative. CHR requested the following undertakings, which are described in paragraph 5 of the reasons of the Tax Court Judge:

> 1. To provide a copy of the letter that the Canada Revenue Agency (CRA) Legislative Policy Directorate wrote to the Department of Finance on February 1, 2001.
>
> 2. To advise as to whether the CRA Legislative Policy Directorate received any response from the Department of Finance to the February 1st correspondence, and if it did, to provide a copy of same.
>
> 3. To provide a copy of the correspondence from the CRA Legislative Policy Directorate to the Department of Finance dated March 8, 2004.

> 4. To enquire of the CRA Legislative Policy Directorate if the Department of Finance responded to the correspondence dated March 8, 2004.
>
> 5. To provide a copy of the letter written by the CRA Legislative Policy Directorate in 2007 asking the Department of Finance to recommend legislative amendments.
>
> 6. To enquire of the CRA Legislative Policy Directorate as to whether there was a response from the Department of Finance relative to the above requested undertaking [*i.e.* #5 above] and if so to provide a copy of the same.

[6] The Crown took these requests under advisement and later notified CHR that it would not be providing the requested documents on the basis that they were irrelevant. The Crown also took the position that the requests constituted a fishing expedition, but has not pursued this argument in this appeal.

[7] CHR's request for these documents arose as a result of the 2009 Fall Report of the Auditor General, which included a reference to a letter from the Canada Revenue Agency (CRA) to the Department of Finance outlining certain corporate reorganizations that the CRA considered inappropriate. The transactions referenced in this letter were undertaken to get around the rules limiting the use of a corporation's non-capital losses by an unaffiliated corporation. There is no suggestion that the transactions described in the letter were those that were undertaken by CHR.

[8] When questioned about the Auditor General's report, the Crown's representative (who was the CRA auditor) responded that he had not seen this report and the report was not considered in his analysis of the transactions completed by CHR, nor had he considered any of the correspondence referenced in this report.

II. Decision of the Tax Court

[9] The Tax Court Judge acknowledged that the determination of the policy underlying the rules restricting, in certain situations, the ability of a corporation to utilize the losses and the SR&ED expenditures incurred by a different corporation, is a question of law. The Tax Court Judge also noted, in paragraph 14 of his reasons:

> […] the jurisprudence already accepts that documentation is admissible in relation to this issue at the discovery stage, including documentation as was in CRA's file in relation to the taxpayer's audit and or objection stages, and documentation that had been considered by a CRA official involved in the taxpayer's audit or objection stages.

[10] In paragraph 15, he stated:

> [15] Additionally, there is basis for consideration that judicial deference, however slight, might be accorded the Respondent's enunciated version, of what is the particular policy, as anticipated by subsection 245(4). It is well established that a degree of judicial deference, again however slight, can be accorded statements of the Minister as to interpretation of fiscal legislation that are published in tax interpretation bulletins and information circulars.

[11] He concluded, at paragraph 16, that a permitted line of inquiry at the discovery stage would include questions and requested documents to determine if "the Minister's pleaded policy for subsection 245(4) purposes does not wholly conform with other administrative fiscal statements on the same subject". As a result, he allowed CHR's motion and ordered the Crown to respond to the six requested undertakings referred to above.

III. Issue and Standards of Review

[12] The issue is whether the Tax Court Judge erred in ordering the Minister to respond to the undertakings. In order to address this issue, the focus will be on the scope of questions that the representative of the Crown would be required to answer at a discovery examination that relate to questions of law, and the scope of the documents that the Crown would be required to produce in relation to questions of law.

[13] The applicable standards of review are as set out in *Housen v. Nikolaisen*, 2002 SCC 33. Questions of fact or mixed fact and law will be reviewed on the standard of palpable and overriding error, while questions of law will be reviewed on the standard of correctness.

IV. Analysis

A. *Issue to be litigated in CHR's appeal to the Tax Court*

[14] The Supreme Court of Canada, in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at para. 66 (*Canada Trustco*) (and confirmed in *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, at para. 33) (*Copthorne*) set out the three requirements that must be satisfied in order for the GAAR to be applied:

1. There is a tax benefit resulting from a particular transaction;
2. The particular transaction is an avoidance transaction; and
3. The avoidance transaction is abusive *i.e.* the tax benefit frustrates the object, spirit or purpose of the provisions relied upon by the taxpayer.

[15] In this matter, the issue that will be litigated when CHR's appeal is heard by the Tax Court is the third requirement – was there abusive tax avoidance? The requested undertakings in issue in this appeal must be considered in light of the issue that is to be ultimately determined in this matter. The scope of discovery questions and hence undertakings that are to be fulfilled is framed by the issues as set out in the pleadings, which in this case have been limited to the issue of whether the transactions completed by CHR resulted in an abuse of the relevant provisions of the Act.

[16] In determining whether there is abusive tax avoidance, the first step is to identify the object, spirit or purpose of the relevant provisions of the Act. This is completed based on a textual, contextual and purposive analysis of the relevant provisions to determine their rationale (*Copthorne*, at para. 70). For ease of reference in these reasons, the object, spirit or purpose of the relevant provisions will be referred to as the rationale of these provisions.

[17] The determination of the rationale of the relevant provisions is a question of law (*Canada v. Oxford Properties Group Inc.*, 2018 FCA 30, at para. 39).

[18] The requested undertakings relate to the Minister's position on the rationale of the relevant provisions as set out in paragraph 45 of the reply filed with the Tax Court:

> 45. In reassessing the Appellant the Minister assumed:
>
> (a) the general scheme of the Act is to prohibit the transfer of tax attributes between arm's length parties, subject to certain express and permissive exceptions;

> (b) subsections 37(6.1), 111(5) and 127(9.1) and paragraph 256(7)(b) of the Act are part of this legislative scheme;
>
> (c) the object, spirit and purpose of subsections 37(6.1), 111(5) and 127(9.1) of the Act is to prevent the arm's length transfer of tax attributes to shelter from tax the income of the person acquiring access to the attributes, subject to an exception permitting the ongoing use of tax attributes if they are used in the same or a similar business; and
>
> (d) subsection 256(7) forms part of the provisions in the Act that prevents the trading of losses between arm's length parties.

[19] CHR acknowledges that the matters addressed in paragraphs 45 (a) to (d) of the reply are questions of law. The only fact in this paragraph is set out in the opening words of paragraph 45 (before paragraph (a)) and is the fact that the Minister assumed that the law is as described in paragraphs (a) to (d) in reassessing CHR.

B. *General Purpose of Oral Examinations for Discovery*

[20] This Court, in *Canada v. Lehigh Cement Limited*, 2011 FCA 120, (*Lehigh*), adopted the description of the general purpose of oral discovery as set out by the Federal Court in *Montana Band v. Canada*, [2000] 1 F.C. 267, [1999] F.C.J. No. 1088 (T.D.) (*Montana Band*):

> [30] First, I believe that the general purpose of oral discovery has not changed. Justice Hugessen described that purpose in the following terms in *Montana Band v. Canada*, [2000] 1 F.C. 267 (T.D.) at paragraph 5:
>
> > The general purpose of examination for discovery is to render the trial process fairer and more efficient by allowing each party to inform itself fully prior to trial of the precise nature of all other parties' positions so as to define fully the issues between them. It is in the interest of justice that each party should be as well informed as possible about the positions of the other parties and should not

> be put at a disadvantage by being taken by surprise at trial. It is sound policy for the Court to adopt a liberal approach to the scope of questioning on discovery since any error on the side of allowing questions may always be corrected by the trial judge who retains the ultimate mastery over all matters relating to admissibility of evidence; on the other hand any error which unduly restricts the scope of discovery may lead to serious problems or even injustice at trial.

[emphasis added by this Court in *Lehigh*]

[21] It should be noted that the general comments on discovery examinations as set out by the Federal Court in *Montana Band* were based on a matter that was before the Federal Court, not the Tax Court. The *Federal Courts Rules*, SOR/98-106, restrict questions on discovery to questions of fact:

Scope of examination	**Étendue de l'interrogatoire**
240 A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that	**240** La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui :
(*a*) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or	*a*) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge;
(*b*) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.	*b*) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action.
[emphasis added]	[Non souligné dans l'original]

[22] This was confirmed in *Montana Band*:

> [23] There is of course no question that examination on discovery is designed to deal with matters of fact. "Pure" questions of law are obviously an improper matter to put to a deponent. […]

[23] Therefore, the comments in *Montana Band*, quoted in *Lehigh*, must be read in light of the applicable *Federal Courts Rules* that restricted discovery questions to questions of fact.

C. *Scope of Discovery Examinations in Tax Court Proceedings*

[24] The *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, (*Tax Court Rules*) however, provide a broader scope for questions on discovery:

Scope of Examination	**Portée de l'interrogatoire**
95 (1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding or to any matter made discoverable by subsection (3) and no question may be objected to on the ground that	**95 (1)** La personne interrogée au préalable répond, soit au mieux de sa connaissance directe, soit des renseignements qu'elle tient pour véridiques, aux questions pertinentes à une question en litige ou aux questions qui peuvent, aux termes du paragraphe (3), faire l'objet de l'interrogatoire préalable. Elle ne peut refuser de répondre pour les motifs suivants :
(*a*) the information sought is evidence or hearsay,	*a*) le renseignement demandé est un élément de preuve ou du ouï-dire;
(*b*) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or	*b*) la question constitue un contre-interrogatoire, à moins qu'elle ne vise uniquement la crédibilité du témoin;

(*c*) the question constitutes cross-examination on the affidavit of documents of the party being examined.	*c*) la question constitue un contre-interrogatoire sur la déclaration sous serment de documents déposée par la partie interrogée.
[emphasis added]	[Non souligné dans l'original]

[25] The limitation imposed by the *Tax Court Rules* is "any proper question relevant to any matter in issue in the proceeding". This broader limitation has been interpreted as including "questions to ascertain the opposing party's legal position" (*Cherevaty v. Canada*, 2016 FCA 71, at para. 18).

[26] The authority cited for the proposition that "any proper question relevant to any matter in issue in the proceeding" would include questions related to a party's legal position is *Six Nations of the Grand River Band v. Canada*, [2000] O.J. No. 1431, 48 O.R. (3d) 377 (*Six Nations*) a decision of the Divisional Court of the Ontario Superior Court of Justice. The Divisional Court considered the scope of Rule 31.06(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, (*Ontario Rules*), which, at the time of the decision, provided that questions at a discovery examination can be posed that relate to any matter in issue:

31.06 (1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relating to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,	**31.06 (1)** La personne interrogée au préalable répond au mieux de sa connaissance directe et des renseignements qu'elle tient pour véridiques, aux questions légitimes qui se rapportent à une question en litige ou aux questions qui peuvent, aux termes des paragraphes (2) à (4), faire l'objet de l'interrogatoire préalable. Elle ne peut refuser de répondre pour les motifs suivants :

(*a*) the information sought is evidence;	*a*) le renseignement demandé est un élément de preuve;
(*b*) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or	*b*) la question constitue un contre-interrogatoire, à moins qu'elle ne vise uniquement la crédibilité du témoin;
(*c*) the question constitutes cross-examination on the affidavit of documents of the party being examined.	*c*) la question constitue un contre-interrogatoire sur l'affidavit de documents déposé par la partie interrogée.
[emphasis added]	[Non souligné dans l'original]

[27] In paragraph 9 of *Six Nations*, the Divisional Court commented on the general wording of this Rule:

> [9] As for discovery, Rule 31.06(1) requires the examined party to answer any proper question related to "any matter in issue in the action". On a plain reading of the rule, the word "matter" is wide enough to include both a question of fact and the actual position taken by a party on a legal issue. […] While the cases referred to by Lane J. give a much more restricted interpretation of the right of discovery, recent experience shows the real need, particularly in complex matters, to narrow the legal issues well in advance of trial. For the reasons given by Kent J., we agree that Rule 31.06(2) should be given the broad purposive interpretation he gave it in order to focus the issues in the litigation.

[28] Prior to 2008, both the *Ontario Rules* and the *Tax Court Rules* had provided that the person being examined was required to answer any proper question "relating" to any matter in issue. For both sets of rules the word "relating" was changed to "relevant" in 2008. In *Lehigh* (paragraphs 27 to 37), this Court noted that the change in Rule 95 of the *Tax Court Rules* from any question "relating" to any matter to any question "relevant" to any matter was not a material change to this provision.

[29] In addressing the issue of a lay witness answering questions of law and the scope of such questions, the Divisional Court in *Six Nations* concluded:

> [14] Canada's argument, that the lay person produced for discovery on behalf of the defendant is unable to answer questions that call for legal conclusions, is without merit. The Rules contemplate that the person being discovered should inform herself as to issues raised (Rule 31.06(1) and Rule 35.02(1)) and is not expected to have personal knowledge of every issue. There is also specific provision for questions being answered by legal counsel (Rule 31.08). Likewise, there is no problem created by the fact that the person being discovered is under oath. She is not required to swear to the truth of the law, but merely to state what the defendant's current legal position is. If that position changes, she is required to advise the plaintiff, as would be the case for any others on discovery.

[30] Similarly, the *Tax Court Rules* provide that the person being examined is to inform himself or herself of the applicable issues (Rule 95(2)) and that counsel may answer questions (Rule 97), where there is no objection.

[31] In addressing Rule 31.06(1) of the *Ontario Rules* (which is substantially the same as the wording of Rule 95 of the *Tax Court Rules*), the Divisional Court stated that the obligation of the person being examined was to state that party's current legal position. Applying this same principle to this case would mean that the representative of the Crown would be required to answer questions relevant to the current position of the Crown on the rationale of the provisions of the Act that are in issue. As noted by the Supreme Court in *Canada Trustco*, at paragraph 65, when the GAAR is invoked the Minister has the obligation to identify the rationale of the relevant provisions. Therefore, it would be appropriate at the discovery examination to ask questions intended to clarify the Minister's current position on the applicable rationale.

[32] In other cases dealing with the application of the GAAR in the context of the loss streaming provisions of the Act, this Court has upheld the Tax Court's finding that certain documents prepared by the CRA were to be disclosed. In particular, this Court noted in *Superior Plus Corp. v. Canada*, 2015 FCA 241 (*Superior Plus*):

> [8] As was held by this Court in *Lehigh Cement Ltd. v. R.*, 2011 FCA 120 [*Lehigh*] in like circumstances, information pertaining to the policy of the Act, even where it is not taxpayer specific, can be relevant on discovery. We accept that an important consideration in that case was that the Crown had itself established the relevance of the documents sought by disclosing an internal policy memorandum on the subject (*Lehigh* at para. 41). However, relevance in the present case is no less established by the Tax Court judge's finding that the refused documents were either prepared in the context of the audit of Superior Plus or considered by officials who were involved in the audit (Reasons at para. 19). We can see no basis for distinguishing *Lehigh*. As always, the trial judge will be the ultimate arbiter of information garnered at the discovery stage.

[33] Unlike *Lehigh* and *Superior Plus*, however, in this case, the Crown has not established the relevance of the documents sought, nor were the documents in issue prepared in the context of the audit of CHR or considered by the officials involved in the audit. Both *Lehigh* and *Superior Plus* can be distinguished on this basis.

D. *Tax Court Judge's Errors*

[34] The Tax Court Judge made a palpable and overriding error in applying the law to the facts of this case. Although he acknowledged that the case law permitted disclosure of documents on questions of law at the discovery stage when such documents were considered in relation to a taxpayer's audit or were in the taxpayer's file, the facts of this case are clear – the requested documentation was not considered in the audit of CHR nor was it in CHR's file.

[35] Simply because other cases have allowed questions that would require the disclosure of documents in a GAAR case, it does not automatically follow that the requested documents should be disclosed in this case. The Tax Court Judge should have considered the facts that were applicable in the other cases where the relevance of the documents was established by the Crown or where the documents were considered in the course of the audit. In deciding this case, the Tax Court Judge should have then considered the facts of this case where the relevance of the documents has not been established by the Crown and the documents in question were not considered in the course of the audit.

[36] The nature of the documents sought to be disclosed is also relevant. The requested documents are correspondence between officials at the CRA and the Department of Finance. CHR is seeking such correspondence to determine if such officials expressed an opinion on the rationale of the applicable provisions that is inconsistent with or conflicts with the current position of the Crown.

[37] In other cases, requests for the disclosure of opinions expressed by individuals within the Department of Finance or the CRA have not been upheld. In a subsequent decision involving a refusal to answer questions in the Superior Plus Corp. matter (2016 TCC 217), the Tax Court refused to compel the Crown to respond to questions related to opinions expressed by officials working with the Department of Finance:

> [79] The problem presented is that, as the Respondent notes, the views of Finance on the matter are irrelevant to determining whether such a policy actually does exist. The existence of the alleged policy is a question of law, with the Respondent having the onus to clearly identify the policy underlying the relevant legislation that is said to be frustrated. It is with reference to legislative intent, not

> the intent of an individual official of Finance, that the GAAR analysis is made. Whether individual Finance officials believe such a policy to exist has no bearing on the object, spirit or purpose of the relevant provisions enacted by Parliament.

[38] Similarly in *Madison Pacific Properties Inc. v. Canada*, 2019 FCA 19, this Court upheld the decision of the Tax Court that the Crown was not obligated to disclose correspondence between CRA and the Department of Finance in a case where GAAR was invoked. The correspondence in issue was not considered in the course of the audit of the taxpayer. This Court also noted, in paragraph 28:

> […] Thus, while it may well be incumbent on the Minister to set out the disputed policy in the Minister's pleadings as a matter of fairness, as was held in *Birchcliff Energy Ltd. v. Canada*, [2013] 3 C.T.C. 2169, [2012] T.C.J. No. 354 (*per* C. Miller J.), cited with approval in *Superior Plus Corp. v. The Queen*, 2015 TCC 132 at paras. 20-21, it does not follow that evidence on the policy will be admissible at trial as matters of law are for a court to determine.

[39] This Court also noted, in paragraph 11, that while a party is entitled to know the legal position of the other party, this does not include questions concerning the legal research or the reasoning that led to that position.

[40] The Tax Court Judge in this appeal erred by expanding the disclosure of documents related to a question of law to require the disclosure of correspondence that was not considered in the course of the audit of CHR and was not otherwise established by the Crown as relevant. The documents are not published documents released by either the Department of Finance or the CRA. The documents are also not requested to clarify the legal position of the Crown, but only to determine if the CRA or the Department of Finance, in correspondence between government

officials, expressed an opinion concerning the rationale for the applicable provisions that contradicts or is inconsistent with the rationale as set out in paragraph 45 of the reply.

[41] The Tax Court Judge also erred in alluding to some deference, even slight, that could be accorded to the Minister's position on the rationale for the applicable provisions that may be reflected in the requested correspondence. As noted by this Court in *Prescient Foundation v. Canada (Minister of National Revenue)*, 2013 FCA 120:

> [13] […] in the normal course of litigation involving the Act, no deference is showed by the Tax Court of Canada, or this Court, to the CRA's or the Minister's interpretation of the Act […]

[42] The Tax Court Judge erred by indicating that any deference could be accorded to any expressions of the rationale of the applicable provisions of the Act that may be disclosed in the letters sought by CHR in this matter.

E. *CHR's allegation that it has the right to know the rationale that was adopted when CHR was reassessed*

[43] At the hearing of this appeal, CHR insisted that it was entitled to know whether the Minister had adopted the same interpretation of the rationale of the applicable provisions when CHR was reassessed. CHR asserted that it was therefore entitled to the requested correspondence to determine if it revealed a different interpretation than expressed in the reply. The implication of the position of CHR is that there would be some unidentified consequence if the Minister had adopted a different interpretation of the rationale of the applicable provisions when CHR was reassessed.

[44] Although CHR did not cite any authority for this proposition, it appears that it may have been based on the decision of this Court in *Loewen v. Canada*, 2004 FCA 146 (*Loewen*), or the decision of the Tax Court in *Birchcliff Energy Ltd v. Canada*, [2012] T.C.J. No. 354, [2013] 3 C.T.C. 2169 (*Birchcliff*).

[45] In *Loewen*, this Court stated:

> [11] The constraints on the Minister that apply to the pleading of assumptions do not preclude the Crown from asserting, elsewhere in the reply, factual allegations and legal arguments that are not consistent with the basis of the assessment. If the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown. This is well explained in *Schultz v. Canada*, [1996] 1 F.C. 423, [1996] 2 C.T.C. 127, 95 D.T.C. 5657 (F.C.A.) (leave to appeal refused, [1996] S.C.C.A. No. 4).

[46] The comments in *Loewen* relate to allegations of fact that were not part of the assumed facts when a taxpayer was reassessed. The consequence of the Minister referring to facts in the reply that were not part of the facts that were assumed when the reassessment was issued is that the onus of proving those facts would lie with the Minister. This principle of placing the onus on the Minister to prove certain facts has no application to this case since the rationale of the provisions for the purposes of the application of the GAAR, is a question of law, not fact.

[47] The opening words of paragraph 45 of the reply ("[i]n reassessing the Appellant the Minister assumed") do not have the same significance as assumptions of fact made by the Minister. As acknowledged by CHR, paragraphs 45(a) to (d) set out the Minister's legal position with respect to the rationale for the applicable provisions. There are no facts identified in

paragraph 45 of the reply, other than the fact that the Minister assumed that the law is as described in paragraphs (a) to (d) in reassessing CHR.

[48] To the extent that the Crown intended to include paragraph 45 as part of the factual assumptions made by the Minister, this is not proper. As noted by Justice Rothstein, writing on behalf of this Court, in *The Queen v. Anchor Pointe Energy Ltd.*, 2003 FCA 294:

> [25] I agree that legal statements or conclusions have no place in the recitation of the Minister's factual assumptions. The implication is that the taxpayer has the onus of demolishing the legal statement or conclusion and, of course, that is not correct. The legal test to be applied is not subject to proof by the parties as if it was a fact. The parties are to make their arguments as to the legal test, but it is the Court that has the ultimate obligation of ruling on questions of law.

[49] This statement that the legal test to be applied is to be based on the arguments presented at the hearing is relevant in relation to the comments of the Tax Court in *Birchcliff*. In *Birchcliff*, the Tax Court held that the taxpayer was entitled to know "the historical fact of what Policy the Crown actually relied upon" (paragraph 18). The Tax Court Judge also acknowledged that the Crown's view of the applicable policy could change:

> [23] […] 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.

[50] However, the relevance of what particular policy the Minister or the Crown may have relied upon in the past is far from clear. The Minister's or the Crown's interpretation of the rationale may change over time and may have changed from the time when a taxpayer was

reassessed to the time when the reply is drafted. The position as set out in the reply will, however, be the position that will be argued at the Tax Court hearing, unless a different rationale is proposed before then. The question for the court to decide will be what was Parliament's rationale of the provisions in issue, not what was the Minister's or the Crown's rationale of these provisions at any particular point in time.

[51] I agree that the Crown, in a GAAR appeal to the Tax Court, is required to state its position on the rationale of the relevant provisions of the Act, and its representative, at the discovery examination, is required to respond to any questions seeking to clarify the Crown's position. This would be the Crown's position that it will be arguing at the Tax Court hearing, which may not be the same as any prior position taken by the Minister. The obligation to respond to questions at a discovery examination would not, however, include responding to any questions concerning any prior opinions that may have been expressed in correspondence between the CRA and the Department of Finance, unless such opinions were considered in the course of the audit or the Crown has admitted the relevance of such opinions.

F. *Admissibility of any contrary or inconsistent opinions at the Tax Court hearing*

[52] It is also far from clear on what basis any prior statements made by either officials with the CRA or the Department of Finance with respect to the rationale of the applicable provisions would be admissible in the appeal before the Tax Court. In *Syrek v. Canada*, 2009 FCA 53, Justice Nadon, writing for this Court, addressed the admissibility of a legal opinion on an issue of domestic law that was to be determined by the Court:

> [28] The questions asked of Ms. Ashenbrenner and the answers she provided in regard thereto were clearly directed, in my respectful view, to an issue of law which the Judge had to decide. It is trite law that questions of law are not questions in respect of which courts will admit opinion evidence. In *The Law of Evidence in Canada*, John Sopinka & Sidney N. Lederman & Alan M. Bryant, 2d ed. (Toronto and Vancouver: Butterworths) at page 640, paragraph 12.83, the learned authors say:
>
> > Questions of domestic law as opposed to foreign law are not matters upon which a court will receive opinion evidence.
>
> [29] In support of the above proposition, the learned authors refer to the decision of the Ontario Court of Appeal in *R. v. Century 21 Ramos Realty Inc.* (1987), 58 O.R. (2d) 737 at 752, where the Court stated the principle as follows:
>
> > It was a question of law for the judge as to what constitutes an appropriation. It was for the judge to determine, in compliance with the legal definition, if and when an appropriation took place. This was not something on which an expert witness could give evidence.
>
> [30] Consequently, it was wrong for the Judge to rely, even if only in part, on the opinion of Ms. Ashenbrenner with respect to whether the Agreement was enforceable or whether the appellant was bound by its terms.

[53] As a result, any expressions of opinion on the rationale of the applicable provisions would not be admissible as they would be expressions of opinion on domestic law, which is the purview of the Court.

V. Conclusion

[54] The courts have recognized that the Crown may be required to respond to certain questions or disclose certain documents related to questions of law at a discovery examination of the representative of the Crown in a Tax Court proceeding where:

(a) Such documents were considered in the course of the audit of the taxpayer;

(b) The Crown has established or admitted that such documents are relevant; or

(c) The questions seek clarification of the Crown's legal position.

[55] As noted by the Divisional Court in *Six Nations*, when a person is responding to questions concerning the law, the person is not testifying as to the truth of such opinion, but rather is simply stating that party's current position on the interpretation of the law. Since a person would not be permitted to testify at the Tax Court hearing with respect to his or her opinion on questions of domestic law, there is no notion of attempting to impeach that witness with any prior inconsistent statements on domestic law.

[56] In this case, none of the requested documents were considered by the Minister in invoking the GAAR. The relevance of these documents was not established or admitted by the Crown. The documents are not requested to clarify the legal position of the Crown but only to determine if someone with the CRA or the Department of Finance, in the requested correspondence, expressed an opinion concerning the rationale for the applicable provisions that contradicts or is inconsistent with the rationale as set out in paragraph 45 of the reply. Even if such a contrary opinion exists, it would be an opinion on a question of domestic law and not admissible in the Tax Court appeal. Therefore, there is no basis to compel the Crown to respond to the requested undertakings.

[57] As a result, I would allow the appeal, with costs, and set aside the decision of the Tax Court. Rendering the decision that the Tax Court should have rendered, I would dismiss CHR's motion for an order compelling the Crown to respond to the six requested undertakings, with costs to the Crown.

"Wyman W. Webb"
J.A.

"I agree
D. G. Near J.A."

"I agree
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE TAX COURT OF CANADA DATED NOVEMBER 29, 2019 (AMENDED JANUARY 17, 2020), CITATION NO. 2020 TCC 17, DOCKET NO. 2017-4745(IT)G

DOCKET:	A-451-19
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. CHR INVESTMENT CORPORATION
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	FEBRUARY 4, 2021
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NEAR J.A. RENNIE J.A.
DATED:	APRIL 9, 2021

APPEARANCES:

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