Docket: 2018-834(IT)G

BETWEEN:

THE BANK OF NOVA SCOTIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 30, 2020 at Calgary, Alberta

Before: The Honourable Justice Susan Wong

Appearances:

Counsel for the Appellant:	Gerald Grenon Kaitlin Gray
Counsel for the Respondent:	Chang Du Alexander Millman

JUDGMENT

[1] The appeal from a reassessment made under the *Income Tax Act* for the Appellant's 2006 taxation year is dismissed with costs.

[2] The parties shall have until January 10, 2022 to reach an agreement on costs, failing which the Respondent shall file written submissions by February 10, 2022 and the Appellant shall file a written response by March 10, 2022. Any such submissions shall not exceed ten pages in length. If the parties do not advise the

Court that they have reached an agreement and no submissions are received by these dates, then costs shall be awarded to the Respondent in accordance with Tariff B.

Signed at Ottawa, Canada, this 20th day of October 2021.

"Susan Wong"

Wong J.

Citation: 2021 TCC 70
Date: 20211020
Docket: 2018-834(IT)G

BETWEEN:

THE BANK OF NOVA SCOTIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Wong J.

I. Introduction/Overview

> [1] Following an audit of the Bank of Nova Scotia's 2006 to 2010 taxation years, the Minister of National Revenue issued a proposal letter with respect to 2006. Before proposal letters were issued for the remaining years, the parties entered into a March 13, 2015 settlement agreement which required certain amounts to be included in income as transfer pricing adjustments for the 2006 to 2014 taxation years. Among other things, the adjustments would result in an increase to the appellant's Part I income for 2006.

[2] On March 12, 2015, the appellant wrote to the Minister to ask that a non-capital loss from 2008 be carried back to offset the resulting increase in income for 2006. The Minister did so and as part of her reassessment, she calculated interest based on the date of the written request (i.e. March 12, 2015). On the other hand, the appellant says that the interest should have been calculated based on the filing date of the loss year return (i.e. April 28, 2009).

II. Preliminary matter

[3] At the commencement of hearing, I granted the appellant's motion for a confidentiality order under section 16.1 of the *Tax Court of Canada Rules (General Procedure)*. The order seals certain documents or portions of documents containing settlement information. I granted the order in the interest of protecting the

confidential nature of settlements and in light of the fact that the information in question did not directly relate to the substantive issues under appeal. The respondent did not oppose the application.

III. **Factual background**

[4] The factual background is relatively straightforward and to that end, the parties filed an agreed statement of facts.[1] It is brief and reads in part as follows:

Agreed Statement of Facts

A. CRA Transfer Pricing Audit and Settlement Agreement

(1) On April 27, 2007, the Appellant, The Bank of Nova Scotia (the "Bank") filed its return for the taxation year ended October 31, 2006 (the "2006 Taxation Year"). The Bank reported net income of $1,941,328,290, reported taxable income of $800,246,606, and paid such taxes as it calculated to be owing in a timely manner.

(2) On April 28, 2009, the Bank filed its return for the taxation year ended October 31, 2008 (the "2008 Taxation Year"). The Bank reported a non-capital loss of $3,972,885,321 including the impact of a section 110.5 designation of $528,000,000. Subsequent reassessments issued by the Minister of National Revenue ("Minister") up to June 9, 2014 reduced the non-capital loss by $667,754,539 (from $3,972,885,321 to $3,305,130,782).

(3) In 2012, the Bank became aware of the Canada Revenue Agency's ("CRA") intention to audit the operations of one of the Bank's foreign subsidiaries, in respect of, *inter alia*, the Bank's 2006, 2007, 2008, 2009 and 2010 taxation years ended on October 31 (the "Transfer Pricing Audit").

(4) In 2013 and 2014, the CRA conducted the Transfer Pricing Audit.

(5) Reassessments of the 2006 Taxation Year issued by the Minister up to January 6, 2014 reduced the Bank's taxable income by

$1,750,567 from $800,246,606 to $798,496,039 in respect of matters unrelated to the Transfer Pricing Audit.

(6) On February 12, 2015, the CRA issued a proposal letter with respect to the Transfer Pricing Audit for the 2006 Taxation Year (the "Proposal Letter").

(7) Prior to the CRA issuing proposal letters for the 2007, 2008, 2009 and 2010 Taxation Years, the Bank entered into a settlement agreement with the Minister of National Revenue (the "Minister") in respect of the Transfer Pricing Audit dated March 13, 2015 (the "Settlement Agreement").

(8) The Settlement Agreement provided for the Minister to reassess the Bank to include certain amounts in its income as transfer pricing adjustments in its 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 and 2014 Taxation Years. In this regard, the Settlement Agreement was to result in an increase of the Bank's Part I income for the 2006 Taxation Year of $54,916,616 (the "Transfer Pricing Adjustment").

B. 2008 Loss Carryback

(9) The Bank wrote to the Minister on March 12, 2015 (the "Letter of March 12") to carry back $54,000,000 of non-capital loss that arose in the Bank's taxation year ended October 31, 2008 to its 2006 Taxation Year in order to offset the pending $54,916,616 Transfer Pricing Adjustment (the "2008 Loss Carryback")...

C. The Reassessment

(10) On March 20, 2015, the Minister issued a notice of reassessment for the 2006 Taxation Year (the "Reassessment"). The Reassessment processed the following adjustments:

a. added $54,916,616 to the Bank's Part I income for the year in respect of the Transfer Pricing Adjustment, in accordance with the terms of the Settlement Agreement;

b. applied the 2008 Loss Carryback as a deduction to the Bank's taxable income of $54,000,000;

c. calculated interest using an effective date pursuant to paragraph 161(7)(b)(iv) of the Act of March 12, 2015; and

d. assessed arrears interest of $7,931,087.49 and a return of refund interest previously paid to the Bank of $180,323.87, both based on an effective interest date of March 12, 2015.

[5] The Minister calculated both the arrears interest and refund interest using the date of the Bank's written request (i.e. March 12, 2015). In doing so, the Minister neglected to add 30 days to her calculation (i.e. April 11, 2015) as required by the statute[2] regardless of which deemed date is used. The error resulted in 30 days' less interest assessed to the Bank.

IV. **Issues**

[6] When a taxpayer makes a written request to carry back non-capital losses to offset tax payable as a result of a reassessment, how does one determine the deemed payment date for the purposes of calculating arrears interest owing?

[7] In using the date of the Bank's written request, the Minister sought to apply subparagraph 161(7)(b)(iv) of the *Income Tax Act*. On the other hand, the Bank says that the Minister should have applied subparagraph 161(7)(b)(ii) and used the date on which the loss year (2008) return was filed, i.e. April 28, 2009.

[8] There is a secondary issue with respect to the effective date for calculating refund interest to be returned to the Minister following the same reassessment. As discussed below, the wording of the provision is identical so the principles are the same.

V. **Legislative framework**

Interest on late balances

[9] Subsection 161(7) deals with the effect of various carrybacks on interest calculations for late balances; by virtue of subparagraph 161(7)(a)(iv), non-capital loss carrybacks[3] are included. The amount of tax payable is deemed to be the amount it would be without applying the particular carryback in question.[4] The resulting difference in tax payable (i.e. with and without applying the particular carryback) is then deemed to have been paid on the day that is 30 days after the latest of four points in time,[5] and interest is calculated based on the deemed payment date.[6]

[10] The relevant portions of subsection 161(7) read as follows:

> **161. (7) Effect of carryback of loss, etc.** – For the purpose of computing interest under subsection (1) or (2) on tax or a part of an instalment of tax for a taxation year...
>
> (a) the tax payable under this Part and Parts I.3, VI and VI.1 by the taxpayer for the year is deemed to be the amount that it would be if the consequences of the deduction, reduction or exclusion of the following amounts were not taken into consideration:
>
> ...
>
> (iv) any amount deducted under section 118.1 in respect of a gift made in a subsequent taxation year or under section 111 in respect of a loss for a subsequent taxation year, *[my emphasis added]*
>
> ...
>
> (b) the amount by which the tax payable under this Part and Parts I.3, VI and VI.1 by the taxpayer for the year is reduced as a consequence of the deduction or exclusion of amounts described in paragraph (a) is deemed to have been paid on account of the taxpayer's tax payable under this Part for the year on the day that is 30 days after the latest of
>
> (i) the first day immediately following that subsequent taxation year,
>
> (ii) the day on which the taxpayer's or the taxpayer's legal representative's return of income for that subsequent taxation year was filed,
>
> (iii) if an amended return of the taxpayer's income for the year or a prescribed form amending the taxpayer's return of income for the year was filed under subsection 49(4) or 152(6) or

> (6.1) or paragraph 164(6)(e), the day on which the amended return or prescribed form was filed, and
>
> (iv) where, as a consequence of a request in writing, the Minister reassessed the taxpayer's tax for the year to take into account the deduction or exclusion, the day on which the request was made.

[11] The version of paragraph 161(7)(b) containing four different points in time as deemed payment dates was first enacted in 1985[7] and applied to loss years ending after 1984.[8] In 2003, the 30-day time window was added,[9] followed by some minor amendments which are irrelevant for the purposes of this appeal. The provision has remained the same since 2009.

Refund interest

[12] Subsection 164(5) deals with the effect of various carrybacks on interest calculations for refunds; by virtue of paragraph 164(5)(d), non-capital loss carrybacks[10] are included. The portion of an income tax overpayment resulting from the deduction of a non-capital loss carryback is deemed to have arisen on the day that is 30 days after the latest of four points in time[11] which are identical to those set out in subparagraphs 161(7)(b)(i) to (iv) above.

[13] The version of subsection 164(5) containing four points in time as deemed overpayment dates was also first enacted in 1985.[12] In 2003, the 30-day time window was added,[13] followed by some minor amendments that are irrelevant for the purposes of this appeal. The provision has remained the same since 2013.

VI. **The parties' positions**

[14] The appellant says that Parliament did not intend for a taxpayer to be subject to interest during periods when a loss was available for carryback but the taxpayer does not know to do so until the conclusion of an audit. In support, the appellant notes that other discretionary deductions under the Act are not subjected to such an interest calculation when they are applied to offset an audit adjustment. The appellant says that the Minister reassessed to make her transfer pricing audit adjustments rather than as a consequence of the written carryback request; therefore, subparagraph 161(7)(b)(ii) applies. In support, the appellant refers to the French version of the provision and relies on the Alberta Court of Appeal's decision in *Methanex*.[14]

[15] The respondent says that the words of the provision are clear so the Court should defer to their ordinary meaning. She states that loss carrybacks do not create a legal fiction in which taxes in earlier years were never owed; rather, taxes are owed until the taxpayer requests an offset by losses carried back. In this case, interest accrued until 30 days after the appellant made its carryback request because it was the latest of the four possible dates. The respondent argues that *Methanex* is distinguishable and the leading authority is *Connaught*.[15] In support, the respondent notes that if the Minister had consecutively issued two separate notices of reassessment – one for the transfer pricing adjustments followed by one for the loss carryback – then subparagraph 161(7)(b)(iv) would apply. The respondent says that there is no basis to find a different result based on the number of notices issued.

VII. **Analysis**

[16] I will focus my analysis on the arrears interest issue, as have the parties. They agree that the same principles apply to the refund interest.

[17] Modern statutory interpretation is founded on the basis that the words of an Act should be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[16] The Supreme Court of Canada has said that: (a) the particularity and detail of many tax provisions often leads to an emphasis on textual interpretation,[17] and (b) where Parliament has specified the conditions to be satisfied in order to obtain a certain result, it is reasonable to assume an intention for taxpayers to rely on these provisions.[18]

[18] Where there is more than one reasonable interpretation of a provision, it may be necessary to look more to context and purpose over the ordinary meaning of words.[19] Legislative purpose does not replace clear statutory language but rather, assists to arrive at the most plausible interpretation of an ambiguous statutory provision.[20] Context and purpose may reveal and resolve latent ambiguities where the meaning of a provision does not appear to be ambiguous.[21]

[19] One must also consider how precisely and clearly a taxing provision is worded, i.e. where a provision is unambiguous in its meaning or application to a set of facts, it must simply be applied.[22] Courts must be cautious before finding unexpressed legislative intention within the clear provisions of the Act because doing so risks upsetting the balance Parliament has attempted to strike.[23]

[20] Based on above principles, I cannot agree with the appellant's interpretation of the provision. I see the distinction they are drawing between a situation where a taxpayer determines the amount of tax owing when they file their return, versus one where the Minister reassesses to make adjustments that result in tax owing. While the circumstances may be different, they do not lead to different treatment under the interest provisions. The Act contemplates retroactive/retrospective liability following reassessment in a self-assessing system. Subsection 152(3) says that liability for tax is unaffected by an incorrect/incomplete assessment or by the fact that no assessment was made. In other words, one is liable for tax owing regardless of the assessment status.

[21] The Minister of Finance's Technical Notes say the following with respect to the 1985 amendment:

> Subsection 161(7) of the Act provides that where the tax payable for a year is reduced as a consequence of the carryback of a loss, tax credit or other amount from a subsequent taxation year, interest on any unpaid tax for the earlier year is calculated, without regard to the amount carried back, for the period ending on the later of the day on which the tax return for the subsequent year was required to be filed and the day on which the return was actually filed. Paragraph 161(7)(b) is amended to provide that interest will be charged only until the day on which the taxpayer's return for the subsequent year is filed. Where, however, the taxpayer files his prescribed form claiming a carryback at a later date or the Minister of National Revenue later accedes to the taxpayer's written request to reassess the earlier year, interest will be computed for the period ending on the day on which the form was filed or the request was made. This amendment applies where an amount is carried back from a taxation year ending after 1984.[24] *[my emphasis added]*

[22] The Technical Notes show that Parliament intended to set out four unnuanced points in time as possible deemed payment dates and seemed to expect that the points in time represented by subparagraphs 161(7)(b)(iii) and (iv) would be the latest of the four scenarios. Combined with the overarching liability for tax set out by subsection 152(3), I cannot see an intent to distinguish between an assessment of tax owing as calculated by a taxpayer at first instance versus an assessment of tax owing after the Minister completes an audit or reaches a settlement with the taxpayer.

[23] The French version of subparagraph 161(7)(b)(iv) reads as follows:

> **(iv)** le jour de la demande écrite à la suite de laquelle le ministre établit une nouvelle cotisation concernant l'impôt du contribuable pour l'année et qui

> tient compte de la déduction ou de l'exclusion, dans le cas où il y a une telle nouvelle cotisation. *[my emphasis added]*

[24] The appellant notes that the phrase "à la suite de" is used in the Act as an equivalent to such English phrases as "as a consequence of" and "as a result of", among others, and that the phrases denote causation rather than simply one event following another. However, I do not see how the temporal aspect can be divorced from the causation component in this instance. For example, the Larousse dictionary says that the phrase "à la suite de laquelle" means "following which".[25]

[25] As I read the French version of the provision literally, it refers to the day of the written request following which the Minister issued a new assessment concerning the taxpayer's tax for the year and which takes into account the deduction or the exclusion, in the case where there is such a new assessment. It contemplates a temporal element by way of a reassessment of tax owing following a written request.

[26] The present situation is more akin to that of *Connaught* than *Methanex*. In *Connaught*, the appellant filed a return reporting nil tax payable and after reassessment, had a net capital gain for the year in question. The appellant requested that its capital loss from a subsequent year be carried back to completely offset the net capital gain in the earlier year.[26] The Federal Court agreed with the Minister that arrears interest was owed with respect to the earlier year. In so finding, the Court stated that taxes were payable as a result of the undeclared capital gain, the wording of subsection 161(7) was unambiguous, and that the Minister's interpretation did not offend the purpose or objectives of the Act.[27]

[27] In *Methanex*, the Alberta court dealt with paragraph 39(3)(b) of the *Alberta Corporate Tax Act*.[28]. The Minister of National Revenue issued three reassessments which resulted in Methanex owing federal and provincial taxes. At the company's request, the Alberta Provincial Treasurer carried losses back to offset the provincial taxes owing under each of the three reassessments. Paragraph 39(3)(b) is not identical but closely follows the four points in time set out in subparagraph 161(7)(b) with respect to determining the deemed payment date for calculating arrears interest. The Provincial Treasurer applied the date on which the loss carryback requests were made while Methanex asserted that the correct date was the date on which the loss year returns were filed.

[28] The Court of Queen's Bench agreed with Methanex and found that in each of the three reassessments, either Methanex had not made a written request or the

reassessment did not take place as a consequence of their request. In so finding, the court noted that the Provincial Treasurer's interpretation left taxpayers vulnerable to pay interest based on the decisions of the Alberta Treasury and not simply on the basis of the taxpayers' own decisions. The Alberta Court of Appeal found no palpable and overriding error.

[29] I believe that *Methanex* is either wrongly decided or its reasoning cannot be applied to an appeal under the federal *Income Tax Act*. The decision contradicts the essence of a self-assessing income tax system under the federal Act whose provisions are replete with examples in which the onus is put on the taxpayer. For example, the Minister is not bound by a return or information supplied by a taxpayer when assessing,[29] taxpayers carrying on business must keep books and records sufficient to enable the Minister to determine the taxes payable,[30] and tax liability is not dependent on an assessment being correct, complete, or made.[31]

[30] In the context of this appeal, the four points in time set out in paragraph 161(7)(b) are as follows:

i. the first day immediately following the loss year, i.e. November 1, 2008;

ii. the day on which the Bank's return of income for the loss year was filed, i.e. April 28, 2009;

iii. if an amended return of the taxpayer's income for the year or a prescribed form amending the taxpayer's return of income for the year was filed under subsection 152(6), the day on which the amended return or prescribed form was filed -- this event did not occur so no date arises; and

iv. where, as a consequence of a request in writing, the Minister reassessed the taxpayer's tax for the year to take into account the loss deduction, the day on which the request was made, i.e. March 12, 2015.

[31] The wording of the provision is unambiguous and when applied to the present circumstances, the correct deemed payment date is April 11, 2015 which is 30 days after March 12, 2015, i.e. based on subparagraph 161(7)(b)(iv). For the purposes of the refund interest, the correct deemed overpayment date is also April 11, 2015, based on paragraph 164(5)(l). The Minister's error in using March 12, 2015 for her calculation rather than April 11, 2015, resulted in 30 days' less interest being assessed and this Court cannot put the taxpayer in a worse position.[32]

VIII. **Conclusion**

[32] For all of the above reasons, the appeal is dismissed with costs.

[33] The parties shall have until January 10, 2022 to reach an agreement on costs, failing which the respondent shall file written submissions by February 10, 2022 and the appellant shall file a written response by March 10, 2022. Any such submissions shall not exceed ten pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received by these dates, then costs shall be awarded to the respondent in accordance with Tariff B.

Signed at Ottawa, Canada, this 20th day of October 2021.

"Susan Wong"

Wong J.

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COURT FILE NO.:	2018-834(IT)G
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DATE OF HEARING:	September 30, 2020
REASONS FOR JUDGMENT BY:	The Honourable Justice Susan Wong
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APPEARANCES:

Counsel for the Appellant:	Gerald Grenon Kaitlin Gray
Counsel for the Respondent:	Chang Du Alexander Millman

COUNSEL OF RECORD:

For the Appellant:

Name:	Gerald Grenon
Firm:	Osler Hoskin & Harcourt LLP Calgary, Alberta

For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada

[1] Exhibit A-1: Agreed Statement of Facts

[2] *Income Tax Act*, paragraph 161(7)(b) and subsection 164(5).

[3] *Income Tax Act*, paragraph 111(1)(a).

[4] *Income Tax Act*, paragraph 161(7)(a).

[5] *Income Tax Act*, subparagraphs 161(7)(b)(i), (iii), (iii), and (iv).

[6] *Income Tax Act*, subsection 161(1).

[7] Statutes of Canada 1985, chapter 45, subsection 91(3).

[8] Statutes of Canada 1985, chapter 45, subsection 91(4).

[9] Statutes of Canada 2003, chapter 15, subsection 116(2).

[10] *Income Tax Act*, paragraph 111(1)(a).

[11] *Income Tax Act*, paragraphs 164(5)(i), (j), (k), and (l).

[12] Statutes of Canada 1985, chapter 45, subsection 93(10).

[13] Statutes of Canada 2003, chapter 15, subsection 118(3).

[14] *Alberta (Provincial Treasurer)* v. *Methanex Corporation*, 2004 ABCA 304 (CanLII), affirming *Methanex Corp* v. *Alberta (Provincial Treasurer)*, 2003 ABQB 157 (CanLII).

[15] *Connaught Laboratories Ltd* v. *Canada*, 1994 CarswellNat 1133 (FCTD).

[16] *Canada Trustco Mortgage Co* v. *Canada*, 2005 SCC 54 (CanLII) at paragraph 10; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at paragraph 21.

[17] *Canada Trustco Mortgage Co* v. *Canada*, 2005 SCC 54 (CanLII) at paragraph 11; *A.Y.S.A. Amateur Youth Soccer Association* v. *Canada*, 2007 SCC 42 (CanLII) at paragraph 16.

[18] *Canada Trustco Mortgage Co v. Canada*, 2005 SCC 54 (CanLII) at paragraph 11.

[19] *Canada Trustco Mortgage Co* v. *Canada*, 2005 SCC 54 (CanLII) at paragraph 10; *Placer Dome Canada Ltd* v. *Ontario (Minister of Finance)*, 2006 SCC 20 (CanLII) at paragraph 22.

[20] *Placer Dome Canada Ltd* v. *Ontario (Minister of Finance)*, 2006 SCC 20 (CanLII) at paragraph 23.

[21] *Canada Trustco Mortgage Co* v. *Canada*, 2005 SCC 54 (CanLII) at paragraph 47; *Placer Dome Canada Ltd* v. *Ontario (Minister of Finance)*, 2006 SCC 20 (CanLII) at paragraph 22.

[22] *Placer Dome Canada Ltd* v. *Ontario (Minister of Finance)*, 2006 SCC 20 (CanLII) at paragraph 23.

[23] *Shell Canada Ltd v. Canada*, [1999] 3 SCR 622 at paragraph 43.

[24] Department of Finance Technical Notes to Bill C-72 (September 10, 1985), clause 91.

[25] *Larousse Concise Dictionary*, 2nd ed. (2001), under the words "suite" and "lequel".

[26] *Connaught Laboratories Ltd v. Canada*, 1994 CarswellNat 1133 (FCTD) at paragraph 2.

[27] *Connaught Laboratories Ltd v. Canada*, 1994 CarswellNat 1133 at paragraphs 7 and 10 (FCTD). See also *Wallace v. The Queen*, [1996] 2 CTC 2497 at paragraph 10.

[28] Revised Statutes of Alberta 2000, chapter A-15.

[29] *Income Tax Act*, subsection 152(7).

[30] *Income Tax Act*, subsection 230(1).

[31] *Income Tax Act*, subsection 152(3).

[32] *Harris v. Minister of National Revenue*, [1964] CTC 562 at paragraph 17 (Exchequer Court of Canada).