

Extra-territorial Jurisdiction of the CRA - Sas Ansari

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[Oroville Reman & Reload Inc v Canada, 2016 TCC 75](#)

At issue was whether Canada can issue a Notice of Assessment pursuant to the *Softwood Lumber Products Export Charge Act, 2006*, to a US company that has never engaged in or carried on business in Canada.

Though the specific question in this case is unlikely to be of general interest, the analysis of the jurisdiction of the CRA is. Please see the NOTE at the end of this post.

ANALYSIS

The court identified three kinds of jurisdiction recognised in international law, each with its own set of pre-conditions:

- **Prescriptive** - this is legislative of substantive jurisdiction that grants the power to make rules, issue commands, or grant authorizations that are binding;
- **Enforcement** - the power to use coercive means to ensure that "rules are followed, commands are executed or entitlements are upheld" - in short, to give effects to its use of prescriptive jurisdiction; and
- **Adjudicative** - the power of a state's courts to resolve disputes and interpret the relevant law through issuance of binding decisions.

The Court had to determine what jurisdiction was exercised when the CRA sent correspondence to the Appellant. This is because the exercise of prescriptive jurisdiction can occur extraterritorially but the exercise of enforcement extraterritorially, in a foreign state, only with that state's consent.

The court held that enforcement jurisdiction occurs right after prescriptive jurisdiction ends, which is where the enactment received royal assent. However, the court left for another day the question of the classification of the action of the CRA in issuing a Notice of Assessment was the exercise of enforcement jurisdiction. However, it appears that this Court, if required to decide the case, would have held that the issuance of a NOA would be the exercise of enforcement jurisdiction.

The Court went on to address the "presumption of conformity with international law" and "the presumption against extraterritoriality" - two canons of statutory interpretation. These two presumptions can, if breached, be displaced by a statute's unequivocal intent to violate the presumptions (para 30). The presumptions are:

- Presumption of Conformity - the presumption that legislation will conform to international law, and therefore with the state's international obligations, absent the statute clearly compelling the alternate result;
- Presumption against extraterritoriality - the presumption that legislation is meant to have legal effect only within a state's territory.

There are 5 grounds of jurisdiction: Territoriality, nationality, passive, protective, and universal. The Court held that the only ground possible in this case was the territoriality principle which requires a "real and substantial link" between Canada and the activities giving rise to the claim for tax (para 38). The relevant factors are set out in [Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers, 2004 SCC 45](#), in the context of the *Copyright Act*.

The Court considered the following factors as supporting a lack of a real and substantial link:

- taxpayer was never registered or continued in any jurisdiction in Canada;
- taxpayer has no facilities, assets, or operations in Canada;
- taxpayer did not arrange for transportation of goods out of Canada;
- the deposits, the refund of which engages the tax in question, were paid to the government of the USA

In this case, the presumption is breached, and the Court had to look at the statute to see whether the breach was authorized by the statute either expressly or by necessary implication. This is a high bar - In *Metcalfe v Yamaha Motor Powered Products Co*, [2012 ABCA 240](#).

The Court did not find that the intention of extraterritorial effect was "manifest" in the statute, or that the purpose of the statute would be frustrated if the provision was not given extraterritorial effect - *Alberta Government Telephones v Canada (Canadian Radio-Television and Telecommunications Commission)*, [\[1989\] 2 SCR 225](#). The Court said (para 55):

It is my view that in order for tax legislation to have effect on a taxpayer, the government must bring the taxpayer's conduct, and the taxpayer, within the four corners of the statute.

NOTE: The decision here relies, in part, on the historical presumption that taxing legislation be interpreted most stringently than other types of legislation. This approach to interpreting tax legislation has been called into question by various SCC decisions. For more on the interpretation of tax legislation see [HERE](#).

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