

Date: 20081021

Docket: A-487-07

Citation: 2008 FCA 316

**CORAM: NOËL J.A.
NADON J.A.
TRUDEL J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

**AVENTIS PHARMA INC.
(FORMERLY: HOECHST MARION
ROUSSEL CANADA INC.)**

Respondent

Hearing held at Montréal, Quebec, on October 21, 2008.

Judgment delivered from the bench at Montréal, Quebec, on October 21, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

NOËL J.A.

Date: 20081021

Docket: A-487-07

Citation: 2008 FCA 316

**CORAM: NOËL J.A.
NADON J.A.
TRUDEL J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

**AVENTIS PHARMA INC.
(FORMERLY: HOECHST MARION
ROUSSEL CANADA INC.)**

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the bench at Montréal, Quebec, on October 21, 2008)

NOËL J.A.

[1] This is an appeal from an interlocutory decision by Justice Lamarre of the Tax Court of Canada (the TCC judge) who dismissed the Crown's motion to compel the representative of Aventis Pharma Inc. (Aventis) to answer certain questions and to allow the Crown (once again) to

amend its pleadings according to the responses it counted on obtaining. At the same time, the TCC judge terminated the examination for discovery.

Background

[2] The motion sought to compel the witness to reattend for the continuation of his examination for discovery and answer any questions on the way in which certain moneys were repatriated to Canada from Portugal and then redirected to Ireland, and on the facts, circumstances and events surrounding the loans made by HIFC (Hoechst International Financial Company, in Ireland) to Aventis.

[3] Both parties agree that these questions pertain to a series of facts that the Minister of National Revenue (the Minister) relied on and accepted as proven when issuing the assessments under appeal but that were nonetheless denied or ignored by the Crown in its reply to the notice of appeal. Importantly, the Crown did not advance any alternative position to justify the assessments in its reply to the notice of appeal.

[4] The TCC judge characterized this approach as “unusual”. She agreed with the position of counsel for the respondent that the approach masks a strategy to establish a new basis of assessment. According to the TCC judge, nothing at that stage warrants a fishing expedition for facts that could have been discovered during the audit, before the pleadings defined the issues.

[5] She therefore dismissed the Attorney General’s motion and terminated the discovery.

[6] Counsel for the Crown contends that in dismissing her motion, the TCC judge confused the roles of the Minister and the Attorney General. Counsel states that the Minister relied on information provided by Aventis to make his assessments, and that in its notice of appeal Aventis merely repeated the facts it had submitted to the Minister (Memorandum of the Crown, paragraph 51).

[7] According to counsel for the Crown, the Attorney General is not bound by the assumptions of fact that the Minister relied on to issue his assessments. Just as the Attorney General has the obligation to faithfully mirror in his pleadings the facts relied on by the Minister in support of his assessments (since only those facts benefit from the legal presumption in favour of the Minister), he also has the option of calling those facts into question if he is not persuaded of their accuracy (Memorandum of the Crown, paragraph 26).

[8] According to counsel for the Crown, the TCC judge erred in law by preventing the Crown from continuing its examination on the disputed facts.

Decision

[9] In our opinion, the TCC judge was entirely correct in questioning the Attorney General's approach in this case. It is true that the Attorney General is not bound by the assumptions relied on by the Minister to issue his assessments and is entitled to defend an assessment using one or several alternative bases to those relied on by the Minister.

[10] However, as mentioned above, Attorney General did not advance an alternative position in the case at hand. From the Attorney General's perspective, the idea of calling into question the Minister's assumptions of fact without offering an alternative position is, if the matter were to end there, nonsensical. It therefore becomes obvious that the Attorney General's aim is to continue the examination for discovery with a view to developing an alternative basis of assessment that he has not yet defined. That is not the role of an examination for discovery.

[11] In the circumstances, it was open to the TCC judge to exercise her discretion, as she did, to terminate the examination for discovery.

[12] The appeal will be dismissed with costs.

“Marc Noël”

J.A.

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-487-07

**(APPEAL FROM AN ORDER OF LAMARRE J. OF THE TAX COURT OF CANADA
DATED OCTOBER 18, 2007, DOCKET 2003-4034(IT)G)**

STYLE OF CAUSE: HER MAJESTY THE QUEEN v.
AVENTIS PHARMA INC.

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: October 21, 2008

REASONS FOR JUDGEMENT OF THE COURT BY: NOËL J.A.
NADON J.A.
TRUDEL J.A.

DELIVERED FROM THE BENCH BY: NOËL J.A.

APPEARANCES:

Josée Tremblay
Daniel Bourgeois

FOR THE APPELLANT

Wilfrid Lefebvre
Dominic C. Belley

FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE APPELLANT

Ogilvy Renault
Montréal, Quebec

FOR THE RESPONDENT