Docket: 2006-1674(IT)G

BETWEEN:

LEOLA PURDY, SONS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on October 24, 2008, at Vancouver, British Columbia.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Counsel for the Appellant: Max Weder
Counsel for the Respondent: Karen A. Truscott

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## **JUDGMENT**

The appeal from the assessment made under the *Income Tax Act* for the 2002 taxation year is allowed with costs and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant be permitted to carry forward a non-capital loss of $1,137,378 in its 1998 taxation year in computing income for its 2002 taxation year.

Signed at Ottawa, Canada, this 9th day of January 2009.

"Gerald J. Rip"

Rip C.J.

Citation: 2009TCC21
Date: 200090109
Docket: 2006-1674(IT)G

BETWEEN:

LEOLA PURDY, SONS LTD.,

Appellant,

and

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Respondent.

## **REASONS FOR JUDGMENT**

Rip, C.J.

[1] Leola Purdy, Sons Ltd., appeals from a reassessment of income tax for its taxation year ended October 31, 2002. In its notice of appeal the appellant identified two issues to be decided, i) whether its gain on dispositions of index futures trading contracts in the S&P 500 International Money Market Fund ("contracts") was taxable on capital or income account, and ii) if the gain was taxable on income account, whether, pursuant to subsection 111(1) of the *Income Tax Act* ("*Act*"), it was entitled to apply its loss on dispositions of contracts in its 1998 taxation year to reduce its income in 2002.

[2] The appellant conceded the first issue, acknowledging its gains on the dispositions of the contracts in 2002 were on income account. However, the appellant argued that if the gain on the sale of the contracts was on income account in 2002, then the loss on dispositions of like contracts in 1998 must also be on income account, notwithstanding that the appellant filed its 1998 tax return on the basis that the loss was a capital loss and the tax authority assessed the loss as declared.

[3] The facts are not in issue. A Statement of Agreed Facts was filed by the parties. Mr. John Purdy, the appellant's sole shareholder, testified as to the appellant's investments and futures trading. From 1997 to 2002 the appellant purchased and sold futures trading contracts and reported gains and losses on their dispositions on capital account. The gains or losses from purchases and sales of the appellant's other securities were also reported on account of capital. The nature of the appellant's activities, in particular its purchases and sales of futures contracts, during the period appear to have been the same in 1998 as in 2002.

[4] The parties agreed on the following facts:

1. During its taxation years ending October 31, 1997 to October 31, 2002, the Appellant traded in various index futures contracts in the S&P 500 International Money Market Fund.

2. The Appellant always reported its gains and losses from its investments in those contracts on capital account.

3. In the relevant period, the Appellant also invested in shares and other securities.

4. From its taxation year ending October 31, 1997 to its taxation year ending October 31, 2002, the Appellant had the following gains and losses with respect to the index futures trading contracts as follows:

| **Taxation Year ending October 31** | **Net Gain/Loss** |
| --- | --- |
| 1997 | $(1,729,243) |
| 1998 | (6,026,121) |
| 1999 | 2,803,186 |
| 2000 | 856,831 |
| 2001 | 1,895,516 |
| 2002 | 1,262,264 |

5. The taxable capital gain or allowable capital loss reported by the Appellant was as follows:

| **Taxation year ending October 31** | **Inclusion Rate** | **Taxable Capital Gain/Loss** |
| --- | --- | --- |
| 1997 | 75% | $(1,276,114) |
| 1998 | 75% | (4,519,591) |

| | | |
|---|---|---|
| 1999 | 75% | 2,102,390 |
| 2000 | 75% | 3,548,109 |
| | 67% | (2,584,439) |
| | 50% | 1,533 |
| 2001 | 50% | 947,758 |
| 2002 | 50% | 631,132 |

6. In its returns of income, the Appellant made the consequential adjustment to its capital dividend account.

7. The Appellant elected under subsection 83(2) to pay capital dividends of $361,418 in its taxation year ending October 31,1998 and $1,900,000 in its taxation year ending October 31, 2002.

**1998 LOSS**

8. During its taxation year ended October 31, 1998, the Appellant disposed of various index futures trading contracts (the "1998 Contracts").

9. The Appellant reported the disposition of the 1998 Contracts in its tax return for its taxation year ended October 31, 1998 as a capital loss of $6,026,121.

10. The calculation giving rise to the allowable capital loss claimed by the Appellant was:

| | |
|---|---|
| $5,491,508 | Gain from other investments |
| $6,026,121 | Loss from trading of index futures contracts |
| $534,613 | Net capital loss |
| X 75% | Inclusion rate |
| $400,959 | Allowable capital loss (available for carryback) |
| $178,140 | Applied in 1996 taxation year |
| $222,819 | Applied in 1997 taxation year |

11. The Appellant applied $4,118,631 of the claimed allowable capital loss (i.e. 3/4 of $6,026,121) against its taxable capital gains in its taxation year ending October 31, 1998.

12. After applying the above allowable capital loss against its taxable capital gains in 1998, the Appellant's remaining taxable income in the taxation year ending October 31, 1998 was $369,152.

13. The Appellant's income tax return for the taxation year ending October 31, 1998 was assessed as filed on April 6, 1999 and became statute-barred under subsection 152(4) on April 6, 2002.

14. The Appellant applied $400,959 of the allowable capital loss as net capital losses against taxable capital gains it had reported in the years prior to its taxation year ending October 31, 1998, being $178,140 in its taxation year ending October 31, 1996 and $222,819 in its taxation year ending October 31, 1997.

15. The Appellant did not make a request for a non-capital loss determination under subsection 152(1.1) with respect to the taxation year ending October 31, 1998.

**2002 GAIN**

16. During the taxation year ended October 31, 2002, the Appellant disposed of various index futures trading contracts (the "2002 Contracts").

17. The Appellant reported the disposition of the 2002 Contracts in its tax return for its taxation year ended October 31, 2002 as a capital gain of $1,262,264 and a taxable capital gain of $631,132.

**NOTICE OF REASSESSMENT**

18. By Notice of Reassessment dated September 6, 2005, the Minister of National Revenue (the "Minister") reassessed the Appellant's taxation year ending October 31, 2002 to:

    (a) increase its business income by $1,277,906; and

    (b) correspondingly decrease its taxable capital gain by $631,132.

19. The Minister increased the Appellant's business income on the basis that the gain on the disposition of the 2002 Contracts was taxable on income account.

20. The Appellant no longer disputes that the 2002 Contracts were taxable on income account and agrees that the gain from the 2002 Contracts was on income account.

[5] The appellant's position is quite simple: if the gains on the dispositions of futures contracts in 2002 are on income account then the losses on dispositions of futures contracts in 1998 also were on income account, notwithstanding that the appellant originally treated the losses as capital losses. In 1998, as described above,

the appellant deducted three quarters of the purported capital losses as allowable capital losses ($4,519,591) from its taxable capital gains for the year ($4,118,632). The net loss of $400,959 was carried back to the appellant's 1996 and 1997 taxation years pursuant to subsection 152(6) of the *Act*.

[6] The appellant states that its losses on the disposition of the futures contracts in 1998, that is, $6,026,121, were incurred in a business and it had a non-capital loss in the year of $1,137,378[1]. The base amount in issue, $1,506,530, is the balance of the one quarter of the originally claimed capital gain of $6,026,121.

[7] The position of the respondent is that if the Minister of National Revenue ("Minister") were to recognize that the appellant had a non-capital loss of $1,137,378 in its 1998 taxation year, he could only do so by reassessing 1998. The respondent submits the Minister has no authority to reassess since the 1998 assessment is statute-barred. Respondent's counsel argued that the appellant is attempting to extend jurisprudence inappropriately and to retroactively recharacterize the losses used in calculating income for 1998 and then apply those losses to non-statute-barred taxation years. A major problem, says the respondent, is that the appellant wishes to recharacterize a transaction that took place in a statute-barred year. In any event, the respondent does not agree that the disposition of the contracts in 1998 were non-capital losses.

[8] As far as the appellant is concerned, 1998 is a lost cause. It has been assessed and the assessment is statute-barred. However, an error made in assessing 1998 impacts on its 2002 taxation year. The error is that there were non-capital losses — not capital losses as claimed by the appellant in its 1998 tax return — from dispositions of futures contracts in 1998. And in assessing 2002 the Minister must recognize the non-capital losses from 1998.

[9] As previously mentioned, Mr. Purdy confirmed that how the appellant conducted itself in buying and selling futures contracts did not change over time. The motivation for buying and selling futures contracts was the same in 1998 as it was in 2002. Cross-examination did not suggest that the dispositions in 1998 could be characterized as capital transactions. And the parties agreed that in 2002 the appellant

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[1] Calculated as follows:
6,026,121 (capital losses for 1998)
- 4,519,591 (allowable capital losses for 1998)
(1,506,530)
+ 369,152 (reported taxable income for 1998)
(1,137,378)

bought and sold futures contracts in the course of a business. In the circumstances, I have concluded that the appellant was doing in its 1998 taxation year what it was doing in 2002, carrying on a business of buying and selling futures contracts. The losses from disposing contracts in 1998 were also non-capital losses.

[10] The appellant relies on the Exchequer Court's decision in *New St. James Limited v. M.N.R.*[2] for the principle that a loss incurred in a statute-barred year may be recalculated for the purpose of reassessing a non-statute-barred year. In *New St. James Limited*, the Court recognized the Minister's right to recompute tax accounts in any year, including years that were statute-barred from assessment.

[11] The respondent does not dispute that the Minister may recalculate a loss incurred in a statute-barred year. However, respondent's counsel submits that in order for the Minister to recalculate a non-capital loss for a taxation year, the taxpayer must have reported a non-capital loss in its tax return for that year, that is, in the tax return for the year the loss was realized. Respondent's counsel refers to a passage in *First Farm Inc. (Formerly Romo Seafood Limited) v. The Queen*,[3] to explain how the principle in *New St. James Limited* is to be applied:

> . . . In that case the original assessment for 1955 was a "nil assessment", New St. James having reported a loss after deducting the cost of the alterations as an expense of some $38,000, which loss was carried forward to 1956. In computing its income for the 1956 reassessment, the Minister recalculated the 1955 loss to be carried forward at $330 by treating the cost of the alterations as an amount subject to capital cost allowance rather than a deductible expense. New St. James maintained that its 1955 loss had been determined by the Minister when making the original "nil assessment" and that the loss could not be altered by him when making the reassessments for 1956 to 1959 because the four-year time limit of subsection 46(4) had elapsed with respect to 1955.
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> *New St. James*, *supra*, relied on subsection 46(4) (the predecessor to subsection 152(4)) and argued that the Minister was precluded thereby from inquiring into the actual loss in respect of which the allowance should be made. Sheppard, D.J. held at page 5243:
>
> > The limitation of section 46(4) only applies when four years have elapsed after the designated notice or notification and that has occurred only in respect of the 1955 taxation year.

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[2] 66 DTC 5241. See also *Coastal Construction and Excavating Limited v. The Queen,* ("*Coastal Construction*") 97 DTC 26 (TCC) per Bowman T.C.J.

[3] 93 DTC 1237 at 1241-42 per Hamlyn J. The respondent also referred to *B&M Carriers Limited v. The Queen*, 93 DTC 1205, p. 1210, per Sarchuk J. and *Sherway Centre Limited v. The Queen*, 2001 DTC 1021 at 1024-25 re Bowie J., aff'd 2003 DTC 5082 (FCA).

> Hence section 46(4) imposes no restriction as to any year other than 1955 and therefore not to be subsequent years 1956 to 1959 inclusive to which the four years have not elapsed and the limitation of section 46(4) cannot apply. For these subsequent years section 46(4), having no application, does not preclude an **assessment being made in accordance with the provisions of this Statute**, including sections 139(1)(*x*) and 32(5). **That requires the loss for the years 1956 to 1959 inclusive being taken as provided by the Statute, not as implied in the assessment for the year 1955**.

> . . . the relevant parts of subsection 46(4) referred to by Sheppard, D.J. are now found in subsection 152(4) and are, for all practical purposes, unchanged.
>
> [Emphasis added by respondent.]

[12] It appears that the respondent relies on the emphasized words above in *New St. James Limited*, *supra*, as authority that a loss must be reported in a prior statute-barred year in order to be reconsidered in a subsequent taxation year that is not statute-barred. In *First Farm Inc.*, *supra*, the taxpayer took an excessive deduction in a prior year in calculating a loss and in the latter year the Minister tried to correct the excess deduction by disallowing a carry-forward of the loss to the extent it was excessive. Whether the loss was reported was not an issue in *First Farm Inc.*

[13] The respondent also argues that if a taxpayer had income as well as a capital loss in a year and is assessed tax for the year, the taxpayer may object to and appeal the assessment recharacterizing the capital loss as a non-capital loss. But if the taxpayer fails to object to, and appeal, the assessment, the taxpayer loses his or her right forever to recharacterize the loss for the year. *New St. James Limited* would not apply in such circumstances.

[14] Thorson P. explained what is an assessment in *Pure Spring Co. Ltd. v. M.N.R.*:[4]

> The assessment is different from the notice of assessment; the one is an operation, the other a piece of paper. The nature of the assessment operation was clearly stated by the Chief Justice of Australia, Isaacs, A.C.J., in *Federal Commissioner of Taxation v. Clarke* ((1927) 40 C.L.R. 246 at 277):

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4 [1946] 2 DTC 844 at 857 [Ex. C.].

> An assessment is only the ascertainment and fixation of liability.

a definition which he had previously elaborated in *The King v. Deputy Federal Commissioner of Taxation (S.A.); ex parte Hooper* ((1926) 37 C.L.R. 368 at 373):

> An "assessment" is not a piece of paper; it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount he sends by post a notification thereof called "a notice of assessment" . . . But neither the paper sent nor the notification it gives is the "assessment". That is and remains the act of operation of the Commissioner.

It is the opinion as formed, and not the material on which it was based, that is one of the circumstances relevant to the assessment. The assessment, as I see it, is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made.

[15] In the respondent's view, therefore, the Minister would have to reconsider the appellant's income and expenses for 1998 and find that the losses on the dispositions of the futures contracts were incurred in a business, in other words, reassess the appellant's income for 1998. This, respondent's counsel says, the Minister cannot do. To recharacterize the loss realized in 1998, reported and assessed as a capital loss, to a non-capital loss realized in the appellant's 1998 taxation year would amount to a reassessment of 1998.

[16] That is not how Bowman J. (as he then was) saw *New St. James Limited.* In *Coastal Construction*, *supra*,[5] he explained:

> . . . The Minister is obliged to assess in accordance with the law. If he assesses a prior year incorrectly and that year becomes statute-barred this will prevent his reassessing tax for that year, but it does not prevent his correcting the error in a year that is not statute-barred, even though it involves adjusting carry-forward balances from previous years, whether they be loss carry-forwards or balances of investment tax credits. *New St. James Limited v. M.N.R.*, 66 DTC 5241; *Allcann Wood Suppliers Inc. v. The Queen*, 94 DTC 1475. No question of estoppel arises: *Goldstein v. The Queen*, 74 DTC 1029.

[17] The Minister need not reassess the appellant's 1998 taxation year in order to recharacterize the loss in issue. The Minister formed an opinion as to the appellant's

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[5] At page 31.

liability for tax for 1998 and fixed the appellant's tax liability for 1998. The appellant's tax liability for 1998 will not change. Any error in making the assessment may be corrected to the extent it affects the calculation of income or fixation of tax liability for future taxation years of the appellant. But, again, the appellant's tax liability for 1998 will not be altered.

[18] One of the respondent's arguments was that in appealing 2002, the appellant is attempting to request a notice of loss determination (in accordance with subsection 152(1.1)[6] of the *Act*) for 1998, notwithstanding the fact that the 1998 taxation year is statute-barred and the appellant did not report a non-capital loss in its original income tax return for 1998. It is a fact that the appellant never made a request for a determination of a loss and I cannot conclude that in making this appeal it is now making such a request.[7] A taxpayer who does not request a notice of determination is not restricted to the conditions of subsection 152(1.1) of the *Act*. In *Aallcann Wood Suppliers Inc. v. The Queen*,[8] ("*Aallcann*") Bowman J. (as he then was) was presented with a similar argument and concluded that:

> [I]n the absence of a binding loss determination under subsection 152(1.1), it is open to a taxpayer to challenge the Minister's calculation of a loss for a particular year in an appeal for another year where the amount of the taxpayer's taxable income is affected by the size of the loss that is available for carry-forward under section 111. In challenging the assessment for a year in which tax is payable on the basis that the Minister has incorrectly ascertained the amount of a loss for a prior or subsequent year that is available for deduction under section 111 in the computation of the taxpayer's taxable income for the year under appeal, the taxpayer is requesting the court to do precisely what the appeal procedures of the Income Tax Act contemplate: to determine the correctness of an assessment of tax by reviewing the

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6 Subsection 152(1.1) reads as follows:

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|---|---|
| Where the Minister ascertains the amount of a taxpayer's non-capital loss, net capital loss, restricted farm loss, farm loss or limited partnership loss for a taxation year and the taxpayer has not reported that amount as such a loss in the taxpayer's return of income for that year, the Minister shall, at the request of the taxpayer, determine, with all due dispatch, the amount of the loss and shall send a notice of determination to the person by whom the return was filed. | Lorsque le ministre établit le montant de la perte autre qu'une perte en capital, de la perte en capital nette, de la perte agricole restreinte, de la perte agricole ou de la perte comme commanditaire subie par un contribuable pour une anne d'imposition et que le contribuable n'a pas déclaré ce montant comme perte dans sa déclaration de revenu pour cette année, le ministre doit, à la demande du contribuable et avec diligence, déterminer le montant de cette perte et envoyer un avis de détermination à la personne qui a produit la déclaration. |

7 Because of this conclusion several cases submitted by respondent's counsel need not be considered: *Inco Limited v. The Queen*, 2004 DTC 2847 (TCC), 2005 DTC 5110 (FCA); *B&M Carriers Limited v. The Queen*, 93 DTC 1205 (TCC); *Bryon M. Armstrong v. The Queen*, 2006 DTC 6310 (FCA).

8 94 DTC 1475 at 1476.

> correctness of one or more of the constituent elements thereof, in this case the size of a loss available from another year. This does not involve the court's making a determination of loss under subsection 152(1.1) or entertaining an appeal from a nil assessment. It involves merely the determination of the correctness of the assessment for the year before it.

[19] The issue of a statute-barred year was absent in *Aallcann*. In any event, there is no statutory obligation for a taxpayer to invoke subsection 152(1.1) of the *Act* and request a determination of a loss. A request for a loss determination is optional and when a taxpayer does not request a determination, the fisc and the taxpayer are in the same position that they were before subsection 152(1.1) was enacted.

[20] The appellant also submits that there is no requirement under the *Act* that a loss, whether a non-capital loss or an allowable capital loss, must be reported in a tax return for the year in which the loss was realized, nor is there any requirement, as submitted by the respondent, that a loss resulting in a nil taxable income for that year must be reported in order to deduct the loss as a carry-forward in a subsequent year. It is the balance of the loss in a prior year that may be carried forward to a subsequent year. Appellant's counsel relies on the comments of Bowman A.C.J. (as he then was) in *Burleigh et al. v. The Queen*:[9]

> The next misconception is the idea that not only must the loss upon which the loss carryforward is based have been reported in a return of income for the year in which it is incurred, but also that the return must have been "processed" and the loss accepted by the Minister. This idea is wrong on two counts. First, it is wrong to say that the loss must have been reported in a return of income for the year in which it was incurred. Section 111 imposes no such restriction. It permits a taxpayer to carry various types of losses forward or back. It says nothing about requiring the losses to have been reported in an income tax return. The definitions in subsection 111(8) of the various types of losses to which section 111 applies do not include a requirement that they be reported in a return of income for the year in which they were incurred. There are obviously practical reasons why it is desirable to report the loss in the return of income for the year in which it is incurred but this is not a requirement of the law.

[21] The respondent submits the facts of the appeal at bar are distinguishable from the facts in *Burleigh et al.* In *Burleigh et al.* the two taxpayers filed their 2001 tax returns claiming net capital losses in November 2003,[10] after they had filed their 2002 tax returns (in April 2003) applying net capital losses that arose in 2001 against

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[9] 2004 DTC 2399 at para. 10.

[10] There is no issue that the 2001 taxation year was statute-barred in either of the *Burleigh et al.* appeals.

their 2002 taxable capital gains. In other words, the Burleighs had not filed tax returns for 2001 claiming a non-capital loss at the time they filed their 2002 tax returns applying their losses.[11]

[22] Because the appellant reported taxable income for 1998 and 2002, the respondent argues, and the Minister assessed tax for each year, neither the *Burleigh et al.* nor the *Aallcann* decisions assist the appellant. The corporate appellant at bar was not issued nil assessments for those years. I do not agree that the *Burleigh et al.* and *Aallcann* cases stand for the propositions that a taxpayer must have a nil assessment or claim non-capital loses in an earlier year to claim an adjustment in the amount of loss carry-forward to a future year. The requirement that a non-capital loss must be reported before one can adjust a non-capital loss is found as a condition in subsection 152(1.1), a request for a determination of a loss. There is no such condition in an appeal from an assessment of a subsequent year.

[23] In *The Queen v. Papiers Cascades Cabano Inc.*[12] ("*Cabano*") the Minister assessed the taxpayer for 1993 to 1995, inclusive, allowing input tax credits ("ITC"). However, later on the Minister audited the taxpayer and determined that the taxpayer had deducted $206,365 in excess of the ITCs to which it was entitled for the years 1993 to 1995 and reassessed, although the reassessments were statute-barred. In assessing the taxpayer for 1996, the Minister reduced ITCs of $493,672 claimed by the taxpayer by $206,865. The Tax Court judge allowed the appeal concluding that the Minister could only correct the initial assessments for 1993 to 1995 by way of reassessment and that it was too late to do so. To allow the Minister to reduce the ITCs in 1996, the trial judge held, would be tantamount to allowing the Minister to circumvent the limitation provisions of subsection 152(4) of the *Act*. The Crown appealed.

[24] The Court of Appeal did not agree with the trial judge. At paragraph 24 of their reasons, the appellate judges held that only ITCs that change the tax payable in 1996 are affected by the Minister's assessment for 1996, and that the reduction in ITCs did not affect the earlier years.

[25] The Federal Court of Appeal agreed in *Clibetre Exploration Ltd. v. The Queen*[13] that there was no bar to recharacterizing expenses claimed as deductions

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[11] It appears that the Minister subsequently notified each of the Burleighs that no tax was payable for 2001.

[12] 2008 DTC 6264 (FCA), 2005 DTC 979 (FC).

[13] 2003 DTC 5073, par. 6.

resulting in non-capital losses as Canadian exploration expenses. There was no need to reassess the earlier taxation years in which the deductions were treated as non-capital losses; in either characterization the taxable income and thus the tax payable for the earlier taxation years would be nil.

[26] In *The Queen v. Bradley*[14] the Federal Court of Appeal held that unless a year is statute-barred, the Minister is obliged to assess each year in accordance with the *Act*. *Bradley* involved calculating the aggregate of deductible charitable gifts with a possible carry-forward for the five years prior to the year in which the deduction was claimed. Strayer J. stated:

> *It appears to us that in, for example, an assessment made in respect of 1985 taxes the Minister is obliged, in considering the amount to be carried forward, to determine the aggregate of "gifts" made in previous years and this must in the context be confined to qualifying charitable gifts.* In this case, the Tax Court Judge determined that *the sum allegedly given* to the Museum in 1984 (purportedly $98,867) *was not a gift because there was no loan which could have been forgiven by the respondent.* Therefore in calculating, for purposes of carry-forward in subsequent years, the aggregate of gifts made in 1984, as required by paragraph 110(1)(*a*), *that aggregate cannot include the invalid amount of $98,867.*
>
> [Emphasis added.]

[27] The respondent is concerned that if I accept the appellant's interpretation of the statutory provisions and the jurisprudence the statute-barred provisions would seem to operate against a further reassessment of a taxpayer by the Minister, but would almost never prohibit taxpayers from making adjustment requests beyond the statutory time period.

[28] The respondent's concern is unnecessary. We are not dealing with an adjustment request. Nobody is saying that a statute-barred year can be reassessed. The tax the taxpayer has been assessed for the statute-barred year cannot be changed. The assessment of tax for the statute-barred year is "deemed valid and binding notwithstanding any error, defect or omission in the assessment. . ."[15] But it is valid and binding only for the year assessed. If an error was made in the assessment of the statute-barred year which affects another year, the Minister, in assessing the other year, must follow the *Act* and if there was an error in law in a previous year, including a statute-barred year, that error ought to be corrected so that the assessment for the current year is correct: *New St-James Limited*, *supra*, *Coastal Construction*,

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[14] 98 DTC 6421 at 6422.

[15] Subsection 152(8).

*supra*, *Aallcann*, *supra*, *Burleigh et al.*, *supra*, *Cabano*, *supra*, *Clibetre Exploration Ltd.*, *supra*.

[29] It is only "a foolish consistency [that] is the hobgoblin of little minds . . ." wrote Ralph Waldo Emerson. Where there is a sound and practical reason to assess in a consistent manner that is not prohibited by statute, the Minister should not fear doing so.

[30] The appeal is allowed with costs.

Signed at Ottawa, Canada, this 9th day of January 2009.

"Gerald J. Rip"

Rip C.J.

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| CITATION: | 2009TCC21 |
| COURT FILE NO.: | 2006-1674(IT)G |
| STYLE OF CAUSE: | LEOLA PURDY, SONS LTD. v. HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Vancouver, British Columbia |
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| REASONS FOR JUDGMENT BY: | The Honourable Gerald J. Rip, Chief Justice |
| DATE OF JUDGMENT: | January 9, 2009 |

APPEARANCES:

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|---|---|
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| Counsel for the Respondent: | Karen A. Truscott |

COUNSEL OF RECORD:

For the Appellant:

| | |
|---|---|
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