Federal Court of Appeal

Cour d'appel fédérale

Date: 20170519

Docket: A-38-16

Citation: 2017 FCA 107

CORAM: PELLETIER J.A.
WEBB J.A.
DE MONTIGNY J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

And

JEFFREY N. GREEN,
YVES POTVIN,
JONATHAN RUBENSTEIN
and IAN DIXON

Respondents

Heard at Vancouver, British Columbia, on December 1, 2016.

Judgment delivered at Ottawa, Ontario, on May 19, 2017.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: PELLETIER J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This appeal raises the question of how the at-risk rules that limit the availability of losses incurred by a limited partnership apply when the partner of a limited partnership is another limited partnership. The Crown had brought a motion for determination, under Rule 58(1)(*a*) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, of the following questions:

> (a) In a two-tiered partnership structure, where the top-tier partnership has no at risk amount in respect of the lower-tier partnership at the end of a particular fiscal period, do business losses incurred by the lower-tier partnership in the particular fiscal period retain their character as business losses of the top-tier partnership, thus available to be allocated to the partners of the top-tier partnership as business losses (which would then be subject to the application of the at-risk rules in the hands of the partners of the top-tier partnership)?
>
> (b) If the answer to question (a) above is no, does a limited partnership loss that the top-tier partnership has in the lower-tier partnership flow through to the partners of the top-tier partnership such that they have a limited partnership loss?

[2] The Tax Court Judge answered the first question in the affirmative and therefore, he did not answer the second question (2016 TCC 10).

[3] The Crown has appealed from the Order of the Tax Court Judge and for the reasons that follow I would dismiss the appeal.

I. Background

[4] A partnership, in the common law jurisdictions, is the relationship that subsists between persons carrying on a business in common with a view to profit (*Backman v. Her Majesty the Queen*, 2001 SCC 10, [2001] 1 S.C.R. 367 at para. 18; section 2 of the *Partnerships Act*, R.S.O. 1990, c. P.5; section 2 of the *Partnership Act*, R.S.B.C. 1996, c. 348).

[5] Since a partnership is a relationship, a partnership is not a person at law. This is reflected in the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (ITA) as a partnership does not pay tax but rather it allocates its income to its partners on a source by source basis (section 96 of the ITA).

[6] Any doubt about whether a partnership, which is not a person, would be recognized as a partner of another partnership for the purposes of the ITA has been removed as a result of the provision of subsection 102(2) of the ITA:

(2) In this subdivision, a reference to a person or a taxpayer who is a member of a particular partnership shall include a reference to another partnership that is a member of the particular partnership.	(2) Pour l'application de la présente sous-section, la mention d'une personne ou d'un contribuable qui est un associé d'une société de personnes vaut également mention d'une société de personnes qui fait partie de la société de personnes.

[7] In this case, throughout the years 1996 to 2009, the respondents were limited partners in Monarch Entertainment 1994 Master Limited Partnership (MLP). MLP was, during this time, a limited partner in 31 different limited partnerships (the PSLPs). Each PSLP incurred business losses for the fiscal years from 1996 to 2009 which were allocated mostly to MLP and then mostly by MLP to its limited partners (including the respondents). The at-risk amount for 1996 to 2008, for the purposes of the ITA, of each of the respondents in MLP was nil and for MLP in each of each of the PSLPs was also nil. The respondents added the losses allocated to them by MLP over these years to their limited partnership losses.

[8] In 2009, as a result of a capital gain that was allocated by MLP to its limited partners, the at-risk amount of the respondents in MLP was increased and each respondent then claimed a portion of the accumulated limited partnership losses in respect of MLP.

II. Decision of the Tax Court

[9] The Tax Court Judge acknowledged that the provisions of the ITA are to be interpreted based on a textual, contextual and purposive analysis (paragraph 25 of the reasons and paragraph 10 of *Canada Trustco Mortgage Co. v. Her Majesty The Queen*, 2005 SCC 54, [2005] 2 S.C.R. 601). The Tax Court Judge concluded that the answer to the first question was yes – the business losses incurred by the lower-tiered limited partnership (the PSLPs) did retain their character as business losses in the top-tier limited partnership (MLP) and could be allocated by the top-tier limited partnership (MLP) to its partners as business losses.

III. Issue

[10] The issue in this appeal is whether the Tax Court Judge was correct in determining that business losses could be flowed through from one limited partnership to another limited partnership and then to the partners of that second limited partnership retaining their character as business losses throughout.

IV. Standard of Review

[11] The only issue in this appeal raises a question of law and therefore the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

V. Analysis

[12] As noted above, partnerships (including limited partnerships) are not persons and, except as provided in subsection 102(2) of the ITA, are not taxpayers for the purposes of the ITA.

Subsection 102(2) of the ITA only applies for the purposes of Subdivision j of Division B of Part I (sections 96 to 103 inclusive). Since partnerships are not persons and are not liable to pay taxes under the ITA, the partners of the partnership are the persons who will report the income of the partnership (in proportion to their interest in the partnership and allocated to them on a source by source basis) and will be liable for any taxes payable on such income, unless the partner is another partnership.

[13] The provision which allocates the income of a partnership to its partners is section 96 of the ITA, which is set out in the appendix. This section provides that a partner's income is to be computed as if the partnership were a separate person. Paragraphs 96(1)(*f*) and (*g*) of the ITA provide that the source of income earned or loss incurred by the partnership is maintained by allocating to each partner their share of income or loss from each source of income or loss. The source of income is important for the purposes of the ITA. As noted by the Supreme Court of Canada in *Stewart v. Her Majesty the Queen*, 2002 SCC 46, [2002] 2 S.C.R. 645, at paragraph 5, "[i]t is undisputed that the concept of a 'source of income' is fundamental to the Canadian tax system…".

[14] If a taxpayer is a member of a limited partnership, that partner's ability to use their share of any losses realized by that limited partnership is restricted as a result of the provisions of subsection 96(2.1) of the ITA. Generally, the amount of the loss that may be claimed is limited to the amount by which the at-risk amount of that partner in that limited partnership exceeds the total of the amounts set out in paragraphs 96(2.1)(*b*)(ii), (iii) and (iv) of the ITA. Since the adjustments as set out in paragraphs (*b*)(ii), (iii) and (iv) are not relevant in this appeal, for ease

of reference the restriction on claiming losses incurred by a limited partnership will be described as the amount by which the losses exceed the at-risk amount.

[15] In this case the Crown focused on the consequences under subsection 96(2.1) of the ITA that arise when the losses exceed the at-risk amount. Paragraphs (c), (d) and (e) of subsection 96(2.1) of the ITA provide that the amount by which the taxpayer's share of the losses of a limited partnership exceeds that partner's at-risk amount in that limited partnership:

shall	est à la fois :
(c) not be deducted in computing the taxpayer's income for the year,	c) non déductible dans le calcul de son revenu pour l'année;
(d) not be included in computing the taxpayer's non-capital loss for the year, and	d) exclu du calcul de sa perte autre qu'une perte en capital pour l'année;
(e) be deemed to be the taxpayer's limited partnership loss in respect of the partnership for the year.	e) réputé être la perte comme commanditaire subie par le contribuable dans la société de personnes pour l'année.

[16] The Crown's argument is that since subsection 96(2.1) of the ITA applies to a taxpayer who is a member of a limited partnership and since MLP in this case will be a taxpayer for the purposes of subsection 96(2.1) of the ITA, this provision will apply to MLP as a member of the lower-tier limited partnerships (the PSLPs). As a result, each year that the lower-tier limited partnerships (PSLPs) incurred losses, such losses would be deemed to be the limited partnership losses of the top-tier limited partnership (MLP). As such, according to the Crown, these losses would no longer be business losses to MLP and would be effectively trapped in MLP as the provision which would allow a partner to claim such losses in the future (if the limited partnership later had income), is paragraph 111(1)(e) of the ITA. Paragraph 111(1)(e) of the ITA is not in subdivision j of Division B of Part I and only applies to taxpayers as determined for the

purposes of section 111. Since MLP is not a taxpayer for the purposes of section 111, MLP could not use the limited partnership losses in the future. The allocation of limited partnership losses by a partnership to its partners is not contemplated in section 96 of the ITA.

[17] As noted by the Tax Court Judge, the provisions of the ITA are to be interpreted based on a textual, contextual and purposive analysis (*Canada Trustco*, at para. 10). In this case, in my view, the text of the provision should not be read in isolation. Rather the context and purpose are important in interpreting the words that are used.

[18] Since a partnership does not pay tax, the purpose of section 96 of the ITA is not to determine the income of a partnership for the purposes of determining the amount of tax payable by that partnership. The purpose of section 96 is to ensure that any income or loss realized by the partnership is allocated to its partners and that the source of that income or loss is maintained to allow the members of that partnership to identify the source of income or loss for the purposes of section 3 of the ITA.

[19] The opening words of section 96 of the ITA state that:

96 (1) Where a taxpayer is a member of a partnership, the taxpayer's income, non-capital loss, net capital loss, restricted farm loss and farm loss, if any, for a taxation year, or the taxpayer's taxable income earned in Canada for a taxation year, <u>as the case may be</u>, shall be computed as if …	96 (1) Lorsqu'un contribuable est un associé d'une société de personnes, son revenu, le montant de sa perte autre qu'une perte en capital, de sa perte en capital nette, de sa perte agricole restreinte et de sa perte agricole, pour une année d'imposition, ou son revenu imposable gagné au Canada pour une année d'imposition, <u>selon le cas</u>, est calculé comme si …:
(emphasis added)	(je souligne)

[20] The words “as the case may be” indicate that it is recognized that not all of the matters listed (income, non-capital loss, etc.) will necessarily be applicable to all members of a partnership. In particular, the general rule for determining income is in section 3 of the ITA. This provision commences with the words “The income of a taxpayer for a taxation year …”. Since a partnership is not a taxpayer for the purposes of section 3, this determination or computation of income does not apply to a partnership.

[21] Similarly, non-capital losses are defined in subsection 111(8) of the ITA. The opening words of this definition are “‘non-capital loss’ of a taxpayer for a taxation year means …”. Since a partnership is not a taxpayer for the purposes of section 111, this definition would not apply to a partnership and, therefore a partnership, that is a member of another partnership, would not have a non-capital loss as defined in subsection 111(8) and would not compute a non-capital loss.

[22] When the instructions in computing income and non-capital loss contained in paragraphs 96(2.1)(*c*) and (*d*) of the ITA are read in context, in my view, they again are only intended to apply to taxpayers who are required to compute these amounts under sections 3 and 111, respectively. Since partnerships are not taxpayers for the purposes of sections 3 and 111, these sections do not apply to partnerships.

[23] It should also be noted that generally the ITA provides that limited partnership losses will be deductible in the future if the at-risk amount of the partner in the limited partnership increases. However, the provision allowing the future deduction is paragraph 111(1)(*e*) of the ITA which does not apply to partnerships since this deduction is only available “for the purpose

of computing the taxable income of a taxpayer for a taxation year …". It does not seem to me that Parliament would have intended to apply the restriction on limited partnership losses to partnerships (MLP) as members of another limited partnership (PSLP) but deny such partnerships (MLP) the benefit of the deduction in the future if the limited partnership (PSLP) should earn income resulting in an increase in the at-risk amount of that partnership (MLP) in the limited partnership (PSLP). Therefore, in my view, paragraph 96(2.1)(*e*) of the ITA would also not apply to a partnership that is a member of a limited partnership.

[24] The position of the Crown would require a partnership (MLP) that is a member of another partnership (PSLP) to compute income which would result in a blending of income and losses from various sources into a single amount – the income or loss of the top-tier partnership (MLP) for a particular year. Assume, for example, that the lower tier partnership (PSLP#1) has the following sources of income for a particular year:

Source	**Income (Loss)**
Business A	$1,500
Business B	($800)
Property	$1,000

[25] In determining income as provided in section 3, the income from each source is aggregated (paragraph 3(*a*)) and the loss from each source is totaled and deducted from the aggregate income amount (paragraph 3(*d*)). Therefore the income of the top tier partnership (MLP) would be:

Income from Business A:	$1,500
Income from Property:	$1,000
Paragraph 3(a) amount:	$2,500
Loss from Business B:	($800)
Income:	$1,700

[26] The top-tier partnership (MLP) would have income of $1,700 from the lower-tier partnership (PSLP #1) and this amount would be aggregated with the income amounts from all of the other partnerships of which the top-tier partnership (MLP) was a member. For simplicity, it will be assumed that in this example there is only one partnership of which MLP is a member.

[27] The problem with this interpretation is the application of section 96 to the top-tier partnership (MLP). How does this partnership (MLP) allocate the $1,700 in income to its partners? What is the source of the income of $1,700? The source of income would be lost as MLP would have combined together all of its sources of income and losses into a single amount. This would make it impossible for each member of MLP to determine that member's source of income or loss for the purposes of section 3 as a source of income from a particular business or property.

[28] In the above example, the lower-tier partnership earned income. Subsection 96(2.1) of the ITA only applies if a taxpayer is a member of a limited partnership and only if the losses of the limited partnership exceed the at-risk amount of the taxpayer in respect of that partnership. However, since subsections 96(1) and (2.1) of the ITA both refer to the computation of income, it does not seem to me that Parliament would have intended that the computation of income would only apply to a partnership that is a member of another limited partnership if that other limited partnership has a net loss in excess of the at-risk amount of the member in respect of the limited partnership. Either Parliament would have intended that the computation of income would be done for all partnerships who are members of other partnerships or not at all for partnerships that are members of other partnerships.

[29] Since the computation of income for a partnership that is a member of another partnership will cause problems when that top-tier partnership attempts to allocate its income on a source by source basis to its partners, in my view, Parliament did not intend for a partnership that is a member of another partnership to compute income. Rather, Parliament intended for the sources of income (or loss) to be kept separate and retain their identity as income (or loss) from a particular source as they are allocated from one partnership to another partnership and then to the partners of that second partnership (and so on as the case may be). This would mean that losses from a business incurred by a particular PSLP would still be losses from a business in MLP and then allocated by MLP to its partners as losses from that business.

[30] There is also another problem with the Crown's interpretation of section 96 of the ITA. Assume that PSLP#1 has a loss of $1,000 in year 1 and a profit of $1,000 in year 2. One would expect that after these two years the ultimate partners would not pay any tax since PSLP#1 only broke even. However, if the Crown is correct that the loss incurred in year 1 is a limited partnership loss of MLP and cannot be allocated to its partners, MLP would not be able, in year 2, to use the limited partnership loss of $1,000 because MLP is not a taxpayer for the purposes of section 111. Therefore, the ultimate partners would presumably pay tax on the income of $1,000 without having the benefit of being able to deduct the loss incurred in year 1. If the income of $1,000 earned in year 2 is not included in the income of the partners of MLP because it does not have a source, this would cause even more problems if PSLP#1 were to continue to make a profit. In my view this could not have been the intended result and supports the interpretation adopted by the Tax Court Judge.

[31] The Crown argued that if the losses incurred by a particular partnership (PSLP) retain their character as business losses when flowed through another partnership (MLP), there could be a possibility that losses incurred by one limited partnership could be claimed against income from another limited partnership. The Crown also submitted that the at-risk rules could be avoided entirely if the top-tier partnership (MLP) were a general partnership. However, in my view, these concerns do not outweigh the concerns that arise based on the Crown's interpretation. Parliament could amend the ITA, if it should choose to do so, and, depending on the particular facts of another situation, the Canada Revenue Agency could seek to apply the general anti-avoidance rule in section 245 of the ITA. Whether this rule would apply in any particular situation can only be determined based on an application of the law to the particular facts.

[32] As a result, I would dismiss the appeal, with costs.

"Wyman W. Webb"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Yves de Montigny J.A."

Appendix

Excerpts from the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.)

Section 3:

3 The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:

(a) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,

(b) determine the amount, if any, by which

(i) the total of

(A) all of the taxpayer's taxable capital gains for the year from dispositions of property other than listed personal property, and

(B) the taxpayer's taxable net gain for the year from dispositions of listed personal property,

exceeds

(ii) the amount, if any, by which the taxpayer's allowable capital losses for the year from dispositions of property other than listed personal property exceed the taxpayer's allowable business investment losses for the year,

3 Pour déterminer le revenu d'un contribuable pour une année d'imposition, pour l'application de la présente partie, les calculs suivants sont à effectuer :

a) le calcul du total des sommes qui constituent chacune le revenu du contribuable pour l'année (autre qu'un gain en capital imposable résultant de la disposition d'un bien) dont la source se situe au Canada ou à l'étranger, y compris, sans que soit limitée la portée générale de ce qui précède, le revenu tiré de chaque charge, emploi, entreprise et bien;

b) le calcul de l'excédent éventuel du montant visé au sous-alinéa (i) sur le montant visé au sous-alinéa (ii):

(i) le total des montants suivants :

(A) ses gains en capital imposables pour l'année tirés de la disposition de biens, autres que des biens meubles déterminés,

(B) son gain net imposable pour l'année tiré de la disposition de biens meubles déterminés,

(ii) l'excédent éventuel de ses pertes en capital déductibles pour l'année, résultant de la disposition de biens autres que des biens meubles déterminés sur les pertes déductibles au titre d'un placement d'entreprise pour l'année, subies par le contribuable;

(c) determine the amount, if any, by which the total determined under paragraph (a) plus the amount determined under paragraph (b) exceeds the total of the deductions permitted by subdivision e in computing the taxpayer's income for the year (except to the extent that those deductions, if any, have been taken into account in determining the total referred to in paragraph (a), and

c) le calcul de l'excédent éventuel du total établi selon l'alinéa a) plus le montant établi selon l'alinéa b) sur le total des déductions permises par la sous-section e dans le calcul du revenu du contribuable pour l'année (sauf dans la mesure où il a été tenu compte de ces déductions dans le calcul du total visé à l'alinéa a));

(d) determine the amount, if any, by which the amount determined under paragraph (c) exceeds the total of all amounts each of which is the taxpayer's loss for the year from an office, employment, business or property or the taxpayer's allowable business investment loss for the year,

d) le calcul de l'excédent éventuel de l'excédent calculé selon l'alinéa c) sur le total des pertes subies par le contribuable pour l'année qui résultent d'une charge, d'un emploi, d'une entreprise ou d'un bien et des pertes déductibles au titre d'un placement d'entreprise subies par le contribuable pour l'année;

and for the purposes of this Part,

Pour l'application de la présente partie, les règles suivantes s'appliquent :

(e) where an amount is determined under paragraph (d) for the year in respect of the taxpayer, the taxpayer's income for the year is the amount so determined, and

e) si un montant est calculé selon l'alinéa d) à l'égard du contribuable pour l'année, le revenu du contribuable pour l'année correspond à ce montant;

(f) in any other case, the taxpayer shall be deemed to have income for the year in an amount equal to zero.

f) sinon, le revenu du contribuable pour l'année est réputé égal à zéro.

Subsection 96(1):

96 (1) Where a taxpayer is a member of a partnership, the taxpayer's income, non-capital loss, net capital loss, restricted farm loss and farm loss, if any, for a taxation year, or the taxpayer's taxable income earned in Canada for a taxation year, as the case may be, shall be computed as if

(a) the partnership were a separate person resident in Canada;

(b) the taxation year of the partnership were its fiscal period;

(c) each partnership activity (including the ownership of property) were carried on by the partnership as a separate person, and a computation were made of the amount of

(i) each taxable capital gain and allowable capital loss of the partnership from the disposition of property, and

(ii) each income and loss of the partnership from each other source or from sources in a particular place,

for each taxation year of the partnership;

(d) each income or loss of the partnership for a taxation year were computed as if

(i) this Act were read without reference to sections 34.1 and 34.2, subsection 59(1), paragraph 59(3.2)(c.1) and subsections

96 (1) Lorsqu'un contribuable est un associé d'une société de personnes, son revenu, le montant de sa perte autre qu'une perte en capital, de sa perte en capital nette, de sa perte agricole restreinte et de sa perte agricole, pour une année d'imposition, ou son revenu imposable gagné au Canada pour une année d'imposition, selon le cas, est calculé comme si :

a) la société de personnes était une personne distincte résidant au Canada;

b) l'année d'imposition de la société de personnes correspondait à son exercice;

c) chaque activité de la société de personnes (y compris une activité relative à la propriété de biens) était exercée par celle-ci en tant que personne distincte, et comme si était établi le montant :

(i) de chaque gain en capital imposable et de chaque perte en capital déductible de la société de personnes, découlant de la disposition de biens,

(ii) de chaque revenu et perte de la société de personnes afférents à chacune des autres sources ou à des sources situées dans un endroit donné,

pour chaque année d'imposition de la société de personnes;

d) chaque revenu ou perte de la société de personnes pour une année d'imposition était calculé comme si :

(i) d'une part, il n'était pas tenu compte des articles 34.1 et 34.2, du paragraphe 59(1), de l'alinéa 59(3.2)c.1) ni des paragraphes

66.1(1), 66.2(1) and 66.4(1), and

66.1(1), 66.2(1) et 66.4(1),

(ii) no deduction were permitted under any of section 29 of the Income Tax Application Rules, subsection 65(1) and sections 66, 66.1, 66.2, 66.21 and 66.4;

(ii) d’autre part, aucune déduction n’était permise par le paragraphe 65(1) et les articles 66, 66.1, 66.2, 66.21 et 66.4 ni par l’article 29 des Règles concernant l’application de l’impôt sur le revenu;

(e) each gain of the partnership from the disposition of land used in a farming business of the partnership were computed as if this Act were read without reference to paragraph 53(1)(i);

e) chaque gain de la société de personnes résultant de la disposition de fonds de terre utilisés dans une entreprise agricole de la société de personnes était calculé compte non tenu de l’alinéa 53(1)i);

(e.1) the amount, if any, by which

e.1) était déduit, en application du paragraphe 37(1), par la société de personnes dans le calcul de son revenu pour l’année l’excédent éventuel du total visé au sous-alinéa (i) sur le total visé au sous-alinéa (ii):

(i) the total of all amounts determined under paragraphs 37(1)(a) to 37(1)(c.1) in respect of the partnership at the end of the taxation year

(i) le total des montants déterminés aux alinéas 37(1)a) à c.1) quant à la société de personnes à la fin d’une année d’imposition,

exceeds

(ii) the total of all amounts determined under paragraphs 37(1)(d) to 37(1)(g) in respect of the partnership at the end of the year were deducted under subsection 37(1) by the partnership in computing its income for the year;

(ii) le total des montants déterminés aux alinéas 37(1)d) à g) quant à la société de personnes à la fin de l’année;

(f) the amount of the income of the partnership for a taxation year from any source or from sources in a particular place were the income of the taxpayer from that source or from sources in that particular place, as the case may be, for the taxation year of the taxpayer in which the partnership’s taxation year ends, to

f) le montant du revenu de la société de personnes, pour une année d’imposition, tiré d’une source quelconque ou de sources situées dans un endroit donné, constituait le revenu du contribuable tiré de cette source ou de sources situées dans cet endroit donné, selon le cas, pour l’année d’imposition du contribuable

the extent of the taxpayer's share thereof; and	au cours de laquelle l'année d'imposition de la société de personnes se termine, jusqu'à concurrence de la part du contribuable;
(g) the amount, if any, by which	g) la perte du contribuable — à concurrence de la part dont il est tenu — résultant d'une source ou de sources situées dans un endroit donné, pour l'année d'imposition du contribuable au cours de laquelle l'année d'imposition de la société de personnes se termine, équivalait à l'excédent éventuel :
(i) the loss of the partnership for a taxation year from any source or sources in a particular place,	(i) de la perte de la société de personnes, pour une année d'imposition, résultant de cette source ou de ces sources,
exceeds	sur :
(ii) in the case of a specified member (within the meaning of the definition specified member in subsection 248(1) if that definition were read without reference to paragraph (b) thereof) of the partnership in the year, the amount, if any, deducted by the partnership by virtue of section 37 in calculating its income for the taxation year from that source or sources in the particular place, as the case may be, and	(ii) dans le cas d'un associé déterminé (au sens de la définition d'associé déterminé figurant au paragraphe 248(1), mais compte non tenu de l'alinéa b) de celle-ci) de la société de personnes au cours de l'année, le montant déduit par la société de personnes en application de l'article 37 dans le calcul de son revenu pour l'année d'imposition provenant de cette source ou de ces sources,
(iii) in any other case, nil	(iii) dans les autres cas, zéro.
were the loss of the taxpayer from that source or from sources in that particular place, as the case may be, for the taxation year of the taxpayer in which the partnership's taxation year ends, to the extent of the taxpayer's share thereof.	

Subsection 96(2.1):

(2.1) Notwithstanding subsection 96(1), where a taxpayer is, at any time in a taxation year, a limited partner of a partnership, the amount, if any, by which

(a) the total of all amounts each of which is the taxpayer's share of the amount of any loss of the partnership, determined in accordance with subsection 96(1), for a fiscal period of the partnership ending in the taxation year from a business (other than a farming business) or from property

exceeds

(b) the amount, if any, by which

(i) the taxpayer's at-risk amount in respect of the partnership at the end of the fiscal period

exceeds the total of

(ii) the amount required by subsection 127(8) in respect of the partnership to be added in computing the investment tax credit of the taxpayer for the taxation year,

(iii) the taxpayer's share of any losses of the partnership for the fiscal period from a farming business, and

(iv) the taxpayer's share of

(A) the foreign resource pool expenses, if any, incurred by the partnership in the fiscal period,

(B) the Canadian exploration expense, if any, incurred by the partnership in the fiscal period,

(C) the Canadian development

(2.1) Malgré le paragraphe (1), dans le cas où un contribuable est commanditaire d'une société de personnes au cours d'une année d'imposition, l'excédent éventuel :

a) du total des montants dont chacun représente la part, dont il est tenu, d'une perte de la société de personnes résultant d'une entreprise — à l'exclusion d'une entreprise agricole — ou d'un bien, calculée conformément au paragraphe (1), pour un exercice de la société de personnes se terminant au cours de l'année,

sur :

b) l'excédent éventuel :

(i) de la fraction à risques de l'intérêt du contribuable dans la société de personnes à la fin de l'exercice,

sur le total des montants suivants :

(ii) la partie du montant déterminé à l'égard de la société de personnes que le paragraphe 127(8) prévoit d'ajouter dans le calcul du crédit d'impôt à l'investissement du contribuable pour l'année,

(iii) la part, dont le contribuable est tenu, des pertes de la société de personnes résultant d'une entreprise agricole pour l'exercice,

(iv) la part attribuable au contribuable des frais globaux relatifs à des ressources à l'étranger, frais d'exploration au Canada, frais d'aménagement au Canada et frais à l'égard de biens canadiens relatifs au pétrole et au gaz, engagés par la société de personnes au cours de l'exercice, expense, if any, incurred by the partnership in the fiscal period, and

(D) the Canadian oil and gas property expense, if any, incurred by the partnership in the fiscal period,

shall

est à la fois :

(c) not be deducted in computing the taxpayer's income for the year,

c) non déductible dans le calcul de son revenu pour l'année;

(d) not be included in computing the taxpayer's non-capital loss for the year, and

d) exclu du calcul de sa perte autre qu'une perte en capital pour l'année;

(e) be deemed to be the taxpayer's limited partnership loss in respect of the partnership for the year.

e) réputé être la perte comme commanditaire subie par le contribuable dans la société de personnes pour l'année.

Subsection 102(2):

(2) In this subdivision, a reference to a person or a taxpayer who is a member of a particular partnership shall include a reference to another partnership that is a member of the particular partnership.

(2) Pour l'application de la présente sous-section, la mention d'une personne ou d'un contribuable qui est un associé d'une société de personnes vaut également mention d'une société de personnes qui fait partie de la société de personnes.

Paragraph 111(1)(*e*):

111 (1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such portion as the taxpayer may claim of the taxpayer's

111 (1) Pour le calcul du revenu imposable d'un contribuable pour une année d'imposition, peuvent être déduites les sommes appropriées suivantes :

[…]

…

(e) limited partnership losses in respect of a partnership for taxation years preceding the year, but no amount is deductible for the year in

e) les pertes comme commanditaire subies dans une société de personnes par le contribuable pour les années d'imposition précédant l'année;

respect of a limited partnership loss except to the extent of the amount by which

(i) the taxpayer's at-risk amount in respect of the partnership (within the meaning assigned by subsection 96(2.2)) at the end of the last fiscal period of the partnership ending in the taxation year exceeds

(ii) the total of all amounts each of which is

(A) the amount required by subsection 127(8) in respect of the partnership to be added in computing the investment tax credit of the taxpayer for the taxation year,

(B) the taxpayer's share of any losses of the partnership for that fiscal period from a business or property, or

(C) the taxpayer's share of

(I) the foreign resource pool expenses, if any, incurred by the partnership in that fiscal period,

(II) the Canadian exploration expense, if any, incurred by the partnership in that fiscal period,

(III) the Canadian development expense, if any, incurred by the partnership in that fiscal period, and

(IV) the Canadian oil and gas property expense, if any, incurred by the partnership in that fiscal period.

toutefois, le montant déductible pour l'année au titre d'une perte comme commanditaire ne l'est qu'à concurrence de l'excédent du montant visé au sous-alinéa (i) sur le total visé au sous-alinéa (ii) :

(i) la fraction à risques de l'intérêt du contribuable dans la société de personnes, au sens du paragraphe 96(2.2), à la fin du dernier exercice de la société de personnes se terminant au cours de l'année,

(ii) le total des montants dont chacun représente :

(A) la partie du montant déterminé à l'égard de la société de personnes que le paragraphe 127(8) prévoit d'ajouter au crédit d'impôt à l'investissement du contribuable pour l'année,

(B) la part dont le contribuable est tenu des pertes de la société de personnes résultant d'une entreprise ou d'un bien pour le dernier exercice de la société de personnes se terminant au cours de l'année,

(C) la part attribuable au contribuable des frais globaux relatifs à des ressources à l'étranger, des frais d'exploration au Canada, des frais d'aménagement au Canada et des frais à l'égard de biens canadiens relatifs au pétrole et au gaz, engagés par la société de personnes au cours de cet exercice.

Subsection 111(8):

(8) In this section,	(8) Les définitions qui suivent s'appliquent au présent article.
non-capital loss of a taxpayer for a taxation year means, at any time, the amount determined by the formula	perte autre qu'une perte en capital La perte autre qu'une perte en capital d'un contribuable pour une année d'imposition correspond, à un moment donné, au montant obtenu par la formule suivante :
(A + B) - (D + D.1 + D.2)	(A + B) - (D + D.1 + D.2)
where	où :
A is the amount determined by the formula	A représente le montant obtenu par la formule suivante :
E - F	E – F
where	où :
E is the total of all amounts each of which is	E représente le total des sommes représentant chacune :
(a) the taxpayer's loss for the year from an office, employment, business or property,	a) la perte que le contribuable a subie pour l'année relativement à une charge, à un emploi, à une entreprise ou à un bien,
(a.1) an amount deductible under paragraph 104(6)(a.4) in computing the taxpayer's income for the year,	a.1) une somme déductible en application de l'alinéa 104(6)a.4) dans le calcul du revenu du contribuable pour l'année,
(b) an amount deducted under paragraph (1)(b) or section 110.6, or deductible under any of paragraphs 110(1)(d) to (d.3), (f), (g), (j) and (k), section 112 and subsections 113(1) and 138(6), in computing the taxpayer's taxable income for the year, or	b) une somme déduite en application de l'alinéa (1)b) ou de l'article 110.6 dans le calcul de son revenu imposable pour l'année ou une somme déductible en application de l'un des alinéas 110(1)d) à d.3), f), g), j) et k), de l'article 112 et des paragraphes 113(1) et 138(6) dans le calcul de son revenu imposable pour l'année,
(c) if that time is before the taxpayer's eleventh following taxation year, the taxpayer's allowable business investment loss for the year, and	c) si le moment donné est antérieur à la onzième année d'imposition postérieure du contribuable, sa perte déductible au titre d'un placement d'entreprise pour l'année,

F is the amount determined under paragraph 3(c) in respect of the taxpayer for the year,	F la fraction calculée selon l'alinéa 3c) à l'égard du contribuable pour l'année;
B is the amount, if any, determined in respect of the taxpayer for the year under section 110.5 or subparagraph 115(1)(a)(vii),	B le montant déterminé à l'égard du contribuable pour l'année selon l'article 110.5 ou le sous-alinéa 115(1)a)(vii);
C [Repealed, 2000, c. 19, s. 19]	C [Abrogé, 2000, ch. 19, art. 19]
D is the amount that would be the taxpayer's farm loss for the year if the amount determined for B in the definition farm loss in this subsection were zero,	D le montant qui constituerait sa perte agricole pour l'année, si le montant représenté par l'élément B dans la formule figurant à la définition de perte agricole au présent paragraphe était zéro;
D.1 is the total of all amounts deducted under subsection 111(10) in respect of the taxpayer for the year, and	D.1 le total des montants déduits en application du paragraphe (10) relativement au contribuable pour l'année;
D.2 is the total of all amounts by which the non-capital loss of the taxpayer for the year is required to be reduced because of section 80;	D.2 le total des montants à appliquer en réduction de la perte autre qu'une perte en capital du contribuable pour l'année par l'effet de l'article 80.

<u>Subsection 248(1):</u>

248 (1) In this Act,	248 (1) Les définitions qui suivent s'appliquent à la présente loi.
[…]	…
non-capital loss has the meaning assigned by subsection 111(8);	perte autre qu'une perte en capital S'entend au sens du paragraphe 111(8).

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE TAX COURT OF CANADA DATED JANUARY 11, 2016, NOS. 2013-897(IT)G, 2013-899(IT)G, 2013-900(IT)G and 2013-3334(IT)G (2016 TCC 10)

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APPEARANCES:

Robert Carvalho Elizabeth (Lisa) G. McDonald	FOR THE APPELLANT
David R. Davies S. Natasha Reid	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPELLANT
Thorsteinssons LLP Tax Lawyers Vancouver, British Columbia	FOR THE RESPONDENT