



COURT OF APPEAL ACCEPTS GLAXOSMITHKLINE ARGUMENTS IN TRANSFER PRICING CASE

By Elinore Richardson

On July 26, 2010, the Canadian Federal Court of Appeal released its decision in the case of *GlaxoSmithKline Inc. v. Her Majesty The Queen*. The case was heard on March 10, 2010 at the instance of the taxpayer on appeal from a decision of the Tax Court of Canada (2008 TCC 324), which, except for a minor upward adjustment to pricing, upheld the Minister of National Revenue's assessment against the taxpayer.

The Federal Court of Appeal found in favour of the taxpayer, that the Tax Court Judge had erred in failing to apply the proper test for purposes of Canada's transfer pricing rules. The Court, however, did not make any finding as to the proper transfer price but instead referred the matter back to the lower court for rehearing and reconsideration in light of its Reasons.

The taxpayer, GlaxoSmithKline Inc. (Glaxo), a Canadian subsidiary of Glaxo Group plc, a UK corporation, purchased ranitidine from an affiliated Swiss corporation, Adechsa, during the years in dispute under a Supply Agreement at a price of between \$1512 and \$1651 per kilo for packaging, marketing and sale of the trademarked product Zantac in the Canadian market. The taxpayer had also concluded a License Agreement with its parent corporation that provided it with the right to, among other things, sell Glaxo Group products, including Zantac, in the Canadian market. Glaxo was required to source its raw materials, including ranitidine, from Glaxo Group approved suppliers.

At the same time, generic producers were also marketing a generic alternative to Zantac. These producers purchased ranitidine at significantly lower prices

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than did Glaxo. The Minister argued successfully that the price paid by these generic produces for ranitidine during the years in dispute was the proper comparable uncontrolled price (CUP).

The Tax Court of Canada found that the price paid by the generics was the "fair market price" for the ranitidine. In doing so, it equated the concept of fair market price to the "reasonable amount in the circumstances" concept set out in the arm's length standard in the Canadian transfer pricing rules. The Tax Court refused to consider the business circumstances of Glaxo, including the License Agreement, in reaching its conclusions on the basis that the agreement and the specific circumstances in which Glaxo operated were irrelevant to its finding.

The Federal Court of Appeal found that the "reasonable amount in the circumstances" test in the Canadian legislation must be that amount which any arm's length purchaser in the same circumstances as the taxpayer would pay. The Court held that the phrase "in the circumstances" requires a consideration of all relevant circumstances in determining the reasonable price, including the existence of the License Agreement, the ownership by Glaxo Group of the Zantac trademark, the premium that the product name Zantac commanded in the market, the ownership of the patent for ranitidine and other relevant factors. The Court also found, accepting the taxpayer's argument, that the circumstances raised as relevant did not arise from the non-arm's length relationship between Glaxo and Adechsa or from the relationship between Glaxo and Glaxo Group but "from the market power attaching to Glaxo Group's ownership of the intellectual property associated with ranitidine". To make a finding without considering the circumstances which were the "business reality" of Glaxo, as the Tax Court had, was in the view of the Federal Court of Appeal making a determination "in a fictitious business world".

The judgment, while commenting on the findings as to methodology made by the lower court did not comment on the appropriateness of those methodologies or on the ultimate transfer price which the taxpayer should have paid. It is now left to the lower court to reconsider its initial finding having regard to the guidance which the Federal Court of Appeal has put on the record.

For a copy of the decision, please [\[click here\]](#).

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