Docket: 2012-4138(IT)G

BETWEEN:

1455257 ONTARIO INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 21 and October 22, 2019,
at Toronto, Ontario.

Before: The Honourable Justice Gabrielle St-Hilaire

Appearances:

Counsel for the Appellant:	**Domenic** Marciano Eric Torelli
Counsel for the Respondent:	Craig Maw

AMENDED JUDGMENT

The appeal from an assessment bearing number 1191785, dated October 18, 2010, made under the *Income Tax Act*, is dismissed with costs to the Respondent, in accordance with the attached Reasons for Judgment.

This Amended Judgment is issued in substitution of the Judgment dated July 22, 2020 for the purpose of correcting the spelling of counsel for the Appellant's name.

Signed at Ottawa, Canada, this **7th day of August 2020**.

"Gabrielle St-Hilaire"

St-Hilaire J.

Citation: 2020 TCC 64
Date: **20200807**
Docket: 2012-4138(IT)G

BETWEEN:

1455257 ONTARIO INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

St-Hilaire J.

I. Introduction

[1] This is an appeal from an assessment made under section 160 of the *Income Tax Act*, (Act).[1] Section 160 is a collections provision that authorizes the Minister of National Revenue (Minister) to recover a tax debt from a person who has received a transfer of property from a non-arm's length debtor for inadequate consideration.

[2] The parties agree that the Appellant, 1455257 Ontario Inc. (257), received a transfer of $998,460 from 1473661 Ontario Limited (661) in 2003. This transfer was made for no consideration at all. Mr. Enrico Lisi was the sole shareholder, sole director and sole officer of both 257 and 661 such that the two corporations were not dealing at arms-length. 257 was a management company; it managed the affairs of 661 as well as that of other corporations. 661 was involved in the construction business. Mr. Lisi had signing authority on the bank accounts of both 257 and 661.

---

[1] *Income Tax Act*, RSC 1985, c 1 (5th Supp). All references to section numbers pertain to the *Income Tax Act* unless otherwise stated. Some of the relevant provisions are included in Appendix A.

[3] The Minister assessed the Appellant pursuant to section 160 of the Act for an amount of $702,374.01, that being the lesser of the amount transferred and 661's tax liability as of October 18, 2010, the date of the assessment (the subject assessment). The subject assessment was made on the basis that 661 transferred funds to the Appellant on January 3, 2003 when 661 had a tax liability in respect of its 2000 taxation year.

II. Issues

[4] The core issue before the Court in this appeal is whether the amount assessed against the Appellant under section 160 of the Act is correct. In the circumstances of this appeal, this raises two sub-issues: (i) whether 661 had a tax liability in respect of its 2003 taxation year or any preceding taxation year when it transferred property to the Appellant; and (ii) whether the Minister's calculation of interest accrued on 661's tax liability is correct. In answering the question regarding 661's tax liability, the Court must determine whether non-capital losses available to 661 with respect to its 2002 taxation year ought to have been carried back to its 2000 taxation year.

III. Background Information

[5] The Appellant, 257, was incorporated in 2000 under the *Ontario Business Corporations Act*,[2] and was dissolved in 2007. During the course of these proceedings, the Respondent took the position that a dissolved corporation lacks the capacity to pursue an appeal of its assessment in the Tax Court of Canada and brought a motion to adjourn the appeal to allow the Appellant to revive its corporate status. In granting the motion in *1455257 Ontario Inc. v The Queen*,[3] the Tax Court concluded that upon dissolution, the Appellant ceased to exist and unless and until revived, it lacked the capacity to pursue its appeal. The Tax Court adjourned the appeal to allow the Appellant time to take the necessary steps to revive its corporate status. The Appellant appealed this order. In *1455257 Ontario Inc. v The Queen*,[4] the Federal Court of Appeal confirmed that the Appellant, as a dissolved corporation, lacked the capacity to pursue an appeal of its assessment in the Tax Court of Canada. The Appellant then took the necessary steps to revive its corporate status.

---

2 *Business Corporations Act*, RSO 1990, c B.16.

3 *1455257 Ontario Inc. v The Queen*, 2015 TCC 173.

4 *1455527 Ontario Inc. v The Queen*, 2016 FCA 100, leave to appeal to SCC refused, 37024 (8 September 2016).

IV. The Law Regarding Section 160 of the Act and Application of the Criteria

[6] In *Livingston v R*,[5] the Federal Court of Appeal set out the criteria that must be met for the application of section 160 of the Act. These criteria are based on the wording of subsection 160(1) and can be expressed simply as follows:

1) There must have been a transfer of property;

2) The transfer must be made between persons not dealing at arm's length;

3) The fair market value of the property transferred must have exceeded the fair market value of the consideration given by the transferee; and

4) The transfer was made by a person who had a liability under the Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year.

[7] The parties agree that the first three criteria are met. The transfer of funds in the amount of $998,460 from 661 to the Appellant on January 3, 2003 was a transfer of property for no consideration between two corporations who were not dealing at arm's length.

[8] The fourth criterion is in issue. This criterion requires that the transfer be made by a person (661 in this case) who had a tax liability in or in respect of the taxation year in which the property was transferred (2003 in this case) or any preceding taxation year. The Appellant's position is that 661 did not have a tax liability in respect of its 2000 taxation year in the amount that led to the subject assessment. The Appellant submits that non-capital losses incurred in 661's 2001 and 2002 taxation years were carried back or ought to have been thereby reducing 661's taxable income for its 2000 taxation year.

[9] The Minister reassessed 661's taxation year ending on October 31, 2000 on the following dates:

- August 13, 2001 (initial assessment);

- April 24, 2002 (application of loss carry-back from 2001);

---

[5] *Livingston v R*, 2008 FCA 89 at para 17.

- October 23, 2003 (application of loss carry-back from 2002);
- January 14, 2005 (adjustments and overall decrease to loss carry-back from 2001 as a result of the Grosvenor settlement); and
- November 20, 2008 (application of the loss carry-back from 2003).

I will refer to the 2008 assessment, the latest assessment, as the "underlying assessment".

[10] In its notice of appeal, the Appellant raised the issue of its right to challenge the correctness of the underlying assessment. It is my view that the Appellant is entitled to challenge the correctness of the underlying assessment made against 661 on any grounds that would have been available to 661 had it appealed its assessment directly. In *Gaucher v R*, the Federal Court of Appeal wrote as follows:

> It is a basic rule of natural justice that, barring a statutory provision to the contrary, a person who is not a party to litigation cannot be bound by a judgment between other parties. […] When the Minister issues a derivative assessment under subsection 160(1), a special statutory provision is invoked entitling the Minister to seek payment from a second person for the tax assessed against the primary taxpayer. That second person must have a full right of defence to challenge the assessment made against her, including an attack on the primary assessment on which the second person's assessment is based.[6]

[11] The Appellant is not bound by the underlying assessment even if it is final for 661 and no longer open to objection and appeal by 661.[7] I note that the Respondent did not address this issue in its reply to notice of appeal and did not challenge the Appellant's position at the hearing.

V. Burden of Proof

[12] Although not specifically raised in the pleadings, at the hearing, both parties briefly addressed the issue of who bears the burden of proving that the underlying assessment is correct. In assessing the Appellant, the Minister proceeded on the assumption that 661 had a corporate tax liability pertaining to its 2000 taxation year of not less than $702,374.01 including penalties and interest as of October 18,

---

6 *Gaucher v R*, [2000] FCJ No 1869 at paras 6-7, 2000 DTC 6678 (FCA). See also *R v 594710 British Columbia Ltd.*, 2018 FCA 166, leave to appeal to SCC refused, 38352 (February 21, 2019); *Abrametz v R*, 2009 FCA 70.

7 See e.g. *Atwill-Morin v R*, 2016 TCC 127.

2010. The Appellant submits that the Minister bears the burden of proof regarding the correctness of the underlying assessment and appears to take the position that this principle applies to all cases in which liability is assessed pursuant to section 160 of the Act. I am of the view that the Appellant has the burden of proving that the underlying assessment is incorrect.

[13] The ordinary rule with respect to the onus of proof in tax appeals was set out by the Supreme Court of Canada in *Johnston v MNR*,[8] and reiterated in *Hickman Motors Ltd. v R*, wherein Justice L'Heureux-Dubé wrote as follows:

> The Minister, in making assessments, proceeds on assumptions (*Bayridge Estates Ltd. v. M.N.R.*, 59 D.T.C. 1098 (Ex. Ct.), at p. 1101) and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment (*Johnston v. Minister of National Revenue*, [1948] S.C.R. 486; *Kennedy v. M.N.R.*, 73 D.T.C. 5359 (F.C.A.), at p. 5361). The initial burden is only to "demolish" the exact assumptions made by the Minister but no more: *First Fund Genesis Corp. v. The Queen*, 90 D.T.C. 6337 (F.C.T.D.), at p. 6340.[9]

[14] This general rule which puts the burden of proof on the taxpayer "is not to be lightly, capriciously or casually shifted" although there may be instances where it is appropriate to shift the burden to the Minister.

[15] In *Voitures Orly Inc./Orly Automobiles Inc. v R*, the Federal Court of Appeal expressed its view on the burden of proof as follows:

> To sum up, we see no merit in the submissions of the appellant that it no longer had the burden of disproving the assumptions made by the Minister. We want to firmly and strongly reassert the principle that the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted. There is a very simple and pragmatic reason going back to over 80 years ago as to why the burden is on the taxpayer: see *Anderson Logging Co. v. British Columbia*, (1925) S.C.R. 45, *Pollock v. Canada (Minister of National Revenue)* (1993), 161 N.R. 232 (F.C.A.), *Vacation Villas of Collingwood Inc. v. Canada* (1996) 133 D.L.R. (4th) 374 (F.C.A.), *Anchor Pointe Energy Ltd. v. Canada*, 2003 FCA 294. It is the taxpayer's business. He knows how and why it is run in a particular fashion rather than in some other ways. He knows and possesses information that the Minister does not. He has information within his reach and under his control. The taxation system is a self-reporting system. Any shifting of the taxpayer's burden to provide and to report information that he knows or controls can compromise the integrity, enforceability and, therefore, the credibility of the system. That being said, we

---

8 *Johnston v MNR*, [1948] CTC 195, 3 DTC 1182 (SCC).

9 *Hickman Motors Ltd. v R*, [1997] 2 SCR 336 at para 92.

> recognize that there are instances where the shifting of the burden may be warranted. This is simply not one of those cases. [emphasis added][10]

[16] In *Anchor Pointe Energy Ltd. v R*, the Federal Court of Appeal restated the principle succinctly as follows: "It is trite law that, barring exceptions, the initial onus of proof with respect to assumptions of fact made by the Minister in assessing a taxpayer's tax liability and quantum rests with the taxpayer."[11]

[17] Several decisions of this Court[12] have recognized both the general rule regarding the burden of proof as well as the exception that provides that there are circumstances in which fairness will require that the burden be shifted to the Minister to show that the assessment is correct.

[18] One often cited example of an exception to the general rule is where the facts are peculiarly or exclusively within the Minister's knowledge. This case is not one of those cases. In this appeal, the facts are squarely within the knowledge of the Appellant through Mr. Lisi who is the sole shareholder, director and officer of both the Appellant and 661 and as such, the information is within his reach and under his control and counsel for the Appellant did not argue otherwise. For example, Mr. Lisi testified that Mr. Derrick Wright, a partner at BDO Dunwoody LLP, was his accountant until around 2009 and that he spoke with him about the Grosvenor losses several times over a number of years. In addition, Mr. Lisi testified that he had several conversations with Canada Revenue Agency (CRA) employees from the collections department regarding 661's balance owing.

VI. Loss carry-back

[19] The Appellant's subject assessment is based on 661's tax liability for its 2000 taxation year and includes interest accrued up to October 18, 2010. 661's carry-back of losses to its 2000 taxation year is at the center of the main issue in this appeal. Appendix B provides an overview of 661's carry back of losses as well as the source of the unused losses that are central to this dispute.

[20] 661's income for its 2000 taxation year was $8,469,700, net of $14,239 of losses claimed from previous years.

---

10 *Voitures Orly Inc./Orly Automobiles Inc. v R*, 2005 FCA 425 at para 20.

11 *Anchor Pointe Energy Ltd. v R*, 2007 FCA 188 at para 35.

12 See for example *Manna v R*, 2019 TCC 70; *Monsell v R*, 2019 TCC 5; *Ansems v R*, 2019 TCC 66; *Andrew v R*, 2015 TCC 1; *Mignardi v R*, 2013 TCC 67.

[21] 661 incurred non-capital losses as a partner in the Grosvenor Services 2000 Limited Partnership (Grosvenor LP) for 2001 and subsequent years[13] and requested carryback of its share of the losses (Grosvenor losses) for taxation years including 2001, 2002 and 2003 to its 2000 taxation year.

[22] In its 2001 taxation year, 661 had Grosvenor losses of $6,566,808 and carried back these losses to its 2000 taxation year. As a result of this loss carry-back, 661's taxable income for the 2000 taxation year was reduced to $1,902,892. The Minister assessed this loss carry-back by Notice of Assessment dated April 24, 2002.

[23] In its 2002 taxation year, 661 had Grosvenor losses of $2,147,666 and carried back part of these losses in the amount of $1,902,892 to reduce its 2000 taxable income to nil. The Minister assessed this loss carry-back by Notice of Assessment dated October 23, 2003. At this point, 661 had a remaining loss balance of $244,797 for 2002.[14]

[24] Following an audit of Grosvenor LP and as a result of a subsequent settlement which was binding on all partners, 661's Grosvenor losses for the 2001 taxation year were reduced to $4,033,959.71 (a decrease of $2,532,848.29) and its losses for the 2002 taxation year were increased to $2,412,306 (an increase of $264,640).[15] The Minister reassessed 661's 2000 taxation year on January 14, 2005 and decreased the loss carry-back from 2001 to reflect the losses as determined by the settlement. Hence, 661's taxable income for its 2000 taxation year increased.

[25] The parties agree that the changes that resulted from the Grosvenor settlement left 661 with a closing balance of losses in the amount of $509,437.17[16] (the unused losses) for its 2002 taxation year and further, that the 2002 loss balance was never applied to 661's 2000 taxation year.[17]

---

13 Agreed Statement of Facts (Partial) at para 11.

14 Agreed Statement of Facts (Partial) at para 15.

15 Agreed Statement of Facts (Partial) at para 20.

16 The amount of $509,437.17 is composed of the following two amounts: 1) the remaining loss balance of $244,797 for 2002 following the loss carry-back reassessed in October 2003 and referred to in paragraph 23 of these reasons; and 2) the increase to the 2002 losses in the amount of $264,640.17 resulting from the Grosvenor settlement and referred to in paragraph 24 of these reasons.

17 Agreed Statement of Facts (Partial) at paras 22 and 23.

[26] 661 requested that losses in the amount of $1,827,051 incurred in its 2003 taxation year be carried back to its 2000 taxation year.[18] The Minister assessed this loss carry-back by Notice of Reassessment dated November 20, 2008 thereby further decreasing 661's taxable income for the 2000 taxation year.

[27] On December 8, 2010, the Appellant made an access to information and privacy (ATIP) request and received the ATIP disclosures on or around October 12, 2011.[19] During examinations for discovery, as read-in at trial, the Appellant acknowledged that it was only in 2011, through the ATIP request, that it discovered that it had non-capital losses from 2002 that had not been applied to its 2000 taxation year.[20]

[28] I note that the 2002 unused losses of $509,437.17 are at the root of the dispute between the parties. In a nutshell, the Appellant takes the position that a prescribed form requesting the carry back of the 2002 unused losses to 661's 2000 taxation year was not required and further that it would have been impossible for 661 to comply with that formal requirement. The Respondent takes the position that the Minister *may*, but could not be *required* to reassess 661's 2000 taxation year to apply the 2002 unused losses and further, that 661 did not request, in prescribed form or otherwise, that the unused losses be carried back to its 2000 taxation year.

[29] Paragraph 111(1)(a) of the Act provides that, in computing taxable income, a taxpayer may carry non-capital losses back three years. There is no dispute that 661 could request that its non-capital losses incurred in taxation years ending in 2001 and 2002 be carried back to 2000 when it filed its returns for those years. In fact, the 2001 losses and part of the 2002 losses were applied to reduce its 2000 taxable income by reassessments of 661's 2000 taxation year in April 2002 and October 2003 respectively. Further, 661 requested a loss carry back of its 2003 losses to its 2000 taxation year and these losses were applied to reduce its taxable income. The issue that remains is whether the balance of losses for 2002 which were never applied to 2000 should have been applied to reduce 661's taxable income and if so, when.

[30] Paragraph 111(1)(a) of the Act authorizes a taxpayer to deduct non-capital losses, subject to the restrictions found in subparagraphs 111(1)(a)(i) and (b)(i).

---

18 Agreed Statement of Facts (Partial) at para 25.

19 Transcript from Hearing, Read-ins at Trial at 277.

20 Transcript from Hearing, Read-ins at Trial at 276.

Neither party has submitted that these restrictions are an impediment to the deduction of 661's 2002 unused losses.

[31] In my view, paragraph 111(1)(a) of the Act is a permissive deduction in light of the preamble of subsection 111(1) which reads "there may be deducted such portion as the taxpayer may claim" [emphasis added]. There is nothing in the provision to suggest that 661 had to deduct its 2002 unused losses in its 2000 taxation year nor that the Minister could force it to do so. Support can be found for this view in the Federal Court of Appeal decision in *CCLI (1994) Inc. v R*, wherein the Court wrote as follows:

> A more important problem with this interpretation is that it fails to respect the choice that Parliament has given to taxpayers in the first line of subsection 111(1). As I read subsection 111(1), only the taxpayer has the right to choose how to allocate the non-capital loss of a particular year between the 3 prior years and the 7 subsequent years, subject only to the restrictions in subparagraphs 111(3)(a)(i) and 111(3)(b)(i). Although in a given situation a taxpayer may be content to allow the Minister to choose how its losses may be applied, nothing in section 111, except subparagraphs 111(3)(a)(i) and 111(3)(b)(i), gives the Minister any legal basis for imposing on a taxpayer a particular allocation. [emphasis added][21]

[32] I find that it was 661's right to choose how to allocate its 2002 losses and more importantly, that the Minister had no legal basis to impose on 661 an obligation to apply its 2002 unused losses to the 2000 taxation year.

[33] Hence, the question now becomes whether 661 requested that its 2002 unused losses be applied to its 2000 taxation year and more specifically, what it had to do to make such a request.

[34] The mechanism by which a taxpayer may request a loss carry-back and the corresponding obligation on the Minister to reassess is provided by subsection 152(6) of the Act which reads in part as follows:

> 152 (6) Reassessment where certain deductions claimed [carrybacks] Where a taxpayer has filed for a particular taxation year the return of income required by section 150 and an amount is subsequently claimed by the taxpayer or on the taxpayer's behalf for the year as
>
> > (c) a deduction […] under section 111 in respect of a loss for a subsequent taxation year,

---

21 *CCLI (1994) Inc. v R*, 2007 FCA 185 at para 42.

> by filing with the Minister, on or before the day on or before which the taxpayer is, or would be if a tax under this Part were payable by the taxpayer for that subsequent taxation year, required by section 150 to file a return of income for that subsequent taxation year, a prescribed form amending the return, the Minister shall reassess the taxpayer's tax for any relevant taxation year (other than a taxation year preceding the particular taxation year) in order to take into account the deduction claimed. [emphasis added]

[35] Reduced to its bare essentials, subsection 152(6) of the Act provides that when a taxpayer has filed a return for a particular taxation year as required by section 150 and an amount is subsequently claimed by the taxpayer *by filing a prescribed form amending the return, the Minister shall reassess*. Thus, assuming the conditions under section 150 are met, the Minister is required to reassess when the taxpayer has requested a loss carry-back by filing a prescribed form. Of course, this must be done within the period provided for in the Act. In effect, subsection 152(6) in combination with subparagraph 152(4)(b)(i) of the Act extends the normal reassessment period by a further three years.[22]

[36] Subsection 152(6) of the Act also provides the period within which the taxpayer may file the prescribed form. Again, reducing the relevant portion of the provision to its bare essentials, subsection 152(6) provides that the taxpayer may request a loss carry-back by filing a prescribed form on or before the day the taxpayer is required by section 150 to file a return of income for that taxation year. In applying this part of the provision to the facts of this case, 661 could request that its 2002 losses be carried back to its 2000 taxation year on or before its filing due date of July 31, 2002 for its taxation year ending in 2002.[23] As mentioned earlier, 661 did request a loss carry-back of $1,902,982 from its 2002 taxation year to its 2000 taxation year and was reassessed accordingly on October 23, 2003.[24] 661 now wishes to carry back the unused losses from its 2002 taxation year to reduce the 2000 taxable income that resulted from the revised Grosvenor losses.

---

22 See *Agazarian v R*, 2004 FCA 32 (“[o]ne notes that while subsection 152(1) confers upon the Minister the power (and the obligation) to assess the taxpayer’s income, and to do so with due dispatch, it does not prescribe a time within which the Minister must exercise that power. Similarly, while subsection 152(6) confers upon the Minister the obligation to reassess a taxpayer’s income to take into account the taxpayer’s claim of a loss carry-back, it does not impose a period within which such reassessment must occur. To determine what those limitation periods are, one must turn to subsection 152(4).” at para 13).

23 Agreed Statement of Facts (Partial) at para 30 (661’s 2002 taxation year ended on January 31, 2002).

24 Agreed Statement of Facts (Partial) at para 14.

[37] By letter dated April 2, 2004, the Minister advised 661 that a settlement, binding on all partners, had been reached on March 31, 2004 in the Grosvenor LP matter and that the Minister had made a determination of losses for the period from 2000 to 2007. Both the letter and the attached Notice of Determination set out the changes to the Grosvenor losses in the aggregate but not for each partner although it did refer to the units held by 661 according to the Minister's records.

[38] The Appellant submits that it was therefore impossible to comply with a requirement to file a prescribed form to request a loss carry-back on or before July 31, 2002 because the increase in 661's taxable income for 2000 and the determination of the Grosvenor losses it now wanted to carry back to 2000 were partly the result of the 2004 settlement. The changes that resulted from the Grosvenor settlement were reflected in the January 14, 2005 reassessment of 661's 2000 taxation year.

[39] The Respondent's position is stated as follows in paragraph 27 of the Agreed Statement of Facts (Partial):

> The Respondent takes the positon that 661 could only carry back the Subject Unapplied Loss if (and only if) it had filed a "prescribed form" following the Grosvenor LP Loss Determination Settlement in or around April 2, 2004, requesting the loss carry back of the Subject Unapplied Loss (of $509,437 in 2002) to 661's 2000 taxation year, in accordance with section 152(6) of the ITA. The Respondent takes the position that the required "prescribed form" (for purposes of section 152(6) of the ITA) was/is (for 1998 and later taxation years) a T2Sch4. [emphasis added]

The Respondent submits that not only is there no prescribed form in this case but also further submits that 661 did not make any written request for the carry-back of the unapplied losses from its 2002 taxation year to its 2000 taxation year at any time during the extended assessment period. During his submissions, Counsel for the Respondent was asked to address the issue regarding the impossibility of filing a prescribed form "in accordance with section 152(6)" because the provision required that the prescribed form be filed by July 31, 2002 while the need to carry back the unused losses arose out of the 2004 Grosvenor settlement. If I understand the Respondent's argument, once the timeframe within which the Minister can reassess pursuant to subparagraph 152(4)(b)(i) of the Act, that is three years beyond the normal reassessment period, has expired, the year is statute-barred and the Minister does not have to reassess to apply the unused losses. Counsel for the Respondent suggested that there might be a right to apply to the Federal Court for a review of the Minister's administrative decision to refuse to reassess.

[40] At trial, Counsel for the Appellant acknowledged that they could not provide the Court with a prescribed form to show 661's compliance with subsection 152(6) of the Act, nor could they provide the Court with any document evidencing 661's request for the carry back of the 2002 unused losses.[25] Rather, the Appellant submits that subsection 152(6) is a permissive provision and that compliance with the requirements of the provision is not mandatory on 661, although the Appellant argues it is mandatory on the Minister. The Appellant submitted, "this Court can find on the basis of oral testimony that the increased loss request would have been made to, but not processed by, the CRA."[26] The Appellant further argued that irrespective of whether 661 made the request, this Court can interpret 661's original loss carry-back request of approximately 1.9 million from 2002 to 2000 as an "implied request to carry back all losses available from 2002 to the extent needed to eliminate and/or reduce to the maximum extent possible 661's 2000 income."[27]

[41] 661 filed a prescribed form to carry-back part of its 2002 losses when it filed its 2002 return. However, it is clearly established that 661 did not file the prescribed form as required by subsection 152(6) of the Act to request a carry-back of the 2002 unused losses after the 2004 Grosvenor settlement. It is also clearly established that 661 did not make a written request for carry-back in any form whatsoever.

[42] The Appellant submitted that subsection 152(6) of the Act does not contemplate the filing of an *amended* prescribed form and further, that the wording in subsection 152(6) precludes compliance with the provision as the Grosvenor settlement was concluded in 2004 when it was too late to comply with the timing of the requirement discussed earlier. Counsel for the Appellant argued that since 661 filed a prescribed form in 2002 in compliance with subsection 152(6), what is contemplated in the circumstances is an amendment to the original request for loss carry-back. He argued that the Minister needs to consider the intention of the taxpayer and queried "so if we're piggybacking off the original prescribed form, the question then becomes: in light of what happened with Grosvenor, what was the taxpayer's intention?"[28]

---

25 Transcript from Hearing at 28-29.
26 Transcript from Hearing at 28.
27 Transcript from Hearing at 29.
28 Transcript from Hearing at 296.

[43] Counsel for the Appellant appears to submit that the Minister has authority to reassess 661 beyond the limitation period independently of subsection 152(6) of the Act. Counsel for the Appellant referred to a number of provisions in the Act that, in his view, illustrate a mandatory requirement on the Minister to reassess but an optional requirement on the part of the taxpayer to comply with subsection 152(6) in particular because of the use of the word "if" in the provisions.

[44] I will provide two examples of the provisions referred to by Counsel for the Appellant. He referred to subparagraph 152(4)(b)(i) of the Act which provides that the Minister may reassess after the end of the normal reassessment period only if the assessment is made before the day that is three years after the end of the normal reassessment period and is required under subsection (6)… or would be so required *if* the taxpayer had claimed an amount by filing the prescribed form. Counsel for the Appellant also referred to subparagraph 161(7)(b)(iii) which speaks to the effect of the carry back of losses on the calculation of interest and uses the wording "if" a prescribed form was filed under subsection 152(6). Counsel again submitted that the reference to "if" suggests that it is an optional requirement, not a mandatory requirement.[29]

[45] I am not persuaded by Counsel for the Appellant's argument to the effect that the filing of a prescribed form is optional. In my view, what is made optional by the use of the word "if" in reference to the filing of a prescribed form under subsection 152(6) is the taxpayer's option or right to choose how to allocate the losses of a particular year between prior and subsequent years. However, once the taxpayer has made the choice to carry back the losses, subsection 152(6) of the Act requires that they file a prescribed form.

Waivers and implied requests

[46] At this point, it is useful to recall that in 2003, 661 requested that part of its 2002 losses be carried back to 2000 to reduce its income to nil. Counsel for the Appellant submitted that it would be reasonable to interpret this request for carry back of the 2002 losses in an amount sufficient to reduce its income to nil as providing an "implied request" to apply the 2002 unused losses to reduce the increase in income that resulted from the 2004 Grosvenor settlement. In support of this position, Counsel for the Appellant argued that interpretive principles

---

[29] Transcript from Hearing at 300.

applicable to waivers[30] should apply to the requirement for a prescribed form under subsection 152(6).

[47] Counsel for the Appellant referred to several cases where the Tax Court of Canada, the Federal Court and the Federal Court of Appeal held that waivers were valid despite their defects. The courts have held that waivers were valid despite the following defects: the use of an incorrect form such as a letter,[31] the lack of clarity of the terms of a waiver,[32] the omission of the taxpayer's name,[33] or the omission of a corporate seal.[34] Counsel for the Appellant submits that these cases support the view that although 661 did not file the prescribed form to request that the 2002 unused losses be carried back, this should not prevent this Court from finding that there was an implied request for loss carry back and that is sufficient.

[48] In reviewing the cases the Appellant relied on, it is clear that they share a common feature, that of involving a signed waiver or a letter, an actual *document*, that the Court could interpret by referring to relevant evidence to determine the validity of the waiver. For example, in *Solberg*, the Federal Court, Trial Division, spoke of technical defects, which did not impair the substance of the waiver and found that "the appropriate approach to the interpretation of the waiver is to seek to ascertain the intention of the parties as expressed in that document together with any relevant circumstances for which evidence is available (emphasis added)."[35] In *Mitchell*, the Federal Court of Appeal wrote that the intention was abundantly clear

---

30 For example, subparagraph 152(4)(a)(ii) of the Act provides that the minister may reassess beyond the normal reassessment period if a taxpayer has filed a waiver in prescribed form. Counsel for the Appellant also submitted that the principles applied in *Dhaliwal v R*, 2012 TCC 84, a case involving an election under section 50 should apply in this case. I note that, at paragraph 21, Justice Boyle states, "there is no prescribed form under the Act for choosing this election". I find the circumstances of *Dhaliwal* too far removed from this case where we are dealing with a specific requirement for a prescribed form.

31 *Mitchell v Canada (AG)*, 2002 FCA 407; *Kerry (Canada) Inc. v Canada (AG)*, 2019 FC 377.

32 *Brown v R*, 2006 TCC 381 (the taxpayer knew he would be reassessed after the normal reassessment period and the reassessment did not contain any element of surprise).

33 *Noran West Developments Ltd. v R*, 2012 TCC 434.

34 *Cal Investments Limited v R.* (1990), [1991] FC 199, 90 DTC 6556 (the seal was found to be a discretionary requirement).

35 *Solberg (SJ) v Canada*, [1990] 2 CTC 418 at para 13, 92 DTC 6448.

and the letter provided all the information required by a waiver in prescribed form.[36]

[49] I am not persuaded by the Appellant's argument that the principles applied in the waiver cases ought to be applied in this case to support the position that 661's original loss carry back request is sufficient to serve as a request for carry back of the unused losses.

[50] Earlier in these reasons, I expressed my view that paragraph 111(1)(a) of the Act is a permissive deduction; only the taxpayer has the right to choose how to allocate their losses and the Minister has no basis to impose a particular allocation on the taxpayer subject to the restriction referred to earlier. It follows that the taxpayer must make the request for loss carry back. Subsection 152(6) of the Act requires that this be done by filing a prescribed form within a prescribed timeframe. The Appellant concedes that 661 did not file a prescribed form. Nor did 661 file *any document* specifically requesting a loss carry back that this Court could review in light of other evidence to ascertain the intention of the parties as expressed in that *document*.

[51] However, what is unusual in the circumstances of this case is that even if 661 had filed a prescribed form, it could not have complied with the requirement to do so within the required timeframe. In light of this and in light of the evidence at trial regarding the CRA's audit manual, I am prepared to consider whether, although not on a prescribed form, there was sufficient information on which the Minister could rely to apply the 2002 unused losses to the 2000 taxation year following the changes that resulted from the Grosvenor settlement.

[52] Although an auditor's view of how the Act should be interpreted is generally irrelevant, in this case, it is useful to consider testimony on how the CRA was applying subsection 152(6) based on an internal policy. Mr. Jonathan Smith, the

---

[36] *Mitchell*, *supra* note 31 ("[i]t was abundantly clear that the intention was present and it is equally clear that this paragraph contains all of the information required by the *Income Tax Act* to constitute a valid waiver. The respondent concedes that this letter did provide all the information required by the waiver "in prescribed form". It is further conceded by Revenue Canada that in the past their practice was to accept as valid waivers, prescribed forms which have been altered, and documents which are not in prescribed form." at para 33).

auditor on the Grosvenor LP file, testified that he was familiar with an audit policy on loss carry-back. When asked about the policy, Mr. Smith testified as follows:[37]

> Q. Okay. But have you read any internal CRA instructions, whether from an audit manual or otherwise, with respect to the processing of loss carryback requests?
>
> A. No.
>
> Q. And have you read any document that reflects the substance of the highlighted portion below, which reads:
>
> > "Where an internally generated adjustment results in an increase to income and a loss of another year has been applied to that year, the taxpayer registrant will be given the opportunity to amend the loss application." (As read)
>
> Have you ever read any documents at the CRA that's in line with that instruction?
>
> A. Have I read something, or am I aware of such a...
>
> Q. Let's start with reading.
>
> A. Have I read it? No.
>
> Q. Are you aware of it?
>
> A. Yes.
>
> Q. You're aware of this requirement?
>
> A. I'm aware that we always give the taxpayer the opportunity to request losses in writing, yes.
>
> Q. You're aware that the CRA gives the opportunity to the taxpayer to amend a loss application?
>
> A. Yes.
>
> Q. Yes? And what does that mean? What is your understanding of that policy?

---

[37] Transcript from Hearing at 69-71.

A. It's a matter of them just requesting in writing, and then we amend the loss.

Q. So is it a separate loss request? Is it amended to the original --

A. If they made an original loss and then they want to amend it, they're going to send in a separate request for an amended loss.

Q. Okay. So you're aware of that policy at the CRA?

A. I'm aware generally that people have to request loss amendments or original loss applications in writing, yes.

Q. Okay. And when it says giving the taxpayer the opportunity to amend it, does that require any sort of communication between the CRA and the -- from the CRA to the taxpayer?

A. Yes, I'm not necessarily going to get into a situation where we're going to interpret those terms, but...

Q. So generally, it's your understanding that you don't need to reach out to the taxpayer?

A. I'll be reaching out to the taxpayer by -- to issue a T7W-C which will show our amended loss. Then the taxpayer would know to actually say, "Okay, I think I want to change the loss at some point in the future."

[53] To summarize, Mr. Smith acknowledged that the CRA has a policy of giving the taxpayer an opportunity to amend their loss application when an internally generated adjustment results in an increase in income and a loss from another year has been applied to that year. The circumstances of this case appear to be directly contemplated by that policy, since an adjustment to 661's losses made following the 2004 Grosvenor settlement resulted in an increase in income for its 2000 taxation year, which had been previously reduced to nil by losses carried back from 2002. Hence, it appears that the CRA reassessed taxpayers who amended their loss applications even when that was not in strict compliance with subsection 152(6) of the Act. Mr. Smith testified that the CRA would reach out to the taxpayer through a T7W-C, a form showing the amended loss and then would expect the taxpayer to communicate with the CRA to advise of whether and how they want to amend their loss application.

[54] On April 2, 2004, Mr. Smith wrote to Mr. Lisi and 661 to inform them of the Grosvenor settlement. In his letter, Mr. Smith expressed the loss determination as an aggregate and as an amount per unit. Mr. Smith wrote that CRA records

indicated that 661 had 116.4400 units in Grosvenor LP and included the telephone number at which he could be reached. Mr. Smith testified that he was involved in the Grosvenor LP audit and would have generated T7W-Cs for individual partners but was not involved in the reassessment of the partners' losses. Any documents specific to a taxpayer such as a T7W-C would have been put in that taxpayer's return file. Mr. Smith testified that the documents associated with the Grosvenor audit including copies of the T7W-Cs were eventually culled as the matter was settled.

[55] The documents sent to the Appellant as part of the ATIP disclosure included a T7W-C addressed to 661 showing that the losses for its 2001 taxation year had been reduced by $2,532,848.29, from $6,566,808.00 to $4,033,959.71. The ATIP disclosure also included a "Revised Non-Capital Loss Schedule" prepared by Mr. Smith. Mr. Smith testified that he would typically attach a Revised Loss Schedule to the T7W-C and that these documents would be sent to Sudbury where the reassessments were prepared and issued.

[56] The Revised Loss Schedule disclosed through the ATIP request had a column showing 661's 2001 and 2002 losses carried back to its 2000 taxation year. The second column entitled "CRA" showed the revised losses of $4,033,959.71 as well as their carry back to 2000. The document also showed that the losses for 2002 were revised to $2,412,306.17. This amount was the amount typed in for "loss applied to 2000" and then scratched out by hand and replaced with $1,902,892. Mr. Smith testified this was his handwriting and explained that he would have put the $2,412,306 amount thinking that there was a possibility that the taxpayer would request that loss to be carried back. He testified that the CRA would give the taxpayer the opportunity to use the losses available but that it was ultimately up to the taxpayer to decide whether they wanted to use the losses or not. Mr. Smith asserted that it was not his role to reach out to individual partners and added: "It's up to them to really say, you know, once they become aware of what they actually can claim to make that request because I'm not in a position to assume that's the best thing for their loss or that's the loss application they prefer to make. I can't make that determination."[38]

[57] Mr. Smith testified that he did not send the Revised Loss Schedule containing his handwritten scratch outs to 661. Although he could not confirm it because the file was culled, Mr. Smith testified that he believed that the following Revised Loss Schedule was sent to 661 with the T7W-C for the 2000 taxation year:

---

[38] Transcript from Hearing at 112.

1473661 Ontario Limited
Revised Non-Capital Loss Schedule

	Taxpayer	CRA
April 22/2001 Opening Balance	$0.00	$0.00
2001 Loss	$6,566,808.00	$4,033,959.71
Loss applied to Oct. 31/2000	($6,566,808.00)	($4,033,959.71)
April 22/2001 Closing Balance	$0.00	$0.00
Jan. 31/2002 Opening Balance	$0.00	$0.00
2002 Loss	$2,147,666.00	$2,412,306.17
Transferred on Amalgamation	$23.00	$23.00
Loss applied to 2000	($1,902,892.00)	($1,902,892.00)
Jan 13/2002 Closing Balance	$244,797.00	$509,437.17

The T7W-C indicated that the revised taxable income was $2,532,849.29 but did not indicate 661's loss balance subsequent to the Grosvenor settlement and corresponding adjustments to 661's 2000 taxation year. However, the loss balance of $509,437.17 was indicated on the November 20, 2008 notice of reassessment for 661's 2003 taxation year. I note that the T7W-C included the following information: "For more information please refer to the letter issued to you on April 2, 2004, or contact Jonathan Smith at (416) 954-xxxx".

[58] Mr. Lisi testified that when he received documents from the CRA, he forwarded them to his accountant, Mr. Derrick Wright. Mr. Lisi stated that he did not make inquiries to the CRA regarding the non-capital losses and how they were being applied. He testified that he had conversations with his accountant and that it was always about all of the available losses from Grosvenor LP being used to offset 661's taxable income to nil. Otherwise, Mr. Lisi's testimony was vague in the sense that he could not recall receiving any of the specific documents put to him during his testimony nor could he remember the dates when he would have spoken with CRA officers or with Mr. Wright.

[59] There were letters from the CRA to Mr. Lisi and 661, dated August 28, 2006 and November 8, 2006 both signed by Mr. Robert A. Thompson referring to an amount of more than one million owing. In the August 2006 letter, Mr. Thompson wrote that he was "enclosing a copy of a letter dated April 2, 2004 which refers to business losses which will be available, but whether or not, these losses are applicable to the above liability is not clear to the writer." The November 2006 letter indicated that Mr. Lisi and his office manager had responded to Mr. Thompson's calls and advised they were referring this matter to their corporate accountant. Mr. Thompson also indicated they were requiring post-dated cheques

of at least $50,000 each. During examinations for discovery, as read-in at trial, Mr. Lisi stated that he recalled having a discussion with Mr. Wright about CRA's attempt to collect upon debts involving 661's 2000 taxation year and that Mr. Wright had advised him that all of the loss carry-backs were applied so that the balance would be zero.

[60] It is clear from Mr. Lisi's testimony at the hearing, as well as statements he made during examinations for discovery which were read-in at trial, that he had conversations with CRA officers and with his accountant and more importantly, that he relied on his accountant to ensure that the Grosvenor losses were being applied to reduce 661's income. However, it is equally clear that there was no direction given to the CRA regarding how the 2002 unused losses should be applied subsequent to the Grosvenor settlement. There is nothing to support the Appellant's position that although there is no prescribed form, there was sufficient information for the Minister to rely on the audit policy and apply the 2002 unused losses to the 2000 taxation year following changes that resulted from the Grosvenor settlement. Counsel for the Appellant referred to communications by an assessing officer[39] as well as a complex cases officer[40] regarding the application of 2002 losses but these communications all predate the 2004 Grosvenor settlement and any resulting adjustments to income and carry back of losses. Counsel for the Respondent, through read-ins of the ACSES collections diary, referred to several communications between CRA officers and Mr. Lisi or his office manager. Parties agree that these entries are hearsay but they show that there was regular contact between CRA collections and representatives of 661 in 2006. There is no evidence that 661 requested that CRA apply the 2002 unused losses to the 2000 taxation year within the extended assessment period.

Conclusion on the existence of 661's tax liability at time of transfer to 257

[61] I reiterate my view expressed earlier that paragraph 111(1)(a) of the Act is a permissive deduction; only the taxpayer has the right to choose how to allocate its losses and the Minister has no basis to impose a particular allocation on 661. In this case, not only is there no prescribed form as required by subsection 152(6), but neither is there any information or document indicating 661's request that the CRA

---

[39] Exhibit A-1, Appellant's Book of Documents, Letter from CRA (Ms. Sorel) to 1473661 Ontario Limited Re: January 31, 2002 Tax Year and Schedule 4 (Corporation Loss Continuity & Application) dated October 1, 2003, Tab 11 (Mr. Wright responded to this document the next day).

[40] Exhibit A-5, Memorandum from Don Ballanger to Susan Simenato dated April 5, 2002.

apply the 2002 unused losses to its 2000 taxation year on the basis of its audit policy. I conclude that the question of whether the unused non-capital losses available to 661 with respect to its 2002 taxation year were or ought to have been carried back to its 2000 taxation year must be answered in the negative. Consequently, 661 had a tax liability in respect of 2003 or a preceding taxation year when it transferred property to the Appellant.

VII. Calculation of interest

[62] An assessment made under section 160 is subject to interest. This Court does not have jurisdiction over an appeal from the CRA's refusal to cancel interest.[41] However, it does have jurisdiction over whether the CRA calculated the interest due correctly. The parties in this case disagree on the period for which interest can accrue and for which the Appellant is liable.

[63] The interest accrued on 661's tax liability for its 2000 taxation year calculated from the date of the transfer on January 3, 2003 to October 18, 2010, the date of the subject assessment, is approximately $535,797.97.[42]

The Appellant's position

[64] The Appellant's position regarding the calculation of interest is that all interest accrued after January 31, 2003 and up to October 18, 2010 should be excluded from the subject assessment, an assessment made pursuant to section 160 of the Act. The Appellant's position can best be explained by breaking the relevant period into three periods as follows:[43]

> **Period A**: the period that ends on January 31, 2003, which is the end of the taxation year during which the transfer occurred and all periods prior.
>
> **Period B**: the period that begins immediately after the year of transfer, hence on February 1, 2003 and goes up to October 18, 2010, the date of the subject assessment.

---

41 See *Neathly v MNR*, 2011 FCA 275. Judicial review of the CRA's refusal to waive interest is within the jurisdiction of the Federal Court.

42 Agreed Statement of Facts (Partial) at para 37.

43 Transcript from Hearing at 333-34.

Period C: the period that begins once the subject assessment is issued, hence from October 18, 2010 and forward until the liability has been paid.

[65] The transfer occurred on January 3, 2003 and 661's 2003 taxation year ended on January 31, 2003. The Appellant takes the position that the subject assessment should not include interest for the period beginning on February 1, 2003 and ending on October 18, 2010. Referring to the periods described above, the Appellant submits that interest can accrue during periods A and C but not B. In the Appellant's view, no interest can form part of a section 160 assessment with respect to period B. Although the amount is not determined, Counsel for the Appellant submitted that the interest that corresponds to period B is somewhere between $500,000 and $535,000.[44] Hence, the bulk of the $702,374.01 amount assessed under section 160 is comprised of interest that accrued during period B.

[66] The Appellant bases his position on an alleged ambiguity in subparagraph 160(1)(e)(ii) of the Act. In the Appellant's view, the ambiguity in the legislation coupled with his view that there is conflict in the relevant jurisprudence, militates in favour of an interpretation that excludes period B from the calculation of interest owed by the Appellant.

The Respondent's position

[67] The Respondent's position is that pursuant to paragraph 160(1)(e) of the Act, the Appellant's assessment under section 160 is subject to any interest on the amount of tax owed by the transferor in respect of the taxation year in which the transfer occurred and any prior taxation year. In the Respondent's view, any conflict in the case law was settled by the Federal Court of Appeal as well as by the amendments to subparagraph 160(1)(e)(ii) applicable to assessments made after December 20, 2002.[45]

Analysis of the interest issue

[68] The starting point to analyse the interest issue in this case is to review the relevant portion of section 160:

160 (1) Where a person has, on or	160 (1) Lorsqu'une personne a, depuis

[44] Transcript from Hearing at 23 and 334.

[45] Bill C-48, *Technical Tax Amendments Act*, 2012, 1st Sess, 41st Parl, 2013, cl 313(1) (introduced by the Minister of Finance 21 November 2012, assented to 26 June 2013), SC 2013, c 34.

after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

(…)

(e) the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) **in or in respect of** the taxation year in which the property was transferred or any preceding taxation year, [emphasis added]

but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to

le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :

[…]

e) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

(i) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,

(ii) le total des montants représentant chacun un montant que l'auteur du transfert doit payer en vertu de la présente loi (notamment un montant ayant ou non fait l'objet d'une cotisation en application du paragraphe (2) qu'il doit payer en vertu du présent article) **au cours** de l'année d'imposition où les biens ont été transférés ou d'une année d'imposition antérieure ou **pour une** de ces années. [je souligne]

Toutefois, le présent paragraphe n'a pas pour effet de limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi ni celle du bénéficiaire du transfert quant aux intérêts dont il est redevable en vertu de la présente loi sur une cotisation établie à l'égard du

pay because of this subsection.	montant qu'il doit payer par l'effet du présent paragraphe.

[69] The Appellant's position is that the use of the expression "in or in respect of the taxation year in which the property was transferred or any preceding taxation year" in paragraph 160(1)(e) means the liability is the amount that includes interest and penalties for the period that ends at the end of the taxation year in which the transfer occurred. Counsel for the Appellant acknowledged that in *Nowegijick v The Queen*,[46] the Supreme Court of Canada asserted that the phrase "in respect of" has a wide meaning but submitted that the French version of paragraph 160(1)(e) which uses the expression "pour une de ces années" mandates a more restrictive interpretation of the provision. Counsel for the Appellant gave examples of other provisions of the Act where the expression "in respect of the taxation year" is rendered by "relativement à".[47] Counsel expressed the view that because Parliament did not use "relativement à" in section 160 where it uses "in respect of", it must mean that Parliament intended to convey a different meaning. I note that there are several provisions of the Act where the expression "in respect of" the taxation year is rendered by the word "pour".[48]

[70] Counsel for the Appellant argued that the word "pour" is narrower than the expression "in respect of". Relying on the Supreme Court of Canada's decision in *Schreiber*,[49] he submitted that by giving subparagraph 160(1)(e)(ii) a very broad interpretation, the Court would be stretching the French version to equate with the English version in a manner that is contrary to the principles of bilingual statutory interpretation.

[71] In *Schreiber*, the Supreme Court of Canada wrote:

> A principle of bilingual statutory interpretation holds that where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two versions would a priori be preferred; […] Furthermore, where one of the two

---

46 *Nowegijick v The Queen*, [1983] 1 SCR 29 [*Nowegijick*].

47 The Appellant referred to sections 12, 91 and 108 of the Act.

48 See for example sections 117, 122.7, 152 and 163, some of which use the expression in respect of "the" taxation year while others use the expression in respect of "a" taxation year in the English version and "pour l'année d'imposition" or "pour une année d'imposition" in the French version.

49 *Schreiber v Canada (AG)*, 2002 SCC 62.

> versions is broader than the other, the common meaning would favour the more restricted or limited meaning.[50]

[72] The Respondent made no submissions on the Appellant's arguments regarding the French and English versions of the Act.

[73] In my view, there is nothing ambiguous about the expression "in respect of" used in section 160 of the Act. The Supreme Court of Canada has made it clear that the words "in respect of" are words of the widest possible scope. The Supreme Court asserted that the phrase "is probably the widest of any expression intended to convey some connection between two related subject matters".[51] In addition, I find that the use of the word "pour" in the French version does not require a restrictive interpretation. In *Montreuil*, the late Justice Dussault wrote: "the Grand Robert de la langue française gives particularly to the word "pour" the meaning of "en ce qui concerne" and "par rapport à" and found that the expression "in respect of" used in subparagraph 160(1)(e)(ii) had the same meaning."[52] I note that the online *Larousse* dictionary provides the meaning of various expressions. According to the online *Larousse*, "par rapport à" means "relativement à" and "rapport à" means "en ce qui concerne". This supports a finding that the word "pour" has the same meaning as "relativement à" and "in respect of". I also note that in *Nowegijick,* the Supreme Court of Canada stated that the words "in respect of" import such meanings as "in relation to", an expression that can be translated by "par rapport à", a phrase that has the same meaning as "pour".[53]

[74] I find that the Appellant's submissions on this point cannot be sustained. I find that there is no ambiguity in the use of the phrase "in respect of" and further that the English and French versions of the relevant provision have a common meaning.

---

50 *Ibid* at para 56.

51 *Nowegijick*, *supra* note 46 at 39, 1983 CarswellNat 123 at para 30 ("[t]he words 'in respect of' are, in my opinion, words of the widest possible scope. They import such meanings as 'in relation to', 'with reference to' or 'in connection with'. The phrase 'in respect of' is probably the widest of any expression intended to convey some connection between two related subject matters."). See also *The Queen v Savage*, [1983] 2 SCR 428 at 440, 1983 CarswellNat 183 at para 23.

52 *Montrueil v R*, [1994] TCJ No 418 at para 48, [1996] 1 CTC 2182 [*Montreuil*].

53 See for example the online Collins English French dictionary that suggests that "in relation to" means "par rapport à". See also the online Larousse English French dictionary that suggest that "with relation to" means "par rapport à" and "relativement à".

[75] The Appellant also submitted that interest would not accrue during Period B under similar provisions found in other legislation.[54] I find that there was no evidence before the Court that the legislator intended that provisions in other legislation apply in the same manner as section 160 of the Act nor was there any evidence that interest could not accrue under provisions in other legislation.

[76] The Appellant submitted that there was confusion in the case law on the interest issue.[55] The Appellant referred, amongst others, to the decision in *Currie v R* [56] where the Tax Court held that a transferee cannot be assessed for interest that accrued on the transferor's debt after the year of the transfer. I note that the *Currie* decision, a matter heard under the informal procedure, was not followed in more recent Tax Court of Canada decisions.

[77] In *Richard v R.*, ACJ Lamarre provided an extensive review of the Tax Court's decisions on this issue and wrote as follows:

> [14] Nevertheless, I fully agree with the recent decision by Archambault J. of this court in the general procedure case of *Christiane Gagnon v. The Queen*, 2010 TCC 482. Archambault J. did not follow *Currie,* and ruled that the Minister could legitimately assess the transferee for interest owed by the transferor for any period after the transfer, as long as it was interest in respect of an amount of tax owed for the taxation year in which the transfer took place or for a preceding taxation year.
>
> (…)
>
> [17] There is not much that I can add to Archambault J.'s reasoning. In *Montreuil, supra* (followed by this court in *Achtem v. M.N.R.,* 1995 CarswellNat 316), judge Dussault clearly interpreted subparagraph 160(1)(e)(ii) in such a way that the transferee is liable for the amount of tax owed by the transferor in respect of the taxation year in which the transfer took place or any preceding taxation year (including penalties assessed and interest accrued, after the year of the transfer, on the tax debt owed by the transferor) up to the amount of the benefit received by the transferee. In *Algoa Trust, supra*, judge Dussault concluded that the tax assessed against the transferee pursuant to section 160 related to the transferor's tax liability, but the section 160 assessment itself did not attract interest, as interest was already included in the transferor's tax liability. My reading of the

---

54 Examples provided by the Counsel for the Appellant include the *Excise Tax Act*, RSC 1985, c E-15 at s 325, *Customs Act*, RSC, 1985, c 1 (2nd Supp) at s 97.29, and the *Softwood Lumber Products Export Charge Act*, 2006, SC 2006, c 13 at s 96.

55 In support of his view that there is confusion in the case law, Counsel for the Appellant referred to the Tax Court's decisions going all the way back to *Montreuil, supra* note 52 and *Algoa Trust v R*, [1998] TCJ No. 292, [1998] 4 CTC 2001.

56 *Currie v R*, 2008 TCC 338.

> proposed amendment to subparagraph 160(1)(e)(ii) is that it is aimed at overruling that particular conclusion in *Algoa Trust*. The way in which the proposed amendment is drafted leads me to conclude that the purpose behind it is to have an assessment pursuant to section 160 considered as a distinct assessment with regard to which interest could accrue. Considering the recent decision in *Zen v. Canada*, 2010 FCA 180, it might not be necessary to amend subparagraph 160(1)(e)(ii) at all. However, it is my understanding that this proposed amendment is not directed at the interest accruing on a transferor's amount of tax owed even after the year of the transfer, as it is clear from the actual wording of the provision that the transferee is jointly and severally liable with the transferor to pay the amount owed by the transferor in respect of the taxation year in which the transfer occurred and any preceding year. That amount, according to the decision in *Montreuil*, *Achtem* and *Gagnon*, *supra*, includes penalties and all interest accrued on the transferor's debt to the date the transferee is assessed but may not exceed the limit prescribed in subparagraph 160(1)(e)(i) of the ITA. I will not follow the reasoning in *Currie* (a case heard under the informal procedure and which, pursuant to *section 18.28* of the *Tax Court of Canada Act*, does not constitute a precedent), which, in my view, does not reflect what Judge Dussault said in *Algoa Trust*, *supra*.[57]

[78] In *Richard*, the Court referred to the proposed amendments to subparagraph 160(1)(e)(ii) of the Act which have since been enacted and apply to the circumstances of this case. The October 24, 2012 explanatory notes accompanying the amendment read as follows:

> The amount that a taxpayer is liable to pay in respect of the transfer of property from a non-arm's length tax debtor is determined under subsection 160(1). The Minister may assess the taxpayer for such a liability under subsection 160(2). Paragraph 160(1)(e) is amended, in respect of assessments made after December 20, 2002, to clarify that the assessment of the taxpayer is subject to interest, without any limit on the amount of interest for which the taxpayer may be liable.[58]

[79] Both parties referred to the Federal Court of Appeal decision in *Loates v Canada*,[59] each submitting that the decision supported their position. In *Loates*, the taxpayer was not challenging the tax debt but rather the Minister's assumptions

---

57 *Richard v R*, 2011 TCC 136 at paras 14 and 17.

58 David Sherman, 2019 *Department of Finance Technical Notes: Income Tax*, Editorial Comment, 31st ed (2019) at s 160(1) (TaxnetPro) ("[t]his overrules *Algoa Trust*, [1998] 4 C.T.C. 2001 (TCC), and *Currie*, 2008 TCC 338; but in *Zen*, 2010 FCA 180 (leave to appeal denied 2011 CarswellNat 47 (SCC)), the FCA suggested that *Algoa Trust* is wrong due to 'the provisions of this Division apply' in 160(2), and that interest runs anyway—ed.").

59 *Loates v Canada*, 2016 FCA 47 [*Loates*].

that the consideration he provided was less than the fair market value of the transferred property.[60] It is not a decision about the calculation of interest. Nonetheless, in light of the issues raised on appeal, the Federal Court of Appeal stated as follows:

> Fifth, the Taxpayer asserts that the Judge erred by not finding that the amount of the Tax Debt at the time of the Assessment was made up wholly or principally of unpaid interest. Even if the Judge was empowered to make such a determination, he was not required to do so because that determination had no bearing on the validity of the Assessment. On the plain wording of subparagraph 160(1)(e)(ii), the amount for which a transferee of property can be assessed is the amount for which the transferor is liable under the Act, regardless of the composition of that amount.[61]

It appears that the Federal Court of Appeal approved of the fact that interest owed by the transferor can be included under section 160. However, the decision does not speak directly to the issue raised by the Appellant and it does not support the Appellant's position that the section 160 assessment should not include interest accrued during Period B.

[80] The Respondent also relied on *Zen v MNR* [62] and submitted that it stood for the proposition that even prior to the amendments, interest owing by the tax debtor would be included in a section 160 assessment because of the use of the phrase "and the provisions of this Division apply, with any modifications that the circumstances require". Although *Zen* was a director's liability case involving sections 227 and 227.1 of the Act, the Appellant in *Zen* argued that cases decided under section 160 supported his position. In commenting on section 160, the Federal Court of Appeal found that even without the proposed amendment, section 160 was suited to attracting the application of subsection 161(1), the interest

---

60 See *Loates v The Queen*, 2015 TCC 30 at para 22.

61 *Loates*, *supra* note 59 at para 11.

62 *MNR v Zen*, 2010 FCA 180, leave to appeal to SCC refused, 33851 (20 January 2011) ("[s]ubsection 160(1) provides that, when a person with an unpaid tax liability transfers property in a non-arm's length transaction, the transferee is jointly and severally liable for the transferor's tax debt, including interest payable by the transferor. The Minister can assess the transferee under subsection 160(2) "at any time" for the amount owing under subsection 160(1)." at para 23).

provision.[63] I note that the wording that was only proposed when *Zen* was decided is now part of section 160 as it applies to this case.

[81] I find that there is no conflict in the jurisprudence at least in the last decade. Hence, not only is there no ambiguity in the legislation but nor is there any conflict in the case law. Although not directly on point, the jurisprudence in the Federal Court of Appeal supports a finding that a transferee is liable for the interest owing without any limits of the type suggested by the Appellant. The wording of subsection 160(1) provides that an assessment under section 160 is subject to interest, without any carve out for the period between the end of the year during which there was a transfer of property and the date of the section 160 assessment.

[82] I find that the Appellant's assessment under section 160 is subject to any interest on the amount of tax owed by the transferor in respect of the taxation year in which the transfer occurred and any prior taxation year including interest accrued between February 1, 2003 and October 18, 2010.

VIII. Conclusion

[83] In light of the particular facts of this case, the Court is left with legislation that does not satisfactorily address the circumstances and an administrative policy that seemingly seeks to address the lacunae but for which there is no legislative authority. The Tax Court's jurisdiction is limited by statute and in matters involving the Act, its jurisdiction is generally limited to considering the correctness of the assessment.[64] In exercising its jurisdiction in this case, the Court's role is one of statutory interpretation and application of the relevant provisions of the Act as they are and not as they might or should be.

[84] Regarding the first issue in this appeal, I find that the 2002 unused losses were not carried back to 661's 2000 taxation year the result of which is that 661 had a tax liability in respect of the taxation year in which the property was transferred or a preceding taxation year. With respect to the second issue raised in this appeal, I find that interest accrues during period B, the period between

---

63 *Supra* note 62 at paras 45-46 (the Federal Court of Appeal found that even without the proposed amendment that would have added after the words "the provisions of this Division", the wording "(including, for greater certainty, the provisions in respect of interest payable)", subsection 160(2) would seem better suited than 227(10) to attract subsection 161(1)).

64 See e.g. *Bonnybrook Park Industrial Development Co. Ltd. v MNR*, 2018 FCA 136 at para 19.

February 1, 2003 (the day after the end of the year during which there was a transfer of property) and October 18, 2010 (the date of the section 160 assessment) and the Minister's calculation of interest accrued is correct.

[85] The appeal is dismissed with costs to the Respondent.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated July 22, 2020 for the purpose of correcting the spelling of counsel for the Appellant's name.

Signed at Ottawa, Canada, this **7th day of August 2020**.

"Gabrielle St-Hilaire"

St-Hilaire J.

Appendix A – Legislation

Paragraph 111(1)(a)

111 (1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such portion as the taxpayer may claim of the taxpayer's

> (a) non-capital losses for the 20 taxation years immediately preceding and the 3 taxation years immediately following the year;

Subsection 152(6)

152 (6) Reassessment where certain deductions claimed [carrybacks] Where a taxpayer has filed for a particular taxation year the return of income required by section 150 and an amount is subsequently claimed by the taxpayer or on the taxpayer's behalf for the year as

> (c) a deduction […] under section 111 in respect of a loss for a subsequent taxation year

by filing with the Minister, on or before the day on or before which the taxpayer is, or would be if a tax under this Part were payable by the taxpayer for that subsequent taxation year, required by section 150 to file a return of income for that subsequent taxation year, a prescribed form amending the return, the Minister shall reassess the taxpayer's tax for any relevant taxation year (other than a taxation year preceding the particular taxation year) in order to take into account the deduction claimed.

Subsection 160(1)

160 (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

> (a) the person's spouse or common-law partner or a person who has since become the person's spouse or common- law partner,
>
> (b) a person who was under 18 years of age, or
>
> (c) a person with whom the person was not dealing at arm's length,

the following rules apply:

> (d) the transferee and transferor are jointly and severally, or solidarily, liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the Income Tax Act, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted for it, and
>
> (e) the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of
>
> > (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
> >
> > (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.

Alinéa 111(1)(a)

111 (1) Pour le calcul du revenu imposable d'un contribuable pour une année d'imposition, peuvent être déduites les sommes appropriées suivantes :

> a) ses pertes autres que des pertes en capital subies au cours des 20 années d'imposition précédentes et des 3 années d'imposition suivantes;

Paragraphe 152(6)

152 (6) Nouvelle cotisation en cas de nouvelles déductions [carrybacks] Lorsqu'un contribuable a produit la déclaration de revenu exigée par l'article 150 pour une année d'imposition et que, par la suite, une somme est demandée pour l'année par lui ou pour son compte à titre de :

> (c) déduction, […] en application de l'article 111, relativement à une perte subie pour une année d'imposition ultérieure;

en présentant au ministre, au plus tard le jour où le contribuable est tenu, ou le serait s'il était tenu de payer de l'impôt en vertu de la présente partie pour cette année d'imposition ultérieure, de produire en vertu de l'article 150 une déclaration de revenu pour cette année d'imposition ultérieure, un formulaire prescrit modifiant la déclaration, le ministre doit fixer de nouveau l'impôt du contribuable pour toute année d'imposition pertinente (autre qu'une année d'imposition antérieure à l'année donnée) afin de tenir compte de la déduction demandée.

Paragraphe 160(1)

160 (1) Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :

> a) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;
>
> b) une personne qui était âgée de moins de 18 ans;
>
> c) une personne avec laquelle elle avait un lien de dépendance,

les règles suivantes s'appliquent :

d) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement d'une partie de l'impôt de l'auteur du transfert en vertu de la présente partie pour chaque année d'imposition égale à l'excédent de l'impôt pour l'année sur ce que cet impôt aurait été sans l'application des articles 74.1 à 75.1 de la présente loi et de l'article 74 de la Loi de l'impôt sur le revenu, chapitre 148 des Statuts revisés du Canada de 1952, à l'égard de tout revenu tiré des biens ainsi transférés ou des biens y substitués ou à l'égard de tout gain tiré de la disposition de tels biens;

e) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

(i) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,

(ii) le total des montants représentant chacun un montant que l'auteur du transfert doit payer en vertu de la présente loi (notamment un montant ayant ou non fait l'objet d'une cotisation en application du paragraphe (2) qu'il doit payer en vertu du présent article) au cours de l'année d'imposition où les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années.

Toutefois, le présent paragraphe n'a pas pour effet de limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi ni celle du bénéficiaire du transfert quant aux intérêts dont il est redevable en vertu de la présente loi sur une cotisation établie à l'égard du montant qu'il doit payer par l'effet du présent paragraphe.

Appendix B: Loss Carryback Overview

Reassessment of 661's 2000 taxation year (income of $8,469,700)	2001 losses available for carryback	2002 losses available for carryback	2003 losses available for carryback	Total losses available for carryback	Losses actually carried back from 2001-03	Unused losses from 2001-03
August 13, 2001 initial assessment	n/a	n/a	n/a	n/a	n/a	n/a
April 24, 2002 application of loss carry-back from 2001	$6,566,808	n/a	n/a	$6,566,808	$6,566,808	n/a
October 23, 2003 application of loss carry-back from 2002	$6,566,808	$2,147,689* • $1,902,892 used • $244,797 unused	n/a	$8,714,497 Applied against 661's 2000 income of $8,469,700, resulting in unused losses of $244,797	$8,469,700	$244,797 there are unused losses because income was already reduced to nil
January 14, 2005 adjustments and overall decrease to loss carry-back from 2001 as a result of the Grosvenor settlement	$4,033,959.71 Downward adjustment from reassessment dated October 23, 2003	$2,412,329.17 Upward adjustment from reassessment dated October 23, 2003 • $1,902,892 used • **$509,437.17 (the "2002 Unused Losses")** comprised of $244,797 (above) and 264,640.17 (adjustment)	n/a	$6,446,265.88 Adjustments resulted in decrease to 2001 losses, increase to 2002 losses, and losses of $509,437.17 not applied.	$5,936,828.71	**$509,437.17** 2002 Unused Losses
November 20, 2008 application of the loss carry-back from 2003	$4,033,959.71	$2,412,329.17 • $1,902,892 used • $509,437.17 unused (the "2002 Unused Losses")	$1,827,051	$8,273,339.88 Losses of $509,437.17 still not applied.	$7,763,902.71	**$509,437.17**

* $2,147,666 Grosvenor losses + $23 of losses transferred on amalgamation

CITATION:	2020 TCC 64
COURT FILE NO.:	2012-4138(IT)G
STYLE OF CAUSE:	1455257 ONTARIO INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 21, 2019
REASONS FOR JUDGMENT BY:	The Honourable Justice Gabrielle St-Hilaire
DATE OF JUDGMENT:	July 22, 2020
DATE OF AMENDED JUDGMENT	**August 7, 2020**

APPEARANCES:

Counsel for the Appellant:	**Domenic** Marciano Eric Torelli
Counsel for the Respondent:	Craig Maw

COUNSEL OF RECORD:

For the Appellant:

Name:	**Domenic** Marciano Eric Torelli
Firm:	Marciano Beckenstein LLP Concord, ON

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada