Federal Court of Appeal  Cour d'appel fédérale

Date: 20140424

Docket: A-129-13

Citation: 2014 FCA 104

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

BAKORP MANAGEMENT LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 26, 2014.

Judgment delivered at Ottawa, Ontario, on April 24, 2014.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: GAUTHIER J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from an Order of Justice Campbell Miller of the Tax Court of Canada (2013 TCC 94) dismissing the appeal of Bakorp Management Limited (Bakorp). Justice Campbell Miller dismissed Bakorp's appeal on the basis that the appeal did not comply with the requirements of subsection 169(2.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). For the reasons that follow I would dismiss the appeal of Bakorp from this decision of Justice Campbell Miller.

Background

[2] Bakorp is a large corporation within the meaning assigned by subsection 225.1(8) of the Act (a large corporation). On March 10, 1992 Bakorp acquired 5 Class A Common shares of 968649 Ontario Limited and on the following day these shares were redeemed. Based on the statements made by Bakorp in its notice of objection and without taking into account whether the provisions of subsection 84(3) of the Act would change the timing of when amounts were paid for the purposes of the Act, it would appear that:

(a) the total amount to be paid for these shares was subject to certain adjustments;

(b) when all of the adjustments were finally determined, the total amount that was paid for these shares was $338,213,849;

(c) the largest portion of this amount was paid to Bakorp during Bakorp's 1993 taxation year;

(d) in Bakorp's 1994 taxation year another payment was made; and

(e) the final payment was made in Bakorp's 1995 taxation year.

[3] As a result of the provisions of subsection 84(3) of the Act (subject to the provisions of subsection 55(2) of the Act), the amount paid on the redemption of the shares minus the paid-up capital of those shares was deemed to be a dividend. Subsection 55(2) of the Act was applicable and a portion of what would otherwise have been a deemed dividend was converted into proceeds of disposition of the shares. This appeal is only related to the deemed dividend portion (the Deemed Dividend).

[4] Bakorp initially took the position that a portion of the Deemed Dividend was not payable until 1995. As a result, in reporting its liability under Part IV of the Act, Bakorp reported $52,912,264 as a dividend that was subject to Part IV tax in 1995 and reported a Part IV tax liability of $13,333,059.

[5] By notice of reassessment dated January 31, 2000, the Minister of National Revenue (Minister) reduced the amount of the dividend subject to Part IV tax in 1995 by $25,332,237 (which would have reduced the amount to $27,580,027). This resulted in a reduction of the Part IV tax liability of Bakorp for 1995 in the amount of $6,333,059.

[6] By notice of objection dated May 29, 2000 Bakorp objected to this reassessment of its Part IV tax liability for 1995. Although the Notice of Objection was served more than 90 days after the date of the notice of reassessment, since no issue was raised with respect to whether this notice was served within the time limits as provided in the Act, presumably an extension of time to serve this notice of objection was granted under section 166.1 of the Act. As discussed below, Bakorp took the unusual position that it should have paid more Part IV tax for 1995 than was reassessed by the Minister.

[7] The first paragraph of the notice of objection is as follows:

ISSUE:

1. Share redemption proceeds added to income as a deemed dividend.

Taxation Year	**Adjustments to Deemed Dividend**
March 10, 1995	**$ (25,332,237)**
March 10, 1994	**(8,154,757)**
March 10, 1993	**154,224,784**
	$ 120,737,790

[8] For two of the three years listed in this notice of objection, the amount of the dividend was decreased and for the other year (1993) the amount of the dividend was increased (by substantially more than the amount of the reductions for 1994 and 1995). The only year in dispute in this matter is 1995.

[9] By notice of confirmation dated March 26, 2012, the Minister confirmed that "$28,000,000 of this deemed dividend should be included in your income in the 1995 year". It would appear that the Minister increased the amount of the dividend that would be subject to Part IV tax in 1995 from the amount on which Part IV tax had been based in the notice of reassessment dated January 31, 2000. There is no indication of why the Minister found that Part IV tax for 1995 should have been imposed on a dividend of $28,000,000 and not on a dividend of $52,912,264 as proposed by Bakorp.

[10] Bakorp then filed a notice of appeal to the Tax Court of Canada asserting in paragraph 16 thereof that "[t]here is no basis under the [Act] upon which the [$28,000,000 that had been included in Bakorp's income for 1995] can be included in the Appellant's taxable income for the 1995 taxation year". The Crown brought a motion for an Order dismissing this appeal on the basis that it did not comply with the requirements of subsection 169(2.1) of the Act. As noted above, the Tax Court Judge agreed and the appeal was dismissed.

Issue in this Appeal and Standard of Review

[11] The issue in this appeal is whether Bakorp has complied with the provisions of subsection 169(2.1) of the Act in relation to its appeal to the Tax Court of Canada and in particular:

> (a) whether Bakorp had appealed to the Tax Court of Canada with respect to an issue in respect of which it had complied with subsection 165(1.11) of the Act in its notice of objection; and
>
> (b) whether Bakorp had appealed with respect to the relief sought in respect of the issue as specified by Bakorp in its notice of objection.

[12] In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, the Supreme Court of Canada confirmed that the standard of review for questions of law is correctness. Findings of fact (including inferences of fact) will stand unless it is established that the Judge made a palpable and overriding error. For questions of mixed fact and law, the standard of correctness will apply to any extricable question of law and otherwise the standard of palpable and overriding error will apply. An error is palpable if it is readily apparent and it is overriding if it changes the result.

[13] The parties do not agree on the applicable standard of review. Bakorp submits that the Tax Court judge erred in his interpretation of the meaning of "issue" for the purposes of the provisions of subsections 165(1.11) and 169(2.1) of the Act. This being an issue of statutory interpretation, Bakorp submits that the standard of review is correctness. The second issue raised by Bakorp is that

the Tax Court judge erred in his interpretation of the requirements of subsection 169(2.1) of the Act in relation to the relief sought. Bakorp submits that this is also a question of statutory interpretation reviewable on the standard of correctness.

[14] The Crown submits that the issue is whether the Tax Court judge erred in finding that the issue as stated in the notice of objection is not the same issue as described in the notice of appeal and that this was a finding of fact that can only be overturned on appeal if the judge made a palpable and overriding error. The Crown also submits the same argument in relation to the finding that the relief sought in the notice of appeal is different from the relief sought in the notice of objection.

[15] In order to consider this matter, the first question that must be addressed is how the words "issue" and "relief sought" should be interpreted for the purposes of subsections 165(1.11) and 169(2.1) of the Act. Without knowing how these terms should be interpreted, how could it be determined whether the issue was the same or different or whether the relief sought was the same or different? The interpretation of these terms as used in subsections 165(1.11) and 169(2.1) of the Act is an extricable question of law reviewable on a standard of correctness.

Procedural Requirements of the Act for Objections and Appeals

[16] Since Bakorp is a large corporation there are restrictions imposed on its right to appeal matters to the Tax Court of Canada. Subsection 169(2.1) of the Act provides as follows:

(2.1) Notwithstanding subsections (1) and (2), where a corporation that was a large corporation in a taxation year (within the meaning assigned by	**(2.1) Malgré les paragraphes (1) et (2), la société qui était une grande société au cours d'une année d'imposition, au sens du paragraphe**

subsection 225.1(8)) served a notice of objection to an assessment under this Part for the year, the corporation may appeal to the Tax Court of Canada to have the assessment vacated or varied only with respect to	**225.1(8) et qui signifie un avis d'opposition à une cotisation établie en vertu de la présente partie pour l'année ne peut interjeter appel devant la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation qu'à l'égard des questions suivantes :**
(a) an issue in respect of which the corporation has complied with subsection 165(1.11) in the notice, or	**a) une question relativement à laquelle elle s'est conformée au paragraphe 165(1.11) dans l'avis, mais seulement à l'égard du redressement, tel qu'il est exposé dans l'avis, qu'elle demande relativement à cette question;**
(b) an issue described in subsection 165(1.14) where the corporation did not, because of subsection 165(7), serve a notice of objection to the assessment that gave rise to the issue and, in the case of an issue described in paragraph (a), the corporation may so appeal only with respect to the relief sought in respect of the issue as specified by the corporation in the notice.	**b) une question visée au paragraphe 165(1.14), dans le cas où elle n'a pas, à cause du paragraphe 165(7), signifier d'avis d'opposition à la cotisation qui a donné lieu à la question.**

[17] A large corporation can only appeal to the Tax Court of Canada with respect to an issue in respect of which it has complied with subsection 165(1.11) of the Act in its notice of objection. This subsection provides as follows:

165 (1.11) Where a corporation that was a large corporation in a taxation year (within the meaning assigned by subsection 225.1(8)) objects to an assessment under this Part for the year, the notice of objection shall	**(1.11) Dans le cas où une société qui était une grande société au cours d'une année d'imposition, au sens du paragraphe 225.1(8), s'oppose à une cotisation établie en vertu de la présente partie pour l'année, l'avis d'opposition doit, à la fois :**
(a) reasonably describe each issue to be decided;	**a) donner une description suffisante de chaque question à trancher;**

(b) specify in respect of each issue, the relief sought, expressed as the amount of a change in a balance (within the meaning assigned by subsection 152(4.4)) or a balance of undeducted outlays, expenses or other amounts of the corporation; and	**b) préciser, pour chaque question, le redressement demandé, sous la forme du montant qui représente la modification d'un solde, au sens du paragraphe 152(4.4), ou d'un solde de dépenses ou autres montants non déduits applicable à la société;**
(c) provide facts and reasons relied on by the corporation in respect of each issue.	**c) fournir, pour chaque question, les motifs et les faits sur lesquels se fonde la société.**

Positions of the Parties

[18] Bakorp submits in paragraph 39 of its memorandum of fact and law that:

> [s]ubsection 165(1.11) does not require that the issue be conflated with the reasons and the relief sought. To the contrary, these elements of the objection are dealt with separate and apart from one another in paragraphs (a), (b), and (c) respectively. The description of the "issue" is to remain solely that: a description of the "point in question".

[19] Bakorp submits in paragraph 45 of its memorandum of fact and law that:

> As this Court explained in *Potash*, a large corporation must describe the issue so that the Minister knows what issue is to be decided. Here, as made clear in the notice of confirmation, the Minister knew that the debate is about the "share redemption proceeds added to income as a deemed dividend". That is the point in question.

[20] Subsection 169 (2.1) of the Act provides that the appeal must be "with respect to the relief sought in respect of the issue as specified by the corporation" in its notice of objection. Bakorp's position in relation to this requirement is that subsection 169 (2.1) of the Act does not require the same level of specificity in relation to the "relief sought" as subsection 165 (1.11) of the Act. It is Bakorp's position that the relief sought in the notice of objection was an adjustment to the Part IV

tax liability of Bakorp, and that Bakorp in its notice of appeal was seeking the same relief albeit in a significantly different amount and as refund rather than as an additional payment. In the notice of objection Bakorp was seeking to increase its Part IV tax liability, while in the notice of appeal Bakorp was seeking to eliminate its Part IV tax liability for 1995.

[21] As noted above, it is the position of the Crown that it is a question of fact whether the issue was the same in the notice of objection and the notice of appeal and whether the relief sought in the notice of appeal is the same as the relief sought in the notice of objection. The Crown submits that the Tax Court Judge did not make a palpable and overriding error on these factual issues.

Analysis

[22] Appeals to the Tax Court of Canada are appeals in relation to a particular assessment or reassessment. In this particular case, the notice of reassessment is related to the liability of Bakorp for tax under Part IV of the Act, not Part I of the Act. While tax under Part I of the Act is based on a person's taxable income, tax under Part IV is not based on taxable income but rather is imposed on certain corporations that have received dividends. Subsection 186(1) of the Act in 1993, 1994 and for taxation years ending before July 1995 provided as follows:

186 (1) Every corporation (in this section referred to as the "particular corporation") that was, at any time in a taxation year, a corporation (other than a private corporation) resident in Canada and controlled, whether by reason of a beneficial interest in one or more trusts or otherwise, by or for the benefit of an individual (other than a trust) or a	**186 (1) Toute société (appelée «société donnée» au présent article) qui, à un moment donné d'une année d'imposition, était soit une société privée, soit une société (autre qu'une société privée) dite «assujettie» à la présent partie, résidant au Canada et contrôlée au moyen d'un droit de bénéficiaire sur une ou plusieurs fiducies ou autrement par un**

related group of individuals (other than trusts) (in this Part referred to as a "subject corporation") or a private corporation shall, on or before the last day of the third month after the end of the year, pay a tax under this Part for the year equal to ¼ of the amount, if any, by which the total of	**particulier (autre qu'une fiducie) ou par un groupe lié de particuliers (autres que des fiducies) ou à leur profit, est redevable, au plus tard le dernier jour du troisième mois suivant la fin de l'année, d'un impôt pour l'année en vertu de la présente partie égal au quart de l'excédent éventuel du total des montants suivants :**
(a) all amounts received by the particular corporation in the year and at a time when it was a subject corporation or a private corporation as, on account of, in lieu of payment of or in satisfaction of, taxable dividends from corporations (other than payer corporations connected with it), **(i) that are deductible under subsection 112(1) from its income for the year, or**	**a) les sommes que la société donnée a reçues au cours de l'année et à un moment où elle était une société assujettie ou une société privée, au titre ou en paiement intégral ou partiel de dividendes imposables de sociétés, sauf des sociétés payantes auxquelles elle est rattachée :** **(i) soit qui sont déductibles, en vertu du paragraphe 112(1), de son revenu pour l'année.**

[23] Subsection 186(1) of the Act was amended by S.C. 1996, c. 21, subsec. 48(1), applicable to taxation years ending after June 1995. The 1995 taxation year of Bakorp ended on March 10, 1995 and therefore any dividends received by it during that taxation year would be subject to the provisions as stated above.

[24] Subsection 187(1) of the Act provides that every corporation that is liable to pay Part IV tax shall file a return under Part IV, and subsection 187(3) of the Act incorporates by reference several

provisions contained in Part I of the Act, including the assessment provisions in section 152, the notice of objection provisions in section 165, and Part J related to appeals to the Tax Court of Canada. Therefore, the restrictions imposed on large corporations in relation to their notices of objection and appeals to the Tax Court of Canada under Part I of the Act apply to notices of objection and appeals to the Tax Court of Canada in relation to assessments or reassessments of Part IV tax.

[25] The first question that must be addressed is what is meant by "issue" in subsection 165(1.11) of the Act as it applies for the purposes of Part IV of the Act. On the issue of statutory interpretation, the Supreme Court of Canada in *The Queen v. Canada Trustco Mortgage Company*, 2005 SCC 54, has given us this guidance:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. R.*, [1999] 3 S.C.R. 804 (S.C.C.), at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[26] In *The Queen v. Potash Corporation of Saskatchewan Inc.*, 2003 FCA 471, the general purpose of subsections 165(1.11) and 169(2.1) of the Act (which were defined as the Large Corporation Rules) was described as follows:

> 4 The Large Corporation Rules were enacted in 1995 to discourage large corporations from engaging in a full reconstruction of their income tax returns for a particular year, after the objection or appeal process had started, based on

> developing interpretations and the outcome of court decisions in litigation involving other taxpayers…
>
> Simply put, Parliament wants the Minister of National Revenue (the Minister) to be able to assess at the earliest possible date both the nature and quantum of pending tax litigation and its potential fiscal impact.

[27] In relation to the requirement to describe the issue to which the corporation is objecting, this Court in *Potash* stated that:

> 21 The Large Corporation Rules place further requirements on large corporations that object to an assessment by the Minister. The main issue in this case is the meaning to be given to the words "each issue" in the phrase "reasonably describe each issue to be decided" in paragraph 165 (1.11)(a). In interpreting those words, the Judge wrote:
>
> > The issue is the legal matter which the taxpayer contests with the CCRA. It is not required to be described exactly, but if it was, it could be expressed in section numbers of the Income Tax Act, or in words taken from or paraphrased from those sections.
>
> 22 I do not agree with this statement. While a large corporation is not required to describe the issue "exactly", as the Judge states, it is required to describe the issue "reasonably". What is reasonable will differ in each case and will depend on what degree of specificity is required to allow the Minster to know each issue to be decided.
>
> 23 In reassessing PCS, the Minister set out the precise items of income which were being disallowed as part of resource profits (see paragraph 8). In filing its notice of objection, PCS objected to the disallowance of these same items of income, describing them in the same fashion as the Minister. That complied with paragraph 165(1.11)(a) because it gave sufficient certainty as to what issues were then under objection.
>
> 24 Contrary to the Judge's suggestion, it would not have been reasonable to simply say that the computation of "Resource Allowance" or "resource profits" was in issue, without specifying the particular elements of that computation that required a determination by the Minister or the Tax Court, as the case may be. That level of generality would render the Large Corporation Rules meaningless, defeating the purpose of their enactment.

Neither party submitted that any of the findings of law in *Potash* were wrong.

[28] A general statement or question related to an amount that is to be determined for the purposes of the Act that would not allow the Minister to determine what is actually in dispute will not be a sufficient description of the issue. The examples cited as inadequate descriptions of an issue are a description of the issue as the computation of resource allowance or resource profits. In a similar vein, Justice Jorré of the Tax Court of Canada in *Canadian Imperial Bank of Commerce v. The Queen*, 2013 TCC 170 in dealing with the corresponding provisions in the *Excise Tax Act*, R.S.C. 1985, c. E-15, stated that a general description of the issue as the correct amount of tax owing would not be sufficient.

[29] Paragraph 165(1.11)(b) of the Act provides that, in relation to each issue, the relief sought must be specified as a change in the balance of the items listed. This means that the issue must be reasonably described in a manner that would result in such quantification as a specified amount. For example, describing an issue as the computation of resource profits would not be sufficient as it would not be possible to ascertain from this description the specific change in any balance that is being requested. If however, the particular element of the computation that is in dispute is reasonably described, then the effect that the resolution of the dispute would have on the income of the corporation is capable of being quantified.

What is the issue that Bakorp raised in its notice of objection?

[30] In this case, Bakorp states that the issue is adequately described in the first paragraph of the notice of objection. This paragraph provides as follows:

ISSUE:

1. Share redemption proceeds added to income as a deemed dividend.

Taxation Year	**Adjustments to Deemed Dividend**
March 10, 1995	**$ (25,332,237)**
March 10, 1994	**(8,154,757)**
March 10, 1993	**154,224,784**
	$ 120,737,790

[31] Bakorp argued that since a notice of objection was served in relation to the reassessment of Part IV tax, Bakorp obviously did not agree with the adjustment made by the Minister. Bakorp argues that this part of the notice of objection should be interpreted as a submission by Bakorp that the issue to be decided was the correct amount of dividends that Bakorp had received in its 1995 taxation year. I do not agree that even if this paragraph could be so interpreted, that this would be an adequate description of the issue for the purposes of subsection 165(1.11) of the Act as it applies for the purposes of Part IV.

[32] In this notice of objection, the issue is stated to be "share redemption proceeds added to income as a deemed dividend". This does not identify any question to be adjudicated but is a cursory statement of what has transpired. The table included in the first paragraph of the notice of objection simply lists the actual adjustments that were made to the deemed dividends that were considered to have been received for the purposes of Part IV in the various years listed. There is nothing in this paragraph to provide any hint of the element or elements of the computation of the amount of dividends received by Bakorp in 1995 for the purposes of Part IV of the Act that would require a determination by the Minister or the Tax Court of Canada nor is there anything in this

paragraph to indicate whether Bakorp is disputing the adjustment to the Deemed Dividend for 1995 on the basis that the adjustment should have been greater or smaller.

[33] A description of the issue as "the correct amount of dividends that Bakorp received in 1995" does not lead to any quantification of the change in any balance other than as a range from nil to $52,912,264 as the amount of the dividend that Bakorp received in its 1995 taxation year. This description of the issue does not indicate anything about the question that must be answered to resolve this dispute.

[34] The purpose of subsection 165(1.11) of the Act would be frustrated if this satisfied the requirement of a reasonable description of the issue. In this case, the reassessment is under Part IV of the Act. Part IV only imposes a tax on certain corporations that have received dividends. In this case there is no dispute that Bakorp was a private corporation and that it was not connected with 968649 Ontario Limited at any time during Bakorp's 1995 taxation year. Therefore, the only matter that could arise in relation to Part IV tax for 1995 would be the amount of the dividends that Bakorp had received in its 1995 taxation year. If the issue is simply the correct amount of dividends that Bakorp had received in 1995, this would mean that subsection 165(1.11) of the Act (as it applies for the purposes of Part IV) does not impose any requirement on a large corporation other than the requirement to object. This would also not satisfy the purpose of allowing the Minister to know the nature and quantum of tax litigation at the earliest possible date.

[35] When the notice of objection is read as a whole, it is clear that Bakorp was taking the position that it had filed its Part IV return correctly and hence Bakorp was submitting that it should

be paying more Part IV tax than was reassessed by the Minister. In paragraph 13 of the notice of objection, Bakorp provided a reconciliation of how Bakorp had accounted for the redemption proceeds in filing its returns under the Act. In particular for its 1995 taxation year Bakorp stated that it had reported $52,912,264 as a deemed dividend on its T2S(3). It also seems clear that Bakorp was taking the position that amounts were to be reported as any questions or disputes related to the adjustments to the amount to be paid on the redemption of the shares were resolved. Therefore, the issue in respect of which Bakorp complied with the provisions of subsection 165(1.11) of the Act, was the issue of whether Bakorp was correct in concluding that it had received $52,912,264 in dividends in 1995 for the purposes of Part IV on the basis that any question or dispute in relation to such amount had then been resolved. In this case the quantification of the amount is part of the description of the issue.

[36] Therefore, Bakorp was restricted to being able to only appeal in respect of this issue. However, this is not the issue that is raised in the notice of appeal. Paragraphs 13 to 16 of the notice of appeal are as follows:

Part III - Issues

13. The issue with respect to the Assessment is whether the 1995 Receipt is properly taxable in the Appellant's 1995 Year.

Part IV – Statutory Provisions

14. The appellant relies on, *inter alia*, section 3, subsections 84 (3) and 84 (7) of the ITA.

Part V – Reasons Which the Appellant Intends to Submit

15. The Deemed Dividend, including the 1995 Receipt, was payable to the Appellant in the 1993 Year and, therefore, should be included in the Appellant's taxable income for the 1993 Year.

16. There is no basis under the ITA upon which the 1995 Receipt can be included in the Appellant's taxable income for the 1995 Year.

[37] Since the reassessment that is the subject of Bakorp's attempted appeal to the Tax Court of Canada was a reassessment of Part IV tax (which is based on dividends *received*), and not a reassessment of Part I tax (which is based on taxable income), it is not at all clear why Bakorp referred to the dividend being *payable* in 1993 and why Bakorp referred to whether the amount for the dividend could be included in Bakorp's taxable income for the 1995 Year.

[38] During oral argument counsel for Bakorp stated that the position that Bakorp wanted to take on appeal to the Tax Court of Canada was that as a result of the deeming provision in paragraph 84(3)(b) of the Act, Bakorp was deemed to have received the $52,912,849 dividend (which Bakorp had reported in its return for 1995) when the shares were redeemed in 1993 (and hence the Part IV tax liability would have arisen in 1993 and not 1995). This is a question of law related to the interpretation of that paragraph and this position was not clearly stated in Bakorp's notice of appeal.

[39] Simply listing subsection 84(3) of the Act as a relevant provision in the notice of appeal and stating that the $28,000,000 (which is the amount that the Minister had determined was subject to Part IV tax in 1995) was payable in 1993 and therefore should have been included in Bakorp's taxable income in 1993, does not identify the legal argument based on the provisions of subsection 84(3) of the Act related to when the Deemed Dividend is received for the purposes of the Act.

[40] The extraction from the notice of appeal of the legal argument that Bakorp is attempting to make is further hampered by the references to the dividends being included in taxable income. Under the Act, dividends received by a corporation resident in Canada from another taxable

Canadian corporation are included in the recipient's income under subsection 82(1) and paragraph 12(1)(*i*) of the Act but are *deducted* from the income of the receiving corporation for the purposes of computing its *taxable income* under subsection 112(1) of the Act. If the dividends were not deductible under this subsection, then the dividends would not have been subject to Part IV tax (subparagraph 186(1)(*a*)(i), as it was written prior to amendments made in 1996 and now part of the definition of assessable dividends in subsection 186(3) of the Act). These references to the dividends being included in taxable income detract from the argument that Bakorp was attempting to make.

[41] It should also be noted that shifting the Part IV tax liability to another year would also raise the question of whether that year could be reassessed under subsection 152(4) of the Act (which is applicable to Part IV as a result of the provisions of subsection 187(3) of the Act).

[42] In my view, a reasonable description of the issue of the effect of subsection 84(3) of the Act on when dividends would be deemed to be received on a redemption of shares would have been a description that would have alerted the Minister to this legal argument related to the interpretation of subsection 84(3) of the Act. This would mean something more than simply listing subsection 84(3) as one of the three provisions that would be relied upon. It is, however, clear that this issue arising as a result of this legal argument was not raised in the notice of objection that had been filed by Bakorp and that Bakorp was not relying on this issue in its notice of objection. If Bakorp's interpretation of the legal argument is correct and the full amount of the deemed dividend that was eventually paid was received by Bakorp in 1993 when the shares were redeemed (and I do not

express any opinion on whether this argument is correct), the result would have been irreconcilable with the position that was taken by Bakorp in its notice of objection.

[43] I agree with the Tax Court judge that the issue that Bakorp is attempting to raise in its notice of appeal is not an issue in respect of which Bakorp has complied with the provisions of subsection 165(1.11) of the Act.

Relief Sought

[44] Although it is not necessary to dispose of the appeal to comment on the question of whether the relief sought in the notice of appeal is the same as the relief sought in the notice of objection, I would also agree with the Tax Court Judge that Bakorp is not seeking the same relief.

[45] The relief that may be granted by a judge of the Tax Court on an appeal under the Act is limited. Under subsection 171(1) of the Act, if an appeal is allowed (which would be what Bakorp would be requesting), the Tax Court judge can only vacate the assessment, vary the assessment or refer the assessment back to the Minister for reconsideration and reassessment. The relief sought as referred to in subsection 169(2.1) of the Act cannot simply be a request in the notice of objection to refer the matter back to the Minister for reconsideration and reassessment. To hold that the restriction imposed by subsection 169(2.1) of the Act in relation to the relief sought would be satisfied as long as the taxpayer was still only asking to have the matter referred back to the Minister for reconsideration and reassessment would be meaningless in light of the limited options available to the Tax Court on an appeal. In the context of both subsections 169(2.1) and 165(1.11) of the Act,

the reference to the relief sought in subsection 165(2.1) of the Act must be a reference to the specific relief sought as described for the purposes of subsection 165(1.11) of the Act. This would be consistent with the purpose of these provisions which was to allow "the Minister of National Revenue (the Minister) to be able to assess at the earliest possible date both the nature and quantum of pending tax litigation and its potential fiscal impact". Such purpose would be frustrated if the relief sought as described in subsection 169(2.1) of the Act was not the relief sought as described in subsection 165(1.11) of the Act.

[46] In this case in the notice of objection Bakorp asked the Minister to "reverse its adjustment of taxes and related interest for its March 10, 1995 taxation year". This relief would have resulted in an increased liability of Bakorp for Part IV tax from what had been reassessed.

[47] The relief requested in the notice of appeal was simply to allow the appeal. Since the appeal was based on the argument that the Part IV tax liability was reassessed in the wrong year, Bakorp was really asking the Court to either vary the reassessment or refer the matter back to the minister for reconsideration and reassessment to eliminate any Part IV tax liability for 1995. Since the purpose of subsections 165(1.11) and 169(2.1) of the Act is to allow the Minister to assess the potential fiscal impact of tax disputes, the relief sought in both the notice of objection and the notice of appeal must be similar with respect to the impact of such relief on the government. Asking for a full refund of all Part IV tax paid in relation to 1995, cannot be said to be the relief identified in the notice of objection, in which Bakorp was not asking for a full refund of all Part IV tax paid in 1995 but rather was asking to pay more Part IV tax that had been reassessed. The appeal in this case is not in respect of the relief that was sought in the notice of objection.

[48] It should be noted that in this case Bakorp attempted to change the issue under appeal and the remedy sought. It remains an open question, as noted in paragraph 27 of *Potash Corporation of Saskatchewan*, whether a large corporation would be allowed to change the amount specified as the remedy sought to an amount more favourable to such corporation if the issue remains unchanged. It would seem that a large corporation should be allowed, if the issue is not changed, to change the amount specified as the remedy sought to an amount that is less favourable to such corporation as this change would still be consistent with the purpose of the provisions.

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

"Wyman W. Webb"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
David Stratas J.A."

Federal Court of Appeal | Cour d'appel fédérale

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	GAUTHIER J.A.
	STRATAS J.A.
DATED:	April 24, 2014

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