2005 CarswellNat 3050, 2005 TCC 621, [2005] 5 **C.T.C**. 2154, 2006 D.T.C. 2189 (Eng.)

GlaxoSmithKline Inc. v. R.

GlaxoSmithKline Inc., Appellant and Her Majesty the Queen, Respondent

Tax Court of Canada [General Procedure]

Beaubier T.C.J.

Heard: September 16, 2005
Judgment: September 21, 2005
Docket: 98-712(IT)G

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Counsel: Pierre Barsalou, Sebastien Rheault, for Appellant

Naomi Goldstein, Karen Janke, Myra Yuzak, for Respondent

Subject: Income Tax (Federal); Corporate and Commercial

Income tax --- Administration and enforcement — Practice and procedure on appeals — Discovery

Minister believed that taxpayer did not deal at arms length with vendor of certain minerals, from whom it made purchases at above market value — Minister believed that purchases were made at direction of taxpayer's parent company/non-resident shareholder, as a benefit to be conferred on vendor — Minister reassessed taxpayer — Taxpayer appealed — Minister was unsatisfied with answers provided by taxpayer's representatives during discovery — Minister brought motion for provision of transcripts of interviews and depositions of taxpayer and related entities conducted by American Internal Revenue Service on similar matters, that Commission be issued to take evidence regarding certain persons in London, England, and for request that judicial authority of London, England issue such processes as necessary for examinations — Motion granted — Proceedings were bona fide — Issues of transfer pricing were of interest to law and should be tried — Evidence sought was material — Potential examinees were not resident in Canada and could not easily be examined there.

Statutes considered:

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Pt. XIII — referred to

s. 212(1)(a) — referred to

s. 212(1)(d) — referred to

s. 246(1)(b) — referred to

Rules considered:

Tax Court of Canada Rules (General Procedure), SOR/90-688

R. 83 — pursuant to

R. 112 — pursuant to

R. 119 — pursuant to

R. 121 — pursuant to

MOTION by Minister of National Revenue for production of certain documents for discovery, in appeal by taxpayer from assessment of Minister.

***Beaubier T.C.J.*:**

1 This Notice of Motion by Respondent's counsel dated September 1, 2005, pursuant to rules 83, 112, 119 and 121 of the *Tax Court of Canada Rules* (General Procedure) is:

> (a) That the Appellant provide transcripts of all post-May 20, 2005 interviews and depositions of executives or former executives of Glaxo Inc. and of Glaxo Holdings plc or related entities being conducted by counsel for the Internal Revenue Service of the United States of America;
>
> (b) That the Court direct that a Commission, authorizing the taking of evidence of the persons listed in Appendix "A" to David Jacyk's affidavit ("the Witnesses"), be issued for the jurisdiction of London, England; and
>
> (c) That a letter of request be directed to the judicial authority of London, England requesting the issuing of such processes as are necessary to the Witnesses to attend and be examined before the commissioner.

2 In support of the motion, Respondent's counsel filed an affidavit by David Jacyk dated August 30, 2005. Appellant's counsel filed an affidavit of Amanda Pollicino dated September 8, 2005.

3 In addition, various transcripts and the Court file were reviewed.

4 The Appellant's May 7, 1999 Amended Notice of Appeal was replied to by the Respondent's Reply dated September 12, 2002. The Appellant was assessed for its 1990, 1991, 1992 and 1993 taxation years for amounts deemed to have been paid as dividends to Glaxo Group Limited, the non-resident shareholder of the Appellant; or, alternatively are they deemed payable pursuant to paragraph 246(1)(*b*) of the *Income Tax Act* to which Part XIII applies; or, alternatively is withholding tax to be remitted pursuant to paragraphs 212(1)(*a*) or (*d*) of the *Act* ? The assumptions in paragraph 14 of the Reply dated September 10, 2002 are that:

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(e) The Appellant, Glaxo Group Limited and Adechsa do not deal at arm's length;

(f) and (g) In 1990 the Appellant paid Adechsa $1,512 Canadian per kilogram for ranitidine when other Canadian pharmaceutical companies where purchasing ranitidine for $292.10 to $304.33 per kilogram and, in the remaining years the corresponding prices were

(h) and (i) (1991) $1,572.48 vs. $243.60 - $289.24;

(j) and (k) (1992) $1,635.37 vs. $219.97 - $252.81;

(l) and (m) (1993) $1,651.72 vs. $193.52 - $248.18; and

(n) That, in those years, arm's length suppliers would have been able to satisfy the Appellant's demands.

And:

q) the Appellant paid Adechsa, with whom it was not dealing at arm's length, a price for ranitidine which was greater than the amount that would have been reasonable in the circumstances if the Appellant and Adechsa had been dealing at arm's length;

r.A) any amounts paid by the Appellant to Adechsa over and above the prices paid by other Canadian pharmaceutical companies (as detailed in Schedule A attached) were not for the supply of ranitidine but were for other services, which services were already paid for by the Appellant to Glaxo Group Limited and such services were provided by Glaxo Group Limited or related companies in the U.K. and not by Adechsa or the manufacturer of the ranitidine (Glaxochem (PTE) Ltd., or its successor);

r.B) the most appropriate method for determining the price for ranitidine, which would have been reasonable in the circumstances if the Appellant and Adechsa had been dealing at arm's length, would be the CUP method;

r) the payments made by the Appellant to Adechsa for ranitidine were made at the direction of or with the concurrence of Glaxo ~~Wellcome PLC~~ Group Limited of the United Kingdom, the non-resident shareholder and parent of the Appellant ~~for its benefit~~ as a benefit Glaxo Group Limited desired to have conferred on Adechsa.

5 In addition, paragraphs 14.A and 14.B of that Reply state:

14.A Although not assumed by the Minister in reassessing the Appellant, the Respondent states that, to the extent that a secondary method of determining a reasonable arm's length price should have been used (or in lieu of the CUP, if the CUP method is not appropriate), the secondary method would have been the cost plus method, calculated as follows:

a) the cost plus method would result in the CUP prices (being the highest comparable generic price as set forth in Schedule A & Appendix A attached), representing the cost of primary manufacture plus a reasonable profit to the primary manufacturer, Glaxochem (PTE) Ltd; and

b) a royalty or similar payment for all patent rights/intellectual property rights in ranitidine, which Glaxo Group Limited or its affiliates valued in 1983 and for subsequent years to be the lesser of

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£75 or 20% of Adechsa's net proceeds of sale to Canada, which amount represented a proper return to Glaxo Group Limited and its affiliates for all intellectual property rights in ranitidine; and

c) the 6% royalty of net sales the Appellant paid to Glaxo Group Limited pursuant to the licence agreement between Glaxo Group Limited and the Appellant; and

d) it may include the deemed royalty payable by Glaxochem (PTE) Ltd. to Glaxo Group Limited pursuant to an agreement between Glaxo Holdings plc., Glaxo Group Limited, and the Commissioners of Inland Revenue which amounted to a notional figure of 15% of the net sales between Glaxochem (PTE) Ltd. and Adechsa.

but, to the extent that any of the cost plus method price includes an amount on account of royalty or similar payment for the use in Canada of any property, patent, trade-mark, process or other thing whatsoever, such amount is subject to Part XIII withholding tax being paid by the Appellant.

14.B Although not assumed by the Minister in reassessing the Appellant, the Respondent states that, to the extent that any other method is appropriate in determining a reasonable arm's length price between the Appellant and Adechsa (including, but not limited to the resale minus method or the modified resale minus method), any amount in excess of the CUP amounts (as being the highest comparable generic price as set forth in Schedule A and Appendix A attached) are:

a) a royalty or similar payment for all patent rights/intellectual property rights in ranitidine, which Glaxo Group Limited or its affiliates valued in 1983 and for subsequent years to be the lesser of £75 or 20% of Adechsa's net proceeds of sale to Canada, which amount represented a proper return to Glaxo Group Limited and its affiliates for all intellectual property rights in ranitidine; and/or

b) a management or administration fee or charge the Appellant paid or credited, or is deemed by Part I to have been paid or credited to Glaxo Group Limited or affiliates or indirectly paid to Glaxo Group Limited or affiliates (through Adechsa) on account of or in lieu of a management or administration fee or charge;

and, to that extent, are subject to Part XIII withholding tax being paid by the Appellant.

6 At the opening of the hearing of the motion, Appellant's counsel agreed to provide the transcripts described in quotation (a) in paragraph [1] hereof. That left the Court to decide whether or not to order the application described in quotation (b). If (b) is ordered, (c) will follow as a matter of course. Thus, the body of what follows will be devoted to (b).

7 The assumptions at assessment were based on comparable uncontrolled prices ("CUP"). However in paragraphs 14.A and 14.B, the Respondent is not entitled to rely on the assumptions which were made during the assessment because the methods described in 14.A and 14.B were determined later. As a result the onus is on the Respondent to prove the allegations in paragraphs 14.A and 14.B; it cannot merely defend the assumptions.

8 Discoveries by the Respondent have gone on for years and examination of four representatives of the Appellant resulted. Respondent's three counsel have asked over 32,000 questions and obtained 1,900 undertakings and the answers to 1,410 written questions. At the return date a motion on April 11, 2005 the counsel met extensively and agreed to a schedule of proceedings set out in this Court's order dated April 13, 2005. It specified dates

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for further examinations (May, 2005), for final lists of documents (September 30, 2005), a pre-trial conference (October 24-28, 2005) and the hearing (February 13 - May 29, 2006). The dates for Expert Reports and the pre-trial conference have since been extended for one month, concluding in the week of November 21, 2005.

9 All of this is recited because Respondent's counsel encountered all of the difficulties complained of starting in early 2001 and continuing since, from at least two witnesses, Messrs. Hasnain and Fiske (see paragraph 14, affidavit of David Jacyk dated August 30, 2005). In summary, the answers complained of are "I don't know", "not relevant", and others which were not "wholly satisfactory".

10 Respondent's counsel proposes to remedy this by a Commission to examine 12 or 13 witnesses to have them confirm answers they gave in depositions taken by the United States International Revenue Services respecting an issue similar to the subject of this appeal and witness statements taken by Inland Revenue in the United Kingdom related to GGL and Adechsa, some of which are in the documents described in paragraph (a) of the Notice of Motion, which has now been agreed to by Appellant's counsel. In essence these statements go to the matters raised in paragraphs 14.A and 14.B of the Reply.

11 Respondent's counsel has had some of these complaints for years and has known the Appellant's position respecting them all that time. Knowing that, counsel conferred thoroughly on the Court's order of April 13, 2005 and only brought this motion on September 1, 2005.

12 The case law is that, in order to obtain the proposed order for commission evidence the Respondent must satisfy the Court that:

> a) The application is *bona fide*. (It is, pursuant to paragraphs 14.A and 14.B of the Reply).
>
> b) The issue is one which the Court ought to try. (This is a "transfer pricing" case, the first in several years, and the issues raised in the pleadings and this motion are ones to which the Court ought to try).
>
> c) The witnesses to be examined can give evidence which is material to the issues, and at least one of them appears to have participated in the decisions raised in paragraphs 14.A and 14.B of the Reply.
>
> d) They cannot be examined in Canada because they are neither resident nor physically in Canada.

13 For these reasons, the Court directs a Commission authorizing the taking of evidence of the persons listed in Appendix "A" to David Jacyk's affidavit for and in the jurisdiction of the United Kingdom of Great Britain and Northern Ireland.

14 It is further ordered that the examinations shall occur on or before December 24, 2005 and that in any event the hearing of this appeal shall proceed on February 13, 2006 as previously ordered.

15 Respondent's counsel shall advise this Court within 10 days from the date of this Order of the dates on which, and the locations at which, the Respondent proposes to examine the persons listed in Appendix "A". The Appellant shall, within that 10 days, advise the Respondent of any addresses of witnesses not shown on Appendix "A".

16 This Court will issue a direction under Section 112 of the *Tax Court of Canada Rules* (General Procedure)

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on account of this Commission within 21 days hereof.

17 Costs shall be determined by the hearing Judge.

18 All expenses incurred by the Commissioner, this Court and the Appellant (other than counsel fees) respecting the Commission shall be reimbursed to this Court or the Appellant, as the case may be, by the Respondent.

19 Appropriate witness fees and expenses required under the laws of the United Kingdom to secure the attendance of the witnesses shall be paid by the Respondent.

Motion granted.

END OF DOCUMENT

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