



April 11, 2017

Briefing Note – Minister of National Revenue v. BP Canada Energy Company

[Lawson Lundell LLP's Tax Group](#)

Introduction

In a judgment delivered March 30, 2017, the Federal Court of Appeal ("FCA") in [Minister of National Revenue v. BP Canada Energy Company](#), 2017 FCA 61, unanimously upheld an appeal by BP (in dismissing the federal court judge's compliance order requiring BP to disclose its uncertain tax positions and underlying analysis contained in its tax accrual working papers ("TAWPs") pursuant to the Minister's inspection powers in subsection 231.1(1) of the [Income Tax Act](#) (the "ITA"). This decision has had the effect of substantially overturning the judgment and statements of law made by the [Federal Court of Canada \("FCC"\)](#) where the judge ruled that the Minister has the statutory authority to request analysis and lists of tax risks and underlying analysis prepared in the course of an audit without justification - but it does not necessarily mean that TAWPs are always off limits from the Minister's investigatory powers.

Note that the BP FCA decision may be appealed to the Supreme Court of Canada as the deadline to request leave has not yet passed.

The BP Case

The BP case concerned an application by the Minister to compel BP to disclose working papers describing BP's uncertain tax positions. Like other corporations that are required (or choose) to comply with GAAP or other financial reporting standards, BP prepared these working papers in order to identify reporting issues that could merit adjustment (the "Issues Lists") and quantify reserves necessary to account for tax and interest that could become payable. Contrary to a long-standing policy of not exercising her power to request general access to accountants' working papers, the Minister sought disclosure of BP's TAWPs for the purpose of providing a roadmap for both current and future audits. BP resisted participation in what it described as a "compulsory self-audit".¹

¹ *BP Canada* (FCC) at para 15.

FCC Decision

The FCC held for the Minister, finding that there was no conscription of BP, as neither the Minister nor the ITA compelled the creation of the Issues Lists. Rather, the Minister sought disclosure of documents already prepared. Critically, the FCC held that it was not a requirement that the Minister need the information in order to conduct the audit, only that the TAWPs existed and were relevant to BP's intention in creating the reserves.

The FCC rejected BP's arguments, which it characterized as an objection not to accountability but "to the certainty of accountability that will arise from the disclosure of the Issues Lists".² It also did not find compelling BP's argument that the Minister's policy constituted discrimination against corporations required to prepare financial statements in accordance with GAAP. Instead, the FCC preferred the Minister's argument that, "Where large corporations are taking positions that are on the line, that they are not black and white, these are precisely the types of cases that should ultimately be resolved before the courts."

FCA Decision

The FCA came to a different result than the FCC and ruled that without reasonable justification, requesting lists of tax issues and underlying analysis in TAWPs does not fall within the purview of [subsection 231.1](#):

In my view, subsection 231.1(1), properly interpreted, does not make papers such as these compellable "without restriction". When one examines the context and purpose of subsection 231.1(1), it is clear the Parliament intended that the broad power set out in subsection 231.1(1) be used with restraint when dealing with TAWPs. It follows that the decision of the Federal Court judge must be set aside.

The FCA came to this conclusion principally on the basis of the following reasons:

- 1) The ITA is built around self-assessment of the taxpayer as opposed to self-audit, and must be interpreted accordingly.

At paragraph 82 of the FCA's decision, the FCA stated that a taxpayer's obligation to "self-assess" does not extend to assessing themselves on amounts they do not believe to be taxable and that taxpayers are entitled to file their tax returns on a favourable basis to themselves.

The FCA at paragraph 82 also noted that it is an auditor's right and mandate to request for "reasonable assistance" from taxpayers in performing audits but that reasonable assistance does not extend to compelling taxpayers to "reveal their soft spots".

² *BP Canada* (FCC) at para 21 (emphasis removed).

- 2) The broad powers of the Minister to request information from taxpayers was enacted in contemplation of other existing provincial and federal legislation.

The FCA recognized that there would be a tension between the ITA and other Canadian legislation if the FCC's decision was upheld since it would disincentivize entities from estimating contingent tax liabilities in the fear that the information in these documents could be requested and reviewed by the Minister for any purpose on an ongoing basis. The FCA found that, when the Minister's investigation powers were drafted, they would have been drafted in contemplation of legislation mandating the financial reporting of certain entities.

The FCA has not precluded the possibility to access information related to the estimation of potential tax liabilities in circumstances where it may be justified to do so - these circumstances were not discussed in detail and the determination of what circumstances or justifications will authorize access to this information is an open issue.³ In that regard, the FCA agreed at paragraph 105 that the Minister's position on requesting tax working papers is consistent with their view of the law. The policy states, among other things, that "although not routinely required, officials may request tax accrual working papers".⁴

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³ Some examples of successful IRS requests of TAWPs in the United States were mentioned, but the FCA did not comment on whether those examples would be sufficient justification for Canadian tax investigation purposes.

⁴ *Supra*, note 1 at para 22.