

MINISTER OF NATIONAL REVENUE v. BP CANADA ENERGY COMPANY

Appeal Re: Disclosure Of Tax Accrual Working Papers

Two years ago I wrote a case comment on the success of the Minister of National Revenue in obtaining a company's private, tax accrual working papers in *Minister of National Revenue v. BP Energy Canada Company*¹ I noted that the Federal Court of Canada's approval of the aggressive audit practices of the Canada Revenue Agency (the "CRA") serves as a warning to all taxpayers that even sensitive, confidential, tax-related information prepared for internal risk-assessment purposes will be compellable in a court of law.

However, the recent decision of the Federal Court of Appeal in *BP Canada Energy Company (Appellant) v. Minister of National Revenue (Respondent) and Chartered Professional Accountants of Canada (Intervener)*² reverses the lower court's decision that such documents are compellable without restriction.

BP Canada is a Canadian subsidiary of BP p.l.c., a European public company in the oil & gas business. For financial reporting and other regulatory purposes, each corporate member of the group is required to prepare financial statements in accordance with generally accepted accounting principles. In particular, each such corporation must calculate reserves to account for contingent tax liabilities. Those calculations supported by working papers, or tax accrual working papers ("TAWP"), must include an estimate of the tax liability the corporation would face if the tax authorities were to challenge uncertain tax positions reported on the corporation's self-assessed tax return.

The TAWP's were prepared by internal accountants to identify the issues which BP believed might merit adjustment. During the course of a regular audit by a team of CRA tax auditors, the existence of the TAWP's came to their attention. The CRA considered these documents would disclose uncertain tax positions of BP Canada, which in its view meant the highest risk for loss of tax revenue and, therefore, the CRA would focus its audit resources in those areas. In the face of the taxpayer's refusal to disclose these positions, the Minister sought and obtained a court order compelling this disclosure.³

BP Canada and the Intervener, the Chartered Professional Accountants of Canada, argued on appeal that such an order would authorize the CRA to have unwarranted general and unrestricted access to BP's TAWP.

In order to address the issues, the Federal Court of Appeal believed it necessary to delve into the detail of the actual audit process, and found that the tax auditor's initial concerns about a large amount of

¹ 2015 DTC 5077 (Federal Court of Canada).

² 2017 DTC 5028 (Federal Court of Appeal of Canada).

³ Under subsection 231.1 of the Income Tax Act (Canada)(the "ITA"). Subsection 231.1(1) provides as follows:

"An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,
(a)inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act...

and for those purposes the authorized person may

(c)...enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and

(d)require the owner or manager of the property or business ...to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person."

tax being “at risk” were allayed by subsequent information provided by the company; nevertheless the tax auditor insisted on the disclosure of the TAWP’s to facilitate the current and future tax audits. The Court described the Minister’s request for production, then, as requesting an order whose sole basis was that the papers were compellable under the ITA “without restriction” (using the Minister’s description in her pleading). This position greatly troubled the Court, as the Minister would be routinely demanding access to TAWP’s prepared by every corporate taxpayer required to maintain such papers for financial and regulatory purposes. In the Court’s view, the statutory power to make the order must be viewed in light of the entire context and in the grammatical and ordinary sense of the words of the provision, read harmoniously with the scheme of the ITA, the object of the ITA and the intention of Parliament.⁴

In reviewing this context, the Court noted that Canada has a tax system based on self-assessment, but not self-audit, which is what the requested order would permit the CRA to require of taxpayers who prepare TAWP’s. The Court also accepted the Intervener’s submission that public companies, being required to maintain TAWP’s, would be less candid in disclosing their uncertain tax positions to their outside financial auditors because of the likelihood that the CRA would compel their disclosure. In sum, the federal law should be interpreted in a more restrictive way so as to work harmoniously with provincial regulations not against them. Accordingly, the appeal succeeded and the decision of the lower court was reversed.

A lesson to take away from this case is that the taxpayer’s win was arguably on a close call that could have gone either way. The guiding principles of the Federal Court of Appeal were not based on so-called “black-letter law” and binding precedent, but rather on the Court’s view of the proper public policy as an aid to statutory interpretation. The next case the CRA takes to court may find a judge who is more sympathetic to the government’s position. Accordingly, caution ought to be exercised in the preparation and dissemination of TAWP’s and, wherever possible, have solicitor-client privilege clothe such communications in confidentiality.

⁴ 2017 DTC 5028, paragraph 57.