

Citation: 2005TCC436

Date: 20050718

Docket: 98-712(IT)G

BETWEEN:

GLAXOSMITHKLINE INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by telephone conference on July 6, 2005

By: The Honourable Justice D.W. Beaubier

Appearances:

Counsel for the Appellant: Pierre Barsalou, Sebastien Rheault and Benjamin Tomlin

Counsel for the Respondent: Naomi Goldstein, Karen Janke and Myra Yuzak

Representing Apotex Inc. ("Apotex"): Gordon Fahner

Representing Novopharm Limited ("Novopharm"): William Mayo

AMENDED REASONS FOR ORDER AND ORDER

[1] Upon reviewing the motion dated June 24, 2005, the affidavit of Travis Chalmers dated June 24, 2005 in support of the motion, the affidavits of Marla McKittrick dated June 25, 2005 for the Respondent, and the examination of

Travis Chalmers on his affidavit, the Court file, and upon hearing counsel in this matter;

[2] This Notice of Motion by the Appellant is, in cursory summary, for:

- (a) An order for the Respondent to produce documents of Apotex Inc. (“Apotex”) or Novopharm Limited (“Novopharm”) that might be used at trial, including financial statements from 1989 to 1995 and relating to rebates granted to pharmacists and drugstores from 1989 to 1993.
- (b) An order requiring Dr. Sherman of Apotex to be re-examined with copies of documents relied upon by Mr. Fahner to prepare Exhibit A-3 in the examination of July 23, 2003; Apotex documents relevant to Tom Burkimsher’s reserved responses of May 4, 2005; and correspondence and documents exchanged with the Respondent since 1994.
- (c) A similar order respect Leslie Dan of Novopharm.
- (d) An order for further examination of the Respondent’s representative, Tom Burkimsher in relation to documents concerning rebates and other forms of discounts granted by Apotex and Novopharm to Dial Drug Stores Ltd. from 1989 to 1993.

Or in Paragraph [4] –

“ [4] IN THE ALTERNATIVE, THIS MOTION IS FOR an order that the Respondent cannot rely on the transactions of Apotex and Novopharm to support the reassessments under appeal, pursuant to section 12 of the *Tax Court of Canada Act*, Rules 65, 91 and 110 or the inherent powers of this Court to prevent an abuse of its process.”

[3] The issues described in the Amended Notice of Appeal and the Reply in this appeal they are quite specific. In paragraphs 22 and 23 of the Amended Notice of Appeal they are:

- 22. The first issue to be determined is whether the price at which the Appellant purchased ranitidine during the 1990, 1991, 1992 and 1993 taxation years was greater than the

amount which would have been reasonable in the circumstances, had Adechsa and the Appellant been dealing at arm's length.

23. The second issue to be determined is whether the Appellant was required to withhold and remit tax in respect of a portion of that price on the basis that the portion represented a benefit conferred on a shareholder.

Paragraph 15 of the Reply agrees and is more specific; it reads:

15. He agrees with the statement of the issues in paragraphs 22 and 23 the Notice of Appeal. He agrees with the statement of issue in paragraph 22 of the Amended Notice of Appeal, but says that with respect to the statement of issue in paragraph 23 of the Amended Notice of Appeal, that issue is more precisely defined as follows:
 - a) did the Respondent correctly assess the Appellant for tax under Part XIII of the *Income Tax Act* for amounts deemed to have been paid as dividends by a corporation resident in Canada to Glaxo Group Limited, the non –resident shareholder of the Appellant, within the meaning of subsections 56(2) and 214(3) of the *Income Tax Act*.
 - b) alternatively, is the Appellant, pursuant to paragraphs 246(b) of the *Income Tax Act*, deemed to have made payments to a non-resident person to which Part XIII applies;
 - c) alternatively, is the Appellant, pursuant to paragraphs 212(1)(a) or 212(1)(d) required to remit withholding tax on amounts considered to be, or in lieu of, management or administration fees or charges and/or royalties.

[4] In other words, insofar as the Appellant's business operations are concerned, the question is whether the Appellant purchased ranitidine at a reasonable price from Adechsa from 1990 to 1993. Ranitidine is a substance to be used by the Appellant in the manufacture of a prescription drug, as stated by Bowie, J. in his Reasons for Order dated October 8, 2002.

[5] The parties have agreed in their pleadings that the issue is ranitidine's purchase price, and the evidence is that the purchases in question are for the

purpose of manufacturing. It is not the profits or losses made on that purchase price.

[6] Bowie, J. stated on October 8, 2002 that Dr. Sherman has been of no more than minimal assistance in the Appellant's examinations. The Appellant's counsel has already examined the proposed witnesses. Moreover, Bowie, J.'s Reasons for Order related to Apotex's purchases of ranitidine and, except for Mr. Burkimsher, the examinations are of persons representing third parties. All of this is part of the continuum of an appeal that began in **1998** respecting the Appellant's 1989 to 1993 taxation years.

[7] Based on the material filed to date, the Respondent's and third parties' witnesses know and have carried out their legal duties in preparing for and carrying out the examinations by Appellant's counsel and providing documents to that counsel and to the Court. On that basis, they have now provided the Appellant with all the information they have respecting matters in issue in this appeal.

[8] In argument, Appellant's counsel stated that after the reassessment was levied, the Respondent proposed a "Cost – Plus method" as an alternative basis for the reassessment. Respondent proposes that a "reasonable profit" can be calculated by taking the cost of primary manufacturer and subtracting it from the Comparable Uncontrolled Prices paid by Apotex and Novopharm. Respondent's counsel did not deny this; rather, she stated that the onus respecting this method would be on the Respondent. But none of this relates to sales by Apotex and Novopharm.

[9] The sales and information into which further examination is sought are not related to the audit and did not form part of the basis for assumptions. CRA relied on the prices that Novopharm and Apotex paid for ranitidine as constituting the comparable uncontrolled manufacturers purchase prices for ranitidine. The Appellant's proposed inquiries are into their sales of ranitidine products to the retail pharmaceutical trade, the discounts they granted and the profits they made on those sales. These are not the issues raised by the pleadings and they are not a part of the Respondent's assessment process in this case.

[10] With respect to the third parties, the Appellant proposes to examine, having reference to Rule 99:

1. Appellant's counsel has already examined these people.

2. Any further search for documents by the third parties would result in unreasonable expense to them.
3. Because the Appellant is seeking evidence respecting their sales profits and discounts to the retail trade, the proposed evidence is not relevant to the issue in dispute – the purchase price of ranitidine for the purpose of manufacturing drugs. Rather, the purpose appears to be a fishing expedition into the financial sales practises of drug companies such as Apotex and Novopharm to retail pharmacies.

[11] For this reason, the Court orders:

- (a) That the Respondent cannot use or rely on the sales transactions of Apotex or Novopharm to support the reassessments under appeal, since they are irrelevant to the issue in dispute.

And orders:

- (b) That the Respondent cannot introduce any documents, redacted or unredacted or amended to any form of unredaction, or submit evidence of or relating to Apotex and Novopharm at the hearing of this appeal in addition to what has already been provided to the Appellant at the date of the last examination of any person representing them by the Appellant's counsel in examinations or contained in the Respondent's List of Documents to this date.

[12] Costs of this motion are in the cause.

Signed at Saskatoon, Saskatchewan, this 18th day of July 2005.

"D.W. Beaubier"

Beaubier, J.

CITATION: 2005TCC436
COURT FILE NO.: 98-712(IT)G
STYLE OF CAUSE: Glaxosmithkline Inc. v. The Queen
PLACE OF HEARING: Ottawa, Canada
DATE OF HEARING: June 30, 2005
REASONS FOR ORDER BY: The Honourable Justice D.W. Beaubier
DATE OF **AMENDED ORDER**: July **18**, 2005

APPEARANCES:

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Benjamin Tomlin

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Karen Janke and
Myra Yuzak

Representing Apotex: Gordon Fahner
Representing Novopharm: William Mayo

COUNSEL OF RECORD:

For the Appellant:

Name:

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For the Respondent:

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