Dockets: 2013-897(IT)G
2013-899(IT)G
2013-900(IT)G
2013-3334(IT)G

BETWEEN:

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

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

Rule 58 Motion heard on January 26, 2015
at Vancouver, British Columbia.
Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellants:	David R. Davies Natasha Reid
Counsel for the Respondent:	Robert Carvalho Lisa McDonald

ORDER

Upon the Respondent bringing a motion for determination, before hearing, of the following questions pursuant to paragraph 58(1)(*a*) of the *Tax Court of Canada Rules* (*General Procedure*):

> (a) In a two-tiered partnership structure, where the top-tier partnership has no at risk amount in respect of the lower-tier partnership at the end of a particular fiscal period, do business losses incurred by the lower-tier partnership in the particular fiscal period retain their character as business losses of the top-tier partnership, thus available to be

> allocated to the partners of the top-tier partnership as business losses (which would then be subject to the application of the at-risk rules in the hands of the partners of the top-tier partnership)?
>
> (b) If the answer to question (a) above is no, does a limited partnership loss that the top-tier partnership has in the lower-tier partnership flow through to the partners of the top-tier partnership such that they have a limited partnership loss?

And upon having heard the submissions of counsel and having read the materials filed;

The motion is allowed and the above questions are decided as set out in the reasons for order attached hereto. Costs on this motion are left to the discretion of the trial judge.

Signed at Vancouver, British Columbia, this 11th day of January 2016.

"B.Paris"

Paris J.

Citation: 2016 TCC 10
Date: 20160111
Dockets: 2013-897(IT)G
2013-899(IT)G
2013-900(IT)G
2013-3334(IT)G

BETWEEN:

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

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Paris J.

[1] The Respondent has applied under paragraph 58(1)(a)of the *Tax Court of Canada Rules* (*General Procedure*) for a determination of the following two questions:

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

[2] The questions were set down by the Court for determination following a previous hearing.

[3] The questions involve the interpretation of subsection 96(2.1) of the *Income Tax Act* (“*Act*”) and its application to a tiered partnership structure. In a tiered partnership, some or all of the interests in one partnership (the “bottom-tier partnership”) are held by another partnership (the “top-tier partnership”).

[4] In this case, the Appellants were limited partners in the top-tier limited partnership which, in turn, was a limited partner in a number of bottom-tier limited partnerships.

<u>Facts</u>

[5] The facts upon which the Court has been asked to make the determination are set out in a Statement of Agreed Facts filed by the parties. Those facts are as follows:

> During the period 1996 to 2009, the Appellants were limited partners of the Monarch Entertainment 1994 Master Limited Partnership (the "MLP").
>
> During the period 1996 to 2009, the MLP was a limited partner in 31 so-called production services limited partnerships (the "PSLPs").
>
> The MLP and each PSLP had a fiscal period ending December 31 each year.
>
> Each PSLP incurred annual business losses from 1996 to 2009.
>
> Pursuant to the relevant PSLP partnership agreements, 99.999% of the loss of each of the PSLPs was allocated to the MLP at the end of each fiscal period of the PSLPs.
>
> Pursuant to the MLP partnership agreement, 99.999% of the loss of the MLP was allocated to the Appellants and other limited partners of the MLP at the end of each fiscal period of the MLP.
>
> At the end of each of the PSLPs’ fiscal periods from 1996 to 2008, the at-risk amount of the MLP in each of the PSLPs was nil.
>
> At the end of each of the MLP’s fiscal periods from 1996 to 2008, the at-risk amount of the Appellants in the MLP was nil.
>
> At the end of 2009, the Appellants' at-risk amounts in the MLP were increased by an allocation of capital gains from the MLP to each of them as partners in the MLP.

> In their respective tax returns for the 2009 taxation year, each of the Appellants claimed, as a deduction in computing taxable income, accumulated limited partnership losses of prior years in respect of the MLP.

Background

[6] Subsection 96(1) of the *Act* sets out the general rules for the computation of the income of a partner from a partnership. A partnership is not a separate legal entity, but subsection 96(1) requires that income of a partner from a partnership be computed as if the partnership were a separate person and as if each partnership activity, including the ownership of property, were carried on by the partnership as a separate person. A computation is then made of each taxable capital gain and allowable capital loss from the disposition of property and of each income and loss of the partnership from each of its sources of income for each taxation year of the partnership. Each income and loss is then allocated among the partners to the extent of each partner's interest in the partnership. The original source of income from each partnership activity is preserved in the hands of the partners.

[7] The relevant portions of subsection 96(1) read as follows:

> 96. (1) Where a taxpayer is a member of a partnership, the taxpayer's income, non-capital loss, net capital loss, restricted farm loss and farm loss, if any, for a taxation year, or the taxpayer's taxable income earned in Canada for a taxation year, as the case may be, shall be computed as if
>
> (*a*) the partnership were a separate person resident in Canada;
>
> (*b*) the taxation year of the partnership were its fiscal period;
>
> (*c*) each partnership activity (including the ownership of property) were carried on by the partnership as a separate person, and a computation were made of the amount of
>
> (i) each taxable capital gain and allowable capital loss of the partnership from the disposition of property, and
>
> (ii) each income and loss of the partnership from each other source or from sources in a particular place,
>
> for each taxation year of the partnership;
>
> …

> (*f*) the amount of the income of the partnership for a taxation year from any source or from sources in a particular place were the income of the taxpayer from that source or from sources in that particular place, as the case may be, for the taxation year of the taxpayer in which the partnership's taxation year ends, to the extent of the taxpayer's share thereof; and
>
> (*g*) the amount, if any, by which
>
> (i) the loss of the partnership for a taxation year from any source or sources in a particular place,
>
> exceeds
>
> (ii) in the case of a specified member (within the meaning of the definition "specified member" in subsection 248(1) if that definition were read without reference to paragraph (b) thereof) of the partnership in the year, the amount, if any, deducted by the partnership by virtue of section 37 in calculating its income for the taxation year from that source or sources in the particular place, as the case may be, and
>
> (iii) in any other case, nil
>
> were the loss of the taxpayer from that source or from sources in that particular place, as the case may be, for the taxation year of the taxpayer in which the partnership's taxation year ends, to the extent of the taxpayer's share thereof.

[8] Tiered partnerships are contemplated by subsection 102(2) of the *Act*, which provides that, for the purposes of subdivision j of Division B of Part I of the *Act* (relating to partnerships and their members), "a reference to a person or a taxpayer who is a member of a particular partnership shall include a reference to another partnership that is a member of the particular partnership."

[9] Subsection 102(2) reads:

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

[10] In *Devon Canada Corporation v. The Queen*, 2013 TCC 415, Hogan J. described the flow through and recognition of income in a tiered partnership structure:

45 In a tiered partnership, the source and location of income is preserved through each level of partnerships until the income is ultimately recognized by, and taxed in the hands of, the corporate or individual partners. This is supported by subsection 102(2) which provides that, in the context of computing the income of partnerships, "a reference to ... a taxpayer who is a member of a particular partnership shall include a reference to another partnership that is a member of the particular partnership.

46 In *Fredette v. The Queen*, [2001 DTC 621] this Court confirmed that income retains its source and its character in a tiered partnership structure. Since an interest in a partnership is not itself a source of income, the source and characterization of the income from each partnership activity must be preserved through all of the tiers, each partnership acting as a flow through, until the income is ultimately taxed in the hands of the corporate or individual partner. In this regard, Justice Archambault of this Court noted [at page 633]:

> ... In other words, the partner's source of income is the same as the partnership's. In addition, elsewhere in the *Act* there is no provision creating the fiction that the income of a partner is earned from an "interest in a partnership". It must therefore be concluded that the partner derives his income from the activities of the partnership itself, not from the property (the interest in the partnership) and that the interest expenses incurred by that partner to finance his contribution were incurred to obtain that business income ... .

[11] Subsection 96(2.1) is part of the at-risk rules found in the *Act*. Those rules restrict the deductibility of a limited partner's losses from a limited partnership. Generally speaking, subsection 96(2.1) provides that, notwithstanding subsection 96(1), any loss of the limited partner will be deductible only to the extent of the partner's at-risk amount at the end of the partnership's fiscal period. To the extent that the loss is not deductible to the limited partner in the taxation year in which it is incurred, it is deemed to be a limited partnership loss, and can be carried forward and deducted to the extent of the limited partner's at-risk amount at the end of any future taxation year.

[12] Subsection 96(2.1) reads as follows:

> (2.1) Notwithstanding subsection 96(1), where a taxpayer is, at any time in a taxation year, a limited partner of a partnership, the amount, if any, by which
>
> > (*a*) the total of all amounts each of which is the taxpayer's share of the amount of any loss of the partnership, determined in accordance with subsection 96(1), for a fiscal period of the partnership ending in the taxation year from a business (other than a farming business) or from property
>
> exceeds

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

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

exceeds the total of

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

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

(iv) the taxpayer's share of

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

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

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

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

shall

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

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

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

First Question

[13] The first question to be determined is whether, for tax purposes, there is a flow-through of a business loss from the bottom-tier limited partnership to the limited partners of the top-tier limited partnership where the top-tier limited

partnership has no at-risk amount in respect of the bottom-tier limited partnership in the year.

Respondent's Position

[14] The Respondent maintains that since the top-tier limited partnership has no at-risk amount, the top-tier partnership's share of the business loss of the bottom-tier limited partnership is deemed to be a limited partnership loss of the top-tier partnership pursuant to paragraph 96(2.1)(*e*) and ceases to be a business loss. Therefore, according to the Respondent's interpretation of subsection 96(2.1), the business loss of the bottom-tier limited partnership cannot be taken into account when determining the top-tier partnership's business loss under paragraph 96(1)(*g*) and there is no business loss in the hands of each of the partners of the top-tier partnership. The deemed limited partnership loss would not flow up to the partners of the top-tier partnership either, because there is no provision for allocating the top-tier partnership's limited partnership loss to the partners of the top-tier partnership.

[15] The Respondent says that the only reasonable interpretation of paragraph 96 (2.1)(*c*) is that, to the extent a limited partnership's loss from business is not deductible in computing the top-tier partnership's income, the top-tier partnership no longer has a loss from business. The Respondent says that by providing in paragraph 96(2.1)(*c*) that the business loss computed under paragraph 96(1)(*g*) is not deductible can only result in there being no business loss for the partner, and that the business loss ceases to exist to the extent of the excess over the partner's at-risk amount and that there is no loss to flow up to the partners of the top-tier partnership. The Respondent maintains that the phrase "shall not be deducted in computing the taxpayer's income for the year" in paragraph 96(2.1)(*c*) is unambiguous in this regard. The Respondent says that since the business loss is not deductible to the partner in computing income and is deemed to be a limited partnership loss, there is no business loss.

[16] The Respondent also says that, unlike paragraphs 96(2.1)(*d*) and (*e*), which relate to the calculation of taxable income and therefore do not apply to a partner that is a partnership, paragraph 96(2.1)(*c*) is clearly applicable to a top-tier partnership because it deals with computing the income of a member of a partnership in the same manner that paragraph 96(1)(*g*) provides for the calculation of a partnership's loss from business.

[17] The Respondent says that subsection 96(2.1) modifies the computation of the top-tier partnership's loss from business by deeming the loss to be a limited partnership loss in paragraph 96(2.1)(*e*). The fact that the deeming provision may create an unfair result in a particular case is not grounds for disregarding or overriding the clear wording of the provision.

[18] The Respondent asserts that the wording of subsection 96(2.1) and in particular the wording of paragraphs 96(2.1)(*c*) and (*e*), is clear and unequivocal and that the ordinary meaning of the words used in those provisions should play a dominant role in its interpretation.

Appellants' Position

[19] The Appellants say that the at-risk rules in the *Act* apply only for the purpose of determining tax liability of a limited partner and therefore can only apply to a partner that is a taxpayer. Since a partnership is not a separate legal person, it is incapable of having a tax liability and the at-risk rules are not relevant and cannot apply to it.

[20] Counsel says that subsection 102(2), which makes the general rules for computing partnership income applicable to tiered partnerships, is only operative for the purposes of Subdivision j of Division B of Part I of the *Act*. Subdivision j comprises sections 96 to 103 dealing with partnerships and their members but does not include the rules for the computation of income or taxable income, which are found in section 3 and Division C of the *Act*, respectively.

[21] The Appellants maintain, therefore, that the rules in paragraphs 96(2.1)(*c*), (*d*) and (*e*) cannot apply to a top-tier partnership that is a limited partner of a bottom-tier limited partnership and that a business loss of the bottom-tier limited partnership retains its character as a business loss and can be allocated to the partners of the top-tier partnership.

[22] According to the Appellants, the scheme of the *Act* directs a taxpayer that is a partner of a top-tier partnership to compute his income or loss from the top-tier partnership by computing the top-tier partnership's share of the income or loss of the bottom-tier partnership without reference to the at-risk rules, and then by computing his share of the income or loss of the top-tier partnership.

[23] Since a person who is a partner of a top-tier partnership has potential liability for tax, he must apply the at-risk rules in respect of his share of the losses

of the top-tier partnership (which include those of the bottom-tier partnership) for the purposes of computing taxable income and tax payable.

[24] The Appellants argue that a textual, contextual and purposive analysis of 96(2.1) leads to this conclusion.

Analysis

[25] In *Canada Trustco Mortgage Co. v. The Queen*, [2005] 2 SCR 601, the Supreme Court of Canada set out the approach to be taken in interpreting tax legislation, as follows:

> 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. Canada*, [1999 CanLII 639 (SCC)], [1999] 3 S.C.R. 804, 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 plays 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.
>
> …
>
> 12 The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently. As stated at para. 45 of *Shell Canada Ltd. v. Canada*, [1999 CanLII 647 (SCC)], [1999] 3 S.C.R. 622:
>
>> <u>[A]bsent a specific provision to the contrary</u>, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the *Act* are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way.
>>
>> [Emphasis added.]

> See also *65302 British Columbia*, at para. 51, per Iacobucci J. citing P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 475-76:
>
> > It would introduce intolerable uncertainty into the *Income Tax Act* if clear language in a detailed provision of the *Act* were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.
>
> 13 The *Income Tax Act* remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation. …

[26] In my view, the text, context and purpose of subsection 96(2.1) all support the Appellants' position that the business loss of the bottom-tier partnership is flowed out to the top-tier partnership and to the partners of the top-tier partnership, and retains its character as a business loss at each step.

<u>Text</u>

[27] According to the wording of subsection 96(2.1), the override to the operation of subsection 96(1) occurs after the losses of a limited partnership from a business or property have been computed and allocated to the limited partners in their proportionate share pursuant to subsection 96(1). This starting point is set out in paragraph 96(2.1)(*a*), which requires the computation of a limited partner's share of "…any loss of the partnership…in accordance with subsection (1)…from a business … or property." The relevant portions of subsection 96(2.1) read:

> 96(2.1) Notwithstanding subsection (1), where a taxpayer is, at any time in a taxation year, a limited partner of a partnership, the amount, if any, by which
>
> > (*a*) the total of all amounts each of which is the <u>taxpayer's share of the amount of any loss of the partnership, determined in accordance with subsection (1)</u>, for a fiscal period of the partnership ending in the taxation year from a business (other than a farming business) or from property…
>
> (Emphasis added)

[28] It is only after the limited partner's loss from business or property has been determined in accordance with subsection 96(1) that the provisions of paragraphs 96(2.1)(*b*) to (*e*) come into play.

[29] After a limited partnership's loss from business or property is computed, and the limited partner's share of the loss is determined, the next step, set out in paragraph 96(2.1)(*b*), is to calculate the limited partner's at-risk amount. Then, to the extent the limited partner's loss from a business or property exceeds his at-risk amount, paragraphs 96(2.1)(*c*) and (*d*) restrict the deductibility of the excess, providing that it shall "not be deducted in computing the taxpayer's income for the year" and shall "not be included in computing the taxpayer's non-capital loss for the year."

[30] As the Appellants point out, there is no wording in subsection 96(2.1) that deems a limited partner's loss from business or property to no longer be a loss from business or property, as the case may be. Preventing a taxpayer from including the portion of such losses that exceed the taxpayer's at-risk amount in computing income and non-capital losses is not the equivalent of deeming such portion of the losses to no longer exist.

[31] I agree with the Appellants that the text of subsection 96(2.1) presumes that the excess continues to be a business loss. If the excess did not continue to be a business loss, there would be no need for paragraphs 96(2.1)(*c*) and (*d*). The Appellants express this argument in their written submissions at paragraph 17 as follows:

> If an Excess was, by operation of the deeming rule in paragraph 96(2.1)(*e*), deemed to be a limited partnership loss only and for all purposes, and ceased to be also a business loss, paragraphs 96(2.1)(*c*) and (*d*) would be superfluous:
>
> a. Paragraph 96(2.1)(*c*) says that the Excess business loss is not deductible in computing income. Ordinary business losses are deductible in computing income for the year up to the amount of the taxpayer's income from other sources under subsection 3(*d*) of the *Act*. Limited partnership losses are deductible in computing *taxable income* under paragraph 111(1)(*e*), which is in Division C of the *Act*. If the Excess was only a limited partnership loss and not also a business loss it would already be not "deductible in computing income" (since a limited partnership loss is deductible only in computing *taxable income*), and thus there would be no need for 96(2.1)(*c*).
>
> b. If a taxpayer's loss for the year exceeds income from other sources, the taxpayer ordinarily has a non-capital loss for the year. Paragraph 96(2.1)(*d*), however, says that an Excess cannot be added to the taxpayer's non-capital loss for the year. "Non-capital loss," as defined in subsection 111(8), is the sum of the

> taxpayer's loss from a source that is an office, employment, business or property. If the Excess lost its character as a business loss by virtue of the deeming rule, a limited partnership loss would not be "from a source that is an office, employment, business or property" and would therefore be excluded from the computation of a non-capital loss. If the Excess lost its character as a business loss, the express prohibition of 96(2.1)(*d*) would be unnecessary.

[32] In my view, the Respondent's interpretation of paragraph 96(2.1)(*c*) is untenable because it conflates the computation of the partnership's business loss with the computation of income under section 3 of the *Act*. It appears to me that the plain and ordinary meaning of the phrase "in computing the taxpayer's income for the year" in paragraph 96(2.1)(*c*) refers to the computation of income required by section 3 of the *Act*, and not to the computation of income from business or property. Section 3 sets out the rules for determining a taxpayer's "income" for a taxation year for income tax purposes. The computation of income under section 3 is made up of a number of components, including the taxpayer's income for the year from all sources, including "the taxpayer's income for the year from each office, employment, business and property" (paragraph 3(*a*)) as well as "the taxpayer's loss for the year from an office, employment, business or property" (paragraph 3(*d*)). The computation of income or loss from a business or property is made according to the rules found in subdivision b of Division B of Part 1 of the *Act*. Income or loss from business or property is a component of section 3 income and therefore must be computed prior to the computation of a taxpayer's income under section 3.

[33] I agree with the Appellants that the prohibition found in paragraph 96(2.1)(*c*) against deducting the excess "in computing the taxpayer's income for the year" can only apply to a limited partner that is a taxpayer and not to a limited partner that is a partnership since a partnership is not required to compute section 3 income under the *Act*. In *Taxation of Corporations, Partnerships and Trusts* 4th ed, (Carswell, 2013), author Norman C. Tobias writes that:

> Section 3 of the *Income Tax Act*, which is applicable to "taxpayers", is not relevant to the determination of income at the partnership level since partnership income or loss is allocated to partners on a source by source basis [para. 96(1)(*c*)]. Section 3 is relevant to the computation of income at the partner level.
>
> (at page 43)

[34] It is clear that the computation of a taxpayer's income for the year is not the same operation as the computation of a taxpayer's income from business for the year. Thus, those expressions are not equivalent, as the Respondent suggests. The Respondent's counsel says that paragraph 96(2.1)(*c*) deals with computing the income of the member of the partnership, similar to paragraph 96(1)(*g*) of the *Act* and that if paragraph 96(1)(*g*) applies in a two-tier partnership situation, then so does paragraph 96(2.1)(*c*).

[35] Paragraph 96(1)(*g*), however, deals with the computation of a partnership's "loss . . . from any source or sources", including a loss from a business, while paragraph 96(2.1)(*c*) deals with the computation of income, which I have found to mean section 3 income. A taxpayer's loss from a source, such as a loss from business, is a component of a taxpayer's section 3 income. Paragraph 96(1)(*g*) reads:

> 96. (1) Where a taxpayer is a member of a partnership, the taxpayer's income, non-capital loss, net capital loss, restricted farm loss and farm loss, if any, for a taxation year, or the taxpayer's taxable income earned in Canada for a taxation year, as the case may be, shall be computed as if
>
> . . .
>
> (*g*) the amount, if any, by which
>
> (i) the loss of the partnership for a taxation year from any source or sources in a particular place,
>
> exceeds
>
> (ii) in the case of a specified member (within the meaning of the definition "specified member" in subsection 248(1) if that definition were read without reference to paragraph (*b*) thereof) of the partnership in the year, the amount, if any, deducted by the partnership by virtue of section 37 in calculating its income for the taxation year from that source or sources in the particular place, as the case may be, and
>
> (iii) in any other case, nil

[36] I would also add that the deeming provision in paragraph 96(2.1)(*e*) does not state that the deeming of the excess of the business or property losses of a limited partner over his at-risk amount causes those losses to cease to be business or property losses. The Respondent's argument that the deeming provision in

paragraph 96(2.1)(*e*) is “of general application” is not supported by the actual wording of that provision. Such an interpretation would in fact require reading words such as “for all purposes” into paragraph 96(2.1)(*e*) after the phrase “be deemed to be the taxpayer’s limited partnership loss”. In the absence of such wording, the scope of the deeming provision should be governed by its context, since a deeming provision must be taken to operate for a particular purpose. In *Verrette v. The Queen*, [1978] 2 S.C.R. 838 the Supreme Court of Canada said that:

> A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is. A deeming provision artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used; it plays a function of enlargement analogous to the word “includes” in certain definitions; however, “includes” would be logically inappropriate and would sound unreal because of the fictional aspect of the provision. (at pages 845-46)

[37] In this case, the context of the deeming provision suggests that it is intended to operate at the level of computation of income and taxable income, as do paragraphs 96(2.1)(*c*) and (*d*), and only after the taxpayer has computed his or her or its income or loss from business and property. Since a partnership is not a taxpayer and does not compute income or taxable income, the deeming provision in paragraph 96(2.1)(*e*) can have no application to it.

[38] Therefore, I find that according to a plain reading of subsection 96(2.1), the business losses of a bottom-tier partnership that exceed the top-tier partnership’s at-risk amount in respect of the limited partnership do not cease to be business losses and are available to be flowed out to the partners of the top-tier partnership.

Context

[39] I also find that this conclusion is supported by the context of subsection 96(2.1).

[40] Within the *Act*, there are numerous provisions dealing with various aspects of the application of the at-risk rules, and the use of limited partnership losses. The Appellants have set out a list of such provisions in their factum. However, in my opinion, only one of those provisions, subparagraph 53(2)(*c*)(i), offers contextual guidance for the specific interpretive question arising in this case.

[41] Subparagraph 53(2)(*c*)(i) of the *Act* reduces the adjusted cost base of a partnership interest by the taxpayer's share of any loss of the partnership from any source for that fiscal period,

> except to the extent that all or a portion of such a loss may reasonably be considered to have been included in the taxpayer's limited partnership loss in respect of the partnership for the taxpayer's taxation year in which that fiscal period ended,

[42] As the Appellants' counsel points out, if a limited partnership loss did not also retain its character as a business loss, there would be no need to include the portion of subparagraph 53(2)(*c*)(i) reproduced above. That is, the limited partnership loss remains a business or property loss and must be carved out of the adjusted cost base reduction rule.

[43] Finally, the Respondent has not offered any contextual analysis to counter the Appellants' interpretation.

<u>Purpose</u>

[44] The purpose of the at-risk rules is straightforward: to limit the extent to which a limited partner may deduct partnership losses from business or property against income from other sources to the capital risked in the partnership (i.e. the partner's at-risk amount). The amount by which the partnership business or property losses exceed the limited partner's at-risk amount may be carried forward and deducted in future years either against income from the partnership which generated the losses or, where the taxpayer's at-risk amount in respect of the partnership has increased, against income from other sources (*Canada Tax Service-McCarthy Tetrault*, Volume 8, Analysis section 96, p. 96-1, October 9, 2015.)

[45] Clearly then, the purpose is not to deny absolutely the losses in excess of a limited partner's at-risk amount but, rather, to defer deduction of the excess until a time when the partnership has generated income or the partner's at-risk amount has increased for some other reason.

[46] The Respondent's interpretation would, in the case of a tiered partnership, result in any business or property losses of a limited partnership that exceed the top-tier partnership's at-risk amount to be denied absolutely because there is no means by which the limited partnership loss created by paragraph 96(2.1)(*e*) can be allocated to the top-tier partnership.

[47] The ability to carry forward a limited partnership loss is a key element of the at-risk rules and I find, therefore, that the interpretation proposed by the Respondent is not consonant with the purpose of the at-risk rules.

[48] More generally, I also believe that the following excerpt from the Department of Finance Technical Notes to sections 96(2.1) to 96(2.7) support the proposition that the purpose of the at-risk rules is not to limit the allocation of losses from business or property to a limited partner, but rather to limit the deductibility of those losses once they have been allocated:

> There is no restriction on the amount of business losses that may be allocated to a limited partner by the partnership. Such losses, however, may only be claimed by the limited partner to the extent of his remaining at-risk amount. Losses that may not be so claimed may be carried forward indefinitely by the limited partner to be applied against income from the same limited partnership.

Conclusion

[49] For all of these reasons, I would answer the first question in the affirmative. Given this conclusion, it is not necessary to proceed to the second question. Costs on this motion are left to the discretion of the trial judge.

Signed at Vancouver, British Columbia this 11th day of January 2016.

"B. Paris"

Paris J.

CITATION:	2016 TCC 10
COURT FILE NO.:	2013-897(IT)G, 2013-899(IT)G, 2013-900(IT)G and 2013-3334(IT)G
STYLE OF CAUSE:	AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATES OF HEARING:	January 26, 2015
REASONS FOR ORDER BY:	The Honourable Justice B. Paris
DATE OF ORDER:	January 11, 2016

APPEARANCES:

Counsel for the Appellant:	David R. Davies Natasha Reid
Counsel for the Respondent:	Robert Carvalho Lisa McDonald

COUNSEL OF RECORD:

For the Appellant:

Name:	David R. Davies Natasha Reid
Firm:	Thorsteinssons LLP Vancouver, British Columbia
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada