



**13 January 2012 – the Supreme Court of Canada (“SCC”) met today to hear the appeal by Her Majesty the Queen (the “Crown”) and response by GlaxoSmithKline Inc. (“Glaxo Canada”) on whether, as the Crown argued, the taxpayer paid too much when it purchased Ranitidine for \$1,500 / kg since the market price paid by generic companies ranged from \$194 to \$304 / kg.**

Matthew Wall of MDW Consulting Inc. attended the hearing and provides the following commentary.

In advance of the hearing, each party submitted a 40 page factum outlining their positions. In brief, the Crown’s Factum argued why the SCC should use the *arm’s length principle* to restore the original decision by the Tax Court of Canada (“TCC”), while Glaxo Canada’s Factum argued why the SCC should use the *reasonable business person* to support the Federal Court of Appeal (“FCA”) decision.

The hearing began with the Crown’s representative explaining their appeal, but was quickly interrupted by questions from the presiding judges, followed by a continuing dialogue. According to Wall, it appeared some judges found it difficult to consider the purchase of Ranitidine under the Supply Agreement in the absence of (i.e., unbundled from) the License Agreement. For example, Wall heard one judge say Glaxo Canada couldn’t be in the business they are in if they did not buy the Ranitidine from a related supplier as required by the License Agreement. Another judge said “it seems to me what you are trying to do is shove Glaxo into the generic market”. These questions by some judges appear to favour the *reasonable business person* – e.g., sending this case back to the TCC with instructions to consider the License Agreement.

In a discussion of what is “arm’s length” Wall heard one judge say everyone agrees the methodology is the CUP but what does “comparable circumstances” mean? Later, another judge said the Crown was extending the definition to say the European licenses are not arm’s length. This appeared to question, without saying so, if the Crown applied the same standard before accepting the generic prices to be arm’s length. These questions by some judges appear to favour the *arm’s length principle*.

After a short intermission, the hearing resumed with Glaxo Canada’s representatives providing their response including a dialogue with the presiding judges to answer their many questions. For example, Wall heard one judge state the key question is would Glaxo Canada pay \$1,500 in the circumstances? Followed by another judge who, very carefully, suggested the issue might be taxpayers in general, not Glaxo Canada, might pay too much for the supply of a product that is not subject to withholding tax, while paying too little for the license of the product that is subject to withholding tax, thereby minimizing taxes.

Later, other judges asked if the price for Ranitidine included some amount for services or intangibles.

Near the end, Glaxo Canada said it was their burden to prove the Crown’s position was wrong which it did in the Federal Court of Appeal, nothing more. One judge disputed this, saying the Crown said Glaxo Canada paid too much for Ranitidine, and so it is up to the taxpayer to show that is not true. To make their displeasure known, as it appeared to Wall, this judge went on to say it is certainly up to us to ask these challenging questions, as if speaking for all the judges. Later on, another judge said Glaxo Canada has not proved this point and then said “why shouldn’t it go back to court?” Further to this point, Wall noted one judge asked Glaxo Canada what evidence would it require if this was to happen, while another judge clarified with the Crown what their position would be if this was done.

The hearing came to an end, with the judges reserving their decision. Wall reminds us that, in all cases, it is the court's responsibility to take the time needed to consider all of the information as it pertains to law before issuing its decision, which may take time. Until the SCC decides, it is foolish guessing who might win this.

Wall suggested the SCC for this case might seek guidance from the Tax Court of Canada's most recent case between Alberta Printed Circuits Ltd v the Crown, which covers these same or similar issues in greater detail – e.g., arm's length principles, reasonable business person, unbundling transactions, applying CUPs, comparability factors, etc. Shaun T. MacIsaac Q.C. was the lead counsel in the AP Circuits case, which the TCC decided in favour of the taxpayer relying heavily on Matthew Wall's expert report and testimony.

Finally, Wall said, "This creates greater uncertainty for taxpayers across all industries, not knowing what the standard in Canada will be: arm's length, reasonable business person, or both. Until then, taxpayers would be well advised to ensure they have adequate support for each transaction on an *arm's length basis* AND consider additional analysis to show the bundle of transactions meets the standard for a *reasonable business person*. It is reasonable to expect the tax authorities will also be considering what to do, expecting they will need to do more in their current audits in order to properly submit and defend Reassessments."

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Crown's Factum: [www.scc-csc.gc.ca/factums-memoires/33874/FM010\\_Appellant\\_Her-Majesty-the-Queen\\_Redacted.pdf](http://www.scc-csc.gc.ca/factums-memoires/33874/FM010_Appellant_Her-Majesty-the-Queen_Redacted.pdf)

Glaxo's Factum: [www.scc-csc.gc.ca/factums-memoires/33874/FM020\\_Respondent\\_Glaxomithkline-Inc\\_Redacted.pdf](http://www.scc-csc.gc.ca/factums-memoires/33874/FM020_Respondent_Glaxomithkline-Inc_Redacted.pdf)

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