

Tax Court Jurisdiction Row to Be Heard by Canada's Highest Court

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Canada's Supreme Court will hear the appeal of Dow Chemical Canada ULC in a dispute over whether the tax court has exclusive jurisdiction to adjudicate litigation concerning the government's denial of a transfer pricing adjustment.

Dow Chemical is contesting an April 2022 decision ([2022 FCA 70](#)) of Canada's Federal Court of Appeal rejecting the company's position that a national revenue minister decision under subsection 247(10) of Canada's Income Tax Act is within the tax court's exclusive original jurisdiction. Dow was granted leave to appeal (*Dow Chemical Canada ULC v. His Majesty the King*, No. 40276) that decision by the Court in a brief [February 23 judgment](#).

The transfer pricing adjustment underlying the appeal was requested by Dow after a reassessment of its 2006 tax year that added C \$307 million to its income. The additions stemmed from intercompany transactions between Dow and a related Swiss operating company. Dow requested a downward adjustment corresponding to a C \$3.26 million interest expense arising from a loan from the Swiss affiliate, but the request was denied by the minister, who cited a limitation period provision in the [Canada-Switzerland tax treaty](#).

The question posed in the tax court was whether a minister's discretionary decision under section 247(10) of the ITA to deny a taxpayer-requested adjustment falls outside the exclusive jurisdiction of the tax court. Section 247(10) prohibits transfer pricing adjustments that don't result in or increase "a transfer pricing capital adjustment or a transfer pricing income adjustment of a taxpayer for a taxation year" unless the minister considers them appropriate.

"The tax court has the jurisdiction to consider an appeal of an assessment," and the minister's subsection 247(10) decision in Dow's case was an essential component of the assessment relevant to its correctness, then-tax court Judge Siobhan Monaghan wrote in her December 2020 decision in *Dow Chemical Canada ULC v. The Queen*, [2020 TCC 139](#). Thus, the decision can be reviewed under the tax court's exclusive appellate jurisdiction, she wrote.

The Federal Court of Appeal disagreed. "In my view, the resolution of this appeal turns on the different remedies that may be granted by the Tax Court and the Federal Court," wrote Judge Wyman Webb for a three-judge panel. The minister's subsection 247(10) opinion "is not an assessment," and the tax court lacks the authority to vary or quash it, he said.

Dow's goal is to obtain a reassessment that accounts for its requested downward adjustment, the appeals court said. The minister, rather than the tax court, determines whether a downward

adjustment is appropriate, and thus, “the validity of the opinion is more properly a matter for judicial review in the Federal Court, which has the power to quash the opinion, if appropriate,” it said.

“It’s interesting that the Supreme Court has granted leave in another tax case,” said Laurie Goldbach of Borden Ladner Gervais LLP. Historically it hasn’t heard many, but over the last couple of years the Court seems to be demonstrating a willingness to hear more of them, she said, citing the December 2021 decision in *Canada v. Loblaw Financial Holdings Inc.*, [2021 SCC 51](#), and [the pending appeal](#) in *Deans Knight v. The King*. It speaks to the increasing prominence and national importance of tax disputes, she said.

When the Court got involved in a case about the jurisdiction of the tax court and Federal Court in *Canada v. Addison & Leye Ltd.*, 2007 SCC 33, in 2007, [it favored limited jurisdiction](#) of the tax court and restricted the availability of broader judicial review remedies, Goldbach said. “It’s curious to me that they would grant leave on a similar issue, which makes me think maybe they’re going to change that view or revisit that view.”

Doug Ewens of Moodys Tax Law said that in his view, the Federal Court of Appeal’s decision that the minister’s opinion requirement in subsection 247(10) isn’t itself an assessment, “but, rather, an independent decision that Parliament has explicitly delegated to the Minister,” is correct. It follows that the tax court cannot alter or quash the ministerial opinion and that recourse to challenge it “could be sought only from the Federal Court of Canada by means of a judicial review,” he said, adding that if a judicial review application were successful, the taxpayer could then proceed with appeal of the minister’s assessment in the tax court.