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Vern Krishna discusses the challenges faced by Tax Experts on the Income Tax Act which is getting bigger every year and the Legislative nightmare it is creating.

Plain meaning and the purposive approach

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 [Plain meaning and the purposive approach—Vern Krishna](#)

Vern Krishna

The *Income Tax Act* is a voluminous statute of more than 2,000 pages, and getting larger every year. The 2012 budget bill before Parliament has more than 450 pages of explanatory notes. How can we interpret such a statute to provide certainty to taxpayers making commercial decisions? What do we do to extract the plain meaning of the words? How do we reconcile the plain meaning of words that produce absurd results with the underlying purpose of the particular provision?

In an earlier era, our courts interpreted tax legislation strictly and literally, regardless of consequences. This was so even where such interpretation produced hardship or inconvenience. The doctrine of literal statutory construction worked reasonably well when the tax statute focused primarily on the raising of revenue.

Indeed, Canadian courts routinely applied the doctrine, despite section 12 of the *Interpretation Act*, which requires every act to be interpreted in a fair, large and liberal manner so as to ensure the attainment of its objects.

Strict interpretation works well only if legislative purpose can always be precisely and accurately captured in statutory language. Then, the purpose is implemented simply by applying the words of the act.

Experience, however, has taught us that legislation is not susceptible to such precise drafting. As early as 1936, in an era of comparatively simple tax legislation, an English codification committee realized the futility of attempting to anticipate every situation with comprehensive legislative drafting: “The imagination which can draw an income tax statute to cover the myriad transactions of a society like ours, capable of producing the necessary revenue without producing a flood of litigation, has not yet revealed itself.”

Literal interpretation also contributes substantially to the complexity of tax legislation. There is impressionistic evidence to suggest that as the courts interpreted the *Income Tax Act* strictly and with increasing stringency, the legislative draftsman responded with ever more complex and comprehensive statutory language in an attempt to provide for, and anticipate, every conceivable factual nuance and circumstance.

However, literal interpretation does not work as well when tax law is used both to raise revenue and promote socio-economic policies. In *Stubart Investments Ltd.*, which marks the first significant breach in the doctrine of strict construction, six decades of literal interpretation were rejected in favour of purposive interpretation.

Following *Stubart*, the Supreme Court expanded on more specific aspects of interpretative methodology in several cases from

1986 to 2002.

The second significant change in interpretational philosophy after *Stubart* is in the manner of resolving ambiguities by looking to legislative intent and not by applying rigid presumptions. However, we must be careful of purposive interpretation that puts a gloss on legislative *language* that was not contemplated by the legislator. If the words of the statute are clear and plain, they should be given their effect and not altered by legislative purpose or object.

Purposive interpretation is judicial interpretation and should not be used as judicial rule making. It should not be used to alter the result of commercial transactions where the words of the act are clear and plain and where the legal and practical effect of the transaction is undisputed.

As the Supreme Court said in *Antosko v. The Queen*: “In the absence of evidence that the transaction was a sham or an abuse of the provisions of the Act, it is not the role of the court to determine whether the transaction in question is one which renders the taxpayer deserving of a deduction. If the terms of the section are met, the taxpayer may rely on it, and it is the option of Parliament specifically to preclude further reliance in such situations.”

And: “Where the words of the section are not ambiguous, it is not for this Court to find that the appellants should be disentitled to a deduction because they do not deserve a ‘windfall’ ... In the absence of a situation of ambiguity, such that the Court must look to the result of a transaction to assist in ascertaining the intent of Parliament, a normative assessment of the consequences of the application of a given provision is within the ambit of the legislature, not the courts.”

And again in *Friesen v. The Queen*: “The clear language of the *Income Tax Act* takes precedence over a court’s view of the object and purpose of a provision ... The object and purpose of a provision need only be resorted to when the statutory language admits of some doubt or ambiguity.”

Antosko and *Friesen* draw the line between strict and literal construction and pedantic application of the purposive approach in the face of clear and unambiguous legislative language. Thus, courts should apply this teleological approach only when the words of the statute are not clear.

As Justice Beverley McLachlin (as she then was) stated in *Shell Canada v. M.N.R.*: “Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act ... The courts’ role is to interpret and apply the Act as it was adopted by Parliament. *Obiter* statements in earlier cases that might be said to support a broader and less certain interpretive principle have therefore been overtaken by our developing tax jurisprudence.”

The *Income Tax Act* does not operate in a commercial vacuum, but draws upon the meaning of words in their broader commercial context. Thus, in applying the plain meaning rule, a court should interpret words in the context of the general commercial law and settled legal definitions therein.

The approach to interpreting tax treaties, however, is more expansive and the courts consider the purpose of provisions even in the absence of ambiguity. In *Crown Forest Industries Ltd. v. Canada*, [1995] S.C.J. No. 56, the Supreme Court stated the rule as follows: “In interpreting a treaty, the paramount goal is to find the meaning of the words in question. This process involves looking to the language used and the intentions of the parties.”

The purpose rule is not a substitute for the plain meaning rule. It is used where statutory language is obscure or ambiguous and a court needs assistance in determining legislative intention. Otherwise, unambiguous legislative language is interpreted according to its plain meaning, but not so literally as to produce absurd results.

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