

# Judicial Review of CRA decision in MAP Process - Sas Ansari

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*CGI Holding LLC v Canada (National Revenue)*, [2016 FC 1086](#)

The Federal Court was asked to conduct a Judicial Review of the conduct of the Canada Revenue Agency throughout the Mutual Agreement Procedure process under a tax treaty. The Applicant argued that the CRA failed to or refused to fully inform itself of the issue alive in the MAP process, that its procedural rights were not respected during the MAP process, and sought *mandamus* forcing the Minister to issue a NOA under the ITA so that it can have recourse to the Tax Court of Canada.

The Court held that it had jurisdiction to review the conduct of the CRA during a Mutual Agreement Procedure process.

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## FACTS

The Applicant is an LLC created under the laws of Delaware. It received a dividend payment from its related Canadian resident corporation in 2007 as a result of a reorganization. The Canadian resident payor withheld and remitted 25% of the dividend based on CRA's interpretation of subsection 212(2). The 2010 Tax Court of Canada decision in *TD Securities (USA) LLC v The Queen*, [2010 TCC 186](#), caused the CRA to change its position on withholding tax requirements for dividends paid to an LLC where the US-Canada tax treaty applies (2010-0369271C6). The Applicant argued that, on the basis of the TD Securities decisions, the withholding rate should have been 5% not 25% and is seeking a refund of the overpaid amounts. The CRA distinguished the two cases.

in 2012, the Applicant applied to the CRA for a refund, but the CRA denied the request because the 2 year limitation period in subsection 227(6) had expired. The Applicant asked the IRS to engage the Mutual Agreement Procedure, but the competent authorities were unable to reach an agreement.

## ANALYSIS

The FC characterised the review as the Applicant reviewing the position of the CRA of its lack of entitlement to a refund because of the difference in facts between its case and that in the TD

Securities decision. In the TD Securities decision, the disregarded LLC was taxable in the US on its worldwide income through its member and, an entity that is fully and comprehensively taxed in the contracting state, is entitled to treaty benefits even if the taxation occurs at the shareholder, member, or partner level. This doesn't mean that every LLC is automatically entitled to treaty benefits.

The Court stated that administrative actions of the Minister, even in the context of the MAP process, are subject to judicial review - *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, [2015 FCA 4](#); *Teletech Canada, Inc v Canada (National Revenue)*, [2013 FC 572](#); *Robert Julien Family Delaware Dynasty Trust v Canada (National Revenue)*, [2007 FC 1071](#). The success or failure of the MAP process involves a decision by the CRA (para 44). This decision is what is subject to review.

The Court does have to show appropriate deference to the role of the Minister and the prerogative powers exercised as part of the review - *Canada (Prime Minister) v Khadr*, [2010 SCC 3](#) at para 46. The FC held that the appropriate standard of review is reasonableness as the MAP procedure gives the Minister a broad margin of appreciation (paras 48-49) - *Canada (Attorney General) v Boogaard*, [2015 FCA 150](#) at para 64. A court can only intervene if the decision is one that falls outside the range of possible, acceptable outcomes defensible in respect of the facts and the law - *Dunsmuir v New Brunswick*, [2008 SCC 9](#) at para 47.

Here, the CRA considered the facts, considered that there was a possible tax avoidance motive to the reorganization giving rise to the dividend, was not convinced that the dividend was fully taxable in the US, and considered these in light of the TD Securities decision. The FC held that the decision was reasonable.

#### *Procedural fairness*

The Court also addressed the procedural protections owed to a taxpayer in the MAP process, which the taxpayer is not a participant. The type and extent of procedural rights depend on the relevant circumstances of the decision - *Baker v Canada (Minister of Citizenship and Immigration)*, [\[1999\] 2 SCR 817](#). The CRA had the obligation to deal fairly with the taxpayer and consider the taxpayer's submissions which includes being satisfied that the taxpayer is aware of the CRA's concerns. The taxpayer should have notice of the concerns and have an opportunity to make submissions.

#### *Mandamus remedy*

Where the Minister is asked to exercise a discretion and does not, mandamus may lie to have the minister exercise that discretion. However, the request for the exercise must be made and the minister must refuse or the time passed must imply refusal to exercise the discretion before *mandamus* can be ordered.

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