Docket: 2019-2603(IT)G

BETWEEN:

SUNCOR ENERGY INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on May 9, 2023, at Calgary, Alberta

Before: The Honourable Justice Steven K. D’Arcy

Appearances:

Counsel for the Appellant:	Joanne Vandale Edward Rowe
Counsel for the Respondent:	Carla Lamash

JUDGMENT

In accordance with my reasons for judgment:

The appeal from a reassessment made under the *Income Tax Act* with respect to the taxation year ending December 31, 2007 is dismissed, with costs.

Signed at Winnipeg, Manitoba, this 12th day of March 2024.

“S. D’Arcy”

D’Arcy J.

Citation: 2024 TCC 31
Date: 20240312
Docket: 2019-2603(IT)G

BETWEEN:

SUNCOR ENERGY INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

<u>REASONS FOR JUDGMENT</u>

<u>D'Arcy J.</u>

[1] This appeal relates to the application of the available-for-use rules contained in subsections 13(26) to 13(32) of the *Income Tax Act*, R.S.C. 1985, C.1 (5th Supp.) (the "**Act**"). These rules provide that a taxpayer may not add the cost of a depreciable capital property to the relevant undepreciated capital cost ("**UCC**") pool until the property is considered, under the Act, to have become available for use. A taxpayer cannot claim capital cost allowance ("**CCA**") in respect of the property until the cost of the property is added to the UCC pool.

[2] The specific issue in this appeal is whether the deeming rule in subsection 13(31) creates a notional taxation year in the situation where a taxpayer is deemed to have acquired depreciable capital property at a time when the taxpayer was not yet in existence. The answer to this question determines the point in time at which the property is considered, for the purposes of subsection 13(26), to be available for use under the so-called *two-year rolling start* rule in paragraph 13(27)(b).

Summary of Facts

[3] The parties filed an Agreed Statement of Facts. There were no witnesses. The Agreed Statement of Facts is attached as Appendix A to these reasons for judgment.

[4] The facts may be summarized as follows:

- The Appellant is an integrated energy company that operates oil sands, natural gas, refining and marketing businesses.
- The Appellant's oil sands business includes the upgrading and processing of crude bitumen and other related products.
- During the relevant period, the Appellant had a December 31 year-end.
- The Millennium Coker Unit was part of the Millennium mine that was built to increase oil sands production.
- In 2003, the Appellant began the Millennium Coker Unit project (the "**MCU Project**"), whose purpose was to add a third set of cokers to the upgrader associated with the Millennium Coker Unit as well as make modifications to other upgrader components.
- In January 2005, the Appellant incurred expenses in the amount of $34,368,000 to acquire, for the MCU Project, depreciable property described in Class 41 of Schedule II of the *Income Tax Regulations*, C.R.C., r. 945 (the "**MCU Depreciable Properties**").
- Suncor Energy Oil Sands Inc. (the "**Subsidiary**") was incorporated on January 19, 2005 as a wholly owned subsidiary of the Appellant.
- On February 1, 2005, the Suncor Energy Oil Sands Limited Partnership (the "**Limited Partnership**") was formed and registered as a limited partnership, with the Appellant as the general partner and the Subsidiary as the limited partner. The Appellant held a 99.9% interest in the Limited Partnership and the Subsidiary held a 0.1% interest.
- The Appellant and the Limited Partnership were not dealing at arm's length for purposes of the Act.
- The fiscal period of the Limited Partnership ended on January 31.
- The net income of the Limited Partnership was allocated at the end of its fiscal year in proportion to each partner's partnership interest.

- On January 1, 2006, the Appellant contributed the MCU Depreciable Properties (together with other assets comprising its oil sands business) to the Limited Partnership.

- The Appellant and the Limited Partnership filed a joint election pursuant to subsection 97(2) with an elected amount of $823,241,000 in respect of depreciable property included in Class 41 (which included $34,368,000 relating to the MCU Depreciable Properties). The elected amount was equal to the fair market value of such properties.

[5] For CCA purposes, the Limited Partnership added $34,368,000 to its Class 41 UCC balance on the basis that the MCU Depreciable Properties became *available for use* immediately after the beginning of the Limited Partnership's fiscal period ending on January 31, 2007.[1] The Limited Partnership then deducted the related CCA when computing its net income for its fiscal period ending on January 31, 2007.

[6] The Limited Partnership allocated 99.9% of its income for its fiscal period ending on January 31, 2007 to the Appellant.

[7] The Minister reassessed the Appellant's 2007 taxation year on the basis that the MCU Depreciable Properties were not *available for use* at any time during the Limited Partnership's fiscal period ending on January 31, 2007. The reassessment disallowed the addition of $34,368,000 to the Limited Partnership's UCC balance and the related CCA deduction. This resulted in an increase in the income of the Limited Partnership and, therefore, in the amount of income allocated to the Appellant in respect of the Limited Partnership's fiscal period ending on January 31, 2007.

The Law and the Issue

[8] Paragraph 18(1)(b) prohibits the deduction of an outlay of capital, a payment on account of capital or an allowance in respect of depreciation when calculating the income of a taxpayer from a business, except as expressly permitted under the Act.

[9] Paragraph 20(1)(a) and the related regulations allow a taxpayer to deduct CCA in respect of the UCC of its depreciable capital assets. It appears from paragraphs 6

---

[1] Relying on paragraph 13(27)(b) and subsection 13(31).

and 16 of the Agreed Statement of Facts that the MCU Depreciable Properties are Class 41 properties with a CCA rate of 25%.

[10] Section 13 contains a number of rules for determining the UCC of a taxpayer's depreciable capital assets. The relevant rule for purposes of this appeal is the so-called available-for-use rule contained in subsections 13(26) to (32)—in particular, the rules contained in subsections 13(26), 13(27) and 13(31).

[11] Subsection 13(26) sets out the available-for-use rule. It provides that a taxpayer cannot add an amount to the UCC of depreciable property of a prescribed class, in respect of the capital cost to the taxpayer of a property of that class, until the property is considered to have become *available for use by the taxpayer*. The subsection reads as follows:

> 13(26) In applying the definition "undepreciated capital cost" in subsection (21) for the purpose of paragraph 20(1)(a) and any regulations made for the purpose of that paragraph, in computing a taxpayer's income for a taxation year from a business or property, no amount shall be included in calculating the undepreciated capital cost to the taxpayer of depreciable property of a prescribed class in respect of the capital cost to the taxpayer of a property of that class (other than property that is a certified production, as defined by regulations made for the purpose of paragraph 20(1)(a)) before the time the property is considered to have become available for use by the taxpayer.

[12] As a result of subsection 13(26), the Limited Partnership was not entitled to add the $34,368,000 cost of the MCU Depreciable Properties to its Class 41 UCC balance until such time as the properties became available for use by the Limited Partnership.

[13] Subsection 13(27) contains a number of rules for determining when a depreciable property, other than a building, is considered to have become available for use. The provision provides that the property is available for use at the earliest of a number of times.

[14] The general rule, contained in paragraph 13(27)(a), states that a property is available for use at the time the property is first used by the taxpayer for the purpose of earning income. Paragraphs (b) through (k) of subsection 13(27) provide rules that may result in the property becoming available for use before it is first used to earn income. The complete provision is attached as Appendix B.

[15] The relevant portions of the subsection, for purposes of this appeal, are paragraphs 13(27)(a) and (b), which read as follows:

> 13(27) For the purposes of subsection (26) and subject to subsection (29), property (other than a building or part thereof) acquired by a taxpayer shall be considered to have become available for use by the taxpayer at the earliest of
>
> (a) the time the property is first used by the taxpayer for the purpose of earning income,
>
> (b) the time that is immediately after the beginning of the first taxation year of the taxpayer that begins more than 357 days after the end of the taxation year of the taxpayer in which the property was acquired by the taxpayer,

[16] Under paragraph 13(27)(b), the property will be considered to have become available for use immediately after the beginning of the second taxation year after the taxation year in which the taxpayer acquired the property. Further, the intervening taxation year must be a full taxation year, at least 357 days long. This is referred to as the two-year rolling start rule.

[17] I have assumed, on the basis of the Agreed Statement of Facts, that the Limited Partnership did not use the MCU Depreciable Properties for the purpose of earning income during the relevant periods. It appears that the Appellant did not complete the MCU Project until some future date.

[18] On the basis of this assumption, paragraph 13(27)(b) determined when the MCU Depreciable Properties became available for use by the Limited Partnership for the purposes of subsection 13(26). Therefore, under the two-year rolling start rule, the Limited Partnership was not entitled to claim CCA in respect of the MCU Depreciable Properties until the time that was immediately after the beginning of the first taxation year of the Limited Partnership that began more than 357 days after the end of the taxation year in which the MCU Depreciable Properties were acquired by the Limited Partnership.

[19] As a question of fact, the Limited Partnership acquired the MCU Depreciable Properties on January 1, 2006. The taxation year of actual acquisition ended on January 31, 2006.

[20] The first taxation year that began more than 357 days after the end of the Limited Partnership's January 31, 2006 taxation year is its taxation year that began on February 1, 2007 and ended on January 31, 2008.

[21] Therefore, if one only considers paragraph 13(27)(b), the MCU Depreciable Properties became available for use on February 1, 2007, the first day of the Limited Partnership's taxation year ending on January 31, 2008.

[22] However, subsection 13(27) is subject to subsection 13(31), which provides a deeming rule that applies, in part, when a person acquires property from a person with whom it is not dealing at arm's length. The subsection reads as follows:

> 13(31) For the purposes of paragraphs (27)(b) and (28)(c) and subsection (29), where a property of a taxpayer was acquired from a person (in this subsection referred to as "the transferor")
>
> > (a) with whom the taxpayer was, at the time the taxpayer acquired the property, not dealing at arm's length (otherwise than because of a right referred to in paragraph 251(5)(b)), or
> >
> > (b) in the course of a reorganization in respect of which, if a dividend were received by a corporation in the course of the reorganization, subsection 55(2) would not apply to the dividend because of the application of paragraph 55(3)(b),
>
> the taxpayer shall be deemed to have acquired the property at the time it was acquired by the transferor.

[23] Under paragraph 13(31)(a), where a taxpayer acquires property from a person with whom the taxpayer was, at the time the taxpayer acquired the property, not dealing at arm's length, the taxpayer is deemed to have acquired the property at the time it was acquired by the transferor.

[24] Paragraph 13(31)(b) applies where a taxpayer acquires property from a person in the course of a butterfly transaction described in paragraph 55(3)(b). It is not relevant for purposes of determining the point in time when the MCU Depreciable Properties were available for use.

[25] The parties have agreed that the Appellant and the Limited Partnership were not dealing at arm's length at the time the Limited Partnership acquired the MCU Depreciable Properties. Therefore, under paragraph 13(31)(a), the Limited Partnership was deemed to have acquired the MCU Depreciable Properties in January 2005. However, the Limited Partnership did not come into existence until February 1, 2005. In other words, the Limited Partnership did not exist at the time it was deemed under paragraph 13(31)(a) to have acquired the MCU Depreciable Properties.

[26] This leads to an interpretation issue with respect to the effect of the subsection 13(31) deeming rule.

Positions of the Parties

[27] The Appellant argues that subsection 13(31) is designed to operate where the transferee did not yet exist at the time it was deemed to have acquired the property, namely the point in time when the property was acquired by the transferor. Specifically, in this situation, subsection 13(31), by its text, context and purpose, necessarily requires that the transferee have a notional taxation year at the time it is deemed to have acquired the property.

[28] The Appellant notes that this interpretation gives effect to the relieving nature of paragraph 13(27)(b) and the continuity of ownership between non-arm's-length parties in paragraph 13(31)(a).

[29] The Appellant argues that the Respondent's interpretation is not harmonious with the Act because the Respondent's position requires a notional fiscal period of at least 13 months. Subsection 249(1.1) limits taxation years (and fiscal periods) of a partnership to 12 months.

[30] It is the Appellant's position that the Limited Partnership is deemed to have acquired the MCU Depreciable Properties in a notional taxation year beginning on February 1, 2004 and ending on January 31, 2005. The Appellant argues that this corresponds to the normal fiscal period that the Limited Partnership would have had, had it been in existence in January 2005.

[31] The Appellant then argues that since the Limited Partnership is deemed under subsection 13(31) to have acquired the MCU Depreciable Properties in January 2005, the properties became available for use on February 1, 2006, which was the first day of the Limited Partnership's taxation year that began on February 1, 2006 and ended on January 31, 2007. This is the first taxation year of the Limited Partnership that began more than 357 days after the end of the Limited Partnership's notional taxation year that theoretically ended on January 31, 2005.

[32] The Respondent agrees that under subsection 13(31), the Limited Partnership is deemed to have acquired the MCU Depreciable Properties in January 2005. However, he argues that subsection 13(31) only deems the date of acquisition for the acquiring taxpayer for purposes of paragraph 13(27)(b); it does nothing else. In

particular, the deeming provision in subsection 13(31) does not deem or create a notional taxation year for the Limited Partnership that ends on January 31, 2005.

[33] The Respondent emphasizes that a textual analysis of paragraph 13(27)(b) makes it clear that for a property to be available for use under this paragraph, at least two actual taxation years of the taxpayer must have passed after a property's acquisition. This is unambiguous and is not changed by the deeming rule in subsection 13(31).

[34] The Respondent argues that the counting of the 357 days begins from the end of the first actual taxation year of the Limited Partnership—the taxation year of the Limited Partnership ending on January 31, 2006. Under the Respondent's argument, the MCU Depreciable Properties became available for use on February 1, 2007, which was the first day of the Limited Partnership's taxation year that began on February 1, 2007 and ended on January 31, 2008.

[35] The Limited Partnership taxation year that ended on January 31, 2008 was its first taxation year that began more than 357 days after the end of its first taxation year.

[36] In summary, the Appellant argues that the MCU Depreciable Properties that the Limited Partnership was deemed to have acquired in January 2005 became available for use on February 1, 2006, while the Respondent argues that they became available for use on February 1, 2007.

Analysis and Disposition of the Appeal

[37] In *Canada Trustco Mortgage Co. v. Canada,* [2] the Supreme Court of Canada identified the "textual, contextual and purposive" principle as the principle that is to be used when interpreting the Act. At paragraph 10 of its reasons, the Court explained the principle as follows:

> [10] … The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play[s] a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of

[2] 2005 SCC 54.

> ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[38] The issue before the Court involves the application of the available-for-use rules in subsections 13(26) to (32). The authors of the book *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* describe the purpose and effect of the available-for-use rules as follows:

> The available-for-use rules, contained in subsections 13(26) through (32), are intended to prevent the claiming of capital cost allowance in respect of a property until that property is actually used in the income-earning process. These rules have the effect of matching the cost of the property incurred with revenue earned from the use of the property and are consistent with the claiming of depreciation for financial accounting purposes.[3]

[39] The wording of each of the relevant provisions for purposes of this appeal (subsection 13(26), and paragraphs 13(27)(b) and 13(31)(a)) is clear—there are no ambiguities.

[40] Subsection 13(26) clearly states that it applies when one is applying the definition "undepreciated capital cost" in subsection 13(21) for the purpose of paragraph 20(1)(a) and any regulations made for the purposes of that paragraph, in computing a taxpayer's income for a taxation year from a business or property. In such a situation, subsection 13(26) provides that no amount shall be included in calculating the undepreciated capital cost to the taxpayer of depreciable property of a prescribed class in respect of the capital cost to the taxpayer of a property of that class[4] before the time the property is considered to have become available for use by the taxpayer.

[41] The wording is clear: when calculating a taxpayer's income for a taxation year from a business or property, the cost of a depreciable capital property cannot be added to the undepreciated capital cost of the relevant prescribed class until the property is available for use.

---

[3] Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes, 2nd ed. (Canadian Tax Foundation, 2015), at 543–544.
[4] Other than property that is a certified production, as defined by regulations made for the purpose of paragraph 20(1)(a).

[42] The wording accomplishes the Minister of Finance's purpose when putting the provision before Parliament as set out in the Department of Finance's May 1991 technical notes, which state the following:

> New subsection 13(26) provides that, for the purpose only of calculating the capital cost allowance claim to which a taxpayer may be entitled, no amount in respect of a property is to be included in computing the undepreciated capital cost of depreciable property of a prescribed class until the property has become "available for use" by the taxpayer. The rules for determining the time at which property becomes "available for use" are provided in new subsections 13(27) to (32), described below.

[43] As noted previously, paragraph 13(27)(b) is one of the rules that is used to determine when a property becomes available for use.

[44] Paragraph 13(27)(b) only applies for the purposes of subsection 13(26) and is subject to subsection 13(29).[5] Subsection 13(29) applies where property (other than a building that is used or is to be used principally to earn rental income) is acquired in the course of a multi-year project. The subsection allows the taxpayer to make an election that modifies the normal available-for-use rules.

[45] Paragraph 13(27)(b) clearly states that one of the times that property[6] acquired by a taxpayer shall be considered to have become available for use by the taxpayer is the time that is immediately after the beginning of the first taxation year of the taxpayer that begins more than 357 days after the end of the taxation year of the taxpayer in which the property was acquired by the taxpayer.

[46] Similar to the wording of subsection 13(26), the wording of the paragraph is straightforward and contains no ambiguities.

[47] As noted in the Department of Finance's May 1991 technical notes, the purpose of the paragraph is to provide that one of the times that property will be considered to be available for use is "the beginning of the first taxation year commencing at least 358 days after the taxation year in which the property was acquired (the two-year 'rolling start' rule)". The effect of the provision is to place a time limit on when a property may become available for use. The time limit is fixed by the dual requirements that the person or partnership acquiring the property have

---

[5] See the introductory words of subsection 13(27).

[6] Other than a building or part thereof.

a taxation year-end following the acquisition of the property, which is followed by a second taxation year-end that is at least 357 days after the first taxation year-end.

[48] Paragraph 13(31)(a) contains the deeming rule that is at issue in this appeal. It is not a complicated provision. The wording of the provision provides that:

- The paragraph applies for the purposes of paragraphs 13(27)(b) and 13(28)(c) and subsection 13(29). As noted previously, subsection 13(29) applies to certain multi-year projects. Paragraph 13(28)(c) contains the same two-year rolling start rule as the rule provided in paragraph 13(27)(b); however, paragraph 13(28)(c) only applies to buildings.

- Paragraph 13(31)(a) applies where a taxpayer acquires property from a person with whom the taxpayer was, at the time the taxpayer acquired the property, not dealing at arm's length.

- Once the paragraph applies, the taxpayer is deemed to have acquired the property at the time it was acquired by the transferor.

[49] There are no ambiguities in this provision. Its application is limited to specific sections of the Act and it deems the non-arm's-length transferee to have acquired the property at the time it was acquired by the transferor.

[50] Paragraph 13(31)(a) clearly states that if the parties were dealing at non-arm's-length at the time the property was transferred, then the taxpayer is deemed to have acquired the property at the time it was acquired by the transferor.

[51] I agree with the Appellant that the wording of the paragraph leads to the conclusion that the purpose of the provision is to provide for continuity of ownership between non-arm's-length parties when applying the two-year rolling start rule.

[52] The clear and unambiguous effect of the deeming rule in paragraph 13(31)(a) is that, for the purposes of paragraph 13(27)(b), the Limited Partnership is deemed to have acquired the MCU Depreciable Properties in January 2005.

[53] Therefore, the properties became available for use at the time that is immediately after the beginning of the first taxation year of the Limited Partnership that began more than 357 days after the end of the taxation year of the Limited Partnership in which the MCU Depreciable Properties were acquired by the Limited Partnership.

[54] The question before the Court is, does paragraph 13(31)(a) deem the Limited Partnership to have acquired the MCU Depreciable Properties in a notional taxation year created by subsection 13(31) that ended on January 31, 2005?

[55] The answer depends on the effect of the deeming rule in subsection 13(31)—a deeming rule that creates a legal fiction.

[56] The Supreme Court of Canada in *R. v. Verrette*,[7] the seminal case on deeming rules, stated the following at page 845:

> … A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is. …

[57] The Appellant asks the Court to find that the effect of the deeming rule in subsection 13(31), in the fact situation before the Court, is to create a notional taxation year for the purposes of paragraph 13(27)(b). I do not accept this argument.

[58] I agree with the Respondent that subsection 13(31) only deems one thing to occur. It deems the Limited Partnership to have acquired the MCU Depreciable Properties in January 2005. It does not deem the Limited Partnership to have a notional taxation year.

[59] The Appellant is asking me to read words into the provision that are not there. That is not the role of the Court; rather, it is the role of Parliament to determine the wording of a provision. If Parliament had intended that a notional taxation year be created in the fact situation before the Court, then it would have specifically stated that a notional taxation year is created. This would require very specific and detailed language.

[60] As I noted in *Vefghi Holding Corp*. *v. The King*[8] at paragraph 55, once it is determined that a deeming provision applies, one must then look at the actual wording of the deeming provision to determine what legal fiction is created. Specifically, one must determine to what extent the created legal fiction changes what, as a question of fact, actually occurred. In making this determination, one must

---

[7] [1978] 2 S.C.R. 838.
[8] 2023 TCC 135.

remember that the scope of a deeming provision is limited to what is clearly expressed in the provision.[9]

[61] Subsection 13(31) deems an acquisition of property to occur on a different day than the day that the property was actually acquired. However, that is all it does; it does not contain any wording that deems the Limited Partnership, for purposes of subsection 13(27) or any other section of the Act, to have been in existence prior to its formation on February 1, 2005 or to have had a notional taxation year prior to the time that it came into existence.

[62] Both parties focused on the paragraph 249(1)(a) definition of taxation year.

[63] Paragraph 96(1)(b) of the Act provides that when calculating the income of a taxpayer who is a member of a partnership, the income is to be computed as if the partnership were a separate person resident in Canada whose taxation year was its fiscal period.

[64] Paragraph 249(1)(a), as it currently reads, states the following: "In this Act, except as expressly otherwise provided, a 'taxation year' is in the case of a corporation or Canadian resident partnership, a fiscal period". This paragraph was amended effective October 31, 2006 to add the words "Canadian resident partnership". Prior to that time, paragraph 249(1)(a) only referred to a corporation.

[65] As both parties stated, the effect of paragraphs 96(1)(b) and 249(1)(a) is that during the relevant periods, the taxation year of the Limited Partnership was its fiscal period.

[66] Fiscal period is defined in subsection 249.1(1). During the relevant periods, paragraph 249.1(1)(c) was the relevant paragraph for purposes of this appeal. It reads as follows:

> 249.1(1) For the purposes of this Act, a "fiscal period" of a business or a property of a person or partnership means the period for which the person's or partnership's accounts in respect of the business or property are made up for purposes of assessment under this Act, but no fiscal period may end …

---

[9] See, for example, *Moules Industriels (C.H.F.G.) Inc. v. The Queen*, 2018 TCC 85, at paragraphs 82 to 84.

(c) ... more than 12 months after the period began.[10]

[67] Since the Limited Partnership did not exist prior to February 1, 2005, it did not prepare accounts prior to February 1, 2005. Therefore, it did not have a fiscal period prior to February 1, 2005. As a result, it did not have a taxation year under the Act prior to February 1, 2005.

[68] There is nothing in the wording of subsection 13(31) that creates the fiction of the Limited Partnership having a year-end prior to February 1, 2005—specifically, as the Appellant argues, a 12-month fictional taxation year that ended on January 31, 2005. The creation of such a fictional taxation year would require very specific wording that, at a minimum, addresses the fictional existence of the Limited Partnership during this period and the beginning and end of the fictional taxation year.

[69] The Appellant argues that the creation of a notional taxation year is consistent with the rationale for the available-for-use rules in subsections 13(26) to (32). I do not agree. In my view, the Appellant's position defeats the purpose of the two-year rolling start rule by shortening the length of time that the Limited Partnership is required to have held the property to one completed taxation year.

[70] As noted by the Respondent, the two-year rolling start rule does not look at when the property is first used to produce income, but rather allows for the claiming of CCA in the third taxation year after the property is acquired. As previously stated, subsection 13(27) imposes a waiting period that is determined by reference to two taxation year-ends. In order for subsection 13(27)(b) to apply, the taxpayer must acquire the property, the taxpayer must have a year-end, and then 357 days must pass before the next year-end of the taxpayer. Under subsection 13(27)(b), two actual year-ends must pass before a property is considered to have become available for use.

[71] Under the Appellant's position, the time is shortened by one actual year-end of the Limited Partnership. Since the notional taxation year would be before the start of the Limited Partnership's first taxation year, under the Appellant's position, the Limited Partnership could claim CCA in respect of the MCU Depreciable Properties immediately after the end of its first taxation year, as long as its first taxation year is

[10] The same wording is now contained in paragraph 249.1(1)(d).

at least 357 days. In my view, this defeats the purpose of the two-year rolling start rule.

[72] Subsection 13(31) attempts to preserve the two-year rolling start rule when depreciable property is transferred between non-arm's-length parties. In the situation where the transferor and transferee have different year-ends, the actual date when the property is available for use will change; however, the time period must still include two taxation year-ends, spread more than 357 days apart.

[73] It is not the intention of subsection 13(31) to shorten the time period to one actual year-end.

[74] The Appellant's fact situation shows that this is what would occur if the Court accepts the Appellant's argument. Under the Appellant's argument, only one actual taxation year of the Limited Partnership would pass before the MCU Depreciable Properties become available for use.

[75] If I accept the Appellant's argument, the MCU Depreciable Properties that the Limited Partnership is deemed to have acquired in January 2005 would become available for use on February 1, 2006, after the end of the Limited Partnership's first taxation year.

[76] The Respondent's argument, however, preserves the two-year rolling start rule. Under his argument, the MCU Depreciable Properties become available for use on February 1, 2007, after the end of the second taxation year of the Limited Partnership.

[77] The Respondent's position is consistent with the purpose of paragraph 13(31)(a) to provide continuity of ownership between non-arm's-length parties, while preserving the two-year rolling start rule.

[78] For the foregoing reasons, the appeal is dismissed, with costs.

Signed at Winnipeg, Manitoba, this 12th day of March 2024.

"S. D'Arcy"

D'Arcy J.

Appendix A

2019-2603(IT)G

TAX COURT OF CANADA

BETWEEN:

SUNCOR ENERGY INC.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

AGREED STATEMENT OF FACTS

The parties to this proceeding admit, for the purpose of this proceeding only, the truth of the facts set out in this Agreed Statement of Facts. The documents in the Joint Book of Documents referred to herein are admitted both with respect to authenticity and as evidence of the truth of their contents. The parties agree that this Agreed Statement of Facts does not preclude either party from calling evidence to supplement the facts agreed to herein or to establish other facts not set out herein, it being accepted that such evidence and facts may not contradict the facts so agreed herein.

1. At all relevant times, the Appellant, Suncor Energy Inc. ("**Suncor**"), was an integrated energy company which operated oil sands, natural gas, and marketing and refining businesses.

2. At all relevant times, Suncor had a taxation year ending December 31.

3. Suncor's oil sands business includes the upgrading and processing of crude bitumen and other related products, including by-products such as petroleum coke and coker offgas.

4. The Millennium Coker Unit was part of the Millennium mine that was built to increase oil sands production to 358 kBPCD.

5. The scope of the Millennium Coker Unit project, which commenced in 2003, was to add a third set of cokers to the upgrader associated with the Millennium Coker Unit as well as make modifications to other upgrader components, including the hydrogen plant, sulphur plant, light naptha hydrotreater, tanks and pipelines.

6. In January 2005, Suncor incurred expenses in the amount of $34,368,000 to acquire depreciable property in Class 41 of Schedule II of the *Income Tax Regulations* for the Millennium Coker Unit project (the "**MCU Properties**").

7. Suncor Energy Oil Sands Inc. ("**SEOSI**") was incorporated pursuant to the *Business Corporations Act* (Alberta) on January 19, 2005, as a wholly-owned subsidiary of Suncor.

8. On February 1, 2005, the Suncor Energy Oil Sands Limited Partnership ("**SEOSLP**") was formed pursuant to the Suncor Energy Oil Sands Limited Partnership Agreement (the "**Partnership Agreement**"). The Partnership Agreement is located at **Tab 1** of the Joint Book of Documents.

9. On February 1, 2005, SEOSLP was registered as a limited partnership under the *Partnership Act* (Alberta), with Suncor as the general partner and SEOSI as the limited partner. The Certificate of Limited Partnership of SEOSLP dated February 1, 2005 is located at **Tab 2** of the Joint Book of Documents.

10. At all relevant times:

    (a) the fiscal period of SEOSLP ended on January 31;

    (b) Suncor held a 99.9% interest and SEOSI held a 0.1% interest in SEOSLP; and

    (c) Suncor and SEOSLP were not dealing at arm's length for purposes of the *Income Tax Act* (Canada) (the "**Act**").

11. The SEOSLP Limited Partnership Agreement was amended and restated effective January 1, 2006 pursuant to the Suncor Energy Oil Sands Limited Partnership Amended and

Restated Limited Partnership Agreement (the "**Amended Partnership Agreement**").[1] The Amended Partnership Agreement is located at **Tab 3** of the Joint Book of Documents.

12. The terms of the Amended Partnership Agreement provided for the allocation of net income from SEOSLP at the end of its fiscal year in proportion to each partner's partnership interest in SEOSLP.

13. The first fiscal year of SEOSLP ended on January 31, 2006.

14. On January 1, 2006, pursuant to an Asset Contribution Agreement between Suncor and SEOSLP, Suncor contributed the MCU Properties (together with other assets comprising its oil sands business) to SEOSLP. A copy of the Asset Contribution Agreement is located at **Tab 4** of the Joint Book of Documents.

15. Suncor and SEOSLP filed a joint election pursuant to subsection 97(2) of the Act with an elected amount of $823,241,000 in respect of depreciable property included in Class 41 (which included $34,368,000 relating to the MCU Properties) (the "**T2059**"). The elected amount was equal to the fair market value of such property.

16. For capital cost allowance ("**CCA**") purposes, SEOSLP added the amount of $34,368,000 to its Class 41 undepreciated capital cost ("**UCC**") balance on the basis that the MCU Properties became available for use in SEOSLP's fiscal period ending January 31, 2007, in accordance with paragraph 13(27)(b) and subsection 13(31) of the Act, and deducted the related CCA in computing its net income for the fiscal period ending January 31, 2007.

17. SEOSLP allocated 99.9% of its income for its fiscal period ending January 31, 2007 to Suncor, being $2,774,357,890. Suncor included that amount in computing its income for its taxation year ending December 31, 2007 (the "**2007 Taxation Year**").

---

[1] The SEOSLP Limited Partnership Agreement was also amended effective May 1, 2005.

18. By notice dated February 29, 2016, the Minister reassessed Suncor in respect of its 2007 Taxation Year, pursuant to which the Minister:

    (a) disallowed the addition of $34,368,000 in respect of the MCU Properties to SEOSLP's Class 41 UCC balance on the basis that the MCU Properties were not available for use in SEOSLP's fiscal period ending January 31, 2007;

    (b) disallowed the related claim for a CCA deduction in computing SEOSLP's net income for the fiscal period ending January 31, 2007; and

    (c) as a result of (a) and (b) above, increased Suncor's income allocated from SEOSLP in respect of SEOSLP's fiscal period ending January 31, 2007.

19. Suncor objected to the reassessment by filing a notice of objection on March 7, 2016 (the "**Notice of Objection**").

20. In response to the Notice of Objection, the Minister issued a reassessment dated April 11, 2019 (the "**Reassessment**"). In issuing the Reassessment, the Minister reassessed issues that are unrelated to this appeal, but confirmed the issue that is the subject of this appeal. A copy of the T7W-C in respect of the Reassessment is located at **Tab 5** of the Joint Book of Documents.

Dated at the City of Edmonton, Alberta this 5th day of May, 2023.

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Prairie Region
300, 10423 – 101 Street NW
Edmonton, Alberta
T5H 0E7

Per: Carla Lamash

Tel: (780) 495-0581
Fax: (780) 495-3319

Counsel for the Respondent

Dated at the City of Calgary, Alberta this 5th day of May, 2023.

OSLER, HOSKIN & HARCOURT LLP

Osler, Hoskin & Harcourt LLP
2700 Brookfield Place
225 – 6th Avenue S.W.
Calgary, Alberta
T2P 1N2

Per: Joanne Vandale / Edward Rowe

Tel.: (403) 260-7091 / 7033
Fax: (403) 260-7024

Counsel for the Appellant

Appendix B

13(27) Interpretation – available for use For the purposes of subsection (26) and subject to subsection (29), property (other than a building or part thereof) acquired by a taxpayer shall be considered to have become available for use by the taxpayer at the earliest of

(a) the time the property is first used by the taxpayer for the purpose of earning income,

(b) the time that is immediately after the beginning of the first taxation year of the taxpayer that begins more than 357 days after the end of the taxation year of the taxpayer in which the property was acquired by the taxpayer,

(c) the time that is immediately before the disposition of the property by the taxpayer,

(d) the time the property

(i) is delivered to the taxpayer, or to a person or partnership (in this paragraph referred to as the "other person") that will use the property for the benefit of the taxpayer, or, where the property is not of a type that is deliverable, is made available to the taxpayer or the other person, and

(ii) is capable, either alone or in combination with other property in the possession at that time of the taxpayer or the other person, of being used by or for the benefit of the taxpayer or the other person to produce a commercially saleable product or to perform a commercially saleable service, including an intermediate product or service that is used or consumed, or to be used or consumed, by or for the benefit of the taxpayer or the other person in producing or performing any such product or service,

(e) in the case of property acquired by the taxpayer for the prevention, reduction or elimination of air or water pollution created by operations carried on by the taxpayer or that would be created by such operations if the property had not been acquired, the time at which the property is installed and capable of performing the function for which it was acquired,

(f) in the case of property acquired by

> (i) a corporation a class of shares of the capital stock of which is listed on a designated stock exchange,
>
> (ii) a corporation that is a public corporation because of an election made under subparagraph (b)(i) of the definition "public corporation" in subsection 89(1) or a designation made by the Minister in a notice to the corporation under subparagraph (b)(ii) of that definition, or
>
> (iii) a subsidiary wholly-owned corporation of a corporation described in subparagraph (i) or (ii),

the end of the taxation year for which depreciation in respect of the property is first deducted in computing the earnings of the corporation in accordance with generally accepted accounting principles and for the purpose of the financial statements of the corporation for the year presented to its shareholders,

(g) in the case of property acquired by the taxpayer in the course of carrying on a business of farming or fishing, the time at which the property has been delivered to the taxpayer and is capable of performing the function for which it was acquired,

(h) in the case of property of a taxpayer that is a motor vehicle, trailer, trolley bus, aircraft or vessel for which one or more permits, certificates or licences evidencing that the property may be operated by the taxpayer in accordance with any laws regulating the use of such property are required to be obtained, the time all those permits, certificates or licences have been obtained,

(i) in the case of property that is a spare part intended to replace a part of another property of the taxpayer if required due to a breakdown of that other property, the time the other property became available for use by the taxpayer,

(j) in the case of a concrete gravity base structure and topside modules intended to be used at an oil production facility in a commercial discovery area (within the meaning assigned by section 2 of the *Canada Petroleum Resources Act*) on which the drilling of the first well that indicated the discovery began before March 5, 1982, in an offshore region prescribed for the purposes of subsection 127(9), the time the gravity base structure deballasts and lifts the assembled topside modules, and

(k) where the property is (within the meaning assigned by subsection (4.1)) a replacement for a former property described in paragraph (4)(a) that was acquired before 1990 or that became available for use at or before the time the replacement property is acquired, the time the replacement property is acquired,

and, for the purposes of paragraph (f), where depreciation is calculated by reference to a portion of the cost of the property, only that portion of the property shall be considered to have become available for use at the end of the taxation year referred to in that paragraph.

CITATION:	2024 TCC 31
COURT FILE NO.:	2019-2603(IT)G
STYLE OF CAUSE:	Suncor Energy Inc. v. His Majesty the King
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	May 9, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice Steven K. D’Arcy
DATE OF JUDGMENT:	March 12, 2024

APPEARANCES:

Counsel for the Appellant:	Joanne Vandale Edward Rowe
Counsel for the Respondent:	Carla Lamash

COUNSEL OF RECORD:

For the Appellant:

Name:	Joanne Vandale Edward Rowe
Firm:	Osler, Hoskin & Harcourt LLP Calgary, Alberta
For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada