Coopers Park decision: on the scope of discovery in cases involving the GAAR

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The Tax Court has confirmed in the recent *Coopers Park* decision that the scope of discovery in litigation involving the application of the general anti-avoidance rule (GAAR) differs from the scope of discovery in non-GAAR cases.

Normally, in the discovery process, a party is not entitled to the legal analysis of the Minister of National Revenue (the Minister). However, Justice Owen confirms that GAAR cases are different and the object, spirit or purpose of the legislative provisions at play, as relied upon by the government in its application of the GAAR, is subject to discovery.

Examinations for discovery: the general rules

Generally, oral examinations for discovery involve the asking and answering of questions to examine the information and belief of the opposing party as to the facts that are relevant to the matters in issue, as defined in the pleadings. Discovery also serves to ascertain the opposing party's legal position.

To be permissible under the rules of procedure of the Tax Court, a question asked at discovery must be proper and relevant to any matter in issue in the proceeding. The scope of permissible questions will also depend upon the factual and procedural context of the case.

Even where relevance is established, the Court retains discretion to disallow a question. However, courts will generally err on the side of allowing a question during discovery, preferring to leave it to the trial judge to determine if the information obtained is admissible at the hearing of the appeal.

Finally, a party will have the right to obtain production of a document if:

- the opposing party admits on an examination that they have possession or control of or power over the document;
- the document relates to a matter at issue in the proceeding; and
- the document is not privileged.

How GAAR cases are different

The general principles governing the discovery process in tax litigation also apply in the GAAR context. However, in light of the uniqueness of the GAAR, and in particular the fact that its application is based on the premise that the taxpayer has complied with the text of the statutory provisions at play, special considerations are in order.

In a non-GAAR appeal, the Minister is required to identify the statutory provisions relied on in making the assessment. In a GAAR appeal, the Minister of National Revenue is required to identify the object, spirit or purpose of the provisions that are claimed to have been abused, also referred to as the policy or underlying rationale.

In his reasons, Justice Owen explains that in a GAAR appeal:

- The taxpayer is entitled to ascertain and explore the Minister's position regarding the policy that supports the application of the GAAR to the taxpayer, and this notwithstanding that the identification of the policy is a question of law.
- Draft documents prepared by the Minister or considered by officials in the context of a taxpayer's audit should be disclosed if they "inform the Minister's mental process leading up to an assessment and reflect the Minister's understanding of the policy at issue".
- Information pertaining to the policy of the *Income Tax Act*, even where it is not taxpayer-specific, can be relevant on discovery.
- In order for third-party information to be relevant for the purposes of discovery, there must be evidence that the third-party information was at least considered by the Canada Revenue Agency (CRA) officials who were charged with the audit and assessment of the taxpayer, or by the CRA officials who were consulted regarding the application of the GAAR to the taxpayer. The fact that there may be similarities between a taxpayer's transactions and the transactions undertaken by another taxpayer does not alone make information about those other transactions relevant for the purposes of discovery. Neither does the fact that the CRA may have analyzed these other transactions.
- The broad right to discover the policy relied on by the Minister does not extend to legal arguments in support of the existence of the policy and its application to the taxpayer's transactions.

Importantly, as Justice Owen puts it, "the policy relied upon by the Minister is a fact and it is this fact that the taxpayer is entitled to know and to explore". The taxpayer is entitled to this information in order to know the case it must meet in its appeal, but because the identification of the policy (or object, spirit or purpose) of the provisions is a question of law, this information "is likely not admissible at trial".

Key takeaways

In *Coopers Park*, the appellant was able to obtain all non-privileged documents considered by the GAAR Committee in deciding to assess an unrelated taxpayer, because that decision directly resulted in the subsequent decision to assess the appellant under the GAAR. Had the GAAR committee considered the appellant's case, the appellant would have been entitled to discovery of all non-privileged documents considered by the GAAR Committee in deciding its case under the GAAR.

If you have further questions regarding the scope of discovery in cases involving the GAAR, reach out to your BLG lawyer, the author of this piece, or a member of BLG's Tax Dispute Group.

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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