

Canada

Canadian Tax Agency Won't Appeal Tax Audits Ruling Post BP

BNA Snapshot

- Tax agency won't appeal ruling in favor of BP Canada
- Decision upheld that even if the law allowed access to documents identifying company's "uncertain tax positions," doing so without justification violated tax agency policy



By Peter Menyasz

Canada's tax agency will not seek leave to appeal a court ruling involving BP Canada Energy Co., which limits the tax authority's access to companies' internal audit documents.

The Canada Revenue Agency said in a May 31 statement that it won't seek the Supreme Court of Canada's leave to appeal the Federal Court of Appeal's March 30 ruling involving BP because the facts and circumstances are unique. The Supreme Court generally only agrees to hear appeals in cases with a broad public interest.

Instead, the agency said it will update its audit procedures "to clarify why and when information is to be requested from taxpayers."

"This will give the CRA better, and more clear, procedures to access information," it said.

But the government still believes that its ability to obtain "all information" needed to enforce tax laws is central to the integrity of Canada's tax regime, it added in its statement.

"The government remains firmly engaged in its commitment to obtaining all the information required to administer and apply Canadian tax laws," it said.

However the tax authority is sending mixed messages, a practitioner has said.

Kim Moody, director of Canadian tax advisory services with Calgary-based Moodys Gartner Tax Law LLP, told Bloomberg BNA June 3 that the tax agency's decision not to appeal is a good one, and gives further credence to the court's well-reasoned ruling, but the agency's other comments send mixed messages on how it will approach accessing tax accrual working papers in the future.

The indication the CRA will seek "all information" needs clarification if it means the agency still believes it should have access to the kind of information it was trying to access in the BP Canada case, Moody told Bloomberg BNA.

"I hope not, since the court was pretty clear that taxpayers are not required to self-audit and provide documents to the CRA that reveals their tax positions that might be debatable," he said.

Litigation Arising over Requests

A new, inter-departmental Access Working Group will support the agency's ability to request information and will coordinate any litigation that arises over those requests, it said. The working group will address information for routine tax filings, as well as for activities to enforce Canada's Income Tax Act, including risk assessment, compliance reviews, and collections, it said.

"To conduct effective audits, the CRA needs to assess information from taxpayers. Getting the right information is critical to a review or audit that is fair and effective. CRA auditors only ask for information when appropriate, given the facts and circumstances of individual cases," it said.

The update of the CRA's audit procedures is encouraging because it would create greater consistency and certainty for taxpayers, but that is countered by the emphasis on the case being fact- and circumstance-specific, Moody said. That is "code" for the agency's belief it could be successful in another case with different facts, even if the facts are similar, which isn't a good result, he said.

'Aggressively Avoid'

Moody also took issue with the tax agency's use of the term "aggressively avoid" in relation to taxpayers, noting that most senior tax practitioners have "no clue" what that means.

"The CRA, and many other international tax administrators, have started using this phrase recently and most tax practitioners are not pleased since we believe it causes confusion to the average person," he said. "Evasion is criminal. Avoidance, aggressive or otherwise, is legal."

In CRA's statement, the agency said it has taken "significant action" in recent years "to detect, correct and deter non-compliance, but more can be done to find those who aggressively avoid or evade tax."

Accountants Praise Ruling

The Chartered Professional Accountants of Canada, which intervened in the BP Canada case, said June 4 that the court's ruling, which now stands unchallenged, maintains a proper balance between the agency's need to efficiently and fairly administer the tax system and the taxpayer's right to keep subjective opinions confidential.

"The decision serves the public interest by fostering an environment for full and frank disclosure between a company and its external auditors, which is a critical component for an effective financial reporting process," Gabe Hayos, the association's vice-president for tax, told Bloomberg BNA in an emailed statement.

Appeals Court Required Justification

The Federal Court of Appeal ruled March 30 that major energy producer BP Canada couldn't be forced to turn over sensitive internal audit documents to help the CRA identify potential areas to challenge its tax returns, overturning a June 2015 ruling by the Federal Court of Canada.

The three-member appellate panel unanimously concluded that Section 321.1(1) of Canada's Income Tax Act allows the tax agency to compel production of tax accrual working papers—internal risk assessments of potential tax liabilities—but only with appropriate justification.

Allowing the Federal Court ruling to stand would force the taxpayer to routinely turn over such documents annually and would allow the CRA to make similar demands on any company that is required by law to maintain tax accrual working papers, the appellate court said.

The Canada Revenue Agency demanded the documents, required as part of BP Canada's preparation of consolidated financial statements, during an audit of the company's 2005 tax year that found an issue with refund interest the government had paid to BP Canada.

The company initially refused to comply, then provided a redacted version of the documents.

The tax agency, which has since demanded similar documentation for BP Canada's 2006 and 2007 tax years, successfully sought an order from the Federal Court forcing production of the documents.

The court upheld BP Canada's argument that even if the Act authorized access to documents identifying the company's "uncertain tax positions," doing so without justification violated the tax agency's published policy.

To contact the reporter on this story: Peter Menyasz in Ottawa at correspondents@bna.com

To contact the editor responsible for this story: Penny Sukhraj at psukhraj@bna.com

For More Information

The Federal Court of Appeal's ruling is available at <http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/229222/index.do>.