



Tax

Glaxo case settles, but earlier ruling gives multinationals pricing flexibility

By AdvocateDaily.com Staff



Although the Tax Court of Canada will not have a chance to reconsider the transfer pricing issue in [Canada v. GlaxoSmithKline Inc.](#), the Supreme Court of Canada's earlier comments that pricing is not an "exact science" will provide large multinationals some leeway, says Toronto tax litigator [Adrienne Woodyard](#).

As the [Financial Post](#) reports, the case recently settled just before it was scheduled to be heard for a second time by the Tax Court of Canada.

According to court documents, the case centred around Glaxo Canada's purchase of ranitidine in the early 1990s, an ingredient in the anti-ulcer drug Zantac, from Adechsa, a related non-resident company, for between \$1,512 and \$1,651 per kilogram. Glaxo had licence and supply agreements with its parent company which enabled it to purchase ranitidine and market it under the trademark Zantac.

At the same time, two Canadian generic pharmaceutical companies, Apotex Inc. and Novopharm Ltd., purchased ranitidine from arm's length suppliers for use in their anti-ulcer drugs for between \$194 and \$304 per kilogram.

The Minister of National Revenue reassessed Glaxo Canada for \$51 million for those tax years on the basis that "the prices it paid for ranitidine were greater than an amount that would have been reasonable in the circumstances had they been dealing at arm's length."



Glaxo Canada appealed to the Tax Court, and the reassessment was upheld on the basis that the licence and supply agreements were to be considered independently. The Federal Court of Appeal allowed the appeal and remitted the matter back to the Tax Court for redetermination of the “reasonable amount” payable for Glaxo Canada’s ranitidine transactions.

But in late 2012, the Supreme Court dismissed the appeal and cross-appeal and remitted the matter back to the Tax Court, noting that: “The prices paid by Glaxo Canada to Adechsa were a payment for a bundle of at least some rights and benefits under the Licence Agreement and product under the Supply Agreement. The generic comparators used by the Tax Court do not reflect the economic and business reality of Glaxo Canada and, at least without adjustment, do not indicate the price that would be reasonable in the circumstances, had Glaxo Canada and Adechsa been dealing at arm’s length.”

“It’s hard to overstate the importance of Glaxo to Canadian taxpayers dealing with cross-border pricing issues,” says Woodyard, partner with Davis LLP.

“The most significant holding the Supreme Court made was to confirm that the pricing of goods and services among non-arm’s length parties must be determined by ‘economic and business reality’ and not by the more mechanical, transaction-by-transaction approach that the CRA tried to impose,” she adds.

The licence agreement in particular conferred certain obligations on and rights to Glaxo, including the obligation to buy ranitidine from approved sources and the right to market the drug in Canada under the brand name Zantac.

Another significant finding, says Woodyard, was that the court explicitly acknowledged that transfer pricing is not an “exact science” – taxpayers have some leeway in setting their pricing and a range of prices may be reasonable depending on the circumstances.

“Even though the Tax Court will not have the opportunity to reconsider the case, the SCC’s recognition of these principles will provide a significant degree of flexibility to taxpayers, particularly large multinationals, in setting their pricing for cross-border goods and services.”



Woodyard adds that the CRA may have made a strategic error in not challenging the amount that Glaxo paid to its parent under the licensing agreement for the right to use the Zantac name.

“If the case had gone back to the Tax Court, the Crown might have tried to put this issue on the table by arguing that one reason why the pricing of the ranitidine was too high was because it included a royalty element. The fact that the case settled enabled Glaxo to avoid litigating this potentially thorny issue,” she says.