Jurisdictional lines drawn by the SCC: Discretionary decisions only reviewable in Federal Court

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On June 28, 2024, the Supreme Court of Canada (SCC) released its decisions in *Dow Chemical Canada ULC v Canada* 2024 SCC 23 and *Iris Technologies Inc. v Canada (Attorney General)*, 2024 SCC 24, clarifying the jurisdictional divide between the Tax Court of Canada (TCC) and the Federal Court (FC). In *Dow*, writing for the 4-3 majority, Justice Kasirer dismissed the appeal, holding that the FC has jurisdiction over reviewing the exercise of the Minister's discretion, even where the discretion has direct implications for the amount of tax assessed under the *Income Tax Act* (ITA). Justice Kasirer also penned the judgment in *Iris*, with similar findings in relation to the *Excise Tax Act* (ETA).

Key points

- The current jurisdictional boundary between the TCC and FC has been confirmed: tax disputes regarding discretionary matters, including the decision-making process itself, remain under the exclusive purview of the FC.
- Even though the TCC is a specialized court for tax matters, not all aspects of a tax dispute can be tried by the TCC. In particular, the TCC does not have the jurisdiction to review disputes involving a challenge to the exercise of ministerial discretion. Such challenges can only be made in the FC.
- The SCC judgments in *Dow* and *Iris* confirm the standard of review principles established in *Vavilov* apply in the context of tax disputes.

Background

Following a transfer pricing audit, the Minister reassessed Dow's 2006 taxation year to add approximately $307 million to its taxable income under section 247 of the ITA. Dow filed both an application for judicial review at Federal Court and a notice of appeal with the TCC. Due to uncertainty as to which forum the dispute should be heard in, prior to the substantive trials, the parties submitted the following question to be answered by the TCC:

> *Where the Minister of National Revenue has exercised her discretion pursuant to subsection 247(10) of the Income Tax Act (ITA) to deny a taxpayer's request for a downward transfer pricing adjustment, is that a decision falling outside the exclusive original jurisdiction granted to the Tax Court of Canada under section 12 of the Tax Court of Canada Act and section 171 of the ITA?*

The TCC held that the Minister's decision to deny a taxpayer's request for a downward transfer pricing adjustment is within the TCC's exclusive original jurisdiction where the assessment resulting from that decision has been properly appealed to the TCC. In her decision, Justice Monaghan concluded that the discretionary element that exists within 247(10), if exercised improperly, would lead to an incorrect assessment of tax. Accordingly, the TCC held that on an appeal of the validity of an assessment, it is within the TCC's power to review the Minister's decision to deny the downward adjustment – discretionary or not.

The Minister appealed. On appeal, the Federal Court of Appeal (FCA) overturned the trial's judge's findings. Justice Webb, writing for the Court, drew a distinction between the CRA decision making process and the result of the audit, being a tax assessment. The FCA held that this distinction was important, as, in its view, the TCC only has jurisdiction to consider the correctness of the product i.e., the resulting tax assessment. The FCA also found that the TCC did not have the appropriate remedy available to it, as the TCC can only vary, vacate, or confirm tax assessments, while the FC alone has the power to force the reconsideration of a Minister's discretionary decisions. For a more in-depth overview of the FCA decision, please see our previous article.

In *Dow,* the taxpayer viewed the TCC as the correct and preferred forum. In *Iris,* the jurisdictional issue appealed to the FCA was essentially the same except the taxpayer in this case was asking for their matter to be heard at the FC and in relation to the ETA. There, the Minister argued that *Iris* was using the FC's judicial review powers to indirectly challenge an assessment that should have been appealed to the TCC, essentially the inverse of the choice made in Dow. The balance of this discussion will focus on *Dow*, returning to *Iris* at the conclusion of it.

Dow at the SCC

Seeking leave to appeal to the SCC, Dow framed the issue broadly, highlighting how the lack of jurisdictional clarity in tax disputes affects individual and corporate taxpayers regardless of the quantum of tax in issue. Dow requested that the Court draw a line in the sand between the FC and the TCC, seeking (and receiving) leave on the following question:

> *Was the Federal Court of Appeal (FCA) correct in holding that a review of the decision by the Minister to deny a requested downward transfer pricing adjustment under subsection 247(10) of the ITA, was a matter outside of the TCC's jurisdiction?*

Before the SCC, Dow argued that the TCC was the correct forum, as the challenge was in relation to the "correctness or validity" of the assessment, and not the process by which it was reached. One of the arguments that the panel seemed to find most compelling was that of the power enumerated under s. 18.5 of the *Federal Courts Act*. This particular provision provides courts jurisdiction where an appeal right is explicitly

laid out in their enabling statute. Since s. 169(1) of the ITA allows the appeal of assessments to the TCC, Dow argued that the TCC should therefore have priority to hear those appeals.

Canada's position at the hearing, which was ultimately accepted by the SCC, was that review of discretionary decisions is exclusively within the FC's jurisdiction, and that Dow was appealing to the TCC as a creative way to indirectly challenge a discretionary decision. Canada also highlighted that the TCC appeared unable to provide a suitable remedy since it could not order the Minister to reconsider her opinion to deny the downward transfer pricing adjustment.

During the hearing, the SCC panel raised questions to counsel on both sides about the TCC's potential ability to hear discretionary disputes. Justice Rowe posed several challenging questions to counsel for Canada, pointing out that the assessed tax is ultimately the center of any tax dispute, even in cases such as this where the exercise of discretion is also a concern. Also, during the hearing, Justice Côté raised questions regarding deductions under s. 67 of the ITA, probing counsel for Canada on how the wording in that section ("except to the extent that the outlay or expense **was reasonable in the circumstances**") could be considered non-discretionary, when s. 247(10) was not.

SCC decision in *Dow*

In their reasons, the 4-3 majority focused on the distinction between the calculation of tax and the exercise of the Minister's discretion under s. 247(10) of the ITA. The SCC ultimately held that the Minister has no discretion in calculating the amount of tax owed under the ITA, and their discretionary decisions are neither assessments, nor do they form part of the assessment.

On the broader jurisdictional question, and in response to an argument that the TCC had inherited the Exchequer Court's broader jurisdiction and wider range of remedies the majority held that the TCC has evolved significantly from the days of the Exchequer Court. The modern TCC cannot provide administrative law remedies and has been granted jurisdiction over a much narrower area. As the SCC held that there is no express right to appeal discretionary decisions under the ITA, this lack of an express right, and the requirement under s. 18.5 of the *Federal Courts Act* that the FC's jurisdiction be expressly overridden, led the majority to reject the extension of the TCC's jurisdiction.

In addition, the SCC took issue with the standard of review that would be applied by the TCC if it were to be given jurisdiction to review discretionary decisions. Whereas the TCC hears appeals of assessments under s. 169 on a *de novo* basis, this would not be the case for reviews of discretionary decisions which are heard on the more deferential standard of reasonableness. The SCC found that it would be a legal impossibility for the TCC to operate with two conflicting standards of review. s this would "…directly contradict Parliament's intent on how the Tax Court should decide if an assessment is correct."

In the end, the SCC restated the FC's exclusive jurisdiction to review discretionary decisions, and as a resulting remedy ordered the Minister to reconsider their opinion. As they held almost 20 years ago in *Canada v Addison & Leyen Ltd.*, 2007 SCC 33, the

SCC has again confirmed that judicial review remains a remedy of last resort (and the only forum for disputes of discretionary tax decisions. The majority concluded by stating that only parliament can make the large-scale changes to Canada's tax regime that both Dow and Iris requested.

Dow - Dissent

The three dissenting justices agreed that even where they agreed with the arguments raised by Dow, the scope of their decision must be narrowed to s. 247(10) of the ITA. Where Dow opened the question to the SCC to rule on discretionary decisions *generally*, Justice Côté writing for the minority held that that question was not before the Supreme Court. But highlighting that there may be a need for wider legislative reform, Justice Cote recognized that these jurisdictional issues have "…resulted in a lack of predictability, certainty, and fairness in an area of law where these principles are most important."[1]

The dissent focused on a close reading of sections 247(2) and 247(10) of the ITA. Read together, these sections imply that the exercise of the minister's discretion is always required and is therefore always part of computing the amount of tax owed. Where this is the case, the dissent found that the TCC should have the exclusive jurisdiction to review the resulting assessments of downward transfer pricing adjustment.

Practical implications

The SCC acknowledged a review is required to fix the administrative difficulties that plague taxpayers when it comes to tax dispute jurisdictional boundaries, but that ultimately "…it falls to Parliament to conduct such a review."

Ultimately, where there is an assessment of tax that is coupled with a discretionary decision, the current position is that the disputes must be brought to both courts—with all of the complexity, time, and expense this entails—if a taxpayer wishes to fully exercise their rights. As held by the SCC, the doctrine of *Vavilov* stands strong, with only the FC having the jurisdiction to review discretionary decisions.

Dow and *Iris*, as a pair of decisions from the SCC, maintain the complex and often confusing status quo: tax assessments are to be challenged in the TCC and discretion decisions of the taxing authorities are to be challenged in FC, even where both challenges arise from the same set of facts.

If you have questions relating the Judgments in *Dow* and *Iris*, or in relation to any tax dispute matter, please contact the authors or another member of our Tax Disputes and Appellate Advocacy teams. For a closer look at the administrative law implications of this decision, please read the bulletin prepared by our Appellate Advocacy group colleagues, Laura M. Wagner and Nadine Tawdy, and summer student, Alexandra Son.

Footnote

[1] Indeed. of the 11 judges who heard the case, 4 agreed with Dow.

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