Federal Court of Appeal | Cour d'appel fédérale

Date: 20190628

Docket: A-79-18

Citation: 2019 FCA 195

CORAM: **WEBB J.A.**
NEAR J.A.
LASKIN J.A.

BETWEEN:

BAKORP MANAGEMENT LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 14, 2019 and March 18, 2019.

Judgment delivered at Ottawa, Ontario, on June 28, 2019.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from a judgment of the Tax Court of Canada (Court File No. 2015-1101(IT)G) that dismissed the appeal of Bakorp Management Ltd. (Bakorp) from the reassessment of the taxation year ending in March 1992.

[2] Following a settlement of a dispute that arose in relation to a prior taxation year with respect to the amount of non-capital losses available to be carried forward, Bakorp requested that

the amount of non-capital losses that had been claimed for the January 1992 taxation year be reduced. The tax return for the year ending in March 1992 was filed on the basis that this request would be granted and the non-capital losses that had originally been claimed for the January 1992 taxation year would be available for the March 1992 taxation year. This request was, however, refused by the Minister of National Revenue (the Minister) and the March 1992 taxation year was reassessed to deny the claim for the non-capital losses.

[3] Bakorp appealed the reassessment of its March 1992 taxation year on the basis that, notwithstanding the refusal of the Minister to make the adjustments as requested for the January 1992 taxation year, the non-capital losses available for the March 1992 taxation year should have reflected the revised amount taking into account the request that Bakorp had made to reduce the non-capital losses claimed for the January 1992 taxation year.

[4] The Tax Court judge did not agree with the position of Bakorp and dismissed its appeal. For the reasons that follow, I would dismiss this appeal.

I. Background

[5] Based on the agreed statement of facts, it would appear that Seven Up Canada Inc. and at least one other corporation amalgamated as Bakorp on March 10, 1992. Seven Up Canada Inc. had a year end on January 18, 1992. Therefore there were two year ends in 1992 that are relevant in this appeal – one on January 18, 1992 and the other on March 10, 1992. The agreed statement of facts does not distinguish between Bakorp and Seven Up Canada Inc. In paragraph 6, it is stated that "[a] predecessor corporation of the Appellant, Seven Up Canada Inc., had a taxation

year end of January 18, 1992" and in the next paragraph "[t]he Appellant initially carried forward and applied non-capital losses to reduce its income to nil for its January 18, 1992 taxation year."

[6] There is also a reference to "the Appellant" being engaged in litigation with the Minister in relation to "the Appellant's" 1989 taxation year. Since the amalgamation occurred in March 1992 and since it appears that Seven Up Canada Inc. had a taxation year ending January 18, 1992 and claimed non-capital losses (which were the subject of the dispute with the Minister), presumably the dispute was in relation to the non-capital losses of Seven Up Canada Inc.

[7] In any event, what is relevant is that there were two taxation years less than 2 months apart in 1992. It is also relevant that there was a dispute related to the 1989 taxation year with respect to the amount of non-capital losses from 1987 that were available to be carried forward. This dispute related to the 1989 taxation year was finally resolved on April 15, 2010.

[8] In filing the tax return for the January 1992 taxation year, an amount was claimed as a carry-forward of non-capital losses. The amount claimed reduced the taxable income to nil. When this tax return was filed, the dispute referred to above (which was related to the amount of non-capital losses that could be carried forward) had not been resolved.

[9] In its memorandum and during oral argument, Bakorp referred to the amount that had been claimed for non-capital losses in the return that was filed for the January 1992 taxation year as a "placeholder figure". However, the concept of a "placeholder figure" does not exist for the

purposes of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (the Act). Either an amount is claimed for non-capital losses or it is not.

[10] On December 7, 2010, following the resolution of the dispute related to the 1989 taxation year, Bakorp sent a letter to the Minister to request that two adjustments be made for the January 1992 taxation year. The first adjustment was to reduce the amount of non-capital losses that were being claimed for that year by $439,581 (to $4,220,959) and the second was to apply the available investment tax credits to eliminate any tax liability that would arise from reducing those non-capital losses.

[11] When the tax return was originally filed for the January 1992 taxation year, no taxes were payable for this taxation year. As a result of these two adjustments (to reduce the amount of non-capital losses that were claimed and to apply the available investment tax credits) there still would be no tax payable for the January 1992 taxation year.

[12] The tax return for the March 1992 taxation year was not filed until the dispute related to the 1989 taxation year and the amount of non-capital losses available for carry forward was resolved. This return was filed on February 10, 2011, after Bakorp had requested the adjustments for the January 1992 taxation year but before the response was received from the Minister.
A claim was made in this tax return for $439,581 of non-capital losses that had been claimed for the January 1992 taxation year but which Bakorp had requested be reversed (and hence would be available for the March 1992 taxation year).

[13] By letter dated November 23, 2011, the Minister indicated that the requested adjustments would not be processed. Since the Minister did not grant the request for the adjustments for the January 1992 taxation year, the March 1992 taxation was reassessed to deduct the $439,581 of non-capital losses that had been claimed for the March 1992 taxation year and which had also been claimed for the January 1992 taxation year.

[14] Bakorp filed a notice of objection to the reassessment issued in relation to the March 1992 taxation year. Bakorp did not file an application in the Federal Court for judicial review of the decision of the Minister dated November 23, 2011 denying its request to make the adjustments to the January 1992 taxation year.

II. Decision of the Tax Court

[15] Oral reasons were provided by the Tax Court judge. An amended transcript of the oral reasons was submitted in this appeal. Because the reasons have been transcribed, there are no paragraph numbers to identify the different paragraphs.

[16] The Tax Court judge, on pages 4 and 5 of the transcript of the reasons, identified two issues:

- Was the Minister required to issue a consequential assessment under 152(4.3) as requested by the taxpayer?
- If yes, is the amount of the 1987 non-capital loss carryforward covered by the request available to be deducted under subsection 111(1)(a), notwithstanding the fact that the Minister did not reassess the Appellant for its January 1992 taxation year to reduce the amount of the loss carryforward used in that year by $439,581 as requested by the Appellant.

[17] Subsection 152(4.3) of the Act provides that:

(4.3) Notwithstanding subsections (4), (4.1) and (5), if the result of an assessment or a decision on an appeal is to change a particular balance of a taxpayer for a particular taxation year, the Minister may, or if the taxpayer so requests in writing, shall, before the later of the expiration of the normal reassessment period in respect of a subsequent taxation year and the end of the day that is one year after the day on which all rights of objection and appeal expire or are determined in respect of the particular year, reassess the tax, interest or penalties payable by the taxpayer, redetermine an amount deemed to have been paid or to have been an overpayment by the taxpayer or modify the amount of a refund or other amount payable to the taxpayer, under this Part in respect of the subsequent taxation year, but only to the extent that the reassessment, redetermination or modification can reasonably be considered to relate to the change in the particular balance of the taxpayer for the particular year.	**(4.3)** Malgré les paragraphes (4), (4.1) et (5), lorsqu'une cotisation ou une décision d'appel a pour effet de modifier un solde donné applicable à un contribuable pour une année d'imposition donnée, le ministre peut ou, si le contribuable en fait la demande par écrit, doit, avant le dernier en date du jour d'expiration de la période normale de nouvelle cotisation pour une année d'imposition subséquente et de la fin du jour qui suit d'un an l'extinction ou la détermination de tous les droits d'opposition ou d'appel relatifs à l'année donnée, établir une nouvelle cotisation à l'égard de l'impôt, des intérêts ou des pénalités payables par le contribuable, déterminer de nouveau un montant réputé avoir été payé, ou payé en trop, par lui ou modifier le montant d'un remboursement ou une autre somme qui lui est payable, en vertu de la présente partie pour l'année subséquente, mais seulement dans la mesure où il est raisonnable de considérer que la nouvelle cotisation, la nouvelle détermination ou la modification se rapporte à la modification du solde donné applicable au contribuable pour l'année donnée.

[18] The Tax Court judge identified three conditions that must be satisfied in order for this provision to apply. He noted that the first condition is that the particular balance (which would include a loss determination) of a taxpayer for a particular taxation year is changed as a result of

an assessment or decision on appeal. There was no dispute that this condition was satisfied in this case.

[19] The second condition is that the taxpayer has made a request in writing in respect of a subsequent taxation year. The Tax Court judge noted that the parties did not dispute that this condition was satisfied in this case.

[20] The third condition is that the requested change must reasonably be considered to relate to the change in the particular balance of the taxpayer for the particular taxation year. In this case, the Tax Court judge concluded that there was not a sufficient connection or nexus between the requested change and the balance that was changed for the non-capital losses that were carried forward to 1989 in order for this condition to be satisfied.

[21] The Tax Court judge also concluded that the question of whether the requested adjustments for the January 1992 taxation year should have been made is a matter that should have been brought before the Federal Court and not the Tax Court.

[22] As a result, Bakorp's appeal was dismissed by the Tax Court.

III. Issue and Standard of Review

[23] Although the Tax Court judge first addressed the interpretation of subsection 152(4.3) of the Act before he addressed the question of jurisdiction, in my view, in this appeal it would be more appropriate to address the question of jurisdiction first.

[24] Therefore, the issues to be decided in this appeal are the following:

(a) did the Tax Court have the jurisdiction, in this case, to interpret subsection 152(4.3) of the Act to decide whether the Minister was required to make the adjustments sought for the January 1992 taxation year?

(b) If the Tax Court did have this jurisdiction, was the Minister required to make the adjustments as requested by Bakorp for the January 1992 taxation year?

(c) If the Tax Court did not have this jurisdiction, what are the implications that arise in relation to the March 1992 taxation year as a result of the Minister's refusal to make the adjustments as requested by Bakorp?

[25] These issues raise questions of law and therefore the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

IV. Analysis

[26] Subsection 152(4.3) of the Act provides that the Minister is, *inter alia*, to reassess the tax, interest or penalties payable by a taxpayer, if a particular balance for a prior taxation year is changed as a result of an assessment or a decision on appeal. There is a further condition that the reassessment must reasonably be considered to relate to the change in the particular balance of the taxpayer for the particular year.

[27] Subsection 152(4.3) also provides that the Minister is to "redetermine an amount deemed to have been paid or to have been an overpayment by the taxpayer or modify the amount of a refund or other amount payable to the taxpayer, under this Part in respect of the subsequent

taxation year…". Bakorp was not, however, requesting any redetermination of any amount deemed to have been paid or any overpayment for the January 1992 taxation year nor was it requesting any modification of a refund for that taxation year or any other amount payable in respect of that taxation year.

[28] The request for the adjustments for the January 1992 taxation year is set out in the first paragraph of the letter dated December 7, 2010 from counsel for Bakorp to the Canada Revenue Agency:

> … [a]s a result of the litigation settled in respect of Bakorp Management Limited's ("Bakorp") 1989 taxation year, the available 1987 non-capital losses have been determined. Bakorp is now requesting that pursuant to subsection 152(4.3) of the *Income Tax Act* (Canada) (the "Act") the Minister reassess its January, 1992 taxation year to vary the losses applied in that year so that, in the aggregate, $4,220,959 of the 1987 non-capital losses are applied. Bakrop *[sic]* is further requesting that the available investment tax credits ("ITCs") in the January 1992 taxation year be applied against any resulting tax payable.

[29] The obligation that is imposed on the Minister under subsection 152(4.3) of the Act is to reassess the tax. Prior to this request being made, no taxes were payable in relation to the January 1992 taxation year. If the request would have been granted, the amount of taxes payable for that taxation year would not change, *i.e.* no taxes would be payable for that year. This led to a question during the hearing of this appeal of whether this was a request to reassess the tax for that taxation year.

[30] This issue had not been addressed by the parties in their memoranda. The hearing was adjourned and each party made additional written submissions. When the hearing resumed, each party also made further oral arguments in relation to this question. An additional question related

to the application (or potential application) of subsection 152(8) of the Act was also addressed by the parties.

[31] In responding to these questions, Bakorp acknowledged, in paragraph 14 of its written submissions, that "requests under subsection 152(4.3) do not form part of the objection and appeal regime in sections 165 and 169, but instead form part of the assessment regime in section 152" and also, in paragraph 24, that "[s]ubsection 152(4.3) is not found within sections 165 or 169, it makes no reference to those provisions, and it in no way indicates that it is subject to those provisions."

[32] I agree that the request made by Bakorp in this case is not part of the objection and appeal regime as set out in sections 165 and 169 of the Act. However, this leads directly to the question of whether the Tax Court, in this case, had the jurisdiction to determine if subsection 152(4.3) of the Act required the Minister to make the requested adjustments.

[33] The jurisdiction of the Tax Court to hear appeals is set out in section 12 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2. This section provides as follows:

12 (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, the *Excise Act, 2001*, Part IX of the *Excise Tax Act*, Part 1 of the *Greenhouse Gas Pollution Pricing Act*, the *Income Tax*	**12 (1)** La Cour a compétence exclusive pour entendre les renvois et les appels portés devant elle sur les questions découlant de l'application de la *Loi sur le droit pour la sécurité des passagers du transport aérien*, du *Régime de pensions du Canada*, de la *Loi sur l'exportation et l'importation de biens culturels*, de la partie V.1 de la *Loi sur les douanes*, de la *Loi sur l'assurance-emploi*, de la *Loi de 2001 sur l'accise*, de la partie IX de la *Loi*

Act, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act, 2006* when references or appeals to the Court are provided for in those Acts.	*sur la taxe d'accise*, de la partie 1 de la *Loi sur la tarification de la pollution causée par les gaz à effet de serre*, de la *Loi de l'impôt sur le revenu*, de la *Loi sur la sécurité de la vieillesse*, de la *Loi de l'impôt sur les revenus pétroliers* et de la *Loi de 2006 sur les droits d'exportation de produits de bois d'oeuvre*, dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

[34] The jurisdiction of the Tax Court is limited to hearing appeals under the Act when those appeals have been provided for in the Act. Under subsection 169(1) of the Act, an appeal can only be brought to the Tax Court if a notice of objection has been served to an assessment. No notice of objection was served in relation to the January 1992 taxation year (and since the assessment for that year was a nil assessment, no notice of objection could have been served) (*Bormann v. Canada*, 2006 FCA 83, at paras. 3 and 8).

[35] Although section 12 of the *Tax Court of Canada Act* also grants the Tax Court jurisdiction to determine references, the only provision of the Act that contemplates a direct reference to the Tax Court is section 174 of the Act. This section only provides that the Minister may apply to the Tax Court for determination of a question. This provision is not available for Bakorp to make a reference to the Tax Court.

[36] In this case, there was no appeal before the Tax Court for the January 1992 taxation year. This distinguishes this case from *Sherway Centre Ltd. v. Canada*, 2003 FCA 26, which was an appeal to this Court from a decision of the Tax Court. In *Sherway* the interpretation of subsection 152(4.3) of the Act was considered. However, the relevant taxation years (the years for which the

adjustments were requested) were before the Tax Court following reassessments issued for those years and the serving of notices of objection.

[37] Since the January 1992 taxation year was not before the Tax Court in this case, there is no provision of the Act that would allow the Tax Court to make the requested adjustments for that year even if the Tax Court was satisfied that Bakorp was entitled to have such adjustments made. Unless the amount claimed for non-capital losses for the January 1992 taxation year is adjusted as requested by Bakorp, $439,581 of these losses will be claimed twice – once in the January 1992 taxation year and again in the March 1992 taxation year.

[38] Bakorp submitted that, in its view, the Minister erred in not making the requested adjustments for the January 1992 taxation year. Bakorp argued that the March 1992 taxation year must be assessed on its own, notwithstanding the failure of the Minister to make the requested adjustments for the January 1992 taxation year, and in assessing the March 1992 taxation year the court must give effect to these requested adjustments. Bakorp, in its supplemental submissions, stated at paragraph 37 that "the caselaw is clear that the Minister must assess each year on the basis of the Act regardless of errors made in other years". As support for this proposition, Bakorp, in a footnote, listed the following cases: *Aallcann Wood Suppliers Inc. v. The Queen*, 94 D.T.C. 1475, [1994] T.C.J. No. 280; *Canada v. Papiers Cascades Cabano Inc.*, 2006 FCA 419; *Leola Purdy Sons Ltd. v. The Queen*, 2009 TCC 21; *Barrington Lane Developments Limited v. The Queen*, 2010 TCC 388; and *On-Line Finance & Leasing Corporation v. Canada*, 2010 TCC 475.

[39] Bakorp also referred to *Trom Electric Co. Ltd. v. The Queen*, 2004 TCC 727, to support the proposition that a particular year is to be assessed in accordance with the law even if this would mean that a taxpayer may escape taxation or otherwise obtain an unintended benefit for a year that is statute barred. In *Trom Electric*, there was no dispute that the taxpayer made errors in how it treated construction lien holdbacks for the purposes of the Act. To correct the errors for only the years that were before the Tax Court (1992 to 1994) would result in a benefit to the taxpayer because the taxpayer had improperly claimed a deduction in 1991 which it had included in income in 1992. The issue was whether the income inclusion in 1992 should be reversed since no adjustment could be made to 1991 (as this year was not before the Tax Court). The Tax Court concluded that the correct assessment was to remove from income the amount that had been included in income in 1992 even though the deduction for this amount for 1991 could not be reversed.

[40] None of the cases referred to by Bakorp involved a situation where a request had been made under subsection 152(4.3) of the Act for an adjustment to a subsequent taxation year as a result of a settlement of a dispute related to a previous taxation year and the Minister had refused to make the requested adjustments.

[41] In this appeal, there is no dispute that the non-capital losses as claimed for the January 1992 taxation year were valid non-capital losses and could be claimed in that year. Therefore, the return as originally filed did not contain any errors with respect to the non-capital losses that were claimed. The Minister simply did not make the adjustment as requested by Bakorp for the

January 1992 taxation year. Bakorp does not agree with this decision that was made by the Minister.

[42] However, this disagreement between Bakorp and the Minister in relation to the application of subsection 152(4.3) of the Act in this case should have been resolved by Bakorp making an application to the Federal Court for judicial review of this decision of the Minister. The Tax Court does not have the jurisdiction to judicially review decisions of the Minister. The jurisdiction of the Tax Court is limited to references and appeals as provided in the Act. There is no provision in the Act that would permit the Tax Court to judicially review the decision of the Minister in this case. Having failed to seek judicial review of this decision before the Federal Court, Bakorp cannot effectively ask the Tax Court to interpret and indirectly apply this provision.

[43] In my view, the Tax Court did not have the jurisdiction, in this case, to interpret subsection 152(4.3) of the Act to decide whether the Minister was required to make the adjustments requested by Bakorp for the January 1992 taxation year.

[44] Since Bakorp did not seek judicial review of the decision of the Minister, this decision to not make the adjustments for the January 1992 taxation year stands. The non-capital losses in issue in this case were therefore claimed in the January 1992 taxation year and could not again be claimed in the March 1992 taxation year.

[45] This case can be distinguished from the situation where a taxpayer has filed a return and claimed a non-capital loss but the Minister disputes the amount of that loss. Assuming that the result is still a nil assessment, the taxpayer cannot file a notice of objection for that year. In a later year when the taxpayer has a profit and wants to carry forward the non-capital loss from the earlier year, the quantum of the earlier year's loss can then be determined by the Tax Court. The dispute would relate to an assessing position taken by the Minister with respect to the amount of the loss incurred in the earlier taxation year, not to a decision made by the Minister to not reassess a taxpayer who requests such reassessment relying on subsection 152(4.3) of the Act.

[46] Bakorp, at the end of its memorandum, raised two issues that it described as procedural fairness and natural justice issues. The first issue is based on the reply that was filed by the Crown in the appeal before the Tax Court. The Crown, in its reply, did not indicate that it was relying on paragraph 111(3)(*a*) of the Act. This is the paragraph that provides that a taxpayer can only claim non-capital losses once. Bakorp submitted that the failure of the Crown to plead this provision means that the Tax Court could not rely on this provision to deny Bakorp its claim for non-capital losses for the March 1992 taxation year on the basis that such losses were also claimed for the January 1992 taxation year.

[47] However, it is obvious from reading the notice of appeal that Bakorp had filed with the Tax Court that it understood that non-capital losses could only be claimed once. Bakorp, in its notice of appeal to the Tax Court, also indicated that it was relying on section 111 of the Act. In in paragraph 11(k) of the reply filed with the Tax Court, the Crown did indicate that the Minister was relying on the assumption that the "maximum non-capital losses available to apply to the

March 1992 Taxation Year was $51,594,852". This amount reflected the amount of non-capital losses claimed for the January 1992 taxation year that Bakorp had requested be reversed. The reference to paragraph 111(3)(*a*) of the Act by the Tax Court judge did not introduce a new legal principle that was unknown to Bakorp. This alleged breach of procedural fairness is without any merit.

[48] Bakorp also submitted that the issue of whether the Tax Court had jurisdiction was previously decided by another judge of the Tax Court. Following the filing of the notice of appeal with the Tax Court, the Crown brought a motion for an order dismissing the appeal on the basis that the Tax Court did not have the jurisdiction to grant the relief sought. In dismissing the motion, the motion judge found that the Crown was effectively asking the Tax Court to strike the notice of appeal and applied the test for striking pleadings. He found that it was not plain and obvious that Bakorp's notice of appeal did not disclose a reasonable cause of action.

[49] The motion judge found at paragraph 12 of his reasons that "[t]he Court does have jurisdiction to hear the appeal and grant the relief requested by [Bakorp]." The relief requested by Bakorp in its notice of appeal filed with the Tax Court was an order that the Minister reassess the March 1992 taxation year to allow it to claim the non-capital losses that were the subject of the adjustment request. While the Tax Court does have the jurisdiction to order the reassessment of a taxation year that is properly before that Court, the issue is whether the Tax Court had the jurisdiction to determine whether the Minister, in this case, was required to make the adjustments as requested for a different taxation year (the January 1992 taxation year) which was not before the Tax Court. In my view, it was still open for the Tax Court judge hearing Bakorp's appeal to

determine that issue. In any event, any finding on jurisdiction made by the motion judge is not binding on this Court.

[50] As a result, I would dismiss this appeal with costs.

"Wyman W. Webb"
J.A.

“I agree
D. G. Near J.A.”

“I agree
J.B. Laskin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED JANUARY 31, 2018 (AMENDED, MARCH 9 2018), DOCKET NUMBER 2015-1101(IT)G

DOCKET:	A-79-18
STYLE OF CAUSE:	BAKORP MANAGEMENT LTD. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATES OF HEARING:	FEBRUARY 14, 2019 AND MARCH 18, 2019
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NEAR J.A. LASKIN J.A.
DATED:	JUNE 28, 2019

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