Docket: 2017-2616(IT)G

BETWEEN:

DOW CHEMICAL CANADA ULC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on May 14, 2019 at Toronto, Ontario and submissions in writing received on January 10, 2020, January 31, 2020 and February 14, 2020, pursuant to section 58 of the *Tax Court of Canada Rules (General Procedure)*

Before: The Honourable Justice K.A. Siobhan Monaghan

Participants:

Counsel for the Appellant:	Daniel Sandler Allison Blackler
Counsel for the Respondent:	Henry Gluch Samantha Hurst Aleksandrs Zemdegs

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ORDER

UPON the Appellant filing an application, on consent, on October 23, 2018, seeking an order for a determination of the following question of law before the hearing of the appeal pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)*:

Where the Minister of National Revenue has exercised her discretion pursuant to subsection 247(10) of the *Income Tax Act* ("ITA") to deny a taxpayer's request for a downward transfer pricing adjustment, is that a decision falling outside the exclusive original jurisdiction granted to the Tax Court of Canada under section 12 of the *Tax Court of Canada Act* and section 171 of the ITA?

AND IN ACCORDANCE with the attached Reasons for Order;

1. The Court has determined that where the Minister has decided, pursuant to subsection 247(10) of the *Income Tax Act* (*Canada*) [the *ITA*], to deny a taxpayer's request for a downward transfer pricing adjustment, that decision is not outside the exclusive original jurisdiction granted to the Court under section 12 of the *Tax Court of Canada Act* and section 171 of the *ITA* provided that the assessment resulting from that decision has been properly appealed to the Court; and

2. Each party shall bear its own costs with respect to this Application.

Signed at Ottawa, Canada, this 18th day of December 2020.

"K.A. Siobhan Monaghan"

Monaghan J.

Citation: 2020 TCC 139
Date: 20201218
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BETWEEN:

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Respondent.

REASONS FOR ORDER

Monaghan J.

I. INTRODUCTION

[1] This decision is about the jurisdiction of the Tax Court of Canada [the *Tax Court*], or perhaps more accurately about the scope of an appeal of an assessment. It arises in the context of an appeal by Dow Chemical Canada ULC [the *Appellant* or *Dow Chemical*] of a reassessment of its 2006 taxation year. The reassessment increased Dow Chemical's income under the transfer pricing provisions in section 247 of the *Income Tax Act*.[1]

[2] Where the relevant conditions are satisfied, the transfer pricing provisions mandate adjustments to amounts that increase a taxpayer's income (or decrease a taxpayer's loss). However, adjustments that would decrease a taxpayer's income (or increase a taxpayer's loss) cannot be made unless "in the opinion of the Minister, the circumstances are such that it would be appropriate that the adjustment be made".

[1] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [the *ITA*]. Unless otherwise stated, all references to statutory provisions are references to provisions of the *ITA*.

[3] In reassessing Dow Chemical for its 2006 and 2007 taxation years, the Minister increased Dow Chemical's income in respect of certain transactions with non-residents to which Dow Chemical is related. The Minister initially indicated that the transfer pricing provisions also would result in a downward adjustment to Dow Chemical's income in those taxation years in respect of another transaction. However, the most recent reassessment of Dow Chemical's 2006 taxation year did not reflect the downward adjustment, although the reassessment of its 2007 taxation year did. Dow Chemical has appealed the 2006 reassessment.

[4] The appeal raised two issues associated with the downward adjustment. The parties apparently resolved the first. The second concerns the Minister's decision to deny Dow Chemical the benefit of the downward adjustment. While the amount of the adjustment is not in dispute, the Minister, as she is entitled to do, determined that it is not appropriate in the circumstances to give effect to the adjustment. The dispute concerns whether that determination was proper.

[5] The issue faced by Dow Chemical is where to bring the remaining issue in dispute. The Tax Court has the jurisdiction to consider an appeal of an assessment. The Federal Court has jurisdiction to judicially review a decision of the Minister, but only if the matter is not otherwise appealable. The uncertainty concerning the proper forum for the dispute led the parties to submit a question of law to the Tax Court under section 58 of the *Tax Court of Canada Rules (General Procedure)* [*Rule 58*]. This decision addresses that question.

II. **CONTEXT**

A. The Transfer Pricing Provisions in Part XVI.1 of the ITA

[6] Part XVI.1 of the ITA contains the transfer pricing provisions. Part XVI.1 does not create or impose a separate tax (although it does impose a penalty). Rather, the transfer pricing provisions (with the exception of the penalty provision) are rules applied to compute amounts relevant to tax imposed under other Parts of the *ITA*, particularly (but not exclusively) Part I.

[7] The transfer pricing provisions in Part XVI.1 of the *ITA* embody the "arm's length principle" in transactions between a taxpayer and a non-resident person with whom the taxpayer does not deal at arm's length. Where transactions between a

taxpayer and a non-arm's length non-resident occur on terms that do not reflect arm's length terms, subsection 247(2) mandates that amounts be increased or decreased as necessary to reflect the amounts that would have been agreed to had the parties been dealing with each other at arm's length.

[8] Read alone, subsection 247(2) makes no distinction between adjustments that increase a taxpayer's income and those that decrease a taxpayer's income:

> . . . any amounts that, but for this section and section 245, would be determined for the purposes of this Act in respect of the taxpayer . . . for a taxation year . . . shall be adjusted (in this section referred to as an "adjustment") to the quantum or nature of the amounts that would have been determined if [the participants had been at arm's length] . . .

[9] However, subsection 247(10) expressly precludes any adjustment under subsection 247(2) that does not result in or increase a transfer pricing capital adjustment or a transfer pricing income adjustment for a taxation year unless, in the opinion of the Minister, the circumstances are such that it would be appropriate that the adjustment be made.

[10] Transfer pricing capital adjustments and transfer pricing income adjustments both result in an increase in a taxpayer's income or a decrease in the taxpayer's loss.[2] They are mandated. In contrast, transfer pricing income setoff adjustments and transfer pricing capital setoff adjustments both result in a decrease in income or an increase in loss.[3] They cannot be made unless the Minister is of the opinion that it would be appropriate in the circumstances to make the adjustment. Nonetheless, both subsection 247(2) and 247(10) are rules that are to be applied to compute income (or some other relevant amount), and thus tax (or some other liability) under Part I (or some other Part) of the *ITA*.

[11] Dow Chemical's appeal concerns only a transfer pricing income setoff adjustment – interest expense. For purposes of these reasons, consistent with the terminology the parties used, the term "downward transfer pricing adjustment"

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[2] In the case of the transfer pricing capital adjustment, the effect on income or loss may be deferred because the adjustment is a reduction in the adjusted cost base or capital cost of assets.

[3] In the case of the transfer pricing capital setoff adjustment, the effect on income or loss may be deferred because the adjustment is an increase in the adjusted cost base or capital cost of assets.

refers to a transfer pricing income setoff adjustment or transfer pricing capital setoff adjustment.

B. The Underlying Appeal

[12] The parties filed a Statement of Agreed Facts, which I have attached to these reasons as Appendix A. However, I have summarized what I view as the salient facts here.

[13] The Appellant, Dow Chemical, is a Canadian resident company governed by the *Companies Act* (Nova Scotia)[4] and indirectly owned by The Dow Chemical Company, a US corporation [*Dow US*]. The Appellant, as borrower, entered into a revolving loan agreement dated February 17, 2009, effective January 1, 2004, with Dow Europe GmbH [*DowEur]*, as lender. DowEur is a Swiss operating company also indirectly owned by Dow US. Pursuant to that loan agreement, the Appellant was obliged to pay DowEur interest of $15,279,034 in respect of the Appellant's 2006 taxation year, and interest of $6,694,341 in respect of its 2007 taxation year.

[14] In 2011, the Minister reassessed the Appellant's 2006 and 2007 taxation years relying on the provisions of section 247. The 2011 reassessment of the 2006 taxation year increased the Appellant's income related to toll manufacturing services it provided to DowEur [*DowEur Manufacturing Amounts*]. The Appellant objected to that reassessment and requested the assistance of the Canadian competent authority with respect to the DowEur Manufacturing Amounts. The Appellant did not seek the assistance of the competent authority with respect to the DowEur loan.

[15] Shortly thereafter, the Minister sent a proposal letter to the Appellant regarding downward transfer pricing adjustments. In particular, the Minister proposed to increase the interest expense with respect to the DowEur loan by $3,260,704 for the Appellant's 2006 taxation year and by $1,509,275 for its 2007 taxation year. However, subsequently the Minister advised the Appellant that the 2006 interest expense would not be changed because of a limitation period in the *Canada-Switzerland Tax Treaty*.

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[4] The Appellant is the successor of Dow Chemical Canada Inc., a corporation incorporated under the *Canada Business Corporations Act*.

[16] The Minister again reassessed the Appellant's 2006 and 2007 taxation years by notices of reassessment dated December 12, 2012. Those reassessments reflected an increase in the Appellant's interest expense related to the DowEur loan for 2007, but not for 2006. However, the reassessment of the 2006 taxation year included transfer pricing adjustments that increased the Appellant's income related to transactions it had with Dow US [the *Dow US Amounts*]. The Appellant objected and requested the assistance of the Canadian competent authority in respect of the Dow US Amounts.

[17] On January 14, 2013, the Appellant asked the Minister to make a downward transfer pricing adjustment for its 2006 taxation year related to the interest expense associated with the DowEur loan. That request was denied on the basis that the additional interest was prohibited by Article 9(3) of the *Canada-Switzerland Tax Treaty* and would result in the amount not being taxed in either jurisdiction (i.e., double non-taxation).

[18] Subsequently, the Minister reassessed:

1. the Appellant's 2006 taxation year, by notice dated December 14, 2015, in accordance with the resolution of the transfer pricing adjustments by the Canadian and Swiss competent authorities regarding the DowEur Manufacturing Amounts, but made no adjustment in respect of the DowEur loan; and

2. the Appellant's 2006 taxation year, by notice dated April 13, 2017, in accordance with the resolution of the transfer pricing adjustments by the Canadian and US competent authorities regarding the Dow US Amounts, but again made no adjustment in respect of the DowEur loan.

[19] The April 13, 2017 reassessment of the 2006 taxation year has been appealed to the Tax Court and has given rise to the question addressed in this decision.

[20] While the Appellant's notice of appeal challenged the Minister's view of Article 9(3) of *the Canada-Switzerland Tax Treaty*, I understand that the parties have resolved that issue. The amount of the downward transfer pricing adjustment is not in dispute. Accordingly, the only remaining issue relates to the Minister's determination under subsection 247(10) that it would not be appropriate in the circumstances to increase the Appellant's interest expense for its 2006 taxation year

by $3,260,704. The Appellant states that that determination was not proper and that therefore the reassessment is incorrect.

III. **THE QUESTION**

[21] The parties have relied on Rule 58 for a determination of the following question:

> Where the Minister of National Revenue has exercised her discretion pursuant to subsection 247(10) of the *Income Tax Act* ("ITA") to deny a taxpayer's request for a downward transfer pricing adjustment, is that a decision falling outside the exclusive original jurisdiction granted to the Tax Court of Canada under section 12 of the *Tax Court of Canada Act* and section 171 of the ITA?

[22] In essence, the question is whether a challenge to the Minister's exercise of the discretion given to her under subsection 247(10) falls within the Tax Court's appellate jurisdiction or is outside of that jurisdiction and is a matter for judicial review in the Federal Court.

[23] Before I proceed, I want to comment on the word "discretion". That word is not used in subsection 247(10), but it is used in the question before me and is used repeatedly in the jurisprudence. However, the term "power" or "discretionary power" or "decision" or "determination" might equally be used – under subsection 247(10), the Minister is given the power to determine whether a downward transfer pricing adjustment is appropriate in the circumstances. In these reasons, I may use "power", "discretion", "discretionary power", "decision", "determination" or "opinion" to refer to the Minister's action taken under subsection 247(10). What is intended by each of these expressions is that the Minister has the power (and the obligation) to determine if the downward transfer pricing adjustment is appropriate in the circumstances and that, in the context of a downward transfer pricing adjustment, what matters is the Minister's opinion.

IV. **THE POSITIONS OF THE PARTIES**

[24] The Respondent seeks an affirmative answer to the question, advocating that any review of the Minister's decision is beyond the jurisdiction of the Tax Court although it may be the subject of judicial review in the Federal Court.

[25] The Appellant seeks a negative answer, arguing that, properly viewed, a challenge to the Minister's decision under subsection 247(10) is an appeal of the assessment[5] that reflects that decision and therefore is within the exclusive appellate jurisdiction of the Tax Court.

[26] The circumstances illustrate the dilemma faced by the Appellant: is the Tax Court or the Federal Court the proper forum for the dispute regarding the Minister's exercise of her discretionary power? Notwithstanding that the Appellant asserts that the Tax Court has the jurisdiction, the Appellant has sought judicial review of the Minister's decision before the Federal Court. That proceeding is being held in abeyance pending a determination of the question in this case.

[27] Assessments issued under the *ITA* can be appealed only to the Tax Court; the Tax Court has the exclusive original jurisdiction to hear appeals of assessments. It is equally clear that the Federal Court has the jurisdiction to consider applications for judicial review, including decisions of the Minister or employees of the Canada Revenue Agency, but only to the extent that an Act of Parliament does not provide for an appeal to another body, including the Tax Court.

[28] Therefore, the answer to the question turns on whether the Minister's decision under subsection 247(10) goes to the correctness of the assessment and so is properly the subject of an appeal to the Tax Court – the position taken by the Appellant – or whether any challenge to the Minister's decision under subsection 247(10) must be by way of judicial review in the Federal Court – the position taken by the Respondent.

V. **THE ANSWER**

[29] For the reasons that follow, I have decided that the answer to the question is no. In my view, the Minister's decision under subsection 247(10) is an essential

[5] The terms "assessment" and "reassessment" are often used interchangeably in these reasons, which is consistent with the definition of "assessment" in the *ITA*.

component of the assessment, goes to the correctness of the assessment, and accordingly may be reviewed by the Tax Court under its exclusive appellate jurisdiction to determine the correctness of the assessment (i.e., whether the assessment is supported by the facts and applicable law).[6] I believe this conclusion is entirely consistent with the jurisprudence, the statutory provisions, and the remedies available to the Tax Court once it reaches a decision on an appeal of an assessment.

[30] However, this is not to say that the Tax Court may substitute its opinion for that of the Minister. That question is not before me. While much of the jurisprudence reviewed below suggests that the Tax Court may not (because Parliament intended the decision to be that of the Minister), that approach was not applied universally. Moreover, more recent jurisprudence, including from the Supreme Court of Canada[7] and the Federal Court of Appeal, has considered courts' powers and duties when reviewing discretionary decisions. This jurisprudence would clearly be relevant to that question. These reasons should not be interpreted as expressing any conclusion on whether the Tax Court may substitute its decision for that of the Minister when the Tax Court reviews the Minister's decision under subsection 247(10) in the context of an appeal of an assessment resulting from that decision.

VI. **DOES SUBSECTION 247(11) PROVIDE THE RIGHT TO APPEAL THE MINISTER'S DECISION?**

[31] In support of its argument that the ministerial decision under subsection 247(10) is appealable to the Tax Court, the Appellant relies in part on subsection 247(11). Subsection 247(11) states:

> (11) Sections 152, 158, 159, 162 to 167 and Division J of Part I apply to this Part, with such modifications as the circumstances require.

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[6] *Canada (Minister of Revenue)* v. *JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 [*JP Morgan*].

[7] See *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, and *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65.

[32] Division I of Part I is titled “Returns, Assessments, Payment and Appeals”, and Division J of Part I is titled “Appeals to the Tax Court of Canada and the Federal Court of Appeal”.

[33] Provisions of this nature are found throughout the *ITA*. For ease of reference, I will refer to them as *mutatis mutandis* provisions, while acknowledging that that traditional language is no longer used in the *ITA*. The purpose of these provisions in the *ITA* is to provide the same rights to object to and appeal assessments issued in reliance on Parts of the *ITA* other than Part I without replicating all of the provisions in each of those other Parts of the *ITA*.

[34] The Respondent asserts that subsection 247(11) is relevant only to an assessment of penalties under subsection 247(3), because the only assessment that can be made under Part XVI.1 is an assessment of penalties under subsection 247(3). Any other assessment relying on the transfer pricing provisions is made pursuant to another Part of the *ITA*.

[35] The Appellant argues that subsection 247(11) has a broader application than to accommodate the appeal of a penalty assessed under subsection 247(3). The Appellant suggests that subsection 247(11) was drafted to apply to all of Part XVI.1 (the provisions are stated to apply “to this Part”) and to ensure that the objection and appeals process in Part I is available to challenge all of the Minister’s actions under the transfer pricing rules, including the Minister’s decision to deny a downward transfer pricing adjustment under subsection 247(10). The Appellant submits that the references to subsections 162 to 167 and Division J in subsection 247(11) bring the Minister’s discretionary decision within the Tax Court’s appellate jurisdiction.

[36] In advancing this position, the Appellant’s largely relies on two arguments:

1. The phrase “with such modifications as the circumstances require” permits the provisions adopted by subsection 247(11) to be read as if the reference to assessment or notice of assessment referred to “the Minister’s decision regarding a downward transfer pricing adjustment pursuant to subsection 247(10)”; and

2. Subsection 247(11) applies as of a date that precedes the application date for the penalty provision, indicating that its purpose includes providing taxpayers

> with the right to appeal all of the Minister's actions under Part XVI.1, including in particular her decision under subsection 247(10).

[37] Provisions in the *ITA* must be interpreted using the textual, contextual and purposive principles described by the Supreme Court of Canada in *Canada Trustco Mortgage Co.* v. *Canada*.[8] The language of a statutory provision is to be interpreted alongside its context and legislative purpose "to find a meaning that is harmonious with the Act as a whole".[9] Where the words used are capable of more than one meaning, the ordinary meaning of the words, while relevant, will play a lesser role in the interpretive process than the context and purpose of the statutory provisions. The context includes not only the surrounding language (i.e., the language of the specific provision) but also the broader context of the related provisions and the *ITA* as a whole.

A. Substitution of "Decision of the Minister" for "Assessment"

[38] Some *mutatis mutandis* provisions in the *ITA* use the phrase "with any modifications" while others use the phrase "with such modifications". The Respondent submits that because subsection 247(11) allows only such modifications (rather than any modifications) as the circumstances require, the scope of subsection 247(11) is narrower than it might otherwise be. For the reasons the Appellant gives in its written submission, I am not convinced that the difference between the two expressions is meaningful in the circumstances before me. However, it is not necessary for me to decide that question in this case.

[39] In my view, neither expression would permit substituting "the Minister's decision denying a downward transfer pricing adjustment under subsection 247(10)" for "assessment" or "notice of assessment" in the relevant provisions. Had Parliament intended subsection 247(11) itself to extend rights of objection and appeal to the Minister's decision as directly as the Appellant suggests, I would anticipate much clearer language such as appears in other *mutatis mutandis* provisions in the *ITA*.

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[8] *Canada Trustco Mortgage Co.* v. *Canada*, 2005 SCC 54 [*Canada Trustco*].

[9] *Ibid.*, at para. 10.

[40] For example, the *ITA* requires the Minister to make certain determinations;[10] the provisions governing notices of objection and rights of appeal expressly are made applicable to those determinations, leaving no doubt.[11] Similarly, where the Minister gives notice of an intention to revoke registration of a taxpayer as a qualified donee, the *ITA* specifies that the relevant provisions apply "with any modifications that the circumstances require, as if the notice [of revocation] were a notice of assessment."[12] A similar approach is taken in Part V to a notice of suspension[13] and in Part X to a notice of refund.[14] These examples of explicit language support a narrower view of the modifications contemplated and permitted by subsection 247(11) than the Appellant advocates.

[41] In coming to my conclusion on the Appellant's first argument regarding the scope of subsection 247(11), I considered *Lord Rothermere Donation* v. *The Queen*.[15] There the Tax Court said that the "any modifications" formulation of these provisions permits a broader range of substitutions or modifications than might have been permitted under a traditional "mutatis mutandis" provision, suggesting that the updated language could accommodate changes that went beyond "a point of detail". However, I view the substitution made there to be of an entirely different nature than that proposed here by the Appellant.

[42] In that case, it is clear from the relevant *mutatis mutandis* provision that subsection 164(3) – which mandates interest on tax refunds - is incorporated by

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[10] See subsections 152(1.01), (1.1), (1.11), (1.5), and (3.3).

[11] See subsection 152(1.2): ". . . this Division and Division J, as they relate to an assessment or a reassessment . . . apply, with any modifications that the circumstances require, to a determination or redetermination . . . of an amount under this Division . . . ".

[12] Subsection 168(4).

[13] Subsection 189(8): ". . . apply in respect of . . . a notice of suspension under subsection 188.2(1) or (2) as if the notice were a notice of assessment made under section 152 . . .".

[14] Subsection 202(3): ". . . for the purposes of the application of those provisions to this Part, a notice of refund under this section shall be deemed to be a notice of assessment".

[15] 2009 TCC 70 [*Lord Rothermere*].

reference for purposes of a refund of Part XIII taxes.[16] Subsection 164(3) requires identification of the date from which the interest is calculated. To apply subsection 164(3) to a non-resident, the Tax Court sought to identify something comparable to a return filed under section 150 to identify the start of the relevant period. For that purpose, given the similarities in the effect of, and the information provided in, a Part I tax return filed under section 150 (giving rise to an assessment under Part I) and an application for a refund of Part XIII taxes (the means by which a non-resident obtains an assessment of Part XIII tax), the Tax Court concluded that it could treat the application for a refund as equivalent to a return filed under section 150.

[43] Those circumstances are not comparable to the circumstances here. Subsection 247(11) can have full effect without being applied as the Appellant has suggested; it applies to and is necessary to object to and appeal an assessment of a penalty.

[44] I note that subsection 247(11) requires the Minister to decide whether a downward transfer pricing adjustment is appropriate in the circumstances, and that subsection 152(1.2) refers to a "determination or redetermination". While subsection 152(1.2) is a provision included among those referred to in subsection 247(11), I do not think this assists the Appellant. Subsection 152(1.2) is concerned with determinations of amounts (not decisions). Subsection 247(10) does not give the Minister the power to determine an amount and does not itself use the word "determine" or "determination" or refer to a "notice of determination".

[45] To read subsection 247(11) as the Appellant suggests would be to stray too far into the realm of legislating, rather than applying, the law. As stated by the Federal Court of Appeal in *Zen* v. *Canada (National Revenue)*,[17] decided after *Lord Rothermere*:

> [73] A statutory modification provision confers an unusual power on courts. The normal role of the judicial branch of government with respect to legislation is to interpret and apply the law as enacted by the Legislature. A cornerstone of

[16] The *mutatis mutandis* provision referred to subsections 164(1) and (1.4) to (7), so it clearly included some parts of section 164 but not all.

[17] 2010 FCA 180.

> parliamentary democracy is that changes to the law require the authorization of the Legislature. However, the exigencies of administration in the modern state have also long required Legislatures to delegate extensive law-making powers. In Canada, these powers are most often delegated to politically accountable bodies and officials with an institutional expertise in public administration, such as the Governor (or Lieutenant Governor) in Council, individual Ministers of the Crown, and municipalities.
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> [74] The fact that courts have neither of these qualities counsels a cautious approach to the scope of the power delegated to them to modify provisions of the ITA, and indicates that it should be interpreted more narrowly than the current text suggests. Thus, determining whether a proposed modification is permitted by the delegated power (to use the terminology associated with *mutatis mutandis*: is it a change in detail or in substance?) requires a court to consider whether considerations of efficiency outweigh the benefits of subjecting it to the scrutiny of the normal legislative process.
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> [Emphasis added.]

[46] Finally, I have considered statements made in the context of the introduction of Part XVI.1. While comments in budget statements or explanatory notes that accompany draft legislation are not dispositive, they may provide insight into Parliament's intention. Nowhere in the 1997 Budget Message,[18] the explanatory notes accompanying the draft legislation released on September 11, 1997,[19] or the explanatory notes accompanying the revised draft legislation released on December 8, 1997,[20] is there any suggestion that the *mutatis mutandis* provision in the transfer pricing rules was intended to allow the reading that the Appellant suggests.

[47] Thus, while the text of subsection 247(11) is broad (leaving aside the "any/such" debate), it nonetheless must be read and applied narrowly in the context of legislation that circumscribes the jurisdiction of the Tax Court as the *ITA* does. Other provisions in the *ITA* that expressly direct that the reference to "notice of

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[18] The Federal Budget of February 18, 1997, Budget Message, Business Tax Measures.

[19] *Draft Legislation and Information Circular on Transfer Pricing dated September 11, 1997,* Department of Finance Release 97-076.

[20] *Notice of Ways and Means Motion with Technical Notes, 1997 Federal Budget, dated December 8, 1997,* Department of Finance Release 97-117.

assessment" be read as a reference to something else – an approach not taken in subsection 247(11) – support that conclusion. In my view the text and context of subsection 247(11), interpreted under the *Canada Trustco* principles, do not support the Appellant's position that "decision of the Minister" may be substituted for "assessment" or "notice of assessment" in applying the sections referred to in subsection 247(11).

B. Purpose of Subsection 247(11)

(1) Date of Application

[48] Amendments to the transfer pricing rules were announced in the February 1997 Budget. While the rules in section 247 were not enacted until 1998,[21] from enactment, most of the provisions in section 247,[22] including subsection (11), were made applicable for taxation years or fiscal periods that began after 1997. However, the penalty provision in subsection 247(3), and the related provisions in subsections 247(4), (5) and (9) [collectively, *the penalty-related provisions]*, were applicable only for taxation years and fiscal periods that began after 1998.

[49] The Appellant argues that if subsection 247(11) is intended to be restricted to an assessment of penalties, one would expect it to become applicable contemporaneously with the penalty-related provisions. The earlier application date was chosen, suggests the Appellant, so that a taxpayer could dispute a decision by the Minister to deny a downward transfer pricing adjustment under subsection 247(10).

[50] The Appellant points out that in the initial publicly-released draft transfer pricing provisions, the *mutatis mutandis* provision appeared as subsection (3) of proposed section 247.1. All of proposed section 247.1 related to the proposed penalties in proposed section 247. Proposed subsection 247.1(1) set out the time for payment of the penalty and proposed subsection 247.1(2) imposed interest on a penalty not paid by the due date. The *mutatis mutandis* provision in proposed subsection 247.1(3) was to apply contemporaneously with the application of the

[21] S.C. 1998, c. 21 received Royal Assent on June 18, 1998.

[22] Amendments subsequently made to section 247 have later effective dates, but that is not relevant to the discussion here.

transfer pricing provisions other than the penalty-related provisions. In contrast, the first two subsections of section 247.1 (related to payment of and interest on the penalty) were to become applicable contemporaneously with the penalty-related provisions.

[51] This distinction between the application dates within proposed section 247.1 itself, the Appellant asserts, supports its position that the scope of subsection 247(11) is broader than to permit an objection to and appeal of the assessment of a penalty. Had Parliament intended the *mutatis mutandis* provision to be relevant to the penalty only, the Appellant submits, all three parts of section 247.1 would have been proposed to become applicable at the same time – on the date the penalty itself was proposed to become applicable.

[52] The Respondent's position is that subsection 247(11) applies only to an assessment under Part XVI.1. Only penalties may be assessed under Part XVI.1 and accordingly, says the Respondent, subsection 247(11) applies only to an assessment of penalties.[23]

[53] The Respondent submits that draft legislation that was not enacted should be viewed with caution. Moreover, while the commentary does not explain why a provision that the Respondent asserts applies only to penalties was made applicable before the penalties could be assessed, the Respondent submits that the delay in the application date of the penalty-related provisions was an exception to the application date for all of the other transfer pricing provisions. The penalty applies where a taxpayer has not satisfied what (then) were new contemporaneous documentation obligations. The Respondent suggests that the purpose of the delay was to give taxpayers time to adjust to the new requirements before penalties became applicable.

[54] The Respondent points out that the earlier application date for subsection 247(11), a provision the Respondent argues relates only to assessments of penalties under section 247, also extends to definitions in subsection 247(1) relevant only to the penalty-related provisions. Although subsection 247(11), like those definitions, applied for taxation years and fiscal periods that began after 1997, no delay in their application was necessary because they imposed no obligations on

[23] In the enacted legislation, the *mutatis mutandis* provision from draft subsection 247.1(3) became subsection 247(11). The other subsections from draft section 247.1 were abandoned.

taxpayers. Although applicable, these provisions could have no consequence unless and until the penalty-related provisions became applicable (i.e., to a taxation year or fiscal period commencing after 1998).

[55] The explanatory notes dated September 11, 1997 that accompanied the draft legislative proposals do not address this difference in proposed application dates for draft section 247.1. Similarly, the explanatory notes that accompanied the December 8, 1997 draft legislation (the version of section 247 that ultimately was enacted) is similarly silent on why subsection 247(11) applied from a date earlier than the penalty provisions.

[56] Although the distinction in dates of application may be viewed as supporting the Appellant's view of the purpose of subsection 247(11), I am not prepared to conclude that that view is correct solely on that basis. Rather, this distinction suggests to me that it is necessary to consider the purpose of subsection 247(11) by interpreting it in the context of the other provisions in Part XVI.1 and in the context of the *ITA* as a whole.

(2) Assessments Based on the Transfer Pricing Provisions

[57] With the exception of any penalty assessed under subsection 247(3), an assessment based on the provisions of section 247 will be made pursuant to another Part of the *ITA*, most notably Part I or Part XIII.[24] For example, a transfer pricing adjustment may result in an increase to a taxpayer's income and a reassessment reflecting that increase will be issued under Part I. Subparagraph 152(4)(b)(iii) specifically contemplates a longer period of reassessment for transactions subject to the transfer pricing provisions. Because the assessment is issued under Part I, the provisions in Part I governing objection and appeal of that assessment automatically apply. Subsection 247(11) has no role to play.

[58] In this respect, Part XVI.1 operates like Part XVI. That Part contains the general anti-avoidance rule [the *GAAR*[25]] and a benefit provision which, when

[24] Assessments for Part XIII tax may arise under Part XV. Assessments relying on the transfer pricing provisions presumably might also arise under Part XIII.1 or Part XIV (imposing branch taxes).

[25] Section 245.

applicable, applies to add the benefit to income for purposes of Part I or to treat the benefit as a payment to a non-resident for purposes of Part XIII. Like the transfer pricing provisions, Part XVI does not impose tax but rather contains rules that are applied for the purpose of computing liability under other Parts of the *ITA*. Where those rules apply, as with the transfer pricing provisions, adjustments are made that affect computations under other Parts of the *ITA*. Accordingly, the assessment based on the application of the rules in Part XVI arises under the other Part of the *ITA*.

[59] With respect to the GAAR this is made abundantly clear. Subsection 245(7) states that:

> . . . the tax consequences to any person, <u>following the application of this section</u> [245], shall only be determined through a notice of assessment, reassessment, additional assessment or determination pursuant to subsection 152(1.11) <u>involving the application of this section</u>.
>
> [Emphasis added.]

[60] The assessment is made following the application of the GAAR but is made under the appropriate Part of the *ITA*, not Part XVI. Similarly, an assessment made following the application of subsection 247(2) and (10) is made not under Part XVI.1, but under the appropriate Part of the *ITA*.

[61] Where a particular person has been reassessed with respect to a transaction, or has received a notice of determination under subsection 152(1.11), involving the application of the GAAR, another person may ask the Minister to assess, or make a determination under subsection 152(1.11), with respect to that same transaction.[26] In that event, the Minister must consider the request and assess or make a determination.[27] The obligation to make the assessment is found in Part XVI, but again the assessment would be made under another Part of the *ITA*.

[62] Despite these specific provisions addressing assessments based on section 245, Part XVI does not contain a *mutatis mutandis* provision. None is necessary because an assessment made consequential on the application of the

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[26] Subsection 245(6).

[27] Subsection 245(8).

provisions in Part XVI is not made under Part XVI, but is made under another Part.[28] The right to object to or appeal that assessment is found in that other Part. Similarly, where the Minister makes a determination under subsection 152(1.11), following the application of section 245, the taxpayer's right to object and appeal are found in Part I.[29]

[63] With two exceptions, the Appellant agrees with this analysis. The Appellant agrees that an adjustment to income based on subsection 247(2) or (10) would be processed as an adjustment to income determined and assessed under Part I and that the objections and appeals provisions in Part I would govern. However, the Appellant states that the "reasons for the objection" and the "issue to be decided" would relate solely to Part XVI.1, where the substantive dispute is grounded. While that may be true, that is not different than an assessment based on the GAAR or on section 246. The reason for the objection and the issue to be decided would be grounded, at least in part, in Part XVI – for example, is there a tax benefit, is there an avoidance transaction, what are the reasonable tax consequences to deny the tax benefit, and has a benefit been conferred, directly or indirectly, on a taxpayer?

[64] The Appellant argues that the difference between Part XVI and Part XVI.1 is not only that Part XVI does not have a penalty provision but that Part XVI does not have a provision that relies on the Minister's exercise of a discretion. That, says the Appellant, is one of the reasons it does not have a *mutatis mutandis* provision. I do not agree that that distinction is meaningful in the context of the Appellant's argument that subsection 247(11) allows the Minister's decision to be the subject of an appeal.

[65] Subsection 247(10) requires a decision, but so does subsection 245(2). Under subsection 247(10) the Minister must decide whether, in her opinion, a downward transfer pricing adjustment is appropriate in the circumstances. Under subsection 245(2), the Minister must decide what tax consequences are reasonable in the circumstances in order to deny a tax benefit. While in the former case the Minister's opinion is the one that matters, and in the latter the Tax Court may come to a different conclusion regarding the reasonable tax consequences than the

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[28] *Quinco Financial Inc*. v. *The Queen*, 2016 TCC 190, at para. 37, aff'd 2018 FCA 137.

[29] See subsection 152(1.2).

Minister, in both cases the Minister's decision results in an assessment under another Part of the *ITA*.

[66] The second distinction between Parts XVI and XVI.1, says the Appellant, is that in some circumstances the Minister's refusal to make a downward transfer pricing adjustment will not result in a reassessment, but a decision letter. In such circumstances, unless subsection 247(11) is read as extending the right of appeal to the Minister's decision letter, argues the Appellant, a taxpayer would have to seek a judicial review, even though another taxpayer who is in the same circumstances but who has received a reassessment would be able to appeal the reassessment to the Tax Court. Therefore, to avoid what the Appellant calls an absurdity, the purpose of subsection 247(11) should be seen as extending the right to object or appeal found in Part I to the Minister's decision under subsection 247(10), regardless of whether that decision is reflected in an assessment.

[67] With respect, I am not persuaded by this argument either. It seems likely to me that a downward transfer pricing adjustment would arise only in the context of an audit, or a reassessment or perhaps a taxpayer's request for an adjustment because of one made under transfer pricing rules in another foreign jurisdiction. It seems unlikely to arise because the Minister chooses to review a transaction in isolation and to send a letter to a taxpayer stating that a downward transfer pricing adjustment was identified but will not be made.

[68] Nonetheless, if such a circumstance arises, and there is no appeal to the Tax Court because there is no assessment, I agree that the taxpayer's only recourse may be to seek judicial review of the Minister's decision in the Federal Court. But that so-called absurdity is not peculiar to a downward transfer pricing adjustment. In many circumstances an aggrieved taxpayer does not have a right of appeal. In some, a taxpayer unable to appeal an assessment[30] has been permitted to seek judicial review.[31] In other circumstances, a taxpayer may not be able to appeal because the result is a notice of no tax payable (i.e., a nil assessment), requiring the taxpayer to wait until a taxation year in which the amount is relevant (e.g., as part of a non-capital loss).

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[30] Otherwise than because the taxpayer failed to take appropriate timely steps to pursue its appeal.

[31] See the discussion below under section IX of these reasons.

[69] Thus, this limitation on a taxpayer's rights to challenge the decision does not persuade me that the purpose of subsection 247(11) is to permit an appeal of the Minister's decision under subsection 247(10) absent an assessment reflecting that decision.

[70] In my view, both the similarities and the differences between Part XVI.1 and Part XVI support the conclusion that the only purpose of subsection 247(11) is to permit assessments of penalties under subsection 247(3) and objections to and appeals from those assessments. As with the GAAR, any assessment based on the application of subsections 247(2) and (10), and the rights to object to and appeal from the assessment, arise elsewhere.

(3) Comparison with Other *Mutatis Mutandis* Provisions

[71] Every Part of the ITA that imposes tax or a penalty[32] allows for an appeal. Typically[33] these Parts contain a *mutatis mutandis* provision similar to subsection 247(11), that makes Division I (or parts of it) and Division J of Part I applicable for purposes of the relevant Part. While Division J (dealing with appeals to a court) invariably is made applicable in its entirety, the parts of Division I made applicable by the relevant *mutatis mutandis* provision vary. Sometimes specific provisions are identified, as in subsection 247(11), while in other circumstances all of Division I is identified,[34] notwithstanding that many parts of Division I would be irrelevant to an assessment under the relevant Part.

[72] These variances sometimes may be explained by other provisions in the relevant Part or the purpose the Part serves. For example, Parts IV.1, VI.1, X.1 and X.2 each contains a provision imposing an obligation to file a return. Their *mutatis mutandis* provisions do not incorporate subsection 150(1) – requiring a return under Part I – but sometimes incorporate subsections 150(2) and (3), entitling the Minister

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[32] That is, every Part of the *ITA* except Part I.01 (dealing with the stock option benefit deferral), Part XV.1 (dealing with reporting of electronic funds transfer), Part XVI (containing the section 245 and 246 anti-avoidance provisions) and Part XIV (containing the interpretation provisions).

[33] Parts XIII and XIII.2, which impose withholding tax, are exceptions. Assessments and appeals related to tax imposed under those Parts are addressed in subsections 227(6),(6.1),(7), (7.1), (10) and (10.1) and section 227.1 in Part XV (Administration and Enforcement).

[34] See, for example, subsections 227(10) and (10.1) in Part XV.

to demand a return and obliging certain representatives to file a return.[35] However, all incorporate at least parts of section 152 – obliging the Minister to issue an assessment after a return is filed and deeming a reassessment to be valid and binding, subject to being varied or vacated on an objection or appeal and subject to a reassessment.

[73] In contrast, Parts XIII.1 and XIV, which impose branch taxes, themselves contain no provision requiring a return. But, their *mutatis mutandis* provision refers to section 150 in its entirety, presumably thereby including the obligation to file a return with the same deadlines as provided for in Part I. And, of course, they refer to section 152 as well.

[74] Part III does not impose an obligation to file a return, and its *mutatis mutandis* provision does not incorporate any part of section 150 (related to return filing) or subsection 152(1), obliging the Minister to assess a return. Rather, Part III imposes an obligation on the Minister to assess the tax payable under Part III after receiving the capital dividend election or other relevant election. Thus, the obligation to issue an assessment is found within Part III itself. The *mutatis mutandis* provision in Part III provides for an objection to and appeal of any such assessment by incorporating by reference other relevant provisions from Division I and all of Division J.

[75] While most Parts of the *ITA* that impose tax or penalties provide that one or more of sections 150, 151, 153 and 161 (or some parts of those provisions) apply, subsection 247(11) does not. This makes sense because assessments under Part XVI.1 are limited to assessments of the penalty provided for in subsection 247(3). A return reporting a penalty is not required to be filed. Any other assessment that arises because of a transfer pricing adjustment is made under another part of the *ITA.*

[76] Subsection 247(11) refers to sections 152, 158, 159 and 162 to 167 from Division I. Section 152 deals with assessments and so is relevant to the assessment

[35] Parts X.1 and X.2 do, but Parts IV.1 and VI.1 do not.

of a penalty under section 247.[36] And, because Part XVI.1 imposes a penalty that is assessed under Part XVI.1, it is appropriate that a taxpayer be given rights to object to and appeal that assessment. With the exception of section 162, dealing with penalties, all of the provisions referred to in subsection 247(11) have some relevance to the assessment of a penalty, and rights to object and appeal. That is, none of them suggest that they are referred to for any other reason, including to permit an objection to or appeal of the Minister's decision under subsection 247(10). This is consistent with the consequence of the transfer pricing provisions, other than the penalty-related provisions, applying: the resulting assessment is not made under Part XVI.1.

[77] While the role section 162 plays in an assessment of penalties under subsection 247(3) is unclear to me, the fact that it is referred to in subsection 247(11) does not change my view. Even if I accepted the Appellant's position with respect to the expanded purpose of subsection 247(11), section 162 is neither necessary nor any more relevant.

(4) Explanatory Notes

[78] As noted above, explanatory notes or statements in the House of Commons may provide some guidance as to the purpose of the provision. The explanatory notes that accompanied subsection 247(11) are at best neutral as to whether the Appellant's or Respondent's position as to the purpose of subsection 247(11) is the better one.[37] They are certainly not sufficient to tip the balance in favour of the Appellant's position.

(5) Conclusion on Purpose of Subsection 247(11)

[79] The Appellant relies on subsection 247(11) as supporting its position that the Tax Court has the jurisdiction to review the Minister's decision under subsection 247(10). In particular, the Appellant argues that one of the purposes of

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[36] See, for example, subsections 152(4), (7) and (8). For the reasons described above, I am not convinced that the reference to a determination in subsection 152(1.2) extends to a decision under subsection 247(10).

[37] The explanatory notes state that subsection 247(11) "ensures that the provisions of Part I of the Act relating to assessments, payments, penalties, refunds, objections and appeals apply to proposed new Part XVI.1".

subsection 247(11) is to permit a taxpayer to appeal the Minister's decision under subsection 247(10) to deny a downward transfer pricing adjustment. I am satisfied that the purpose and scope of subsection 247(11) is limited to an assessment issued under Part XVI.1 – which can only be an assessment of penalties – and that it does not extend to an assessment issued under another Part of the *ITA* relying on the application of the other transfer pricing provisions in Part XVI.1.

[80] Consequently, I have concluded that subsection 247(11) does not itself permit the Appellant to challenge the Minister's decision under subsection 247(10).

[81] If, as the Appellant submits, the Minister's opinion formed under subsection 247(10) goes to the correctness of the assessment, the right to appeal that assessment already exists – in the Part of the *ITA* under which the assessment based on section 247 is issued. In those circumstances, subsection 247(11) adds nothing.

VII. **THE TAX COURT'S APPELLATE JURISDICTION**

[82] I turn now to the Appellant's second argument, that is, that the Minister's decision regarding a downward transfer pricing adjustment goes to the correctness of an assessment.

[83] An assessment is the process or operation undertaken by the Minister to confirm a taxpayer's liability under the *ITA*. The function of an assessment is to determine the tax, interest and penalties, if any, payable by a taxpayer.

[84] The Appellant argues that the discretionary power given to the Minister under subsection 247(10) is unlike any other discretionary powers given to the Minister under the *ITA* because the taxpayer's income, and therefore the tax, interest and penalties, if any, for which the taxpayer is liable, cannot be determined (assessed) until it has been exercised. Where a downward transfer pricing adjustment is established, the Minister is mandated to determine whether, in her opinion, it is appropriate in the circumstances to make the downward transfer pricing adjustment.

[85] The taxpayer has a right to appeal an assessment to the Tax Court. Therefore, argues the Appellant, the Tax Court's function in considering the correctness of the assessment includes a review of the Minister's decision regarding a downward transfer pricing adjustment.

A. Statutory Provisions Relevant to Jurisdiction in Income Tax Matters: Divided Jurisdiction

[86] The Tax Court's jurisdiction in income tax matters is limited by section 12 of the *Tax Court of Canada Act*[38] and by the *ITA*. Section 12 of the *TCCA* provides the Tax Court with "exclusive original jurisdiction to hear and determine references and appeals . . . on matters arising under" the *ITA* when provided for in the *ITA*. Thus, in the context of issues arising under the *ITA*, the Tax Court's jurisdiction is limited to what the *ITA* expressly provides.

[87] The Tax Court may hear an appeal of an assessment,[39] a confirmation or redetermination of fair market value of a property that is an ecological gift,[40] and certain specific determinations made under the *ITA*.[41] The Tax Court also has jurisdiction to decide questions of fact, law or mixed questions of law and fact[42] and to hear applications for extensions to the time for filing a notice of objection or a notice of appeal.[43]

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[38] R.S.C. 1985, c. T-2, as amended [the *TCCA*].

[39] Subsections 169(1) and 171(1).

[40] Subsections 169(1.1) and 171(1.1).

[41] Subsection 152(1.2).

[42] Sections 173 and 174. However, the Tax Court does not have exclusive jurisdiction. Under subsection 17(3) of the *Federal Courts Act*, the Federal Court has jurisdiction to determine any question of law, fact, or mixed law and fact that the Crown and any person have agreed in writing should be determined by the Federal Court. See *Bonnybrook Park Industrial Development Co. Ltd*. v. *Canada (National Revenue)*, 2018 FCA 136 at paras 17-19. See also *Bakorp Management Ltd.* v. *The Queen*, 2019 FCA 195 [*Bakorp*] where the Federal Court of Appeal observed that if an appeal is not before the Tax Court, the Tax Court does not have jurisdiction to hear a reference (at paras 34-37). That restriction would not apply to the Federal Court.

[43] Sections 166.2 and 167. The *ITA* gives the Federal Court and superior courts of the provinces jurisdiction over certain matters, including search warrants and collection in jeopardy orders, but that jurisdiction is not relevant to the issues in this decision.

[88] Jurisdiction over certain other issues arising under the *ITA* are within the exclusive jurisdiction of the Federal Court of Appeal,[44] and in such cases, neither the Tax Court nor the Federal Court has jurisdiction.[45]

[89] Under the *Federal Courts Act*,[46] the Federal Court has jurisdiction to judicially review decisions or actions of a Minister having, exercising or purporting to exercise jurisdiction or powers conferred under an Act of Parliament[47] unless an Act of Parliament expressly provides for an appeal to another court or body.[48] The objective of this limitation on the Federal Court's jurisdiction has been described as avoiding parallel proceedings in the Federal Court where a federal statute provides for an appeal in another forum.[49]

[90] As the Supreme Court of Canada put it in *Canada* v. *Addison & Leyen Ltd*.:[50]

> It is not disputed that the Minister belongs to the class of persons and entities that fall within the Federal Court's jurisdiction under s. 18.5. Judicial review is available provided the matter is not otherwise appealable.
>
> [Emphasis added.]

[91] The qualification at the end of this passage goes to the heart of this case. To the extent a decision or order of the Minister cannot be appealed to the Tax Court or the Federal Court of Appeal, it may be subject to judicial review in the Federal

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[44] See, for example, subsections 204.81(9) and 172(3).

[45] Subsection 180(2).

[46] R.S.C. 1985, c. F-7, as amended [the *FC Act*].

[47] See definition of "federal board, commission or other tribunal" in section 2, and sections 18 and 18.1 of the *FC Act*.

[48] The Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court of Canada, the Tax Court of Canada, the Governor in Council or the Treasury Board (see section 18.5 of the *FC Act*).

[49] *Walker* v. *Canada*, 2005 FCA 393 at para. 11 [*Walker*].

[50] 2007 SCC 33, [2007] 2 S.C.R. 793 at page 797 [*Addison & Leyen*].

Court.[51] However, it is equally true that if the matter can be appealed to the Tax Court, it is outside the Federal Court's jurisdiction.

[92] The relevant statutory language in section 18.5 of the *FC Act*, with particular relevance to an appeal under the *ITA* is worthy of careful consideration:

> . . . if an Act of Parliament [the ITA] expressly provides for an appeal to . . . the Tax Court of Canada . . . from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.
>
> [Emphasis added.]

[93] Section 18.5 of the *FC Act* does not distinguish between decisions arising because of the exercise of a discretionary power or by virtue of some other decision-making power. The ITA contains many provisions under which the Minister makes a decision before an assessment is issued. Some of those decisions can be challenged in the Tax Court on an appeal of the resulting assessment, and some cannot.

[94] Subsection 247(10) requires the Minister to make a decision. So, the question is whether that decision is one from which the *ITA* provides for an appeal to the Tax Court. If it does, then the Federal Court has no jurisdiction.

B. What about Parallel Proceedings?

[95] In *Canada (National Revenue)* v. *Sifto Canada Corp.*,[52] the Federal Court of Appeal recognized that the division of jurisdiction can result in parallel proceedings in the Tax Court and the Federal Court, or sometimes proceedings in the Tax Court followed by a judicial review application in the Federal Court. While that may present challenges – including a decision as to which action should proceed first –

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[51] Examples include decisions of the Minister relating to applications for a waiver of interest or penalties under what are referred to as the Fairness Provisions, as discussed later in these reasons.

[52] 2014 FCA 140 [*Sifto*].

that division is a function of Parliament's decision to restrict the Tax Court's jurisdiction in the way it has.[53]

[96] On the other hand, the Federal Court of Appeal has cautioned that courts must consider the true nature of the claim. The following passage from *JP Morgan* is apt:

> Armed with sophisticated wordsmithing tools and cunning minds, skilful pleaders can make Tax Court matters sound like administrative law matters when they are nothing of the sort. When those pleaders illegitimately succeed, they frustrate Parliament's intention to have the Tax Court exclusively decide Tax Court matters. Therefore, in considering a motion to strike, the Court must read the notice of application with a view to understanding the real essence of the application.
>
> The Court must gain "a realistic appreciation" of the application's "essential character" by reading it holistically and practically without fastening onto matters of form: *Canada* v. *Domtar Inc.*, 2009 FCA 218 at paragraph 28; *Canada* v. *Roitman,* 2006 FCA 266 at paragraph 16; *Canada (Attorney General)* v. *TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 at paragraph 78.[54]

[97] Although *JP Morgan* concerned a motion to strike, the principle outlined in this passage applies when determining whether an application for judicial review is in substance an appeal of the assessment.[55]

[98] Many applications for judicial review of ministerial decisions have been dismissed on the basis that the application amounted to an attack on the validity or correctness of an assessment, something courts have repeatedly acknowledged is within the Tax Court's jurisdiction.[56] And, the correctness of the assessment is not limited to a consideration of the amount or liability for tax but extends to "the more

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[53] *Sifto* at para. 26.

[54] *JP Morgan* at paras 49 and 50.

[55] See *Johnson* v. *The Queen (Minister of National Revenue)*, 2015 FCA 51 at paras 34-35.

[56] See, for example, *Newton* v. *Canada (National Revenue)*, 2018 FC 343; *Horseman* v. *The Queen*, 2016 FCA 252; *Garbutt* v. *The Queen*, 2016 FC 1292; *Canada Revenue Agency* v. *TeleMobile Company Partnership et al.*, 2011 FCA 89, leave to appeal to SCC refused; and *Karam* v. *Attorney General*, 2016 FCA 86, leave to appeal to SCC refused.

fundamental question of the Minister's legal authority to make the assessments."[57] That is, did the Minister properly understand or ascertain all of the relevant facts? Did the Minister properly interpret and apply the law to the facts?

[99] The question to be answered here is whether a challenge to the Minister's decision under subsection 247(10) is an attack on the correctness of the resulting assessment (either in fact or law) and therefore is a matter for the Tax Court.

C. Historical Perspective

[100] In considering this question, jurisprudence from the period during which the Exchequer Court had both appellate jurisdiction in tax matters and jurisdiction to review the actions of government ministers is illuminating.

[101] The *Income War Tax Act*[58] provided for an appeal to the Exchequer Court of an assessment of taxes imposed under that statute.

[102] In particular, a taxpayer dissatisfied with "the amount at which he is assessed, or who considers that he is not liable to taxation" under the *IWTA* first could appeal to the Minister setting out the reasons for the appeal and the relevant facts. On receiving a notice of appeal, the Minister was obliged to consider it, either affirm or amend the appealed assessment, and notify the taxpayer of his decision in writing. Following receipt of the Minister's decision, the taxpayer, if still dissatisfied, could appeal to the Exchequer Court by mailing a notice of dissatisfaction to the Minister, who was obliged to reply admitting or denying the facts alleged and confirming or amending the assessment. Within two months after making the reply, the Minister was obliged to send documents relevant to the appeal, including the notice of dissatisfaction and the reply, to the Exchequer Court. Thereafter, the matter became an action in the Exchequer Court as an appeal. Failure to meet the timelines resulted in the right of appeal being lost.[59]

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[57] *The Queen* v. *Parsons, et al*.,[1984] C.T.C. 352 (FCA).

[58] R.S.C. 1927, c. 97, as amended [*IWTA*].

[59] See the *IWTA* sections 58 to 69.

[103] This process under the *IWTA* resembles the objection and appeal process that now exists in the *ITA*: a taxpayer dissatisfied with an assessment may file an objection with the Minister, who is obliged to reconsider the assessment and either vacate, confirm, or vary it. A taxpayer who remains dissatisfied may appeal the assessment to the Tax Court. Timelines are established and, if not met, an appeal may not be available.

[104] Under the *Exchequer Court Act*,[60] the Exchequer Court had exclusive original jurisdiction in all cases in which relief was sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty.[61] This jurisdiction is similar to the judicial review jurisdiction vested in the Federal Court under the *FC Act*.

[105] The *IWTA* contained provisions related to the computation of income that depended on the Minister exercising a discretion (i.e., determining an amount). Several appeals arose in which the matter in dispute was the Minister's exercise of a discretion. The jurisprudence establishes that where the taxpayer's complaint about an assessment under the *IWTA* was grounded in the Minister's exercise of a discretion bestowed on him in the *IWTA*, the Exchequer Court's appellate jurisdiction under the *IWTA* was engaged, rather than the Exchequer Court's jurisdiction under the *EC Act*. *Pioneer Laundry & Dry Cleaners Ltd.* v. *Minister of National Revenue*[62] is an early example of such a case.

[106] In computing income for purposes of the *IWTA*, a taxpayer was not permitted any deduction for depreciation, depletion or obsolescence except as permitted by the *IWTA*.[63] Section 5 of the *IWTA* provided for a deduction of "such reasonable amount as the Minister, in his discretion, may allow for depreciation." In filing its tax return, Pioneer Laundry & Dry Cleaners Ltd. claimed depreciation in accordance with rates in a circular published by the Minister. The Minister disallowed the claim, did not

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[60] R.S.C. 1927, c. 34, as amended [the *EC Act*].

[61] Paragraph 30(c) of the *EC Act*.

[62] [1939] 4 D.L.R. 481 (Privy Council) [*Pioneer Laundry*].

[63] This is a summary of how the provisions in the *IWTA* worked. Income was defined as "annual net profit or gain" and the limitation applied for the purpose of computing annual net income or gain.

allow the company any deduction for depreciation of machinery and equipment, and assessed the company accordingly. The company appealed.

[107] The appeal failed at the Exchequer Court and the Supreme Court of Canada. However, on further appeal, the Privy Council expressed agreement with the dissenting opinion of Davis J. and Chief Justice Duff of the Supreme Court of Canada:[64] that the taxpayer had a statutory right to an allowance; the Minister had a duty to fix a reasonable amount in respect of that allowance, and that duty was an administrative duty of a quasi-judicial nature and so not final. Rather, a dissatisfied taxpayer had a right to appeal.

[108] At the Supreme Court, the dissenting judges clearly viewed the matter as an appeal of an assessment notwithstanding that the basis of the appeal was a complaint about the Minister's exercise of discretion:

> Section 60 of the Act entitles a taxpayer, after receipt of the decision of the Minister upon appeal from an assessment, if dissatisfied therewith, to appeal to the Court. The decision is appealable, but the exercise of the discretion will not be interfered with unless it was manifestly against sound and fundamental principles.[65]
>
> [Emphasis added.]

[109] The decision of the Minister referred to in this passage is the decision to affirm or amend the assessment following the taxpayer's objection to the amount assessed.[66] In their dissent, Davis J. and Chief Justice Duff said they would have allowed the appeal and referred the matter back to the Minister:

> The *Income War Tax Act* gives a right of appeal from the Minister's decisions [on the appeal of the assessment to the Minister] and while there is no statutory limitation upon the appellate jurisdiction, normally the Court would not interfere with the exercise of a discretion by the Minister except on grounds of law. But here, the Commissioner acting for the Minister, did exercise a discretion upon what I consider to be wrong principles of law and it is the duty of the Court in such

[64] [1939] S.C.R. 1. Davis J. wrote the dissenting decision on behalf of the Chief Justice and himself.

[65] *Ibid*., at page 5.

[66] See sections 58, 59 and 60 of the *IWTA*.

> circumstances to remit the case, as provided by sec. 65 (2) of the Act [the IWTA], for a reconsideration of the subject-matter, stripped of the application of these wrong principles.[67]
>
> [Emphasis added.]

[110] In other words, the challenge to the Minister's exercise of his discretion was encompassed in the right to appeal an assessment provided in the *IWTA*:

> In my view that is not a legitimate exercise of the discretion . . . . I have not the slightest doubt that the Commissioner was as anxious to do justice as I am, but the public have been given the right to appeal to the court from the decision of the Minister . . . .[68]
>
> [Emphasis added.]

and

> Here the Minister was to say what was "a reasonable amount" to be allowed for depreciation and he says, in effect – nothing. The statute expressly gives the taxpayer a right of appeal from the Minister's decision.[69]
>
> [Emphasis added.]

[111] The Privy Council agreed with the dissenting opinion and referred the matter back to the Minister, as the Chief Justice and Davis J. would have:

> Their Lordships agree with the Chief Justice and Davis J. that the reason given for the exercise of the Minister's decision was not a proper ground for the exercise of the Minister's discretion, and that he was not entitled, in the absence of fraud or improper conduct, to disregard the separate legal existence of the appellant company and to enquire as to who its shareholders were and its relation to its predecessors. . . . Their Lordships agree with the reasons given by these learned Judges [Chief Justice and Davis J.], and their application of the authorities cited by them, and it is unnecessary to repeat them.

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[67] *Supra*, note 64, at page 8.

[68] *Ibid*., at page 6.

[69] *Ibid*., at page 7.

> It follows that the assessment should be set aside, and the matter should be referred back to the respondent. . . . [70]
>
> [Emphasis added.]

[112] The *IWTA* required the Minister to determine in his discretion such reasonable amount as he might allow as depreciation. In *Pioneer Laundry*, the Minister exercised that discretion improperly and thus the matter was referred back to the Minister for reconsideration. This review of the exercise of ministerial discretion was undertaken under the authority of the *IWTA* (i.e., the right to determine an appeal on assessment). The Exchequer Court's jurisdiction under the *EC Act* was not relevant.

[113] *The King* v. *Noxzema Chemical Company of Canada, Ltd.*[71] dealt with a claim by the government for payment of excise and sales taxes under the *Special War Revenue Act*.[72] Section 98 of the *SWRA* provided that where goods were sold at a price that "in the judgment of the Minister is less than the fair price on which sales tax should be imposed", the Minister had the power to determine the fair price and tax would be payable accordingly. The government commenced an action in the Exchequer Court against Noxzema Chemical Company of Canada, Limited for payment of taxes the government claimed were due based on fair prices as determined by the Minister. Noxzema Chemical Company of Canada, Limited's defence was that it had paid all taxes for which it was liable based on what it asserted were fair prices.

[114] Unlike the *IWTA*, the *SWRA* did not provide for an appeal.[73] Nonetheless, the Exchequer Court interpreted the Minister's powers to set prices under the *SWRA* as being limited. The Supreme Court disagreed, characterizing the Minister's function in setting prices under the *SWRA* as a purely administrative one and expressing the

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[70] *Pioneer Laundry* at page 486.

[71] [1942] S.C.R. 178 [*Noxzema*].

[72] R.S.C. 1927, c. 179, as amended [the *SWRA*].

[73] This is expressly recognized in the decision of the Exchequer Court in [1941] Ex. C.R. 155 at page 169 and of the Supreme Court of Canada in *Noxzema* at page 180.

view that *Pioneer Laundry* was inapplicable. In this regard, Kerwin J. for the majority said:

> While in the *Income War Tax Act* there under review there was no appeal provided in terms from a decision of the Minister as to depreciation, there was an appeal from the determination as to the amount of taxes to be paid, and the proceedings which culminated in the decision of the Privy Council originated with an appeal taken from such determination. It was held that in arriving at the amount of the income taxes to be paid by the Pioneer Laundry & Dry Cleaners, Ltd., the Minister had actually not exercised the discretion left to him by the Act as to depreciation, and the matter was referred back to him in order that that should be done. In the present case, the Minister has considered and determined the two matters mentioned in section 98 of the *Special War Revenue Act*.[74]
>
> [Emphasis added.]

[115] In *Noxzema*, because the *SWRA* did not provide for an appeal, any jurisdiction to review the Minister's exercise of discretion presumably had to be derived from the *EC Act*.[75] Nevertheless, there was no suggestion that the Minister had not acted honestly and impartially or that the taxpayer had not been given every opportunity to be heard:

> . . . it is quite clear that the Minister acted honestly and impartially and that he gave the respondent [Noxzema] every opportunity of being heard, and, in fact, heard all it desired to place before him.[76]

[116] Thus, the two cases may stand together. The *SWRA* did not provide a right of appeal, whereas the *IWTA* did. As to the Exchequer Court's jurisdiction to provide relief against the Minister concerning the performance of his duty to set fair prices, in *Noxzema* the Minister properly exercised the discretion he had a duty to exercise. Had he not, perhaps that could be considered by the Exchequer Court under its jurisdiction to review anything done or omitted to be done by the Minister in the performance of his duty, but that was not addressed in either case. In *Pioneer Laundry*, the right to appeal the amount of taxes to be paid (i.e., the assessment)

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[74] *Noxzema* at page 185.

[75] See note 61 and associated text.

[76] *Noxzema* at page 186.

provided for in the *IWTA* permitted the Exchequer Court to examine the manner in which the discretion leading to that assessment was exercised. The jurisdiction under the *EC Act* was neither necessary nor engaged.

[117] It might be argued that *Pioneer Laundry* concluded that the Minister erred in not allowing any depreciation, when the *IWTA* mandated a reasonable amount of depreciation and, while that type of error in exercising a decision goes to the correctness of the assessment, that is an error of a different nature than the discretion under subsection 247(10). Said differently, in *Pioneer Laundry*, the Minister's error was in interpreting the statute: in concluding that no depreciation could be a reasonable amount of depreciation when the statute mandated a reasonable amount.[77]

[118] The manner in which the Supreme Court in *Noxzema* distinguished *Pioneer Laundry* might be viewed as supporting that narrower interpretation. However, subsequent cases support an interpretation consistent with the Appellant's position in this case: that *any* error of law made in exercising a discretion which must be exercised before an assessment of taxes payable is made (the error may include, but is not limited to, improperly interpreting the statutory language that bestows the discretionary power) is a matter that falls within the appellate jurisdiction of the Tax Court.

[119] Consistent with that view, in *D.R. Fraser and Co.* v. *Minister of National Revenue*[78] the Privy Council described its decision in *Pioneer Laundry* as follows: that the appellants were entitled to such deduction for depreciation as the Minister might allow and "that the Minister had not properly exercised his discretion inasmuch as he had had regard to inadmissible considerations".[79]

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[77] Following the decision in *Pioneer Laundry*, the Minister apparently reassessed the company and allowed it depreciation of $1. The company appealed that reassessment. The Exchequer Court allowed the appeal and again referred the matter back to the Minister. See [1942] Ex. C.R. 179.

[78] [1949] A.C. 24 (Privy Council) [*Fraser*].

[79] *Fraser* at page 33.

[120] *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.*[80] considered an appeal of an assessment under which the Minister disallowed commissions Wrights' Canadian Ropes Ltd. paid to another corporation. Under the *IWTA,* the Minister could disallow any salary, bonus, commission or director's fee which in the Minister's opinion is "in excess of what is reasonable . . . for the business carried on by the taxpayer". The Exchequer Court dismissed the taxpayer's appeal and the taxpayer appealed to the Supreme Court of Canada. The Supreme Court of Canada allowed the appeal and referred the matter back to the Minister. The Privy Council dismissed the Minister's appeal of that decision.

[121] Lord Greene, who gave the unanimous decision, stated:

> The word "discretion" is in truth scarcely appropriate in the context since what the Minister is required to do before he can make a disallowance [of the commissions] is to "determine" that an expense is in excess of "what is reasonable or normal for the business carried on by the taxpayer". The reference to "discretion" in this context does not in the opinion of their Lordships mean more than that the Minister is the judge of what is reasonable or normal. If the matter had stood there and there had been no right of appeal against the decision of the Minister the position would have been different from what it is. But in contrast to cases . . . where the decision of the Minister is to be "final and conclusive" a right of appeal to the Exchequer Court is given and the appeal is to be regarded as an action in that Court. This right of appeal must, in their Lordships' opinion, have been intended by the Legislature to be an effective right. This involves the consequence that the Court is entitled to examine the determination of the Minister and is not necessarily to be bound to accept his decision.[81]
>
> [Emphasis added.]

[122] It is clear from this passage that the Privy Council considered that it was the taxpayer's right of appeal under the *IWTA* (i.e., the right to appeal an assessment) that permitted the Exchequer Court to examine the Minister's determination of the reasonableness of the commission. However, it is equally clear that the right of appeal did not permit the Exchequer Court to overrule the Minister only because it would have come to a different conclusion.

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[80] [1947] 1 D.L.R. 721 (Privy Council), affirming [1946] S.C.R. 139 [*Wrights' Ropes*].

[81] *Wrights' Ropes* at page 730.

> Nevertheless the limits within which the Court is entitled to interfere are in their Lordships' opinion strictly circumscribed. It is for the taxpayer to show that there is a ground for interference and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle of law the Court, in their Lordships' opinion, cannot interfere: the section makes the Minister the sole judge of the fact of reasonableness or normalcy and the Court is not at liberty to substitute its own opinion for his. But the power given to the Minister is not an arbitrary one to be exercised according to his fancy.[82]
>
> [Emphasis added.]

[123] Putting *Wrights' Ropes* in the context of Dow Chemical's appeal, the Minister is the person responsible for forming an opinion under subsection 247(10) as to whether a downward transfer pricing adjustment is appropriate in the circumstances. The Minister is the sole judge. But, if the Minister does not form that opinion and come to her decision in accordance with proper legal principles, the Tax Court may interfere on an appeal of the assessment resulting from the Minister's decision.

[124] In *Wrights' Ropes*, the Privy Council referred to its own decision in *Pioneer Laundry* and said that the ground of attack there had been different explaining that in *Pioneer Laundry*, the Minister gave a reason for his decision which was not supportable in law, whereas in *Wrights' Ropes* the Minister had given no reasons for his decision. The Privy Council agreed that the *IWTA* did not require the Minister to provide reasons for his decision to disallow the expense. But that, in the Privy Council's view, did not disentitle the taxpayer to its appeal.

> But this does not necessarily mean that the Minister by keeping silence can defeat the taxpayer's appeal. To hold otherwise would mean that the Minister could in every case or at least the great majority of cases render the right of appeal given by the statute completely nugatory. The Court is, in their Lordships' opinion, always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the Court insufficient in law to support it the determination cannot stand. In such a case the determination can only have been an arbitrary one. If, on the other hand, there is in the facts shown to have been before the Minister sufficient material to support his determination the Court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion. As has already been said, the Minister is by the subsection made the sole judge of the fact of reasonableness

[82] *Wrights' Ropes* at page 730.

> and normalcy but as in the case of any other judge of fact there must be material sufficient in law to support his decision.[83]
>
> [Emphasis added.]

[125] That is to say, the Exchequer Court's role was not to determine what is reasonable – the legislators gave that power to the Minister. But, the Exchequer Court's role on an appeal of an assessment was to ensure that the Minister's determination was well-founded in law and supported by the facts.

[126] In the context of Dow Chemical's appeal, under subsection 247(10), before the Minister can assess a taxpayer who has established a downward transfer pricing adjustment, she is required to determine whether, in her opinion, it would be appropriate to make that adjustment in the circumstances. The Minister's opinion is not stated to be final and conclusive. The *ITA* provides Dow Chemical with a right to appeal the assessment. That right must be intended to be an effective right. Accordingly, under its appellate jurisdiction, the Tax Court is entitled to examine the Minister's opinion (and resulting decision) on the appropriateness of making a downward transfer pricing adjustment in the circumstances and to consider whether it was well-founded in fact and law. If it was not, then how can it be said that the assessment based on that opinion is correct?

[127] *Nicholson Ltd.* v. *Minister of Natioanl Revenue*[84] also dealt with the disallowance of an expense under subsection 6(2) of the *IWTA.* The Exchequer Court itself described the case as an appeal that:

> raises squarely for the first time in Canada the question whether the Court under its appellate jurisdiction may review the actual exercise of discretionary powers vested by the Act in the Minister where such exercise may affect the assessment under appeal and substitute its own opinion for the Minister's discretion.

[128] After examining the scheme for appeal provided by the *IWTA*, the subject matter of the appeal, and the Exchequer Court's jurisdiction, Thorson J. concluded that: (i) the *IWTA* provided the taxpayer with a right of appeal; (ii) the appeal was from the assessment; (iii) a taxpayer could appeal the assessment on grounds of fact

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[83] *Wrights' Ropes* at page 731.

[84] [1945] 4 D.L.R. 683 (Ex. Crt.) [*Nicholson*] at page 685.

as well as law; and (iv) the Exchequer Court's jurisdiction was to consider the correctness of the assessment under appeal.

[129] While the taxpayer argued that the Exchequer Court's appellate jurisdiction gave it the power and duty to exercise the discretion given to the Minister, this proposition was rejected by Thorson J. Although he acknowledged the Exchequer Court's broad appellate jurisdiction under the *IWTA*, in his view a:

> . . . distinction must be drawn between the Minister's determination and the assessment; they are not the same; the determination must be made before the assessment can be levied. The facts before the Minister do not enter into the assessment; it is the Minister's determination that does so. The determination itself is, therefore, a fact connected with the assessment. The facts before the Minister are connected with his determination but not with the assessment. The issues before the Minister on his determination and the Court on the appeal to it are not the same. I can find no support anywhere for the view that the Court may try *de novo* matters left by Parliament for determination by the Minister in his discretion. What is before the Court is an appeal from the assessment, not an appeal from the Minister's determination. The sole issue before the Court in an appeal under the *Income War Tax Act* is whether the "assessment under appeal" is correct in fact and in law. If it is, the appeal must be dismissed; if not, it must be allowed.[85]

[130] Although by itself this passage might be viewed as suggesting that the Exchequer Court had no role under its appellate jurisdiction, read in the context of the entire judgment that was not the point being made. Rather, Thorson J.'s position was that the appellate jurisdiction had limits: although it allowed the Exchequer Court to examine the Minister's discretionary decision underlying the assessment to determine whether it was supportable, it did not allow the Exchequer Court to put itself in the Minister's shoes and substitute its decision for that of the Minister.

[131] However, he was clear that the result of the Minister's exercise of the discretion (i.e., the Minister's determination) is a fact connected with the assessment. Therefore, the Minister's determination is a fact that the Exchequer Court could examine on an appeal of an assessment – because a taxpayer may appeal an assessment on the grounds of fact as well as law.

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[85] *Nicholson* at page 692.

[132] The *ITA* contains many provisions that require the Minister to make a determination before an assessment can be issued, although most of them would not be described as discretionary. For example, before issuing an assessment, the Minister must determine whether interest payable is in excess of a reasonable amount (per paragraph 20(1)(c)); the tax consequences to a taxpayer following the application of the GAAR (per subsection 245(2)); whether unrelated persons deal with each other at arm's length as a matter of fact (per paragraph 251(1)(c)); or whether *bona fide* arrangements were made for repayment of a shareholder loan (per subsection 15(2.4)). Each of these determinations, like the determination under subsection 247(10) (whether the downward transfer pricing adjustment is appropriate in the circumstances) is, using Thorson J.'s language, one that "must be made before the assessment can be levied" and is "a fact connected with the assessment". Facts connected with an assessment go to the correctness of the assessment and so can be challenged on an appeal of the assessment.

[133] It is true that in subsection 247(10) Parliament has given the Minister the power to decide whether a downward transfer pricing adjustment is appropriate in the circumstances, a characteristic of this power not shared with other determinations of the nature referred to in the preceding paragraph. But what is the consequence of this distinction? In my view, the distinction (and the jurisprudence) does not support the proposition that the Tax Court's appellate jurisdiction does not extend to challenges to both types of determination. Rather, the distinction is relevant only to the Tax Court's role (or standard of review) on the appeal of the assessment. Nothing in the *ITA* or the jurisprudence suggests to me that the determinations are so fundamentally different that one must be addressed by the Tax Court, but the other cannot be. In my view, the function of each of these determinations in the assessment process is the same; all go to the correctness of the assessment, and all can be challenged on an appeal of the assessment to the Tax Court.

[134] But how far the Tax Court can go on the appeal of an assessment attacking the Minister's decision under subsection 247(10) is a different question. While not relevant in the matter before him, Thorson J. strongly suggested that the Exchequer Court's appellate jurisdiction under the *IWTA* extended to a review of the manner in which the discretion was exercised by the Minister, but not to changing the result where the Minister had properly exercised the discretion.

> The Minister's discretion . . . must be exercised in a proper manner. If in making his determination he has not acted judicially, within the meaning of the cases cited, he has not exercised the discretion required by the section at all, and if his determination so made is included in an assessment, the assessment is, to such extent, incorrect. Whether the discretion has been exercised in a proper manner is, therefore, a question connected with the assessment over which the Court has jurisdiction. Indeed, the Court owes a duty of supervision over the manner of its exercise in order to ensure that the Minister acts as the law ordains. The fact that it has appellate jurisdiction does not alter the nature of the principles to be applied in its duty of supervision; they are the same as those applied by the Courts in the *certiorari* and *mandamus* cases. This was settled in *Pioneer Laundry*. . . .[86]
>
> [Emphasis added.]

[135] That is to say, where the determination is a fact on which the assessment is based, whether the determination was made in a proper manner is a question connected with the assessment over which the Exchequer Court had jurisdiction. Moreover, that jurisdiction was part of its appellate jurisdiction under the *IWTA*: its jurisdiction to determine whether the assessment is correct in fact and law.

[136] But, in the case before him, there was no suggestion that the Minister had not acted judicially in exercising his discretion. Thus, *Nicholson* turned on whether the Exchequer Court's appellate jurisdiction extended to permitting the Court to substitute its decision for that of the Minister. Thorson J.'s view was that it did not, and accordingly he dismissed the appeal.

[137] In *Pure Spring Co.* v. *Minister of National Revenue*[87] Thorson P. again was faced with an appeal challenging the Minister's exercise of discretion under subsection 6(2) of the *IWTA*. In that decision, he stated more clearly what he suggested in *Nicholson*: on an appeal of an assessment under the *IWTA*, when it comes to the Minister's exercise of a discretion he has been granted, the Exchequer Court's duty is supervisory. But, that supervisory duty is derived from its appellate jurisdiction, i.e., the jurisdiction to determine whether an assessment is correct in fact and law:

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[86] *Ibid*., at page 694.

[87] [1947] 1 D.L.R. 501 (Ex. Crt.) [*Pure Spring*].

> The fact that access is had to the Court by way of an appeal from the assessment and not on an application for *certiorari* or *mandamus* does not alter the nature of the Court's duty of supervision or the principles to be applied.[88]

[138] That is, the principles to be applied on an appeal of an assessment challenging the exercise of ministerial discretion are the same principles that apply in another context. But, the duty to apply them is derived from the Exchequer Court's appellate jurisdiction to determine whether the resulting assessment is correct in fact and law. Again, Thorson P. was not persuaded that the right of appeal in the *IWTA* gave the Exchequer Court the right to exercise the discretion granted to the Minister. In his view, that power was vested only in the Minister:

> Counsel for the appellant strongly contended that the provisions for appeal in the *Income War Tax Act* gave the Court a wider power of supervision over the Minister's discretionary powers under the Act than it would have had if it had been confined to supervision by way of the prerogative writs of *mandamus* or *certiorari*; that the aggrieved taxpayer was always entitled to the protection afforded by the Court's power to issue such writs, but that his right of appeal under the Act gave him a statutory right in addition to his rights at common law; and he argued that under its appellate jurisdiction the Court was vested with the same discretionary power as the Minister, could review its actual exercise by him and substitute its own discretion for his. In my view, no support can be found for these propositions.[89]

[139] Thorson P. referred to his own decision in *Nicholson*[90] and explained that he had there concluded that the right of appeal did not carry with it any right of appeal from the Minister's determination. But, what he meant is that the right of appeal did not allow the Exchequer Court to exercise the discretion under its appellate jurisdiction. He identified the difference between the Minister's discretionary determination and the assessment levied by the Minister after that determination as follows:

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[88] *Pure Spring* at page 516.

[89] *Pure Spring* at pages 522-523.

[90] In *Pure Spring*, Thorson P. refers to *Nicholson* being under appeal to the Supreme Court of Canada. It appears that a notice of appeal (or perhaps application for leave to appeal) was filed on November 5, 1945 and an order was issued on June 17, 1946. However, the nature of the order is unknown. There is no record suggesting that the Supreme Court of Canada heard an appeal.

> The two operations are quite separate and distinct in point of time and scope of substance and the Minister's functions in respect of them are fundamentally different in character. The Minister's discretionary determination must be made before the assessment operation can be performed. It is, of necessity, antecedent in point of time . . . .The two functions also differ fundamentally in character. In so far as the Minister's determination may involve duties of a quasi-judicial nature such as, for example, giving the taxpayer an opportunity to make his representations, he must perform them. In the assessment operation, on the other hand, there are no quasi-judicial duties of any kind to be performed. The operation is solely administrative. There is an even more vital difference. The determination involves the exercise of a discretion of a policy nature, that is legislative in effect. When that function is finished, all that the Minister need consider in respect of this item, when he comes to the assessment operation, is the amount of his statutory determination. The assessment operation is quite different; no exercise of discretion is involved.[91]
>
> [Emphasis added.]

[140] While Thorson P. clearly concluded that determining the amount of reasonable expense was a discretion only the Minister could exercise, he was equally clear that the right to appeal an assessment permitted the Court to intervene when, in exercising that discretion, the Minister did not apply proper legal principles. That, he said, was not an exercise of the discretion at all. In other words, in those circumstances, the Minister has not performed the function required by the legislation, and the resulting assessment is incorrect because it is not founded in law.

[141] He returned to this principle again and again:

> The right of appeal is a substantive right and the Court must not extend it beyond the purpose for which it was conferred. The purpose of providing an appeal from the assessment is to ensure to the taxpayer that it shall be correct in fact and in law.[92]

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[91] *Pure Spring* at pages 527-28. More recently, in *742190 Ontario Inc. (Van Del Manor Nursing Homes)* v. *Canada (Customs and Revenue Agency)*, 2010 FCA 162, the Federal Court of Appeal described the assessment process as follows (at para. 6): "The word 'assessment' generally refers to the determination by the Minister of the amount of a person's liability, and includes the act of making the determination and the product of the determination . . ." [Emphasis added.]

[92] *Pure Spring* at page 529.

[Emphasis added.]

> The Court is concerned only with the question whether the Minister has not actually exercised the discretion that Parliament has vested in him. If it appears that the Minister has applied proper legal principles in arriving at his determination the Court has no further supervisory duty in the matter.[93]

[Emphasis added.]

> If the discretion has actually been exercised it cannot be interfered with at all; what is meant is that if the purported exercise of discretion is manifestly against sound and fundamental principles it is not the exercise of discretion contemplated by the Act.[94]

[Emphasis added.]

[142] Put another way, although not stated expressly in the legislation, it is a principle of law that a discretion must be exercised judicially. Thorson P. described acting judicially as exercising the discretion fairly and honestly and in accordance with sound and fundamental principles. If the Minister does not so act, he has not exercised the discretion at all and the resulting assessment is not correct in law.

[143] Other cases similarly have concluded that the manner in which a discretionary power is exercised may be challenged on an appeal of an assessment.[95]

[144] A review of the jurisprudence leads me to conclude that, where a taxpayer claims an entitlement to a downward transfer pricing adjustment, the Minister's

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[93] *Pure Spring* at page 531.

[94] *Pure Spring* at page 531.

[95] See, for example, *Stewart* v. *Minister of National Revenue*, 50 DTC 449 (T.A.B.), *Donald Tecklenburg Brown* v. *Minister of National Revenue*, 50 DTC 156 (T.A.B.) and *Anger* v. *Minister of National Revenue*, 49 DTC 65 (T.A.B.), each dealing with the discretion under paragraph 6(1)(n) of the *IWTA*; *Estate of Norman K. MacDonald* v. *Minister of National Revenue*, 50 DTC 109 (T.A B.) dealing with Minister's discretion to set the value of a gift under the *IWTA*; and *Minister of National Revenue* v. *Robertson*, [1954] Ex. C.R. 321 dealing with the Minister's discretion to determine a taxpayer's chief source of income under the *Income Tax Act*, S.C. 1948. See also *Quebec (Sous-ministre du Revenu)* v. *Vezeau*, 1995 CanLII 4733 (QCCA), discussed in note 126.

decision under subsection 247(10), like the decisions the Minister was required to make under the *IWTA*, has to be made by the Minister before any assessment of a taxpayer's taxes can be made. That decision must be made judicially, i.e., in accordance with proper legal principles. If it is not, then the resulting assessment is incorrect. Thus, on an appeal of the resulting assessment, under its appellate jurisdiction, the Tax Court is both permitted and required to review the manner in which the Minister came to her determination under subsection 247(10).

VIII. **DOES JURISPRUDENCE CONSIDERING THE TAX COURT'S APPELLATE JURISDICTION UNDER OTHER STATUTES SUGGEST A DIFFERENT ANSWER TO THE QUESTION?**

[145] The Tax Court's jurisdiction is not limited to appeals under the *ITA*, and it is clear that under other legislation the Tax Court may review discretionary decisions made by the Minister under its appellate jurisdiction. Thus, the conclusion is this case is not a novel interpretation of the scope of the Tax Court's jurisdiction.

[146] Under the *Employment Insurance Act*,[96] insurable employment is one of the key determinants of entitlement to benefits. In that context, employment will not be insurable if the employer and employee are not dealing with each other at arm's length.[97] The *EIA* incorporates by reference the meaning of arm's length under the *ITA* with one notable and important exception.

[147] Where the employee and employer are related, the *ITA* would deem them to not deal with each other at arm's length. However, under the *EIA*, if the Minister is satisfied, having regard to all the circumstances of employment, that it is reasonable to conclude that a related employer and employee would have entered into a substantially similar contract of employment had they been dealing with each other at arm's length, they are deemed not to be related.[98] Thus, the Minister must exercise a discretion (she must be satisfied) and decide whether the employment of an employee related to the employer should be considered insurable employment.

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[96] S.C. 1996, c. 23 [the *EIA*].

[97] See paragraph 5(2)(i) of the *EIA*.

[98] See paragraph 5(3)(b) of the *EIA*.

[148] On request, a ruling may be sought as to whether particular employment of a related person is insurable.[99] That ruling may be appealed to the Minister and then to the Tax Court. On an appeal of a ruling, the Tax Court may vacate, confirm or vary the Minister's decision; the *EIA* does not permit the Tax Court to refer the matter back to the Minister for reconsideration.[100]

[149] Notwithstanding that a ruling with respect to the status of employment of a related person as insurable is based on the Minister being satisfied as to the "substantially similar" nature of the contract of employment, it is clear that under its appellate jurisdiction the Tax Court may vary the Minister's decision. In doing so, the Tax Court must approach the appeal with judicial review principles in mind. That is, the Tax Court must decide whether the evidence establishes "that the Minister acted in bad faith, or capriciously or unlawfully, or based his decision on irrelevant facts or did not have regard to relevant facts."[101] Where the Tax Court finds the Minister did not act as he or she should have, the Court may substitute its decision for that of the Minister. The power to do so arises because the Tax Court has the ability to vary the Minister's decision:

> Once the Tax Court is of the view that the Minister's determination cannot stand, its power to "vary" under subsection 70(2) of the **Act** implies it can exercise fully the powers given to the Minister by the **Act**. There is, in my view, no reason to distinguish between a quasi-judicial decision rendered by the Minister . . . and a discretionary one . . ..[102]
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> [Emphasis added.]

[150] In fulfilling this role, the Tax Court is not deciding whether the Minister's decision was correct, but rather whether it resulted from the proper exercise of

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[99] See section 90 of the *EIA*.

[100] See subsection 103(3) of the *EIA*.

[101] *Elia* v. *Minister of National Revenue*, [1998] 3 C.T.C. 198 (FCA) at para. 2.

[102] *Tignish Auto Parts Inc*. v. *Minister of National Revenue* (1994), 185 N.R. 73 (FCA) at para. 18.

discretionary authority.[103] The Federal Court of Appeal described it this way in *Legere* v. *Minister of National Revenue*:[104]

> The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.
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> [Emphasis added.]

[151] The Minister's power to treat related persons as at arm's length is discretionary. Nonetheless, it is clear that it is subject to review by the Tax Court under its appellate jurisdiction over the Minister's ruling. Deference must be given

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[103] *Ferme Emile Richard et Fils Inc*. v. *Minister of National Revenue et al*., (1994), 178 N.R. 361 (FCA).

[104] 1999 CarswellNat 1458, [1999] F.C.J. No. 878 (QL) (FCA). More recent jurisprudence has suggested that the Tax Court's function may go somewhat farther but nonetheless is clear that the opinion is that of the Minister:

> The function of an appellate judge is thus not simply to consider whether the Minister was right in concluding as he did based on the factual information which Commission inspectors were able to obtain and the interpretation he or his officers may have given to it. The judge's function is to investigate all the facts with the parties and witnesses called to testify under oath for the first time and to consider whether the Minister's conclusion, in this new light, still seems "reasonable" (the word used by Parliament). The **Act** requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs him not simply to substitute his own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood.
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> [Emphasis added.]

Per *Perusse* v. *Minister of National Revenue* (2000), 261 N.R. 150 at para. 15, application for leave to appeal to the Supreme Court of Canada denied. See also *Valente* v. *Canada (Minister of National Revenue)*, 2003 FCA 132 and *Massignan* v. *Canada (Minister of National Revenue)*, 2003 FCA 172.

to the person exercising the discretion unless and until it is determined that that person has exercised the discretion in a manner contrary to law.[105]

[152] Thus, the scope of the Tax Court's appellate jurisdiction, as it has been interpreted under the *EIA,* is entirely consistent with the scope of its appellate jurisdiction over an assessment as interpreted by the *IWTA* jurisprudence reviewed above.

IX. **DO THE POWERS OF THE COURT ON AN APPEAL OF AN ASSESSMENT SUGGEST A DIFFERENT ANSWER TO THE QUESTION?**

[153] A taxpayer has a right to appeal to the Tax Court to have an assessment vacated or varied. Once the appeal has been determined, the only options available to the Tax Court are:

a) to dismiss the appeal – effectively confirming the assessment; or

b) to allow the appeal and in conjunction with that do one of three things:

   i) vacate the assessment,

   ii) vary the assessment, or

   iii) refer the assessment back to the Minister for reconsideration and reassessment.[106]

[154] These rights are similar to the obligations the Minister has when a taxpayer files a notice of objection. The Minister must "reconsider the assessment and vacate, confirm or vary the assessment or reassess" and notify the taxpayer in writing.[107]

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[105] *Minister of National Revenue* v. *Jencan Ltd.*, (1997), 215 N.R. 352 (FCA).

[106] Subsection 171(1).

[107] Subsection 165(3).

[155] The jurisprudence concerning the Exchequer Court's appellate jurisdiction in income tax appeals, and the Tax Court's jurisdiction under the *EIA,* confirms that a court should be reluctant to substitute its opinion for the one the Minister forms under subsection 247(10) because Parliament granted the power to determine what is appropriate in the circumstances to the Minister. However, the powers available to the Tax Court on an appeal of an assessment under the *ITA* are entirely consistent with this principle.

[156] On an appeal of an assessment under the *ITA*, the Tax Court may refer the matter back to the Minister for reconsideration and reassessment, a power it does not have on appeal of a ruling under the *EIA*. Thus, if, on Dow Chemical's appeal, the Tax Court concludes that the Minister did not act appropriately (i.e., judicially) in forming her opinion under subsection 247(10), the Tax Court may refer the matter back to the Minister for reconsideration and reassessment applying the proper principles.

[157] The Respondent contends that the power to refer the matter back does not assist the Appellant's case because the word "and" in the phrase "reconsideration and reassessment" must be read conjunctively. If the Tax Court refers the matter back, but the Minister, applying the proper principles, comes to the same conclusion, then, says the Respondent, the Minister would not reassess. Therefore, the limitations on the Tax Court's powers on an appeal support its position that the matter is outside the Tax Court's jurisdiction. That is, the Tax Court cannot refer the matter back for reconsideration and reassessment, because following reconsideration the Minister may not need to issue a reassessment.

[158] The Appellant does not agree with this position, arguing that even if the "and" is properly read as conjunctive, nothing precludes the Minister from issuing a reassessment following the Minister's reconsideration even if that reassessment assesses the same amount of tax as the appealed assessment. The difference, says the Appellant, is that where the Minister applies the correct principles, the reassessment will be correct but the appealed assessment, made applying incorrect principles, cannot be said to be correct.

[159] I agree that the limitations on the Tax Court's powers on hearing an appeal of an assessment do not preclude a conclusion that the Tax Court's appellate jurisdiction permits it to review the Minister's decision under subsection 247(10).

[160] First, the jurisprudence in the *EIA* context suggests that the ability to vary the assessment may allow the Tax Court to substitute its decision for that of the Minister where the Tax Court is not satisfied that the Minister has exercised the discretion properly. While the Tax Court presumably would (and should) be reluctant to do so, because Parliament decided that the Minister should form the requisite opinion, the Tax Court may have the power to make the decision the Minister "should" have made.

[161] Secondly, older jurisprudence suggests that the Tax Court may have an implied jurisdiction to refer the matter back under its appellate jurisdiction. In *Pure Spring*, Thorson P. expressed the view that the Exchequer Court could not substitute its opinion for that of the Minister. In delivering that decision,[108] he had the benefit of the Supreme Court's decision[109] in *Wrights' Ropes*, but not the decision of the Privy Council.[110] In *Wrights' Ropes*, the Privy Council did not view a reference back to the Minister for reconsideration as desirable. Rather, it decided that the assessment should be referred back to the Minister for an adjustment on the basis that the amounts disallowed by the Minister should be allowed – in other words, for reassessment without reconsideration. That order, the Privy Council said, could be made under the Court's inherent jurisdiction. Lord Greene, who gave the unanimous decision of the Privy Council, stated:

> On consideration of the reasons for judgment of the Supreme Court their Lordships are of opinion that in allowing the appeal it was intended to decide that the disallowances complained of were to be set aside once and for all and that the reason for referring the matter back to the Minister was merely to enable him to adjust the assessments in accordance with this decision. That, in the opinion of their Lordships, was the correct order to make, but the reference back to the Minister for this purpose could and should have been made under the inherent jurisdiction of the Court and not under s. 65(2). It cannot be doubted that when the Court has answered a question submitted to it in such way as to necessitate a revision of the

[108] August 26, 1946.

[109] January 24, 1946.

[110] December 11, 1946.

> assessment it has inherent jurisdiction to send the assessment back for that purpose instead of being bound itself to make the consequential alterations.[111]
>
> [Emphasis added.]

[162] Although the Privy Council used the phrase "inherent jurisdiction", a more appropriate term today might be "implied jurisdiction", that is, by implication the Tax Court has all the powers reasonably necessary to accomplish its mandate, which includes determining the appeal of an assessment.[112] In this regard, the Supreme Court of Canada has said:

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[111] *Wrights' Ropes* at pages 733-34. Subsection 65(2) of the *IWTA* stated:

> 65. After an appeal has been set down for trial or hearing as above provided, any fact or statutory provision not set out in the said notice of appeal or notice of dissatisfaction may be pleaded or referred to in such manner and upon such terms as the Court or a judge thereof may direct.
>
> 2. The Court may refer the matter back to the Minister for further consideration.

Interestingly, in *Pioneer Laundry*, the Privy Council endorsed and adopted the reasoning of the dissent in the Supreme Court of Canada. In those reasons, Davis J and the Chief Justice would have relied on subsection 65(2) of the *IWTA*. While the Privy Council, like the dissenting judges in the Supreme Court, concluded that the assessments should be set aside and the matter referred back to the Minister, in doing so it did not express any views on the scope of subsection 65(2). In contrast, in *Wrights' Ropes*, the Privy Council concluded that the "power conferred on the Court . . . to 'refer the matter back to the Minister for further consideration' is, in their Lordship's [*sic*] opinion, limited to cases of the kind referred to in" subsection 65(1) of the *IWTA*, being "matters not referred to in the notice of appeal or notice of dissatisfaction." (See page 733.)

[112] See *407 International Inc.* v. *The Queen*, 2019 TCC 245 at paras 15 and 16 [*407*]. In *Windsor (City)* v. *Canadian Transit Co.*, 2016 SCC 54 [*Windsor*], the Supreme Court stated that a statutory court created under section 101 of the *Constitution Act, 1867*, as both the Federal Court and the Tax Court are, only has jurisdiction conferred by statute and has no inherent jurisdiction. But, the Exchequer Court also was a section 101 court, as recognized by the Supreme Court of Canada in *Windsor*. The description, of what Lord Greene in *Wrights'* Ropes referred to as an inherent jurisdiction of the Exchequer Court, is consistent with the description of an implied jurisdiction in *407*: in *Wrights' Ropes*, the answer to the question submitted to it (was the assessment correct in law) necessitated a revision of the appealed assessment. Thus, on an appeal of the assessment, the Exchequer Court had the implied jurisdiction to refer it back.

> . . . the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime . . . .[113]

[163] This has been referred to as the "doctrine of jurisdiction by necessary implication".[114] The notion is that the Tax Court's power to hear and determine an appeal of an assessment should be construed to permit it to refer the matter back to the Minister for reconsideration without reassessment, if on reconsideration no reassessment is necessary.

[164] But, regardless of whether the implied jurisdiction of the Tax Court under the *TCCA* goes that far, and I confess some doubt that it does, I agree with the Appellant that the "and" in the expression "for reconsideration and reassessment" does not put the Minister's determination under subsection 247(10) outside the Tax Court's appellate jurisdiction. To read the "and" in the way the Respondent suggests would be construing the provision in a manner contrary to Parliament's intention that the Tax Court, a specialized court, hear and determine appeals of assessments. The warning from the Supreme Court in *Addison & Leyen* applies here:

> . . . The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.[115]
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> [Emphasis added.]

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[113] *ATCO Gas & Pipelines Ltd.* v. *Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51; *R* v. *Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331 at para. 19, and *High-Crest Enterprises Limited* v. *Canada*, 2017 FCA 88 at para. 39.

[114] *R.* v. *Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331 at para. 19.

[115] *Addison & Leyen*, at para. 11. Cited with approval in *1099065 Ontario Inc.* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 47 and in *JP Morgan.*

[165] On an appeal of an assessment, if the Tax Court finds that the Minister did not form her opinion under subsection 247(10) properly, the appealed assessment is not correct. Therefore, the Tax Court may refer the assessment back to the Minister for reconsideration and reassessment, applying the proper principles. Following a reconsideration applying those proper principles, the basis of the assessment is changes, even if the amount assessed does not.[116] In accordance with the Tax Court's judgment that the Minister reconsider the appealed assessment and reassess, the Minister then would be required to issue a reassessment. While the income and tax assessed in that reassessment may reflect the same amount of income and tax as the appealed (incorrect) assessment, that does not make the appealed (incorrect) assessment correct – it was not, because it was not supportable in law.[117]

[166] In contrast, the powers of the Federal Court on a judicial review are not suited to a challenge to the Minister's determination under subsection 247(10). Those powers are limited by section 18 of the *FC Act*. Notably, as observed in *JP Morgan*, the Federal Court is not permitted to vary, set aside or vacate an assessment.[118]

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[116] This result is not peculiar to this circumstance. For example, a taxpayer's return may be assessed on the basis that her income is $50,500. The Minister may subsequently reassess the taxpayer to disallow a $500 expense she had claimed and the Minister had allowed on initial assessment, but to allow a different $500 expense claimed by the taxpayer but disallowed by the Minister on the initial assessment. The reassessment makes no difference to the taxpayer's tax, but the basis on which the income (and resulting tax) were assessed in the first assessment was incorrect.

[117] Of course, there also will be circumstances when the manner in which the Minister exercised the discretion is not the only ground of appeal, even where the only grounds of appeal relate to the application of the transfer pricing provisions. For example, the amount of the transfer pricing adjustment, whether the non-resident deals at arm's length with the taxpayer, and whether the penalty is imposed appropriately, also may be in dispute. If the taxpayer succeeds on one or more other issues, a reassessment will be required. However, even where, as in Dow Chemical's appeal, the only issue is the correctness of the Minister's decision under subsection 247(10), the Tax Court's powers on an appeal of an assessment provide an appropriate remedy.

[118] *JP Morgan* at para. 92.

[167] Where a taxpayer disagrees with the Minister's decision under subsection 247(10), "the 'essential character' of the relief sought is the setting aside of an assessment", and that is beyond the powers of the Federal Court.[119]

X. IS THE ANSWER TO THE QUESTION INCONSISTENT WITH THE PRINCIPLE THAT JUDICIAL REVIEW IN THE FEDERAL COURT IS THE PROPER FORUM TO CHALLENGE OTHER DISCRETIONARY DECISIONS MADE BY THE MINISTER UNDER THE *ITA*?

[168] The Respondent argues that any review of a discretionary power of the Minister under *the ITA* must be by way of judicial review in the Federal Court. The Respondent refers to the many cases in which the Federal Court has undertaken a judicial review of discretionary decisions of the Minister under the *ITA*.

[169] The Appellant agrees that the Federal Court is the proper forum for judicial review of certain of the Minister's discretionary powers. However, the Appellant's position is that the Minister's discretion to allow or deny a downward transfer pricing adjustment is unlike any other discretionary power in the *ITA*. This distinction, says the Appellant, is what makes the Tax Court the proper forum for a challenge to the Minister's refusal to process a downward transfer pricing adjustment.

[170] In light of the jurisprudence, I do not agree with the Respondent that because the Minister's power under subsection 247(10) may be described as discretionary, it is thereby "automatically" outside the Tax Court's jurisdiction. That, in my view, is too general a proposition. I have not been referred to any case that has gone that far. In my view, the jurisprudence reviewed above supports the contrary conclusion. Still, there is no doubt that many discretions the Minister may exercise under the *ITA* are outside the Tax Court's jurisdiction. However, a review of the nature of these discretionary powers provides important context.

[171] Discretions granted to the Minister under the *ITA* may be divided into three broad categories:

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[119] *JP Morgan* at para. 93.

1. Discretions related to the waiver of interest, penalties or taxes;[120]

2. Discretions related to the waiver of compliance with timelines, filing requirements or other documentary requirements under the ITA or to decide whether to assess a taxpayer;[121] and

3. Discretions directly related to computations of income, taxable income or tax[122] under a provision of the ITA.

[172] Subsection 247(10) falls into the third category, but it is not the only provision that does.

[173] The Appellant's position is that unlike the first two categories of discretions, subsection 247(10) does not involve a waiver or relaxation of the strict application of a provision in the *ITA* or a purely administrative decision of the Minister regarding administrative action she may, but is not obliged to, take under the *ITA*. Rather, says the Appellant, the Minister must make a determination under subsection 247(10) before she is entitled to assess. The two actions – the determination and the resulting assessment – are inextricably linked, and so the determination goes to the correctness of the assessment.

A. The Fairness Provisions

[174] Subsection 152(4.2) permits the Minister to reassess an individual's tax, interest and penalties beyond the normal reassessment period where the individual

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[120] This category includes discretions described in sections 207.06, 207.64 and 207.8 (waiver of taxes), and section 161.3 and subsection 220(3.1) (waiver of interest and penalties).

[121] This category includes discretions like those in subsection 165(6) (acceptance of notice of objection not served in manner required); subsection 212(5.3) (reduction of withholding tax); subsection 220(2.1) (waiver of requirement to file a document); subsection 220(3.2) (late filing of elections or filing amended elections); and those that permit (but do not require) the Minister to assess, such as section 160 or subsections 152(4.2) and 227(10) to (10.1).

[122] In this third category, I am not referring to provisions that permit the Minister to waive tax otherwise payable but rather to provisions that go to the computation of tax liability in the first instance.

seeks a reassessment for the purpose of determining a refund or reduction of an amount payable under the *ITA*.

[175] Subsection 220(3.1) permits the Minister to waive interest and penalties payable under the *ITA*. Where the Minister chooses to do so, the Minister must make an assessment to take such decision into account. Subsection 220(3.1) expressly states "any assessment of the interest and penalties shall be made that is necessary to take into account the cancellation of the penalty or interest."[123]

[176] Subsection 220(3.2) permits the Minister to extend the time for filing an election, to agree that an election may be amended, or to agree that an election may be revoked. Where the Minister does so, the Minister is obliged under subsection 220(3.4) to assess the tax, interest and penalties payable by each affected taxpayer as is necessary to take into account the election, amended election or revocation of an election.

[177] Collectively, these provisions in the *ITA* are referred to as the Fairness Provisions.

[178] The Minister's decision to deny relief, or to grant only partial relief, under the Fairness Provisions cannot be appealed under the *ITA*. But why is that the case?

[179] In the case of an assessment made following the Minister agreeing to a taxpayer's request under subsection 152(4.2), the *ITA* expressly states that any resulting reassessment cannot be the subject of an objection or appeal. The same is true where the Minister reassesses to waive all or part of the taxpayer's interest and penalties under the Fairness Provisions.[124] While an assessment issued in reliance on subsection 220(3.4) may be the subject of an objection or appeal, the grounds of

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[123] The obligation to reassess was not in the original version of subsection 220(3.1) but was added with effect from the date that subsection 220(3.1) became applicable. See subsection 181(1) of S.C. 1994, c. 7, Schedule II, and subsection 127(2) of S.C. 1994, c. 7, Schedule VIII. Interestingly, the *Excise Tax Act* does not appear to impose an obligation on the Minister to assess following an application for a waiver of interest and penalties under section 281.1 of the *Excise Tax Act*, the comparable provision to subsection 220(3.1).

[124] See subsections 165(1.2) and 169(1).

objection and appeal are restricted.[125] Thus, although the Minister's exercise of the relevant discretion in the taxpayer's favour results in an assessment, and generally assessments can be appealed to the Tax Court, the *ITA* does not allow these particular types of assessment to be appealed to the Tax Court, or in the case of a subsection 220(3.4) assessment, allows an appeal only on very limited grounds.[126]

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[125] See subsections 165(1.1) and 169(2). However, an assessment will be issued under subsection 220(3.4) only where the Minister agrees to exercise her discretion under subsection 220(3.2).

[126] But for subsection 165(1.2), it is arguable that an assessment under the Fairness Provisions might be the subject of an objection and an appeal to the Tax Court. This observation was made in *Germain Pelletier Ltee.* v. *The Queen*, 2000-285(GST)G [*Germain Pelletier*], where the Tax Court allowed an appeal of penalties levied under the *Excise Tax Act* (Canada) in circumstances where the Minister had declined to exercise the discretion to waive them. In that decision, the Court stated (at page 10):

> My analysis of the [*Excise Tax*] *Act*'s provisions relating to that ministerial discretion confirms that he [counsel for the respondent] was right not to raise the point that this Court has no jurisdiction. As I stated in paragraphs 25 and 26 of these Reasons, it seemed to be accepted by the courts that the exercise of the Minister's discretion under section 281.1 of the [*Excise Tax*] *Act* could not be reviewed by this Court. After reading the *Act* carefully, I think that this is not the case. A provision in the *Income Tax Act* that is apparently similar but is actually different has led to some confusion.
>
> Under subsection 220(3.1) of the *Income Tax Act*, the Minister exercises a similar discretion concerning penalties and interest. The Minister's decision following that exercise of discretion is reflected in an assessment under subsection 220(3.7) of that statute. <u>According to subsection 165(1.2) of the *Income Tax Act*, such an assessment is not subject to the appeal process in this Court. As a result, it is the Federal Court that has jurisdiction</u> . . . .
>
> The provision of the [*Excise Tax*] Act that authorizes the Minister to waive interest and penalties is section 281.1. Under subsection 296(1) of the [*Excise Tax*] *Ac*t, the Minister may make an assessment after exercising his discretion. The objection procedure is provided for in section 301, <u>and there is no exception for assessments made following the exercise of the Minister's discretion. The appeal procedure is set out in section 302, and it is this Court that hears appeals from assessments under the [*Excise Tax*] *Act*. The exercise of the Minister's discretion is therefore reviewable by this Court.</u>

[Emphasis added.]

In other cases, the Minister's exercise of the discretion to waive interest and penalties under the *Excise Tax Act* has been the subject of judicial review. See, for example, *Vitellaro* v. *Canada (Customs and Revenue Agency)*, 2005 FCA 166 (relief was sought under both the *ITA* and the *Excise Tax Act*); *Isaac* v. *Canada (Attorney General)*, 2002 FCT 410; *Brickenden* v. *Canada Customs and Revenue Agency*, 2003 FC 929 (relief was sought under both the *ITA* and the *Excise Tax Act*); *Drag* v. *Canada (National Revenue)*, 2014 FC 367, aff'd 2014 FCA 291; *Gordon* v. *Canada (Attorney* General), 2016 FC 643; *Dougal & Co. Inc*. v. *Canada (Attorney General)*, 2017 FC 1075; and *Pathak* v. *Canada (National Revenue)*, 2019 FC 252 (relief was sought under both the *ITA* and the *Excise Tax Act*). In none of these cases was the jurisdictional issue referred to in *Germain Pelletier* addressed. Nonetheless, *Germain Pelletier* might be viewed as consistent with the jurisprudence under the *IWTA* regarding the scope of the appellate jurisdiction over the correctness of an assessment. Similarly, in *Quebec (Sous-ministre du Revenu)* v. *Vezeau*, 1995 CanLII 4733 (QCCA) [*Vezeau*], the Quebec Court of Appeal considered a provision that permitted the Quebec Minister of Revenue to cancel or reduce interest if the Minister considered that it would not have been computed but for a mistake or negligence not attributable to the taxpayer or someone acting on the taxpayer's behalf. The taxpayer was assessed interest on a reassessment and, while the taxpayer did not dispute the underlying tax, he sought a reduction in the assessed interest based on the delay in the Quebec reassessment after the corresponding reassessment under the *ITA*. When the Quebec Minister refused to do so, the taxpayer appealed. The Minister argued that there was a distinction between an assessment of interest based on the provisions of the relevant legislation and a decision to cancel or reduce the interest, implying that for the former an appeal is available but for the latter there is no appeal, and the only remedy would be judicial review. The Quebec Court of Appeal disagreed, stating:

> With respect, this distinction seems to me artificial and cumbersome. While the Taxation Act and the Ministere du Revenu Act are, admittedly, two distinct statutes, they are complementary in several areas. The "interest" contemplated in Sec. 94.1 [the provision in the Ministere du Revenu Act that allowed the Minister to reduce or cancel interest] is the same "interest" as that assessed in the assessment by the Minister. Clearly, the Minister would not be asked to cancel it or reduce it if he had not assessed it or reassessed it in the first place.
>
> Nor do I see why the Court should not have regard to Sec. 94.1 and to the decision of the Minister when deciding an appeal under Sec. 1066 of the Taxation Act respecting the assessment of interest. Unless the Court does consider Sec. 94.1 there will usually be no point to the appeal since, in the absence of Sec. 94.1, interest must always be paid on tax debts due to the Crown. For all practical purposes, if the Court of Quebec cannot, on appeal, have regard to Sec. 94.1 when deciding whether interest assessed by the Minister is due, any right of appeal as regards interest would be virtually non-existent.

This leaves a taxpayer with the ability to seek a judicial review of the Minister's decision in the Federal Court; the Federal Court has jurisdiction because the matter is not otherwise appealable.

[180] Where the Minister decides not to grant the relief sought, the Minister is not required to issue an assessment. With no assessment, there is nothing to appeal to the Tax Court. And, by virtue of subsection 152(8), the assessment previously issued (*e.g.*, the one that was issued in the normal reassessment period[127] or under which the interest and/or penalties were assessed) is deemed valid and binding. It cannot be said to be incorrect or invalid because the Minister does not agree to waive interest or penalties; at the time it was issued, the assessment was correct: it was (presumably) supported by the facts and the law or was deemed correct because there was no timely objection or appeal.

[181] Moreover, in many cases where an application is made under the Fairness Provisions, the previous assessment would not be eligible for objection or appeal because the time for doing so will have passed. The Fairness Provisions permit a taxpayer to apply for relief up to 10 calendar years after the taxation year in issue. Frequently, the (earlier) assessment of the relevant taxation year, sought to be varied through the application under the Fairness Provisions, will no longer be appealable

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> I do not believe this was what the legislature intended. In granting a right of appeal under Sec. 1066 of the Taxation Act to have the "assessment" vacated or varied, in my opinion the legislature intended the right of appeal to extend to all matters covered by the assessment, including interest.

The Quebec Court of Appeal's decision is not binding on the Tax Court. Nonetheless, its approach to the issue is similar to that in the jurisprudence under the *IWTA*. And, interestingly, it came to the conclusion it did notwithstanding that the discretion to waive or reduce interest appeared in an entirely different statute. But, regardless of whether the views expressed in *Germain Pelletier* and *Vezeau* have application in the context of ministerial decisions under the Fairness Provisions or the provisions of the *ITA* that permit the Minister to waive or cancel tax discussed below, in my view the discretions to waive, cancel or reduce interest, penalties or tax are distinguishable from the discretion under subsection 247(10). These reasons should not be interpreted as suggesting or concluding that the approach taken in *Germain Pelletier* or *Vezeau* will apply in cases where the challenge is to the Minister's exercise of her discretion to waive interest and penalties under the *Excise Tax Act* or taxes under the *ITA.*

[127] Or any extended period permitted under a relevant exception to the normal reassessment period.

under the *ITA*. Where there is no right of appeal, the Federal Court may be the only available forum to challenge the decision.[128]

[182] Finally, the discretions under the Fairness Provisions are not ones that must be exercised before an assessment that complies with the provisions of the *ITA* can be issued. Indeed, they are entirely permissive: the Minister may reassess (subsection 152(4.2)); the Minister may waive or cancel and where she does she shall reassess (subsection 220(3.1); and the Minister may extend the time (subsection 220(3.2) and, where she does, she shall assess (subsection 220(3.4). In contrast, subsection 247(2) mandates an adjustment to amounts (upward or downward) subject, in the case of a downward transfer pricing adjustment, to the Minister determining that it is appropriate in the circumstances to do so: amounts shall be adjusted (subsection 247(2)) except a downward transfer pricing adjustment shall not be made unless appropriate in the opinion of the Minister (subsection 247(10)).

B. Ministerial Discretions to Waive or Cancel Tax

[183] Each of Part X.4, Part XI (now repealed), Part XI.01, Part XI.3 and Part XI.4 of the *ITA* impose special taxes in respect of deferred income plans. Each obliges a taxpayer to file a return where the taxpayer is liable for tax under the relevant Part. And, each contains a *mutatis mutandis* provision so that the Minister is obliged to assess taxes under those Parts (or can assess them even if no return is filed). And, a taxpayer is able to object to and appeal an assessment under each of those Parts.

[184] However, each of those Parts also contains provisions that permit the taxpayer to seek a waiver or cancellation of the relevant tax from the Minister. For example, subsection 207.06(1) states that where an individual is liable for taxes payable under section 207.02 or 207.03 the "Minister may waive or cancel all or part of the liability" if certain conditions are met including the individual establishing "to the satisfaction of the Minister that the liability arose as a consequence of a reasonable error". Subsection 207.06(2) provides that "the Minister may waive or cancel all or part of the liability" for tax payable by virtue of subsection 207.04(1) or section

[128] *Bakorp* illustrates this principle. In that case, the taxpayer's 1992 taxation year was not before, and could not be brought before, the Tax Court because the time for objecting and appealing had long expired.

207.05 “where the Minister considers it just and equitable to do so having regard to all the circumstances”, including specific factors identified in subsection 207.06(2).

[185] Unlike the Fairness Provisions, these provisions do not expressly mandate that the Minister issue an assessment when she decides to waive or cancel part or all of the tax. Nonetheless, a reassessment seems a likely consequence because, unless a reassessment is issued, the tax and penalty owing under the relevant Part will be as assessed under the earlier assessment; in the absence of a reassessment, the earlier assessment remains valid.[129]

[186] Where the Minister assesses tax under one of these Parts, the taxpayer has a right to object to the assessment. Nothing appears to preclude the taxpayer from seeking a waiver of the tax in the course of the objection. Indeed, as some of these Parts set out factors that the Minister must consider in deciding whether to waive the relevant tax, one might anticipate a taxpayer to raise information regarding those factors in an objection.[130] Following the filing of a notice of objection, the Minister must reconsider the assessment and vacate, confirm or vary the assessment or reassess and notify the taxpayer in writing. Where the Minister confirms the assessment or reassesses, the taxpayer may appeal to the Tax Court.

[187] Nothing in the *ITA* expressly states that there is no right to appeal an assessment that arises because the Minister exercises her discretion to waive or cancel only part of the tax or that what was described as the Exchequer Court’s supervisory function under its appellate jurisdiction would not extend to reviewing that assessment. To put it another way, if the Minister exercises her discretion without regard to the specified factors, could it be said that that failure goes to the correctness of that assessment as a matter of law, because the Minister would not

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[129] Subsection 152(8). By virtue of the *mutatis mutandis* provision in each of these Parts, section 152 applies with necessary modifications. Each of these Parts therefore permits an assessment under the relevant Part following the waiver or cancellation of all or some of the tax.

[130] In fact, presumably a taxpayer could make a claim for a waiver or cancellation of the tax at the time the taxpayer files a return reporting a liability for tax under the Part, on the basis that the factors the Minister must consider in exercising her discretion fully support the waiver.

have exercised the discretion she is mandated to exercise by the *ITA*?[131] If so, would that make that assessment appealable to the Tax Court?

[188] That is not the issue before me in this case and many cases have proceeded on the basis that the Minister's failure to waive taxes under these Parts of the *ITA* is a matter for judicial review by the Federal Court. As under the Fairness Provisions, where the Minister decides not to waive the taxes, there may be no assessment reflecting that decision to appeal and in those circumstances the Tax Court would have no jurisdiction. In the context of partial waivers of tax the jurisdictional question may not have been specifically raised in these cases.[132] However, it is neither necessary nor appropriate for me to suggest that an appeal of an assessment issued following the Minister's decision to waive a part of the tax is within the jurisdiction of the Tax Court.[133]

[189] The Appellant's position is that the discretions to waive or cancel all or part of the taxes assessed under these Parts of the *ITA* are like the Fairness Provisions and that neither are like subsection 247(10). Rather, the Appellant asserts that subsection 247(10) is like those provisions in the *IWTA* which gave the Minister the power to determine allowable deductions in computing income, and so goes to the correctness of the resulting assessment. That, says the Appellant, brings the decision

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[131] As noted above, this view was the one taken in *Germain Pelletier* and *Vezeau*.

[132] See *Robitaille* v. *The Queen*, 2019 TCC 200 (Informal Procedure), citing *Almadhoun* v. *Canada*, 2018 FCA 112. *Neubauer* v. *The Queen*, 2006 TCC 457 (Informal Procedure) [*Neubauer*]; *Lennox* v. *The Queen*, 2009 TCC 360 (Informal Procedure) citing *Neubauer*; and *Lans* v. *The Queen*, 2011 TCC 121 (Informal Procedure), citing *Neubauer*, aff'd 2011 FCA 290. *Hunt* v. *The Queen*, 2020 FCA 118 touched only on the constitutional aspects of provisions granting the Minister the discretion to waive tax, but, in the absence of full argument, declined to address the question. See also *Connolly* v. *Canada (Minister of National Revenue)*, 2017 FC 1006, aff'd 2019 FCA 161; and *Pouchet* v. *Canada (Attorney General)*, 2018 FC 473.

[133] See note 126. The application for a waiver of tax under these Parts may include an application for a waiver of interest and/or penalties under the Fairness Provisions. The two applications could result in a single assessment. In that context, one can see the merit of a single proceeding in the Federal Court, rather than one in the Federal Court under the Fairness Provisions and a second in the Tax Court to address the waiver of tax. However, for reasons that follow, I believe subsection 247(10) reflects a power of a different nature.

under subsection 247(10) within the Tax Court's jurisdiction on the appeal of the assessment. I agree.

[190] As has been observed, provisions that provide for a waiver or cancellation of tax otherwise payable only are activated once the tax liability is established by an assessment that complies with the statutory provisions of the *ITA*.[134] That is, they follow an assessment that is otherwise supported by the law. If the tax is not otherwise payable, the cancellation or waiver is unnecessary. Thus, a failure to exercise the discretion in the taxpayer's favour in these cases may not be viewed as going to the correctness of the (earlier) assessment.

[191] Put another way, these discretions, like the discretions in the Fairness Provisions, are permissive (the Minister may waive or cancel) and are exercised only after a correct assessment (one that is supported by the facts and law) is made. In contrast, where a taxpayer claims and establishes a downward transfer pricing adjustment, the determination under subsection 247(10) is not permissive – it must be made and it must be made before a correct assessment can be issued.

C. Ministerial Discretions that Affect Income or Taxable Income

[192] Although the *ITA* contains very few provisions that give the Minister a discretion that affects the amount of a taxpayer's income or taxable income, subsection 247(10) is not the only provision of that nature.

[193] A taxpayer, required to include an amount in income because a controlled foreign affiliate has foreign accrual property income, may be eligible for a reserve where the Minister is satisfied that monetary or exchange restrictions in another country would impose undue hardship on the taxpayer were the taxpayer required to include the full amount in income.[135] In such case, in computing income, the taxpayer may deduct "such amount as a reserve in respect of the amount so included as the Minister deems reasonable in the circumstances."

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[134] *Hunt* v. *The Queen*, 2018 TCC 193, at para. 29, aff'd on narrower grounds, 2020 FCA 118.

[135] See subsection 91(2).

[194] Similarly, paragraph 111(1.1)(c) provides a taxpayer with the possibility of a greater deduction on account of net capital losses than the taxpayer has, as of right, under paragraphs 111(1.1)(a) and (b). In particular, paragraph 111(1.1)(c) states that in addition to the amounts deductible under paragraphs 111(1)(a) and (b), the taxpayer may deduct "the amount, if any, that the Minister determines to be reasonable in the circumstances."

[195] Like the determination under subsection 247(10), these determinations by the Minister will have a direct effect on the taxpayer's income or taxable income, and therefore the amount of tax that is assessed by the Minister.[136] In the event that a taxpayer disagrees with the assessment based on the determination by the Minister under these provisions, is the proper forum the Tax Court or the Federal Court? While this question is not before me, my reaction is that the Tax Court would have jurisdiction under its role as arbiter of the correctness of the resulting assessment. Like the decision in subsection 247(10) these decisions are pre-assessment determinations, not waivers.

[196] However, I need only consider the Minister's decision under subsection 247(10). In that regard, I agree with the Appellant that this decision, being one that must (not may) be exercised before income and resulting tax liability can be assessed in compliance with the transfer pricing provisions, is of a different character than a discretion that is entirely permissive and need not be exercised until after tax, interest and penalties have been assessed in accordance with the provisions of the *ITA*.

[197] In other words, the power conferred on the Minister under subsection 247(10) is of the same nature as the Minister's power to determine deductions under sections 5 and 6 of the *IWTA* and to determine the chief source of income under the *Income*

[136] Provisions related to the small business deduction also give the Minister a discretion to determine the amount of a taxpayer's "specified corporate income": see paragraph (b) of the definition of "specified corporate income" in subsection 125(7), which refers to "an amount that the Minister determines to be reasonable in the circumstances". Where the Minister exercises that discretion there is a direct effect on tax liability, rather than income or taxable income. Nonetheless, it is a pre-assessment decision and so shares many similarities with subsection 247(10) and the provisions under the *IWTA* described above. However, it is not necessary for me to characterize it for purposes of this decision.

Tax Act, S.C. 1948. As in those circumstances, if the power under subsection 247(10) is not properly exercised, the resulting assessment is not correct in law.

[198] In *JP Morgan*, the Federal Court of Appeal discussed in some detail the limits of judicial review in tax matters and cautioned that it is necessary to consider the true nature of the claim. Importantly, the Federal Court of Appeal did not go so far as to conclude that a complaint about the Minister's exercise of a discretion under the *ITA* could never be the subject of an appeal to the Tax Court. In fact, it left that door open:

> On occasion in the tax context, parties have alleged that the Minister abused her discretion in making an assessment. To date, all such claims have been dismissed as not being cognizable because in assessing the tax liability of a taxpayer, the Minister generally has no discretion to exercise and, indeed, no discretion to abuse . . .[137]
>
> [Emphasis added.]

[199] I view subsection 247(10) as outside the "generally has no discretion to exercise" statement in *JP Morgan* – subsection 247(10) embodies a discretion (or a determination) that the Minister both can and must exercise in assessing the liability of a taxpayer where the provisions of subsection 247(2) are engaged and there is a downward transfer pricing adjustment.

[200] The Tax Court's jurisdiction is not limited to questions of the quantum and liability for taxes but includes questions of the Minister's legal authority to make an assessment and the legal efficacy of the assessment.[138] The Tax Court has the jurisdiction to hear an appeal of an assessment. In this context, assessment has been interpreted as meaning the product of the process by which tax is assessed. The process of assessing is not completed until the amount of tax owing is determined.[139]

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[137] *JP Morgan* at para. 77.

[138] *Johnson* v. *The Queen*, 2015 FCA 51 at para. 26.

[139] See *The Queen* v. *Anchor Pointe Energy Ltd*., 2007 FCA 188, at paras 32 and 33.

In *742190 Ontario Inc. (Van Del Manor Nursing Homes)* v. *Canada (Customs and Revenue Agency)*,[140] the Federal Court of Appeal said:

> The word "assessment" generally refers to the determination by the Minister of the amount of a person's liability, and includes the act of making the determination and the product of the determination.
>
> [Emphasis added.]

[201] The determination by the Minister mandated by subsection 247(10) is, in my view, part of the act of determining a taxpayer's tax liability, just as determining whether an expense is reasonable, whether unrelated persons deal with each other at arm's length, or whether repayment terms are *bona fide*. The *ITA* mandates that the Minister make each of these determinations before an assessment is issued. An assessment cannot be correct unless the determination is both made before the assessment is issued and correct in fact and law (including, in the case of a determination under subsection 247(10), with regard to the appropriate judicial principles). Because each of these determinations goes to the correctness of the assessment, each may be challenged on an appeal of the assessment to the Tax Court.[141]

XI. **DOES IT MATTER THAT THE DECISION UNDER SUBSECTION 247(10) DOES NOT REQUIRE THE MINISTER TO DETERMINE AN AMOUNT?**

[202] Where the Minister determines to exercise her discretion in favour of the taxpayer under the Fairness Provisions or the provisions permitting the Minister to

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[140] 2010 FCA 162 at para. 6.

[141] Although the distinction is a fine one, I do not believe my conclusion here conflicts with *Main Rehabilitation Co.* v. *Canada*, 2004 FCA 403, leave to appeal to the Supreme Court of Canada dismissed (2005), 343 N.R. 196, and similar cases concerning complaints about the conduct of Canada Revenue Agency officials during the assessing process or objection process which might be viewed as purely administrative, rather than quasi-judicial. Conduct of officials of the nature considered in these cases is too far removed from the correctness of the assessment. The correctness of the assessment depends on correctly assessing the relevant facts and correctly applying the provisions of the *ITA* to correctly determine the tax liability. See, for example, *Chrysler Canada Inc.* v. *The Queen*, 2008 FC 727, aff'd 2008 FC 1049; *Bonnybrook Park Industrial Development Co. Ltd.* v. *Canada (National Revenue)*, 2018 FCA 136.

cancel or waive tax, the Minister must determine an amount. She may waive all, none or some of the penalties, interest or taxes.

[203] Similarly, the discretions given to the Minister under the *IWTA* addressed in the jurisprudence reviewed above gave the Minister the discretion to determine an amount that could be deducted. In contrast, subsection 247(10) does not give the Minister any discretion regarding the amount of the downward transfer pricing adjustment. Any dispute regarding the amount of the adjustment (whether upward or downward) is within the appellate jurisdiction of the Tax Court. The Minister's power under subsection 247(10) is to determine whether, in her opinion, giving effect to an established downward transfer pricing adjustment would be appropriate in the circumstances.

[204] Therefore, I have considered whether that distinction is one that places the decision the Minister must make under subsection 247(10) outside the principles in the jurisprudence under the *IWTA*. In my view, it does not.

[205] In *Fraser*, the issue on appeal of an assessment was the taxpayer's entitlement to depletion. One question addressed in that case was whether the Minister's discretion under the *IWTA* concerning depletion was limited to the amount of depletion or whether the Minister had a discretion as to whether to grant depletion and, having decided to grant it, a discretion as to the amount. The Privy Council decided that the Minister had two discretions:

> Taking the statute as it stands, their Lordships are of the opinion that the section . . . plainly confers on the Minister a discretion to determine whether the case before him is one for making any allowance at all and does not limit his discretion to determining the extent of the allowance to be made. He has a double discretion, first, to determine whether the case is one for an allowance, and second, if so, to determine how much shall be allowed.[142]
>
> [Emphasis added.]

[206] However, each of these discretions could be considered on an appeal of the assessment. The Privy Council reviewed the Minister's exercise of the first

[142] *Fraser* at page 32.

discretion to determine whether the case was suitable for an allowance. In doing so, it considered whether the Minister "proceeded on just, reasonable and admissible grounds" in deciding not to permit any depletion allowance. The Privy Council concluded the Minister's view of the circumstances was:

> an intelligible view which was both tenable and admissible, and in adopting it the Minister cannot be said to have transgressed the bounds of his discretion so as to justify any interference with his decision. The criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases, and it is well settled that if the discretion has been exercised bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise.[143]

[207] Thus, it did not need to consider the second discretion.

[208] The discretion bestowed on the Minister under subsection 247(10) is like the first discretion considered in *Fraser* – a discretion to determine whether the case before her is an appropriate one for a downward transfer pricing adjustment. Unlike *Fraser*,[144] under subsection 247(10) there is only one discretion because the amount of the adjustment is not discretionary. But, that discretion must be exercised on proper grounds before a correct assessment can be made. As a result, the manner in which that discretion is exercised is reviewable on an appeal of the resulting assessment. The amount of the downward transfer pricing adjustment is not something the Minister determines but that does not remove the matter from the Tax Court's jurisdiction.

XII. **CONCLUSION**

[209] Subsection 247(10) provides that notwithstanding subsection 247(2) – which on its face mandates that all transfer pricing adjustments be made – a downward

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[143] *Fraser* at pages 35-36.

[144] The other discretions identified in the third category of discretions I describe above involve determinations of an amount and so may be said to involve a double discretion – whether the case is one for a deduction under subsection 91(2) or under paragraph 111(1.1)(c) or for fixing the specified corporate income for purposes of the small business deduction, and if so, the appropriate amount.

transfer pricing adjustment shall not be made unless "in the opinion of the Minister, the circumstances are such that it would be appropriate that the adjustment be made". Thus, transfer pricing adjustments that would reduce income or increase loss cannot be made unless the Minister determines that it would be appropriate to make the adjustment in the circumstances.

[210] Where the taxpayer establishes a downward transfer pricing adjustment, subsection 247(10) mandates the Minister to form an opinion as to whether the taxpayer should be assessed with or without the benefit of that adjustment. The Minister must form that opinion as part of the assessment process: an assessment can be issued only after that opinion is formed. Simply put, an assessment cannot be issued in compliance with the provisions of the *ITA* before the Minister forms her opinion as to whether the downward transfer pricing adjustment is appropriate in the circumstances. The power bestowed under subsection 247(10), unlike other discretionary powers the Minister has under the *ITA*, is not permissive, or a power to waive an amount owing or a matter of compliance. No provision of the *ITA* expressly precludes an appeal of an assessment made after the Minister exercises her power under subsection 247(10).

[211] In *Addison & Leyen*, the Supreme Court noted the importance of maintaining the integrity and efficacy of the system of tax assessments and appeals, as well as Parliament's intent to set up a complex structure to deal with a multitude of tax-related claims whose structure relies on an independent and specialized court, being the Tax Court.[145] In *JP Morgan*, the Federal Court of Appeal said that "[s]ections 165 to 169 of the *Income Tax Act* constitute a complete appeal procedure that allows taxpayers to raise in the Tax Court all issues relating to the correctness of the assessments."[146]

[212] The *ITA* does not require that the Minister's opinion formed under subsection 247(10) to be "separately" conveyed to the taxpayer; it is conveyed as part of the taxpayer's assessment. That is, either the assessment will reflect a downward transfer pricing adjustment or it will not.

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[145] *Addison & Leyen* at para. 11.

[146] *JP Morgan* at para. 82.

[213] The *ITA* provides a right to appeal an assessment. On the appeal of an assessment, can the appeal be allowed on the basis that the Minister did not exercise her power under subsection 247(10) correctly? I conclude that the answer is yes. Where the Minister did not exercise the discretion at all, or exercised it on incorrect principles, the assessment cannot be said to be correct. Consideration of the correctness of an assessment is within the exclusive jurisdiction of the Tax Court.

[214] This conclusion is consistent with prior jurisprudence on the scope of appellate jurisdiction on the appeal of an assessment. It also accords with the desirability of avoiding parallel proceedings in the Tax Court and the Federal Court.[147] The Tax Court will address all challenges to the correctness of the assessment made after the transfer pricing provisions have been applied, including whether the conditions for their application are met, the amount of any adjustments, the liability for penalties and whether the Minister exercised her discretion properly. Once the Tax Court decides to allow an appeal of an assessment on the basis that the Minister did not act properly in exercising her discretion, the powers available to it under section 171 provide it with the relevant remedies.

[215] Because the exercise of ministerial discretion under subsection 247(10) is subject to appeal to the Tax Court, it is not subject to judicial review by the Federal Court, although the Tax Court's decision on the appeal of the assessment may be appealed to the Federal Court of Appeal.[148]

Signed at Ottawa, Canada, this 18th day of December 2020.

"K.A. Siobhan Monaghan"

Monaghan J.

[147] The Federal Court of Appeal has said that section 18.5 of the *FC Act* "should be interpreted, as far as possible, to preclude parallel proceedings in the Federal Court and the Tax Court of Canada in respect of the substantially the same underlying issue." See *Walker* at para. 13.

[148] See subsection 171(4) of the ITA and subsection 27(1.1) and (1.2) of the *FC Act*.

APPENDIX "A"

2017-2616(IT)G

TAX COURT OF CANADA

BETWEEN:

DOW CHEMICAL CANADA ULC
(o/a as successor of DOW CHEMICAL CANADA INC)

Appellant

and

HER MAJESTY THE QUEEN

Respondent

STATEMENT OF AGREED FACTS

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The parties to this proceeding admit, for the purposes of this proceeding only, the truth of the following facts, and the authenticity of the documents cited herein:

The Appellant and Related Entities

1. The Appellant, Dow Chemical Canada ULC, is a Canadian resident corporation, formed by articles of amalgamation under the laws of Nova Scotia and governed by the *Companies Act* (Nova Scotia).

2. The Appellant is an indirect wholly-owned subsidiary of The Dow Chemical Company, a U.S. corporation ("**Dow US**").

3. The Appellant is the successor of Dow Chemical Canada Inc., a corporation incorporated under the *Canada Business Corporations Act*.

4. Dow Europe GmbH ("**DowEur**") is a Swiss operating company that is an indirect wholly-owned subsidiary of Dow US.

5. Dow Chemical International Limited is a U.S. finance company that is an indirect wholly-owned subsidiary of Dow US.

6. The registered office address of the Appellant is Suite 2400, 215 2nd Street SW, Calgary, AB T2P 1M4.

DowEur Loan Amounts

7. By agreement dated February 17, 2009, DowEur, as lender, entered into a revolving loan agreement with the Appellant, as borrower.

8. The effective date of the loan agreement was January 1, 2004.

9. Interest in the amount of $15,279,034 was paid or payable in 2006 by the Appellant to DowEur pursuant to the loan agreement.

10. Interest in the amount of $6,694,341 was paid or payable in 2007 by the Appellant to DowEur pursuant to the loan agreement.

History of Assessments of the Appellant's 2006 Taxation Year

11. In computing income for the taxation year ended December 31, 2006 ("2006 taxation year"), the Appellant, among other things, included various amounts received or earned pursuant to intercompany transactions with DowEur. The Appellant reported $5,930,155 in income in respect of toll manufacturing services provided by the Appellant to DowEur (the "**DowEur Manufacturing Amounts**"), and claimed interest expenses of $15,279,034 pursuant to a revolving loan agreement with DowEur (the "**DowEur Loan Amounts**").

12. The Minister of National Revenue initially assessed the Appellant for the 2006 taxation year by Notice dated July 26, 2007.

13. The Minister reassessed the Appellant's 2006 taxation year by Notice of Reassessment dated December 14, 2011 with respect to transfer pricing adjustments relating to intercompany transactions involving DowEur. In particular, the Minister added $307,234,104 to the Appellant's income relating to the DowEur Manufacturing Amounts. The reassessment did not adjust the interest expense reported by the Appellant with respect to the DowEur Loan Amounts.

14. The Appellant objected to the Notice of Reassessment dated December 14, 2011 by Notice of Objection dated February 29, 2012. The Appellant objected to the DowEur Manufacturing Amounts. The Appellant did not object to the DowEur Loan Amounts.

15. The Appellant requested assistance from the Canadian Competent Authority in respect of the DowEur Manufacturing Amounts and asked for its objection to be held in abeyance pending the conclusion of the competent authority process between Canada and Switzerland. The Appellant did not request assistance with respect to the DowEur Loan Amounts.

16. On March 9, 2012, the Minister sent a proposal letter to the Appellant regarding downward transfer pricing adjustments under s. 247(2), among other issues. In respect of the 2006 taxation year, the Minister proposed to increase by $3,260,704 the interest expense taken with respect to the DowEur Loan Amounts. In respect of the 2007 taxation

year, the Minister proposed to increase by $1,509,275 the interest expense taken with respect to the DowEur Loan Amounts. The basis for the proposal to increase the interest expense in the 2006 and 2007 taxation years was the same for both years.

17. On December 11, 2012, the Minister issued another proposal letter to the Appellant, in which the Minister advised that its previous proposal to increase the interest expense taken with respect to the DowEur Loan Amounts for the Appellant's 2006 taxation year would not be made due to the application of the limitation period in the Canada-Switzerland Tax Treaty.

18. By that same letter, the Minister advised the Appellant that the proposed downward transfer pricing adjustment in respect of the interest expense taken with respect to the DowEur Loan Amounts for the Appellant's 2007 taxation year would be implemented.

19. By Notices of Reassessment dated December 12, 2012, the Appellant's 2006 and 2007 taxation years were reassessed as outlined in the letter of December 11, 2012.

20. The reassessment for the 2006 taxation year included transfer pricing adjustments related to Dow US (the "**Dow US Amounts**") but did not adjust the DowEur Loan Amounts, and the reassessment for the 2007 taxation year increased by $1,509,275 the interest expense allowed with respect to the DowEur Loan Amounts.

21. On January 14, 2013, the Appellant requested the Minister to make a downward transfer pricing adjustment under s. 247(10) of the *Income Tax Act* (the "**Act**"). The Minister exercised her discretion under s. 247(10) of the Act and rejected the request on the basis that the adjustment of $3,260,704 was prohibited by article 9(3) of the Canada-Switzerland Tax Treaty and on the basis that it would result in double non-taxation, *i.e.* that the amount would not be taxed in either jurisdiction. A letter to that effect was sent to the Appellant on February 11, 2013. On March 11, 2013, the Appellant sought judicial review of the Minister's decision before the Federal Court. Those proceedings have been held in abeyance pending a determination on the jurisdiction of this Court.

22. On March 11, 2013, the Appellant objected to the Notice of Reassessment dated December 12, 2012 in respect of the 2006 taxation year. In its Notice of Objection, the

Appellant raised three issues: (a) the Dow US Amounts, (b) the DowEur Manufacturing Amounts, and (c) the DowEur Loan Amounts. In particular, the Appellant sought a further deduction of $3,260,704 in addition to the $15,279,034 interest expense already allowed.

23. The Appellant requested assistance from the Canadian Competent Authority in respect of the Dow US Amounts and asked for its objection to be held in abeyance pending the conclusion of the competent authority process between Canada and the U.S.A. The Appellant did not request assistance with respect to the DowEur Loan Amounts.

24. The Canadian and Swiss competent authorities resolved the transfer pricing adjustments in respect of the DowEur Manufacturing Amounts. The Minister reassessed the Appellant's 2006 taxation year by Notice of Reassessment dated December 14, 2015 in accordance with the competent authority resolution. The income inclusion of $307,234,104 was reduced to $39,516,111. No adjustments were made in relation to the DowEur Loan Amounts.

25. The Appellant objected to the Notice of Reassessment dated December 14, 2015 by Notice of Objection dated December 29, 2015. The Appellant reiterated its objections to the DowEur Loan Amounts and to the Dow US Amounts.

26. In accordance with a resolution of the competent authority process between Canada and the U.S.A. concerning the Appellant and Dow US, the Minister reassessed the Appellant's 2006 taxation year by Notice of Reassessment dated April 13, 2017. The reassessment did not adjust the DowEur Loan Amounts.

27. The Appellant appealed this last reassessment in respect of the DowEur Loan Amounts to this Court.

Corresponding Transfer Pricing Adjustments by Treaty Partners

28. Switzerland assessed DowEur regarding the DowEur Manufacturing Amounts and the U.S.A. assessed Dow US regarding the Dow US Amounts in accordance with the competent authority resolutions referred to in paragraphs 24 and 26 above.

29. With respect to the DowEur Loan Amounts, Switzerland did not increase the taxable income of DowEur in 2006 or 2007 corresponding to the downward transfer pricing adjustments outlined in paragraphs 24 to 26 above; i.e. corresponding to the amount of CDN$3,260,704 initially proposed for 2006 and the amount of CDN$1,509,275 proposed and allowed for 2007 in Canada.

DATED at the City of Toronto, Ontario, February 14, 2019.

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DATE OF ORDER:	December 18, 2020

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