# BP Canada Energy Company v. Canada (National Revenue)

On March 30, 2017, the Federal Court of Appeal (FCA) rendered its decision in *BP Canada Energy Company v. Canada (National Revenue)*,[1] allowing BP Canada's appeal and reversing the Federal Court's decision.

BP Canada was appealing the Federal Court's June 5, 2015 decision in which the Court authorized the Minister's access to certain of BP Canada's Tax Accrual Working Papers (TAWP). These are internal accounting documents prepared by public corporations for financial reporting purposes. TAWP typically reveal uncertain tax positions taken by public corporations in filing their tax returns, and they may contain opinions as to the likely outcome should the Minister challenge a position. TAWP also provide for the establishment of reserves to ensure sound and fair financial reporting.

## BP Canada's position

BP Canada's position was that the Minister was not allowed to access the TAWP because they contained opinions, not facts, and that the law only requires taxpayers to keep (and provide CRA access to) documents evidencing facts that establish a taxpayer's taxable income or tax liability. BP took the position that the Minister was not allowed access to TAWP without proper justification and compelling reasons, and that obtaining the documents as an "audit road map" was not justified in this case. BP Canada also argued that it was unreasonable for the Minister to divert from its longstanding published policy and request the disclosure of the TAWP for an improper and unauthorized purpose.

## The Minister's position

The Minister's position was that the disclosure of the TAWP as part of an audit was necessary to administer and enforce the *Income Tax Act* (the Act) and that her ability to properly administer the Act required broad powers to obtain information and make use of all available risk assessment techniques. The Minister's view was that the Federal Court decision should be maintained, as the wording of the Act and powers conferred upon her were broad enough to compel TAWP.

[1] 2017 FCA 61.

## CPA Canada's position

Chartered Professional Accountants of Canada (CPA Canada) had sought and obtained intervener status before the FCA. CPA Canada intervened because of its belief that the Federal Court had authorized general and unrestricted access to Canadian taxpayers' TAWP. CPA Canada was allowed to produce both written and oral submissions to the effect that formal requests for the production of TAWP cannot be routine and uncontrolled, and that the obligation to produce TAWP should not undercut the public interest role of CPAs in certifying financial statements.

## The FCA's analysis

The FCA recognized that the TAWP contain highly sensitive information and held that the real issue was whether the Act allowed general and unrestricted access to this information. The FCA noted that the Federal Court's decision, as is stood, could have allowed the Minister to require BP Canada to routinely turn over to the Minister its uncertain tax positions every year from this point on. This would also have authorized the Minister to demand the same from all taxpayers who are required by law to maintain TAWP.

The FCA held that the correct interpretation of the Act did not make TAWP compellable "without restriction." When one examines the context and purpose of the provisions giving the Minister the power to request books and records from taxpayers, Parliament clearly intended such powers to be used with restraint when dealing with TAWP.

The FCA recognized the obligation of taxpayers to self-assess under the Act but stated that the Act does not require taxpayers to tax themselves on amounts they believe are not taxable. The Court had to balance the right of auditors to be provided with "all reasonable assistance" in performing their audits against the principle that taxpayers should not be compelled to reveal their "soft spots." In this case, the FCA ruled this principle countered any construction of the Act that would allow the Minister to compel a taxpayer to self-audit on an ongoing basis.

The FCA also recognized that the Minister's powers under the Act have to account for the financial reporting obligations under provincial securities legislation, which impose on publicly traded corporations and their subsidiaries a disclosure obligation to ensure that the financial statements they issue for public consumption are reliable and accurately reflect their financial situation. The FCA, in balancing the Minister's powers and the effectiveness of provincial legislation, accepted CPA Canada's suggestion that general and unrestricted access to TAWP, if authorized, would be "in direct confrontation" with the CPAs' ability to perform financial statement audits because they may not have access to all the required information.

The FCA also drew a clear distinction with the regulated approach taken in the United States on the same issue and distinguished the US case law relied on by the Minister. The FCA was of the view that the US cases in which access to TAWP was granted to the IRS were decided in very different contexts and did not support the Minister's position.

Ultimately, the FCA concluded that as a matter of public interest, the Minister could not rely on its general audit powers under the Act for the purpose of obtaining general and unrestricted access to BP Canada's TAWP (and those of all taxpayers, for that matter) to perform the core aspect of audits conducted under the Act. In the end, this case stands for the principle that CRA cannot ask for an "audit roadmap" without compelling reasons.