



The Supreme Court confirms that a taxpayer's challenge to a discretionary decision by the Minister of National Revenue should be brought in Federal Court.

This appeal addressed whether the Tax Court of Canada had jurisdiction to consider a company's challenge to a decision by the Minister of National Revenue. The Minister refused to reduce the company's taxable income by adjusting the value of a "non-arm's length" transaction that the company had concluded with a foreign lender. This procedure is called a downward transfer pricing adjustment.

A "non-arm's length" transaction is one in which the parties are related to each other. They can also be between unrelated individuals, partnerships or corporations, depending on the circumstances. In contrast, an arm's length transaction is one in which both parties act in their separate interests. In the tax context, this distinction is important because when evaluating a transaction between two companies that are not at arm's length, meaning they are associated in some way, the revenue agency wants to ensure it is still collecting tax on the transaction at the fair market value.

The Canadian company in question, Dow Chemical Canada ULC, concluded a non-arm's length loan agreement to borrow money from a related Swiss company. As a result of this loan agreement, Dow incurred interest expenses for its 2006 and 2007 taxation years. It also reported income for the 2006 taxation year in respect of manufacturing services provided to the Swiss company.

Following a review of the transactions between Dow and the Swiss company, the Minister reassessed Dow for its 2006 taxation year, applying transfer pricing rules set out in section 247(2) of the *Income Tax Act* ("ITA"). Under section 247(2), where a taxpayer is dealing with a non-resident person with whom it is not at arm's length – in this case, the Swiss company – the amounts in a given transaction will be adjusted to reflect what would have been agreed to had the persons been dealing with one another at arm's length. The application of section 247(2) resulted in a significant increase in Dow's income in the 2006 taxation year, meaning it would need to pay more tax on that income.

Dow believed that its income should be decreased. Where an amount is identified that would decrease the taxpayer's income, section 247(10) of the *ITA* says that a downward adjustment cannot be made unless approved by the Minister. Dow asked the Minister to allow a downward transfer pricing adjustment, but the Minister exercised her discretion to refuse Dow's request.

Dow then asked the Federal Court to review the Minister's decision. This process is called a "judicial review". Dow also objected to the reassessment for the 2006 taxation year and eventually appealed the reassessment to the Tax Court.

Dow's appeal asked whether the Minister's denial of the request for a downward transfer pricing adjustment fell outside the exclusive original jurisdiction of the Tax Court. The Tax Court said that the Minister's discretionary decision under section 247(10) is an essential component of the taxpayer's assessment and goes to the correctness of that assessment, and may therefore be reviewed by the Tax Court under its exclusive jurisdiction to determine, on appeal, the correctness of the assessment. The Minister disagreed and appealed to the Federal Court of Appeal.

The Federal Court of Appeal allowed the Minister's appeal and held that the Federal Court has exclusive jurisdiction to conduct a judicial review of the Minister's discretionary decisions under section 247(10). Dow appealed to the Supreme Court of Canada.

The Supreme Court dismissed the appeal.

The Tax Court did not have jurisdiction to review the Minister's discretionary decision.

Writing for the majority, Justice Kasirer held that when the Minister has exercised her discretion under section 247(10) of the *ITA* to deny a taxpayer's request for a downward pricing adjustment, that decision falls outside of

the jurisdiction of the Tax Court in respect of an appeal of the taxpayer's assessment. The Minister's discretionary decision is not part of the assessment. The meaning of "assessment" is settled in law, and the Minister's opinion formed under section 247(10) is qualitatively distinct from that concept. As there is no express right of appeal to the Tax Court, the proper forum to challenge the Minister's discretionary decision under section 247(10) is the Federal Court, pursuant to its exclusive jurisdiction in judicial review under section 18(1) of the *Federal Courts Act*. Only the Federal Court has the jurisdiction to apply the appropriate standard of review and access to the appropriate range of administrative law remedies.

Breakdown of the decision: *Majority*. Justice [Kasirer](#) dismissed the appeal (Justices [Martin](#), [Jamal](#) and [O'Bonsawin](#) agreed) | *Dissenting*. Justice [Côté](#) would have allowed the appeal (Justices [Karakatsanis](#) and [Rowe](#) agreed).

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