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Federal Court of Appeal holds Canada Revenue Agency does not have the power to compel oral interviews during audit

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The Canada Revenue Agency (CRA) has increasingly requested oral interviews during audits, particularly in transfer pricing audits. In *Minister of National Revenue v. Cameco Corporation*, the CRA sought an order compelling employees of the Cameco group to attend oral interviews. The decision of the Federal Court of Appeal (FCA) will be welcomed by taxpayers as it holds that an auditor does not have the power to compel such interviews.

The CRA's demand for interviews

In aid of conducting a functional analysis as part of a transfer pricing audit, the CRA requested oral interviews from upwards of 25 people employed by the Cameco group (including employees of non-Canadian subsidiaries). Cameco, represented by Osler, declined the interview request on the basis that the CRA did not have the power to compel interviews, but offered to respond to written questions.

The CRA sought a compliance order pursuant to section 231.7 of the *Income Tax Act (Canada)* (the Act) on the basis that Cameco was not providing the assistance compelled by paragraph 231.1(1)(a) of the Act.

The CRA argued that the general power in paragraph 231.1(1)(a) to "inspect, audit or examine" the books and records of a taxpayer is broad and encompasses the ability to compel oral responses to questions. The CRA contended its interpretation was consistent with the purpose of the provision to verify taxpayers' information and ensure compliance with the Act, along with the broader public interest in supporting a self-assessment system of taxation.

In the background, Cameco's transfer pricing appeal in the Tax Court of Canada (Tax Court) concerning earlier tax years regarding the same transfer pricing issues was proceeding. (For more information on Cameco's successful appeal at the Tax Court, see Osler's 2018 Legal Year in Review: Taxpayer prevails in landmark transfer-pricing dispute.) Cameco was concerned that the CRA's demand for oral interviews could cause prejudice to its tax appeal.

The FCA rejects the power to compel oral interviews

The federal court rejected the CRA's application for an order and the CRA appealed to the FCA.

The FCA (reasons written by Justice Rennie and concurred with by Justice Laskin) dismissed

the CRA's appeal and held that the general power to "inspect, audit or examine" the books and records of a taxpayer does not extend to compelling a taxpayer to submit to oral interviews.

The FCA noted that the text focuses on the ability of the CRA to access information in the books and records of the taxpayer and nothing in the text suggests a power to compel a person to answer oral questions. The FCA reinforced this reading of the text by noting that in other statutes where Parliament intended to compel a person to provide oral answers in response to a government inquiry, it did so expressly.

The FCA drew on its earlier guidance in *BP Canada* that the CRA's audit powers do not extend to "compel taxpayers to reveal their soft spots." (For more information on Osler's representation of BP Canada see our Update "Federal Court of Appeal denies CRA routine access to tax accrual working papers.")

While agreeing that it is important that the CRA be able to verify information in the context of a self-reporting tax system, the FCA held that such a purpose cannot replace the language of Parliament. The FCA further noted that the CRA has other investigatory powers to pursue information from a taxpayer (for example, seeking information from third parties and authorizing a formal inquiry). The FCA observed that it was not expressing a view as to whether these other powers are sufficient such that the CRA does not need the power to compel oral answers during an audit and any change to provide such a power was a policy matter for Parliament.

The FCA also noted that the legislative history of paragraph 231.1(1)(a) removes any possible doubt regarding the scope of the provision. The predecessor provision used the word "orally" in connection with the duty to answer all proper questions relating to an audit and offered the CRA the option of requiring a taxpayer to give answers under oath. The removal of those terms in the current version of the provision is telling.

The CRA was overreaching

Justice Woods wrote a separate judgment concurring in the result but advancing different reasons. While Justice Woods held that it was not necessary to consider the scope of the CRA's audit powers more generally, she saw no reviewable error in the federal court's decision dismissing the CRA's application. In particular, she noted the federal court's reliance on four "unique and compelling" facts: the transfer pricing issue involved multiple taxation years; Cameco's clean hands having complied with all requests, including having voluntarily agreed to oral interviews in prior years; the large number of interviews requested and Cameco's offer to answer written questions; and the parallel Tax Court litigation. While Justice Rennie did not find these considerations should be taken into account, Justice Woods believed that such facts were relevant to the exercise of the federal court's discretion in deciding whether to issue an order. Justice Woods concluded that the facts "amply support that the Minister's application overreaches" and the federal court made no reviewable error in dismissing the CRA's application.

The FCA's decision will be welcomed by taxpayers. How the CRA responds to the decision remains to be seen.

For more information on the decision or Osler's assistance during the course of an audit, please contact the author above or any member of our National Tax Group.