Docket: 2016-3680(IT)G

BETWEEN:

984274 ALBERTA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 27, 2018, at Montreal, Quebec.

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant:	Barry **Landy** Marie-Lou Laprise
Counsel for the Respondent:	Simon Petit

AMENDED JUDGMENT
[This Amended Judgment is issued in substitution of the Judgment dated April 24, 2019 to correct spelling of counsel's surname.]

The appeal from the reassessment made under the *Income Tax Act* (the "Act") with respect to the 2003 taxation year is allowed, with costs, on the basis that the Minister of National Revenue was not entitled to reassess the Appellant pursuant to subsections 160.1(1) and (3) and subsection 164(3.1) of the Act.

Signed at Ottawa, Canada, this **14th** day of **May** 2019.

"Guy R. Smith"

Smith J.

Citation: 2019 TCC 85
Date: 2019**0514**
Docket: 2016-3680(IT)G

BETWEEN:

984274 ALBERTA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT
[These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated April 24, 2019 to correct spelling of counsel's surname.]

Smith J.

I. Introduction

[1] 984274 Alberta Inc. (the "Appellant") appeals from a reassessment made by the Minister of National Revenue (the "Minister") with respect to the 2003 taxation year. The Minister reassessed the Appellant pursuant to subsections 160.1(1) and (3) and 164(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "Act") on the basis that the Appellant had received a refund in excess of the amount to which it was entitled.

[2] As will be explained in greater detail below, the Appellant reported a capital gain from the disposition of a parcel of land and paid taxes of $1,809,598. Following the initial assessment and in the context of an audit of the parent company, the Minister issued a reassessment in 2010 reducing the capital gain to nil and purported to refund the taxes paid with refund interest of $767,633 for a total of $2,577,231.

[3] Having later reached an agreement with the parent company pursuant to subsection 169(3), the Minister issued a further reassessment seeking a return of the excess refund with arrears interest of $682,187 for a total of $3,259,418.

II. Issues

[4] The issue in this appeal is whether the Minister was entitled to reassess the Appellant for the sum of $3,259,418 pursuant to subsections 160.1(1) and (3) and 164(3.1) of the Act.

III. Relevant Facts

[5] An Agreed Statement of Facts ("ASF") was submitted and is reproduced as Schedule A hereto. I will nevertheless review the relevant facts.

[6] The Appellant was incorporated under the laws of the Province of Alberta on April 16, 2002 as a wholly-owned subsidiary of Henro Holdings Corporation ("Henro").

[7] Henro owned 84 acres of land in Alberta that was acquired in 1987.

[8] On April 24, 2002, Henro transferred a parcel of the aforesaid land (the "Land") to the Appellant and both elected to do so on a "rollover" basis pursuant to subsection 85(1) of the Act. The Land was then sold to an arm's length third party.

[9] When computing its income for the taxation year ending March 31, 2003, the Appellant reported a capital gain of $7,904,475 and a taxable capital gain of $3,952,238. It paid Part 1 taxes of $1,809,598.

[10] In 2002 and again in 2003, the Appellant declared and paid dividends to Henro and elected pursuant to subsection 83(2) of the Act to have the dividends paid from its capital dividend account ("CDA").

[11] On June 23, 2003, the Minister issued a Notice of Assessment for Part I taxes of $1,809,598, as filed, on the capital gain (the "2003 Assessment"). The assessment indicated a credit for the amount paid and thus a balance due of nil.

[12] By letter dated June 8, 2009, the Appellant was formally informed by the Canada Revenue Agency ("CRA") that an audit was in progress with respect to Henro. The Minister was taking the position that the Land was real property inventory in the hands of Henro, that the rollover described above was invalid, and that the proceeds of disposition of the Land would be treated as business income for Henro. Further adjustments would be required with respect to amounts paid from the CDA.

[13] As a result, the Minister proposed to refund the taxes paid by the Appellant in connection with the capital gain reported for the 2003 taxation year. At the request of the Minister, the Appellant purported to deliver a waiver of the normal reassessment period pursuant to subsection 152(4) of the Act. It was dated June 17, 2009 but was limited to the issuance of a refund for taxes over-paid in the event CRA determined that the Land transferred to the Appellant was inventory in the hands of Henro.

[14] On March 23, 2010, the Minister issued a reassessment (the "2010 Reassessment") reducing the Appellant's capital gain for the 2003 taxation year to nil and on July 20, 2010 issued a payment of $2,577,231 (the "Payment"), purporting to refund the taxes of $1,809,598 with refund interest of $767,633 calculated at the prescribed rate.

[15] The Appellant reported and paid taxes on the interest of $767.633.

[16] Henro had been the subject of a CRA audit since as early as June 2006.

[17] On December 22, 2009 and on January 22, 2010, the Minister reassessed Henro on the basis that the Land transferred to the Appellant was inventory, that the proceeds of sale should have been reported as business income and that it had paid dividends in excess of the amounts available in the CDA.

[18] Henro filed an objection to the reassessments and, following the confirmation by the Minister, filed an appeal with this Court on July 9, 2012.

[19] In July 2014, the Minister and Henro entered into an agreement and executed an out-of-court settlement (the "Settlement") pursuant to subsection 169(3) of the Act.

[20] The Appellant was also a signatory to the Settlement.

[21] The Settlement provided, *inter alia*, that CRA would reduce Henro's business income for the 2003 taxation year by $7,904,475 and correspondingly increase the Appellant's income to include a capital gain for the same amount, as initially reported.

[22] The Minister issued a further reassessment on March 23, 2015 (the "2015 Reassessment") purporting to implement the terms of the Settlement and claiming a total of $3,259,418 consisting of Part I tax of $1,809,598 on the taxable capital

gain, refund interest of $767,633, pursuant to subsections 160.1(1) and (3) and arrears interest of $682,187, pursuant to subsection 164(3.1), calculated from July 30, 2010 to March 23, 2015.

[23] The Appellant filed an objection arguing, *inter alia*, that the assessment of arrears interest had never been contemplated. The Minister argued that she could not issue a reassessment without addressing the matter of arrears interest.

IV. Statutory Provisions

[24] As indicated above, the Minister reassessed the Appellant pursuant to subsections 160.1(1) and (3), and 164(3.1) of the Act.

[25] Subsections 160.1(1) and (3) require taxpayers to pay back refunds received in excess of what they were entitled to with interest calculated at the prescribed rate. These provisions state:

> 160.1(1) Where excess refunded — Where at any time the Minister determines that an amount has been refunded to a taxpayer for a taxation year in excess of the amount to which the taxpayer was entitled as a refund under this Act, the following rules apply:
>
> (a) the excess shall be deemed to be an amount that became payable by the taxpayer on the day on which the amount was refunded; and
>
> (b) the taxpayer shall pay to the Receiver General interest at the prescribed rate on the excess (other than any portion thereof that can reasonably be considered to arise as a consequence of the operation of section 122.5 or 122.61) from the day it became payable to the date of payment.
>
> (3) Assessment — The Minister may at any time assess a taxpayer in respect of any amount payable by the taxpayer because of subsection (1) (…), and the provisions of this Division (including, for greater certainty, the provisions in respect of interest payable) apply, with any modifications that the circumstances require, in respect of an assessment made under this section, as though it were made under section 152 in respect of taxes payable under this Part.
>
> (My Emphasis.)

[26] Subsection 164(3.1) provides that the taxpayer must pay interest at the prescribed rate on the excess interest if it is determined that the taxpayer was entitled to less of a refund. The subsection states:

> 164(3.1) Idem — Where at a particular time interest has been paid to, or applied to a liability of, a taxpayer under subsection 164(3) or 164(3.2) in respect of an overpayment and it is determined at a subsequent time that the actual overpayment was less than the overpayment in respect of which interest was paid or applied,
>
> (a) the amount by which the interest that has been paid or applied exceeds the interest, if any, computed in respect of the amount that is determined at the subsequent time to be the actual overpayment shall be deemed to be an amount (in this subsection referred to as "the amount payable") that became payable under this Part by the taxpayer at the particular time;
>
> (b) the taxpayer shall pay to the Receiver General interest at the prescribed rate on the amount payable computed from that particular time to the day of payment; and
>
> (c) the Minister may at any time assess the taxpayer in respect of the amount payable and, where the Minister makes such an assessment, the provisions of this Division are applicable, with such modifications as the circumstances require, in respect of the assessment as though it had been made under section 152.
>
> (My Emphasis.)

V. Position of the Parties

A. The Appellant's Position

[27] The Appellant's position is that the Minister had no statutory authority to make the Payment. The tax on the capital gain was assessed in 2003 and paid at that time. The Payment was simply an amount paid in error and the Minister's recourse is in civil law under the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, before a court of competent jurisdiction.

[28] The Appellant has two primary arguments to support its position: (i) the 2010 Assessment is null and void; and (ii) the 2015 Assessment is null and void.

[29] The Appellant argues that the 2010 Assessment is null and void because it was issued outside of the Appellant's normal reassessment period.

[30] The Appellant argues that the 2015 Assessment is null and void because the conditions necessary for subsection 160.1(1) to apply were not met. The Appellant argues that this provision will only apply where: (i) a refund was made pursuant to

a provision of the Act; and (ii) the Minister determined, pursuant to another provision of the Act, that an amount has been refunded in excess of the amount the taxpayer was entitled to.

[31] The Appellant argues that there was no refund pursuant to a provision of the Act, the Payment was not a refund under section 164 of the Act and, moreover, the Appellant never claimed a refund.

[32] The Appellant also argues that there was no determination by the Minister that the Appellant was refunded an amount in excess of what it was entitled and no determination made pursuant to any other provision of the Act.

[33] The Appellant argues that subsection 169(3) of the Act does not give the Minister the authority to issue the 2015 Assessment since it was not a party to the appeal.

[34] Additionally, the Appellant argues that because there was no refund made pursuant to subsection 164(1), subsection 164(3.1) does not apply to allow the Minister to assess arrears interest of $682,187.

B. The Respondent's Position

[35] The Respondent agrees that the 2010 Assessment is null and void, and says that the effect is to revive the 2003 Assessment.

[36] The Respondent argues that, even though the 2010 Assessment is null and void, the Payment was still in the nature of a refund of tax that the Appellant had paid for the 2003 taxation year.

[37] The Respondent argues that the Appellant received a refund of $1,809,598 of tax and refund interest of $767,633, but was not entitled to any refund or interest under the Act. Therefore, the Appellant was correctly assessed under subsections 160.1(1) and (3), and 164(3.1).

[38] The Respondent refers to *MNR v Expotronics Inc et al*, 1998 CanLII 12923 (QCCA) and *3199959 Canada Inc.*, 2007 QCCA 1153, where the Quebec Court of Appeal held that tax legislation, rather than civil law concepts, should be applied in the context of refunds that are specifically dealt with in the applicable legislation.

VI. Preliminary Issues

A. Is the 2010 Reassessment null and void?

[39] The parties both agree for the purposes of this appeal that the 2010 Reassessment is null and void, but the Court is not bound by that agreement.

[40] While litigants are able to concede issues of facts, they are not able to concede issues of law: *Labourer's International Union of North America, Local 527 Members' Training Trust Fund v. Canada*, [1992] 2 CTC 2410 at para. 16, citing C(G) v V-T(T), [1987] 2 SCR 244 at pp. 257-258 and *Sport Maska Inc. v. Zittrer*, [1988] 1 SCR 564 at p. 612.

[41] The validity of an assessment is an issue of law, and therefore this Court is not bound by the joint concession that the 2010 Reassessment is null and void.

[42] Subsection 152(4) of the Act states that the Minister may only reassess a taxpayer outside of the normal reassessment period if certain conditions are met. Paragraph 152(3.1)(b) defines "normal reassessment period" as three years after the sending of the original assessment. The 2003 Assessment was sent on June 23, 2003, meaning that the Appellant's normal reassessment period ended June 23, 2006. The 2010 Reassessment was sent on March 23, 2010, and therefore was clearly outside of the Appellant's normal reassessment period.

[43] Subparagraph 152(4)(a)(ii) allows the Minister to reassess outside of the normal reassessment period if the taxpayer files a waiver with the Minister "within the normal reassessment for the taxpayer in respect of the year". The Waiver was filed on June 17, 2009, which was outside of the normal reassessment period. Therefore, the Waiver was not valid and could not be used by the Minister to reassess the Appellant outside of the normal reassessment period.

[44] Subsection 152(8) of the ITA states:

> 152(8) Assessment deemed valid and binding — An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.

(My Emphasis.)

[45] Therefore, it may be argued that subsection 152(8) deems the 2010 Reassessment to be valid and binding despite the fact it was made outside of the normal reassessment period, since it was not varied or vacated on objection or appeal.

[46] In *Lornport Investments Ltd. v. Canada*, [1992] 1 CTC 351 (FCA) ("Lornport"), the Minister issued an initial assessment followed by a first reassessment and a second reassessment (para. 3) that was made outside the normal reassessment period. The appellant argued that the second reassessment had legal effect from the date it was issued, and was presumed valid by subsection 152(8) until set aside by the court. Therefore, despite the fact that the second reassessment was made outside of the normal reassessment period, it was argued that it still superseded the first reassessment and rendered it null.

[47] The Federal Court of Appeal ("FCA") rejected the appellant's argument and held that subsection 152(8) does not apply if a reassessment is issued outside of the normal reassessment period. The FCA went on to state that the court order finding that the second reassessment was issued outside of the normal reassessment period was simply "judicial recognition" that the second reassessment "issued as it was beyond that statutory time limit, was not legally issued" (p. 5).

[48] As well, in *Canadian Marconi Co. v. Canada (C.A.)*, [1992] 1 FC 655 (FCA) ("Canadian Marconi") the FCA held that a taxpayer does not need to object to a statute-barred reassessment in order for it to be void. According to the Appellant, this supports its argument that the 2010 Reassessment was void, and not voidable.

[49] Therefore, in the present case, the Court agrees with the parties and finds that the 2010 Reassessment is null and void. And since it was issued outside of the normal reassessment period, it cannot be saved by the Waiver or subsection 152(8) of the Act.

B. What is the effect of the 2010 Reassessment being null and void?

[50] In Lornport, the FCA held that an invalidly issued subsequent reassessment "did not supersede or nullify the first assessment" and that since the second reassessment was not legally issued, the first reassessment "continues to subsist." (p. 5).

[51] This has been followed in subsequent cases including *Bolton Steel Tube Co v. Canada*, 2014 TCC 94, where Campbell D. J. held (para. 48) that Lornport is authority for the proposition that if a subsequent reassessment is found to be void, the previous assessment or reassessment remains valid.

[52] As a result, since the Court has concluded that the 2010 Reassessment is null and void, the 2003 Assessment which assessed the Appellant for tax of $1,809,598 in connection with the capital gain, subsists. As argued by the Appellant in oral submissions, "the tax comes back to where it was."

C. Is the Appellant bound by the Settlement?

[53] It is not disputed that the Settlement was made pursuant to subsection 169(3) in the context of the appeal filed by Henro, as referenced above. Henro is clearly described as the party but the Appellant is mentioned in the body of the agreement and appears as a signatory.

[54] The Settlement contains the following relevant paragraphs:

> (…)
>
> 4. The Canada Revenue Agency will reassess 984274 Alberta Ltd for its taxation year ended March 31, 2003 to add to its income an amount of $7,904,475 of capital gain and will adjust its "capital dividend account" and "refundable dividend tax on hand" accordingly.
>
> (…)
>
> 7. The Canada Revenue Agency will reassess Henro for it taxation year ended March 31, 2003 to reduce its business income by an amount of $7,904,475.
>
> (…)
>
> 12. The Canada Revenue Agency will waive only on the interest payable, by virtue of subsection 220(3.1) on the *Income Tax Act*, on the remaining taxes payable, after the above-mentioned adjustments, by Henro, its shareholders and 984274 Alberta Ltd, for the period from November 11, 2006 to December 22, 2009 for the tax payable under Part 1 of the ITA and from November 11, 2006 to January 22, 2010 for the tax payable under Part III of the ITA.

[55] It is apparent that the dispute between the parties revolves, at least in part, on the interpretation to be given to paragraph 12 of the Settlement and the extent to

which CRA had agreed, or not, to waive interest and the Appellant's understanding of this issue at the time.

[56] If the Appellant was bound by the Settlement, then subsection 165(1.2) would prevent it from objecting to the 2015 Assessment. It provides as follows:

> 165(1.2) Limitation on objections — Notwithstanding subsections (1) and (1.1), no objection may be made by a taxpayer to an assessment made under subsection 118.1(11), 152(4.2), 169(3) or 220(3.1) nor, for greater certainty, in respect of an issue for which the right of objection has been waived in writing by the taxpayer.

[57] However, the Appellant argues that it is not bound by the Settlement made pursuant to subsection 169(3) since it was not "the" taxpayer referenced in that provision. In other words, since it was not a party to those proceedings, the Minister could not have imposed the result on the Appellant. This seems logical since, had the appeal proceeded, the Court would not have had the jurisdiction to issue judgment against a third party who had not been joined to the proceedings.

[58] Subsection 169(3) of the Act states:

> 169(3) Disposition of appeal on consent — Notwithstanding section 152, for the purpose of disposing of an appeal made under a provision of this Act, the Minister may at any time, with the consent in writing of the taxpayer, reassess tax, interest, penalties or other amounts payable under this Act by the taxpayer.
>
> (My Emphasis.)

[59] Subsection 169(3) refers to "the consent in writing of the taxpayer". Since the provision refers to "the" taxpayer rather than "a" taxpayer, the Appellant argues that it can only apply to a party to the appeal. The decision of *Pirart v. Canada*, 2016 TCC 291, para. 19, appears to support this position. Although not binding on this Court, this would also appear to be consistent with the CRA's position (CRA Views 2010-378981A11 — October 26, 2010) that the expression "taxpayer" in subsection 169(3) is limited to persons who are a party to the action.

[60] Since the Appellant was not a party to the appeal that was purportedly settled pursuant to subsection 169(3), it could not "consent in writing" pursuant to that provision for the purposes of allowing the Minister to "reassess tax, interest, penalties or other amounts payable under this Agreement by the taxpayer". (My Emphasis).

[61] I note that the Respondent could have filed a motion to enforce the terms of the Settlement as against the Appellant (see *Softsim Technologies Inc. v. Canada*, 2012 TCC 181 and *Huppe v. Canada*, 2010 TCC 644). She has not done so.

[62] It follows that the 2015 Reassessment is null and void as against the Appellant to the extent that it purported to implement the terms of the Settlement made pursuant to subsection 169(3) and therefore, the Appellant was not precluded by virtue of subsection 165(1.2), from objecting to the 2015 Reassessment.

D. Was the Payment made pursuant to subsections 164(1) and (3) of the Act?

[63] The Appellant argues that the Payment was not a refund within the meaning of the Act. More specifically, the Appellant argues that the portion of the Payment that sought to refund the taxes paid by the Appellant ($1,809,598) was not a refund within the meaning of subsection 164(1) and that the portion intended as interest on the refund of taxes ($767,633) was not made pursuant to subsection 164(3).

[64] Subsection 164(1) allows the Minister to make refunds to taxpayers:

> 164(1) Refunds — If the return of a taxpayer's income for a taxation year has been made within 3 years from the end of the year, the Minister
>
> (a) may,
>
> (i) (…)
>
> (ii) (…)
>
> (iii) on or after sending the notice of assessment for the year, refund any overpayment for the year, to the extent that the overpayment was not refunded pursuant to subparagraph (i) or (ii); and
>
> (b) shall, with all due dispatch, make the refund referred to in subparagraph (a)(iii) after sending the notice of assessment if application for it is made in writing by the taxpayer within the period within which the Minister would be allowed under subsection 152(4) to assess tax payable under this Part by the taxpayer for the year if that subsection were read without reference to paragraph 152(4)(a).
>
> (…)

> (3) Interest on refunds and repayments — If, under this section, an amount in respect of a taxation year (other than an amount, or a portion of the amount, that can reasonably be considered to arise from the operation of section 122.5 or 122.61) is refunded or repaid to a taxpayer or applied to another liability of the taxpayer, the Minister shall pay or apply interest on it at the prescribed rate for the period that begins on the day that is the latest of the days referred to in the following paragraphs and that ends on the day on which the amount is refunded, repaid or applied:
>
> (…)
>
> (My Emphasis.)

[65] Subparagraphs 164(1)(a)(i) and (ii) (not reproduced) are not applicable since both refer to a refund of an amount "claimed in the return as an overpayment for the year" (My Emphasis) and, in this instance, it seems apparent that the Appellant had not claimed a refund of an overpayment for the 2003 taxation year.

[66] However, subparagraph 164(1)(a)(iii) suggests that the Minister may, "on or after sending the Notice of Assessment (...) refund any overpayment for the year".

[67] Paragraph 164(1)(b) would not be applicable since it contemplates an application "made in writing by the taxpayer" which the Appellant had not filed.

[68] This analysis is supported by *Tawa Developments Inc. v. Canada*, 2011 TCC 440 ("Tawa"), where Hogan J. examined subsection 129(1) of the Act which allows the Minister to pay dividend refunds. He explained the relationship between paragraphs 129(1)(a) and (b) — the wording of which is similar to paragraphs 164(1)(a) and (b) — and stated:

> 15. (…) paragraph 129(1)(a) permits the Minister to make a dividend refund on sending the notice of assessment, without the corporation having to make a special application for the dividend refund. Where, presumably, the refund has not been made, paragraph 129(1)(b) provides that, if a written application for the dividend refund is made to the Minister within the period in which the Minister is permitted to assess the taxpayer under subsection 162(4), the Minister shall make the dividend refund.
>
> (My Emphasis.)

[69] If subparagraph 164(1)(a)(iii) is the applicable provision, allowing the Minister to make a refund without a written application, the difficulty remains that the Court has concluded that the 2010 Reassessment was null and void.

[70] Both parties referred to *Imperial Oil Resources Limited v. Canada (Attorney General)*, 2016 FCA 139 ("Imperial Oil") where the FCA confirmed the lower court's conclusion that a remission order "does not create, in and of itself, an 'overpayment' within the meaning of section 164" (para. 18) and as such does not engage the "the refund provisions" of the Act. The FCA concluded that the remission order "had no bearing on tax liability as assessed or reassessed (…)" (para. 60). Noël C.J. then explained that:

> [61] The objection procedure before the Minister and the subsequent right to bring an appeal before the Tax Court only applies to assessed amounts (*Perley*, paras. 1 and 7). An assessment determines or confirms the liability of a taxpayer to pay specified amounts. Pursuant to subsection 152(1) of the ITA, the only amounts that can be assessed are taxes, interest and penalties. To be clear, assessed interest is interest claimed by the Minister pursuant to the ITA (see for example section 161), and interest payable by the Minister pursuant to section 164 does not come within that description. As explained by Rip J. (as he then was) in *McMillen Holdings Ltd v. M.N.R.*, [1987] 2 C.T.C. 2327 (T.C.C.) [*McMillen*], the amount of a refund resulting from an overpayment, although often set out on the notice of assessment, is not an assessed amount (*McMillen*, para. 47). The objection procedure does not apply to a contested refund and the Tax Court is therefore without jurisdiction to hear an appeal pertaining to its computation (*McMillen*, para. 51; see also *Topol v. Canada*, 2003 FCT 658 (CanLII), [2003] 4 C.T.C. 44 (F.C.T.), paras. 11 and 12, where the Federal Court came to the same conclusion).
>
> (My Emphasis.)

[71] This would suggest that if there is no "overpayment of taxes", and the amount in issue is in reality "a contested refund", then the refund provisions of the Act are not engaged and the objection procedure does not apply, suggesting further that this Court is "without jurisdiction to hear an appeal pertaining to its computation" (Imperial Oil, para. 61).

[72] In my view, the decision of *Interprovincial Steel and Pipe Corp. v. Canada (F.C.A.)*, [1986] 2 CTC 473 (FCA) ("Interprovincial Steel"), cited by the Respondent, reached a similar conclusion. In that instance, the taxpayer had filed amended returns for two years as a result of which it was entitled to a refund. The Minister refunded the overpayment with interest, only to change its position at a later date. The taxpayer was thus reassessed for the full amount of the refund with arrears interest "of $328,656 for 1978 and (…) $6,377 for 1979".There was no issue that the refund arose as a result of an overpayment but the taxpayer objected to the payment of arrears interest (subsection 164(3.1) had not yet been enacted).

[73] The FCA granted the appeal indicating that:

> (…) it is clear that the only amounts that can be claimed by way of assessment under the *Income Tax Act* are those that are payable under the Act. The Minister cannot use his power of assessment (…) to collect sums that are not exigible under the Act. (…) It follows that those amounts could not be claimed by way of assessment. If the Minister felt that he was, under the common law, entitled to recover the interest that he had previously paid to the appellant, he should have sued the appellant before a Court of competent jurisdiction." (p. 3)

(My Emphasis.)

[74] As noted above, subsection 164(1) refers to a refund to a taxpayer as a result of an overpayment made in the taxation year. The expression "overpayment" is defined in paragraph 164(7)(b) of the Act for the purpose of section 164 as being:

> (b) where the taxpayer is a corporation, the total of all amounts paid on account of the corporation's liability under this Part or Parts I.3, VI or VI.1 for the year minus all amounts payable in respect thereof.

(My Emphasis.)

[75] Therefore, an "overpayment" for the purpose of section 164 is the difference between the taxes that the taxpayer paid and the taxes that were owed.

[76] As noted, the 2003 Assessment assessed the Appellant as owing $1,809,598 for the taxation year ending March 31, 2003. The Appellant paid that amount at that time. There was thus no overpayment.

[77] The 2010 Reassessment purported to refund this amount, thereby reducing the amount owed to nil. However, since the 2010 Reassessment is null and void, the 2003 Assessment remained operative and therefore the Appellant owed the amount of $1,809,598 pursuant to the 2003 Assessment.

[78] As a result it cannot be said that the payment of $1,809,598 made by the Minister was an "overpayment" within the meaning of subsection 164(1).

[79] Similarly, subsection 164(3) provides that the Minister must pay interest on refunds made "under this section". If the Court concludes that the Payment was not a refund made pursuant to subsection 164(1), it follows that the payment of $767,633 was not refund interest within the meaning of subsection 164(3).

[80] The Appellant refers to *Clover International (L) Properties Ltd. v. Canada (Attorney General)*, 2013 FC 676 ("Clover"),where the taxpayer had overpaid its anticipated taxes for 1996 resulting in an overpayment of $386,406, but failed to file an application within three years. The Respondent argued that the taxpayer was statute-barred and that the Minister lacked the statutory authority to issue a refund of the overpayment. The Court agreed finding that the taxpayer was "the author of its own misfortune by failing to file its T2 return within the three year requirement of subsection 164(1)" (para. 65) before adding that:

> 67. While it is true that, in the result, the Minister retains an overpayment to which she has no entitlement, which on its face is offensive to the Applicant and likely others, there is nothing this Court or the Minister can do to avoid that result given the lack of statutory authority for a refund. (…)

[81] In this instance, the Respondent argues that even if the Payment was not a refund within the meaning of subsections 164(1) and (3), it was still in the nature of a refund for the purposes of subsections 160.1(1) and (3).

VII. Analysis

[82] In addressing the preliminary issues noted above, the Court concluded that the 2010 Reassessment was null and void which had the effect of reviving the 2003 Assessment. It also concluded that the 2015 Reassessment was null and void insofar as it purported to implement the terms of an agreement made pursuant to subsection 169(3) in the context of an appeal to which the Appellant was not a party.

[83] The Court also concluded that the payment of $2,577,231 made to the Appellant on March 23, 2010 pursuant to the 2010 Reassessment, was not a refund of an 'overpayment' pursuant to subsections 164(1) and (3) of the Act.

[84] The remaining issues are whether the Minister was entitled i) to issue the Reassessment pursuant to subsections 160.1(1) and (3), and ii) to claim arrears interest pursuant to subsection 164(3.1).

A. Was the Minister entitled to assess arrears interest of $682,187?

[85] Subsection 164(3.1) allows the Minister to reassess a taxpayer to recover interest that the Minister paid to the taxpayer under subsection 164(3) or 164(3.2) if it is determined that an overpayment was actually less than was initially calculated.

[86] In order for the Minister to reassess a taxpayer pursuant to subsection 164(3.1), the Minister must have paid interest under subsection 164(3) or subsection 164(3.2), neither of which would appear to apply in this appeal.

[87] Subsection 164(3.2) creates an obligation for the Minister to pay interest on an overpayment that is determined because of an assessment made under subsections 152(4.2), 220(3.1) or 220(3.4), none of which apply in this instance.

[88] As discussed above, the Appellant was also not paid interest pursuant to subsection 164(3), since the Payment was not made pursuant to subsection 164(1).

[89] Therefore, based solely on the plain wording of the provision, in order for the Minister to reassess the Appellant under subsection 164(3.1) for arrears interest, the Appellant would have needed to receive the refund pursuant to subsection 164(1) and interest pursuant to subsection 164(3), which for the reasons mentioned above, did not occur.

[90] Since it appears that the Respondent does not dispute that the refund was not given pursuant to subsection 164(1), the Minister is not able to reassess under subsection 164(3.1) for the $767,633 of interest that it purported to pay to the Appellant. Consequently, the Minister was not able to assess the Appellant for arrears interest at the prescribed rate for the period of July 30, 2010 to March 23, 2015 as it purported to do in the 2015 Reassessment.

B. Was the Minister entitled to reassess pursuant to subsections 160.1(1) and (3)?

[91] Section 160.1 of the Act allows the Minister to assess a taxpayer for a refund the taxpayer received in excess of what they were entitled under the Act. As well, the Minister is able to assess the taxpayer for interest at the prescribed rate on the amount of the excess refund.

[92] The Appellant has three main arguments as to why the Minister is not able to assess it under subsections 160.1(1) and (3). Each of these arguments appear to relate to the preamble of subsection 160.1(1), which states:

> 160.1(1) Where excess refunded — Where at any time the Minister determines that an amount has been refunded to a taxpayer for a taxation year in excess of the amount to which the taxpayer was entitled as a refund under this Act, …

(My Emphasis.)

[93] I will deal with each of the Appellant's arguments in turn.

(1) Do subsections 160.1(1) and 160(3) require that the Minister make a determination pursuant to another provision of the Act?

[94] For reasons that follow, I conclude that the Minister is not required to make a determination prior to an assessment under these provisions.

[95] The Appellant argues that in order for the Minister to assess a taxpayer under subsections 160.1(1) and (3), the Minister must make a determination pursuant to another provision of the Act that the taxpayer received a refund in excess of what they were entitled. The Appellant argues that there was no "determination" for the purpose of subsection 160.1(1).

[96] The Respondent argues that the word "determination" in subsection 160.1(1) does not have a "technical meaning". The Respondent points out that subsection 160.1(3) explicitly states that the Minister may "at any time assess a taxpayer" (My Emphasis) for an amount owing under subsection 160.1(1). Therefore, if subsections 160.1(1) and (3) hinge on a determination pursuant to a reassessing action, then the normal reassessment period of subsection 152(4) or 152(3.1) would apply and curtail the ability of the Minister to reassess under subsection 160.1(3) at any time.

[97] I am of the view that the Respondent's position is correct. The plain wording of subsection 160.1(1) does not support the Appellant's position that the Minister must make a determination pursuant to another provision of the Act. Subsection 160.1(1) simply states "if the Minister determines", but does not state the means by which the Minister must make the determination.

[98] The only authority cited by the Appellant to support of its interpretation of subsection 160.1(1) is a CRA Views publication, but it provides the CRA's view on subsections 160.1(1) and (3) "as they apply to ITC refunds", which is not the case in the present appeal. As well, administrative documents produced or advice given by the CRA does not bind this Court: *Freitas v The Queen*, 2017 TCC 46 at para. 14.

[99] As well, *Markevich v. Canada*, [2003] 1 SCR 94, supports the Respondent's position that where Parliament has put its mind to a limitation period in the Act and

intends that there be no limitation period, it states so (para. 16). Therefore, the effectiveness of assessing a taxpayer under subsection 160.1(3) "at any time" would be greatly diminished if its application depended on a reassessment pursuant to another provision of the Act which is subject to a limitation period.

(2) Do subsections 160.1(1) and (3) require that a taxpayer have claimed a refund in excess of what they were entitled?

[100] For reasons that follow, I conclude that this provision does not require that a taxpayer have claimed a refund in excess of what they were entitled.

[101] The Appellant argues that for subsections 160.1(1) and (3) to apply, "the taxpayer must have claimed a refund that exceeded what it was entitled to." The Appellant refers to legal commentary (Canada Tax Service — McCarthy Tétrault Analysis, 160.1 — Repayment of Excessive Refunds), as well as a CRA Internal Technical Interpretation (T1 2009-033435117, January 29, 2010), to support this position.

[102] The Respondent takes the position that the operation of section 160.1 is "not predicated upon a claim by the Appellant." The Respondent also argues that there is more to the story than just that the absence of a claim for a refund. There is also context.

[103] The Respondent refers to the fact that the Appellant was revived as a corporate entity after receiving notice of the proposed refund, that it submitted the Waiver and signed the Settlement, all of which suggest that no one had turned their mind to the possibility that the 2010 Reassessment was void.

[104] The Respondent also argues that the Appellant's actions show that it wanted to avoid double taxation and that, ultimately, the Appellant accepted the Payment. I attach little weight to this context.

[105] In any event, I am of the view that the wording of subsection 160.1(1) does not support the Appellant's position that the taxpayer must "claim" a refund in order for section 160.1 to apply. The preamble of subsection 160.1(1) merely states: "an amount has been refunded to a taxpayer". Nothing in subsections 160.1(1) or (3) indicates that the taxpayer must have taken positive actions to claim the refund.

[106] Additionally, the Appellant was not able to point to any binding authorities to support this proposition. As with the CRA Views noted above, legal commentary or CRA interpretations are not binding on this Court.

(3) Does the expression "amount refunded to the taxpayer" in subsection 160.1(1) refer to a refund pursuant to a provision of the Act?

[107] For reasons set out below and given the words "as a refund under this Act", I have concluded that in order to reassess a taxpayer pursuant to subsection 160.1(1) and (3), the amount refunded must be pursuant to a provision of the Act.

[108] The Appellant argues that the refund received by the taxpayer needs to be given under a specific provision of the Act in order for subsection 160.1(1) to apply and relies on the Technical Notes to support this position.

[109] Since the Payment was not made pursuant to subsections 164(1) and 164(3), the Appellant argues that the Minister had no statutory authority to give the "refund". Therefore, the Payment was not a refund for the purpose of subsection 160.1(1) and was merely an amount paid in error, the remedy for which is a civil action in a competent court.

[110] The Respondent takes the position that the Payment was in the nature of a refund regardless of whether it was made pursuant to the 2010 Reassessment. In other words, subsection 160.1(1) applies to any excess refund, regardless of whether the refund was given "as a refund under this Act".

[111] The Respondent also relied on Imperial Oil which states that: "the amount of a refund resulting from an overpayment, although often set out on the notice of assessment, is not an assessed amount" (para. 61). Therefore, the Respondent appears to be arguing that it is immaterial that the 2010 Reassessment is null and void, because the refund was in fact made.

[112] The Appellant's interpretation of subsection 160.1(1) appears to be supported by the historical versions of the provision, as well as the Technical Notes.

[113] Subsection 160.1(1) was added by 1978-1979, c 5, s 6. When first enacted, it only applied with respect to refunds received by reason of section 122.2. At the time, it read as follows:

> Where at any time the Minister determines that by reason of the application of section 122.2 an amount has been refunded to an individual ...
>
> (My Emphasis.)

[114] Subsection 160.1(1) was again amended by 1983-84, c. 1, s. 85 and this amendment expanded the provisions pursuant to which the refund could have been received under. The provision was amended to read:

> Where at any time the Minister determines that as a consequence of the operation of subsection 119(2), 120(2), section 122.2, subsection 127.1(1), 127.2(2), 129(1), 131(2), 132(1), 133(6), 144(9), 192(5) or 194(5) an amount has been refunded to a taxpayer for a taxation year …
>
> (My Emphasis.)

[115] The Technical Notes 1988, section 160.1, explaining the amendment to its current formulation, strongly supports the Appellant's position. It states as follows:

> Subsection 160.1(1) provides for the recovery of certain amounts refunded to a taxpayer under certain provisions of the Act in excess of the amount to which he was entitled. The amendment to subsection 160.1(1) deletes the references to specific provisions of the Act so that the subsection will apply where the excess amount is refunded under any provision of the Act.
>
> (My Emphasis.)

[116] This language was broadened to refer to "any provision of the Act" but there is still a requirement that the amount refunded be in excess of the amount to which the taxpayer is entitled "as a refund under this Act".

[117] I agree with the Appellant's interpretation that in order for subsection 160.1(1) of the Act to apply, the taxpayer must have received a refund under a specific provision of the Act in excess of what they were entitled to. This conclusion is supported by the historical versions of the provision, as well as the Technical Notes noted above, supporting the last amendment. Historically, subsection 160.1(1) only applied to refunds received under specific provisions of the Act and the last amendment was such that it applied to refunds received under any provision of the Act.

[118] Since the Payment was not made pursuant to a provision of the Act, it was a payment made in error in that it was made without any statutory authority. It

follows that the Minister was not entitled to reassess the Appellant under subsections 160.1(1) and (3).

[119] As an aside, it is interesting to note that this outcome is consistent with the CRA's internal technical interpretation (T1 2009-033435117, January 29, 2010) where the CRA examined a scenario where a taxpayer who had received a refund cheque, claimed that he did not receive it and was issued a duplicate cheque. The taxpayer then cashed the original cheque. The CRA opined that the amount obtained from cashing the original cheque was not an amount refunded in excess for the purpose of subsection 160.1(1). Therefore, the amount of the liability could be enforced by the CRA by a civil action in the Federal Court, but not by an assessment under subsections 160.1(1) and (3).

(4) If the refunded amount does not need to be pursuant to a specific provision of that Act, was the Payment nonetheless a "refund"?

[120] If I was wrong in concluding that the Payment was required to be made pursuant to a specific provision of the Act in order to qualify as a refund for subsection 160(1), then it remains to be determined whether the Payment was a "refund" within the ordinary definition of the word. In my opinion, it was not.

[121] The Respondent points out that the word "refund" is not a defined term, and relies on a definition of refund from *Canada Safeway Ltd v. Canada*, [1997] 154 DLR (4th) 449 (FCA) ("Canada Safeway"). The FCA examined paragraph 12(1)(x) of the Act dealing with "inducements or reimbursements" received by a taxpayer in the "course of earning income from a business or property". The FCA held (para. 12):

> 12. (…) the word 'refund' has the primary meaning of restitution or return of a sum received or taken and a secondary meaning of reimbursement.

[122] The Respondent argues that the Payment falls within this definition, and therefore qualifies as a "refund" and subsections 160.1(1) and (3) apply. It is also important to note that, although not cited by the Respondent, Canada Safeway goes on to state (para. 20):

> 20. It is clear in both statutes (the *Excise Tax Act* and the *Income Tax Act*) that Parliament has envisaged the return of moneys paid by error to taxpayer as refund and not a reimbursement. (…)

[123] This would appear to reinforce the Respondent's position that the Payment (which the Appellant admits was given in error), was a refund.

[124] However, in determining the definition of "refund", more than one definition needs to be examined. Subsection 160.1(1) states "an amount has been refunded" and therefore, the provision is using the word "refund" as a verb, rather than a noun.

[125] . In *Bois Aisé Roberval Inc v. Canada*, [1999] 4 CTC 2161 (TCC) ("Bois Aisé"), McArthur J., when examining the definition of "refund" for the purpose of paragraph 12(1)(x), explained that a refund involves two parties: "the taxpayer, who paid something and to whom that amount is now refunded by another party." (para. 76). McArthur J. went on to discuss the effect of refunding a sum of money and stated: "refunding someone a sum of money merely restores that person to the position he or she was in before the person paid out the money" (para. 28).

[126] *Black's Law Dictionary*, 10th ed., defines "refund" as: "The return of money to a person who overpaid, such as a taxpayer who overestimated tax liability or whose employer withheld too much tax from earnings" (My Emphasis). It also defines "overpayment" as: "A payment that is more than the amount owed or due". This definition of overpayment is consistent with that found in subsection 164(7) of the Act, noted above.

[127] The *Dictionary of Canadian Law*, 3rd ed. (Scarborough, Ontario: Thomson Carswell) defines "refund" as: "The restitution or return of a sum received or taken; reimbursement. Generally involves return of money from one party to another." (pp. 1090-1091)

[128] As well (p. 1091), it defines "refund of tax" as "The amount of (a) an overpayment of tax paid under the *Income Tax Act* …".

[129] These definitions of "refund" diverge on whether a refund requires an overpayment or whether it is merely the return of money. *Black's Law Dictionary* and *The Dictionary of Canadian Law* define "refund" as involving a return of money to another party which overpaid. Conversely, Canadian Safeway and Bois Aisé define "refund" as merely returning money, and do not contain the element of overpayment.

[130] In the present appeal, there was no overpayment. Since the 2010 Reassessment is null and void, the 2003 Assessment remained effective. The 2003

Assessment stated that the Appellant owed taxes of $1,809,598, and the amount was paid. Therefore, if the definition of "refund" from *Black's Law Dictionary* and *The Dictionary of Canadian Law* is followed, the Payment was not a "refund" and the Minister was incorrect in assessing the Appellant under subsections 160.1(1) and (3).

[131] However, if the definition of "refund" from Canada Safeway and Bois Aisé is followed, then the Appellant received a refund of $1,809,598 because the Appellant paid that money to the CRA, and the CRA paid it back. However, the Appellant was not entitled to any refund under the Act because the taxes owing pursuant to the 2003 Assessment had in fact been paid.

[132] In my opinion, the former definition is correct for the purpose of subsection 160.1(1). Canada Safeway and Bois Aisé were decided in the context of paragraph 12(1)(x) which seeks to include amounts paid as "inducements or reimbursements" as income. Additionally, the definition of "refund" as the return of an overpayment is consistent with section 164. Since subsection 160.1(1) and section 164 are in the same Division, they should be interpreted consistently.

[133] Having concluded that the definition of "refund" is the return of an overpayment, then the Payment was not a refund in the ordinary sense of the word, and there was no refund for the purpose of subsection 160.1(1).

[134] It is, therefore, immaterial whether the refund was made pursuant to a specific provision of the Act, as either way subsection 160.1(1) would not apply. As well, using this definition of "refund" creates a result consistent with denying the assessment of the $682,187 of arrears interest.

VIII. Conclusion

[135] The appeal is allowed with costs on the basis that the Minister was not entitled to reassess the Appellant pursuant to subsections 160.1(1) and (3) and subsection 164(3.1) of the Act.

Signed at Ottawa, Canada, this **14th** day of **May** 2019.

"Guy R. Smith"

Smith J.

SCHEDULE A

No. 2016-3680 (IT)G

TAX COURT OF CANADA

BETWEEN:

984274 ALBERTA INC.

Appellant

AND:

HER MAJESTY THE QUEEN

Respondent

AGREED STATEMENT OF FACTS

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The parties agree, through their undersigned counsels, for the purposes of this appeal only, to admit the truth of the following facts. For purposes of clarity, it is acknowledged that the parties may ask the Court to draw conclusions of fact (either directly or by inference) that could result from these facts as well as the attached exhibits.

A) From 2002 to 2005: The Initial Transactions and Assessments

1. Henro Holdings Corporation ("**Henro**") bought 84 acres of land in Calgary in 1987 (the "**Land**").

2. The Appellant 984274 Alberta Inc. (the "**Appellant**") is a company incorporated on April 16, 2002, pursuant to the laws of the Province of Alberta, as a wholly owned subsidiary of Henro.

3. Both Henro and the Appellant had taxation years starting April 1, 2002, and ending March 31, 2003. After its taxation year ended March 31, 2003, however, the Appellant changed its taxation year to a calendar year.

4. 1076461 Alberta Ltd. ("**107**") is another wholly owned subsidiary of Henro (the Appellant and 107 collectively being referred to as the "**Subsidiaries**").

a. The Transfer of a Parcel of the Land to the Appellant

5. On April 24, 2002, Henro transferred one parcel of the Land to the Appellant.

6. Henro and the Appellant made an election pursuant to subsection 85(1) ITA in order that the transfer be made on a "rollover" basis.

7. On the same day, the Appellant sold the parcel of Land to a third party with whom it dealt at arm's length.

8. On September 5, 2002, the Appellant made an election pursuant to subsection 83(2) ITA and paid a dividend of $1,250,000 to Henro from the proceeds of sale. The Appellant intended this dividend to be treated as a dividend from its capital dividend account.

9. On November 18, 2003, the Appellant again made an election in accordance with subsection 83(2) of the *Act* and paid a further dividend of $2,702,238 to Henro from the proceeds of sale, intending it to be treated as a dividend from its capital dividend account.

b. The 2003 Tax Return of the Appellant and the Initial Assessment of the Appellant

10. In computing its income for its taxation year ended March 31, 2003, the Appellant reported a capital gain of $7,904,475 and a taxable capital gain of $3,952,238 resulting from the sale of the parcel of Land to a third party.

11. By notice dated June 23, 2003, identified as **Exhibit AR-1**, the Minister assessed the Appellant for Part I tax in the amount of $1,809,598 for its taxation year ended March 31, 2003.

12. This assessment was further to the capital gain of $7,904,475 and the taxable capital gain of $3,952,238 on the disposition of the Land which the Appellant had reported in its income tax return for the year.

13. The tax assessed and owing at that time was paid by the Appellant.

c. The Transfer of Parcels of the Land to 107

14. In 2004 (during Henro's 2005 taxation year), Henro transferred two parcels of the Land to 107.

15. Henro and 107 made an election pursuant to 85(1) ITA in order that the transfer be made on a rollover basis.

16. 107 then sold the parcels of Land to a third party with whom it dealt at arm's length.

17. In computing its income for its relevant taxation year, 107 reported a capital gain resulting from the sale of the parcels of Land to a third party.

18. 107 made an election pursuant to subsection 83(2) ITA and paid a dividend to Henro from the proceeds of sale. 107 intended this dividend to be treated as a dividend from its capital dividend account.

B) From 2006 to 2009: The Henro Audit

19. In June 2006, the Canada Revenue Agency ("**CRA**") informed Henro that it had been selected for an audit.

20. By letter dated July 20, 2007, the CRA informed Henro of its proposal to reassess Henro on the basis that the Land was inventory to Henro and that Henro could not make elections in accordance with subsection 85(1) ITA with respect to the transfer of parcels of the Land to the Appellant and to 107.

21. Settlement negotiations took place between representatives of Henro, the Appellant and 107 and the CRA.

22. A letter dated June 8, 2009, was sent by Mr. Joseph Armanious, Team Leader in the Montreal office of the CRA, to a legal representative of Henro. This letter is identified as **Exhibit AR-3**.

23. The CRA had earlier informed a representative of the Appellant that its taxation year ended on March 31, 2003, was statute-barred.

24. On June 17, 2009, at the request of the CRA, the Appellant signed a waiver, which forms part of **Exhibit AR-4**.

C) From 2009 to 2010: The Minister's Actions Following the Henro Audit

a. The Assessments and Reassessments of Henro

25. By notice dated December 22, 2009, the Minister of National Revenue ("**Minister**") reassessed Henro tax pursuant to Part I of the ITA and assessed tax under Part IV of the ITA for taxation years 2003, 2004, 2005 and 2007 on the basis that the Land transferred to the Appellant and to 107 were inventory, and that Henro should have declared as business income the amount of capital gain reported by the Subsidiaries.

26. By notices dated January 22, 2010, Henro was assessed tax for 2002, 2004 and 2006 pursuant to Part III of the ITA on the basis that in those years it paid dividends from its capital dividend account in excess of the amount in the account at the relevant times.

27. By notice dated March 8, 2010, Henro objected to the Part I and Part IV reassessments and assessments, respectively, for its 2003, 2004, 2005 and 2007 taxation years and by notice dated April 8, 2010, objected to the Part III assessments for its 2002, 2004, 2006 taxation years.

28. By notice dated July 20, 2010, the Minister reassessed Henro's 2007 taxation year amending the reassessment issued on December 22, 2009. A notice of objection to the reassessment was made on October 12, 2010.

b. The Invalid Reassessment of the Appellant

29. By notice dated March 23, 2010, identified as **Exhibit AR-5**, the Minister purported to issue a reassessment to the Appellant in order to reduce its capital gain from $7,904,475 to nil for the taxation year ended on March 31, 2003. This appears to be based on the reassessment to Henro for its 2003 taxation year, described in paragraph 25 herein.

30. This notice, however, was issued after the Appellant's normal reassessment period for the taxation year ended on March 31, 2003. The parties both now take the position that this reassessment was null and void.

c. The Payment by the Minister to the Appellant

31. The Appellant admits receipt of an amount of $2,577,231 on or about July 30, 2010, following the purported issuance of the invalid reassessment of March 23, 2010 (**Exhibit AR-5**).

32. Of this amount, $1,809,598 is on account of income tax paid by the Appellant on the reported taxable capital gain, and $767,633 is on account of interest.

33. The Appellant declared the interest portion as interest income in its tax return for the taxation year ending on December 31, 2010, and paid tax at the required rate on this amount.

D) From 2012 to 2014: The Appeal by Henro to the Tax Court of Canada

a. The Issuance of Proceedings

34. On April 25, 2012, the Minister confirmed the Part I reassessments and the Part III and IV assessments issued to Henro.

35. On or about July 9, 2012, Henro appealed to the Tax Court of Canada the Part I reassessments and the assessments issued pursuant to Part III and IV of the Act, dated December 22, 2009, and January 22, 2010.

36. Henro's Amended Notice of Appeal in this Court's file 2012-2829(IT)G is identified as **Exhibit AR-7**.

37. On or about September 18, 2012, the Respondent filed its Reply to the Amended Notice of Appeal at the Tax Court of Canada in this Court's file 2012-2829(IT)G, identified as **Exhibit AR-8**.

b. The Settlement of the Appeal

38. On July 22 and 23, 2014, representatives of the CRA and Henro executed an agreement (**"Agreement"**) settling the outstanding appeals in this Court's file 2012-2829(IT)G, identified as **Exhibit AR-9**.

39. The Appellant also signed the agreement (**Exhibit AR-9**).

c. The Correspondence in relation to the Settlement

40. On July 23, 2014, a letter was sent from Spiegel Sohmer Inc. (Barry Landy) to the Respondent (Benoit Mandeville), identified as **Exhibit AR-10**.

41. On August 11, 2014, a letter was sent from Spiegel Sohmer Inc. (Barry Landy) to the Respondent (Benoit Mandeville), identified as **Exhibit AR-11**.

42. On August 13, 2014, a letter was sent from the Respondent (Benoit Mandeville) to Spiegel Sohmer Inc. (Barry Landy), identified as **Exhibit AR-12**.

43. On August 14, 2014, a letter was sent from Spiegel Sohmer Inc. (Barry Landy) to the Respondent (Benoit Mandeville), identified as **Exhibit AR-13**.

44. On August 22, 2014, a letter was sent from the Respondent (Benoit Mandeville) to Spiegel Sohmer Inc. (Barry Landy), identified as **Exhibit AR-14**.

45. On August 25, 2014, a letter was sent from Spiegel Sohmer Inc. (Barry Landy) to the Respondent (Benoit Mandeville), identified as **Exhibit AR-15**.

46. On September 8, 2014, a letter was sent from the Respondent (Benoit Mandeville) to Spiegel Sohmer Inc. (Barry Landy), identified as **Exhibit AR-16**.

47. On September 11, 2014, a letter was sent from the Respondent (Benoit Mandeville) to Spiegel Sohmer Inc. (Barry Landy), identified as **Exhibit AR-17**.

48. On September 16, 2014, a letter was sent from Spiegel Sohmer Inc. (Barry Landy) to the Respondent (Benoit Mandeville), identified as **Exhibit AR-18**.

49. On November 17, 2014, a letter was sent from the Respondent (Benoit Mandeville) to Spiegel Sohmer Inc. (Barry Landy); a redacted copy is identified as **Exhibit AR-19**.

50. On December 2, 2014, a letter was sent from Spiegel Sohmer Inc. (Barry Landy) to the Respondent (Benoit Mandeville); a redacted copy is identified as **Exhibit AR-20**.

E) From 2015 to 2018: The Object of the Present Appeal

a. The Refund Assessment Issued to the Appellant

51. On March 23, 2015, the Minister issued a Notice of assessment to the Appellant pursuant to subsections 160.1(1) and (3) and 164(3.1) ITA (the "**Refund Assessment**").

52. The Refund Assessment also includes interest payable by the Appellant from July 30, 2010, up to March 23, 2015 (the date of the refund assessment).

b. The Objection and the Appeal by the Appellant

53. The Appellant filed a Notice of objection dated June 17, 2015, with respect to the Refund Assessment, identified as **Exhibit AR-23**.

54. More than ninety (90) days having elapsed after the filing of its Notice of objection and before the Minister had rendered a decision on the objection, the Appellant filed its Notice of Appeal in the present Court file.

55. The Minister's appeals officer sent a letter dated August 24, 2016, to the legal representatives of the Appellant, identified as **Exhibit AR-25**.

56. The legal representatives of the Appellant sent a letter dated August 25, 2016, to the legal representatives of the Respondent, identified as **Exhibit AR-26**

57. The Minister's appeals officer sent a letter dated September 22, 2016, to the legal representatives of the Appellant, identified as **Exhibit AR-27**.

SIGNED AT MONTREAL, on April 25, 2018

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CITATION:	2019 TCC 85
COURT FILE NO.:	2016-3680(IT)G
STYLE OF CAUSE:	984274 ALBERTA INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	April 27, 2018
AMENDED REASONS FOR JUDGMENT BY:	The Honourable Justice Guy R. Smith
DATE OF **AMENDED** JUDGMENT:	**May 14**, 2019

APPEARANCES:

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