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SCC Clarifies Jurisdictional Issue in Canadian Tax Disputes: Iris Technologies and Dow Chemicals

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On June 28, 2024, the Supreme Court of Canada (SCC) released *Dow Chemical Canada ULC* (2024 SCC 23) (*Dow*) and *Iris Technologies Inc.* (2024 SCC 24) (*Iris*), two decisions which sought to clarify whether the Tax Court of Canada (TCC) or the Federal Court (FC) had jurisdiction to review discretionary decisions of the Minister of National Revenue (Minister). The majority in Dow held that the FC had jurisdiction to review a discretionary ministerial decision for reasonableness and dismissed Dow's appeal. In Iris, the SCC dismissed a judicial review application challenging the Minister's conduct in the issuance of a GST/HST assessment and held that the Minister's conduct in assessing Iris was non-discretionary and that the TCC had exclusive jurisdiction to evaluate challenges to the correctness of a tax assessment. The SCC also held that an allegation by Iris that the Minister acted with an improper purpose be struck because Iris did not plead sufficient facts to support their claim at the FC and that the declaratory relief sought by Iris lacked practical effect.

Lower courts have already begun to apply the principles from the SCC such as in *Mattina v. Canada (Mattina).*

Background

Challenges to a tax assessment generally follow the rules as set out in the ITA and ETA, as applicable, which include the filing of a Notice of Objection and a further appeal right to the TCC, followed by appeals to the Federal Court of Appeal and, with leave, to the SCC. Challenges to a tax assessment are generally limited to the application of facts to the law, whereby a determination is made as to the correctness of the assessment. The TCC's jurisdiction in adjudicating tax disputes is occasionally blurred when the Minister exercises discretion in its review and assessment of a taxpayer rather than strictly applying fact to law. Iris and Dow both challenged ministerial decisions that resulted in a tax assessment. In Iris, the taxpayer challenged the Minister's at the FC whereas Dow challenged the Minister's application of discretion in a tax assessment at the TCC.

Iris Technologies

In *Iris*, the registrant claimed input tax credits (ITCs) in its GST/HST returns that would have resulted in

significant refunds but were disallowed by the Minister. Iris applied for a judicial review of the Minister's determination and challenged the conduct of the Minister in disallowing its refunds at the FC. Iris alleged that (a) the Minister failed to maintain procedural fairness in the audit, (b) assessments were made without evidentiary foundation, and (c) the assessments were made for an improper purpose. The SCC characterized Iris's allegations as attacks on the correctness of the assessment and at its core the denial of the tax refunds. The SCC found that the Minister issued the assessment in accordance with the ETA, which was a non-discretionary application of law. Iris's allegation that the Minister breached procedural fairness was grounded in the timing of assessments and failure to receive an opportunity to respond to proposed denials of the ITCs. The SCC held that the TCC is the appropriate court to cure evidentiary defects.

Iris also alleged that the Minister acted with an improper purpose. The SCC acknowledged that improper purpose can be a basis for a judicial review in some cases, but the registrant did not allege the facts needed to support its claim and it was struck.

Dow Chemical ULC

In *Dow*, the taxpayer (i.e., Dow) appealed the Minister's denial of a downward transfer pricing adjustment pursuant to subsection 247 (10) of the ITA. Dow argued that the TCC should have jurisdiction to provide relief because the exercise of ministerial discretion pursuant to subsection 247(10) is "inextricably linked" to the tax assessment. They also argued that the TCC, as a court specialized in tax matters, is the only forum able to provide the appropriate remedy and would do so through procedures that would be desirable from an access to justice perspective.

The SCC rejected Dow's position and clarified that the TCC has exclusive jurisdiction to conduct reviews of income tax assessments, but only on a standard of correctness. The SCC concluded that a tax assessment is non-discretionary in nature and focuses on a determination of the amount of tax owing, where as the Minister's opinion formed under subsection 247(10) is fundamentally different than the non-discretionary act of preparing a tax assessment. Pursuant to subsection 247(10), the Minister is empowered to form an opinion on whether the circumstances justify a downward transfer pricing adjustment. The Minister's opinion will be informed by policy considerations and is discretionary in nature. Therefore, the SCC determined that a decision made by the Minister pursuant to subsection 247(1) should be reviewed on a standard of reasonableness, making judicial review at the FC the correct forum for adjudication.

Further, the SCC was not convinced that granting the TCC with jurisdiction to review discretionary decisions of the Minister would enhance access to justice. The SCC stated that, in the absence of comprehensive legislative reform, judicially expanding the TCC's jurisdiction would only increase uncertainty, cause further litigation over jurisdictional issues, and ultimately undermine access to justice.

Conversely, the dissenting justices agreed with Dow's position that the Minister's decision pursuant to

subsection 247(10) to deny a downward transfer pricing adjustment is “inextricably linked” to a tax assessment because it directly impacts the amount of a taxpayer’s income. Therefore, in the dissent’s view, the TCC could review the challenge using the standard of correctness.

Key Takeaways

1. TCC remains the proper forum to challenge the “correctness” of a tax assessment.
2. Discretionary decisions of the Minister should be adjudicated at the FC on the more deferential standard of reasonableness. Budget 2024 proposed administrative amendments that would dramatically increase the discretionary powers of the CRA such as the issuance of non-compliance orders, notices of non-compliance, and further extended limitation periods. (See Cassels Budget 2024 for more details on budget measures.)
3. Uncertainty remains for taxpayers in ascertaining whether a challenge is strictly to correctness versus a discretionary ministerial determination. Both the *Excise Tax Act* (RSC, 1985, c. E-15) (ETA) and the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (ITA) contain many provisions that are quasi-discretionary or that contain intrinsically discretionary elements.
4. Tax assessments that contain a discretionary ministerial determination may continue to be adjudicated in both the TCC and FC.

The SCC’s Impact on Canadian Tax Disputes

Iris and *Dow* both confirm that the FC is the right court to challenge *discretionary* decisions of the Minister. Difficulties remain in delineating whether a ministerial decision is discretionary or the application of legislation to the facts (i.e., the correctness of an assessment). In *Dow*, the SCC noted that the required clarity may need to come from Parliament.

Nevertheless, *Iris* and *Dow* will have greater significance as the CRA and other tax authorities continue to expand upon their administrative and enforcement powers under the ITA and ETA. The exercise of such powers requires the application of ministerial discretion and insight into the appropriate course of action to resolve such disputes whether it is at the TCC or FC. See Cassels Budget 2024 to learn more about the additional proposed administrative powers of the CRA, such as notices of non-compliance, compliance orders, and expanded reassessment limitation periods.

Since the release of *Dow* and *Iris*, two tax cases have referenced the SCC decisions with one – *Mattina v. Canada* (*Mattina*) – now applying the SCC’s guidance. In *Mattina*, the applicant sought a judicial review of the CRA’s conduct during a tax audit. The FC dismissed the taxpayer’s application and concluded that the application be quashed for lack of basis and what the applicant was really seeking was to interfere with or otherwise usurp the tax assessment process. FC held that the claim should be adjudicated at the TCC, not

the FC.

If you have any questions about Canadian tax disputes, please contact any member of the Cassels Tax & Trusts Group.

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