



INCOME TAX

PRACTICE

Discovery — Appeal from Tax Court of Canada (T.C.C.) decision (2020 TCC 17) concluding that Crown obligated to respond to undertaking requests made during discovery examination of Crown representative — Respondent reorganizing in 2008 — Claiming carryover amounts incurred by another corporation in its 2009 to 2013 taxation years — On reassessment, Minister of National Revenue denying amounts claimed on basis that general anti-avoidance rule (GAAR) as set out in *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1, s. 245 applying — Respondent appealing Minister's decision — Conceding that it had received tax benefit, that there was an avoidance transaction — T.C.C. concluding that permitted line of inquiry at discovery stage including questions, requested documents to determine if “the Minister's pleaded policy for subsection 245(4) purposes does not wholly conform with other administrative fiscal statements on the same subject” — Whether T.C.C. erring in ordering Minister to respond to undertakings — Issue to be litigated when respondent's appeal heard by T.C.C. whether there was abusive tax avoidance — Requested undertakings in issue herein must be considered in light of issue ultimately determined in this matter — T.C.C. made palpable, overriding error in applying law to facts of case — Requested documentation not considered in audit of respondent nor was it in respondent's file — T.C.C. should have considered facts applicable in other cases where relevance of documents established by Crown or where documents considered in course of audit — Nature of documents sought to be disclosed also relevant — Requests for disclosure of opinions expressed by individuals within Department of Finance or Canada Revenue Agency (CRA) not upheld in other cases — T.C.C. erring, *inter alia*, by expanding disclosure of documents related to question of law to require disclosure of correspondence not considered in course of audit of respondent, not otherwise established by Crown as relevant — Obligation to respond to questions at discovery examination not including responding to questions concerning any prior opinions expressed in correspondence between CRA, Department of Finance, unless such opinions considered in course of audit or Crown admitting relevance of such opinions — Far from clear on what basis prior statements made by CRA, Department of Finance officials with respect to rationale of applicable provisions would be admissible in appeal before T.C.C. — Questions of domestic law as opposed to foreign law not matters upon which a court will receive opinion evidence — In present case, none of requested documents considered by Minister in invoking GAAR — Relevance of these documents not established or admitted by Crown — Even if contrary opinion existing, it would be opinion on question of domestic law, not admissible in Tax Court appeal — Therefore, no basis to compel Crown to respond to requested undertakings — Respondent's motion for order compelling Crown to respond to requested undertakings dismissed — Appeal allowed.

CANADA V. CHR INVESTMENT CORPORATION (A-451-19, 2021 FCA 68, Webb J.A., reasons for judgment dated April 9, 2021, 22 pp.)