Docket: 2013-1066(IT)G

BETWEEN:

DEVON CANADA CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on common evidence with the
Motion of *Devon Canada Corporation,* 2013-1327(IT)G
on July 14, 2014, at Toronto, Ontario.

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant:	Al Meghji Pooja Samtani
Counsel for the Respondent:	Luther P. Chambers Ernesto Caceres

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ORDER

The following portions of the Notice of Appeal are hereby struck:

(a) the phrase “as eligible capital expenditures (“ECEs”) under subsection 14(5) and paragraph 20(1)(*b*), or” in paragraph 8;

(b) the phrase “as ECEs under subsection 14(5) and paragraph 20(1)(*b*), or” in paragraphs 16 and 19;

(c) the references to section 14, paragraph 20(1)(*b*) and subsection 111(5.2) in paragraph 17; and

(d) the phrase “as ECEs at the time of the acquisition of control pursuant to subsection 111(5.2) and paragraph 20(1)(*b*), or” in paragraph 20(a).

Costs in respect of this Motion are awarded in the cause.

Signed at Ottawa, Canada, this 29th day of August 2014.

“David E. Graham”

Graham J.

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ORDER

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(b) the phrase "as ECEs under subsection 14(5) and paragraph 20(1)(*b*), or" in paragraphs 15 and 18;

(c) the references to section 14, paragraph 20(1)(*b*) and subsection 111(5.2) in paragraph 16; and

(d) the phrase "as ECEs at the time of the acquisition of control pursuant to subsection 111(5.2) and paragraph 20(1)(*b*), or" in paragraph 19(a).

Since costs have already been awarded in respect of a virtually identical motion in appeal number 2013-1066(IT)G, no costs are awarded in respect of this Motion other than disbursements.

Signed at Ottawa, Canada, this 29th day of August 2014.

"David E. Graham"

Graham J.

Citation: 2014 TCC 255
Date: 20140829
Dockets: 2013-1066(IT)G
2013-1327(IT)G

BETWEEN:

DEVON CANADA CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Graham J.

[1] The Respondent has brought a motion to strike various portions of two Notices of Appeal filed by Devon Canada Corporation on the ground that those portions of the Notices of Appeal do not comply with the large corporation rules in subsection 169(2.1) of the *Income Tax Act*.

[2] Devon was formed as a result of a number of amalgamations. In 2001, two of Devon's predecessor companies made significant payments to their employees in exchange for those employees surrendering various share purchase options (the "Surrender Payments"). The predecessor companies deducted the Surrender Payments on current account in their respective year ends. The Minister of National Revenue reassessed Devon to deny the deductions. Devon objected to the reassessments[1]. The Minister issued Notices of Confirmation and Devon appealed.

[3] In its Notices of Appeal, Devon raises the following arguments:

[1] One of the reassessments was actually a nil assessment so Devon made an application for a loss determination and then objected to the resulting determination. As nothing turns on this, for simplicity I will refer to the objections as being to reassessments.

(a) Devon's primary argument is that the Surrender Payments are deductible as current expenses under subsection 9(1) of the *Income Tax Act*.

(b) In the alternative, Devon argues that the Surrender Payments are eligible capital expenditures that, once added to cumulative eligible capital, would result in deductions pursuant to paragraph 20(1)(*b*). It further argues that, due to the fact that there were acquisitions of control of both of the predecessor companies during the taxation periods in which the Surrender Payments were made, subsection 111(5.2) applies to cause significant additional deductions of cumulative eligible capital.

(c) In the further alternative, Devon claims that the Surrender Payments are financing expenses deductible under paragraph 20(1)(*e*).

[4] Devon was a large corporation in the years in question. Accordingly, subsection 169(2.1) limits the issues and relief upon which Devon may appeal to those issues and the related relief in respect of which Devon complied with subsection 165(1.11) in its Notices of Objection. The Respondent seeks to strike the portions of Devon's Notices of Appeal dealing with its two alternative arguments on the basis that Devon did not comply with subsection 165(1.11) in respect of those arguments.

Questions to be Determined on this Motion

[5] There are three questions that I must determine on this Motion.

(a) The first question I must determine is whether Devon reasonably described the issue or issues to be decided in its Notices of Objection.

(b) If I find that Devon reasonably described the issue or issues, then the second question that I must determine is whether Devon adequately described the relief sought in respect of that issue or issues in its Notices of Objection.

(c) If I find that Devon did not reasonably describe the issue or issues or did not adequately describe the relief sought, I must then consider an alterative argument raised by Devon. Devon argues that if the Minister confirms a reassessment on a basis that differs

> from the basis upon which the taxpayer objected, then the taxpayer may appeal to court in respect of that basis notwithstanding the restrictions in subsection 169(2.1).

Did Devon Reasonably Describe Each Issue or Issues to be Decided?

Summary of Devon's Position

[6] Devon submits that there are two bases upon which it can be said to have reasonably described the issue or issues in its Notices of Objection.

[7] Devon's principle argument is that the issue under objection / appeal is, and has always been, whether the Surrender Payments are deductible. Devon says that there are three different reasons why the Surrender Payments may be deductible (i.e. on current account under section 9; as part of cumulative eligible capital under paragraph 20(1)(*b*) and subsection 111(5.2); or as a financing expense under paragraph 20(1)(*e*)) but that the presence of those individual reasons does not change the overall issue of deductibility.

[8] Devon's alternative argument is that, if its Notices of Objection did not reasonably describe the issue or issues, then the Minister's acceptance of a detailed supplemental memo (the "Supplemental Memo") from Devon during the objection process and the Minister's consideration and confirmation of the Notices of Objection on the basis of the arguments contained in the Supplemental Memo had the effect of amending Devon's Notices of Objection to include the arguments set out in the Supplemental Memo as issues.

Summary of the Respondent's Position

[9] The Respondent's principle argument is that the three "reasons" described by Devon are, in fact, three separate issues and thus that Devon was required to comply with subsection 165(1.11) in respect of each of those issues.

[10] The Respondent further submits that Devon's alternative argument must fail first because the Supplemental Memo cannot have amended the Notices of Objection because there is no mechanism in the *Income Tax Act* for making such an amendment and second because the actions of the Minister in accepting and considering the Supplemental Memo cannot override the restrictions of subsection 165(1.11).

Analysis of the Law

[11] The courts have not yet had the opportunity to fully consider the parameters of subsections 165(1.11) and 169(2.1) but there are themes that have emerged from the cases that have been decided:

(a) a taxpayer is not required to describe each issue exactly but is required to describe it reasonably (*Potash Corporation of Saskatchewan Inc. v. The Queen*[2]);

(b) the determination of what degree of specificity is required for an issue to have been described reasonably is to be made on a case by case basis (*Potash*);

(c) a taxpayer may add new facts or reasons on appeal but not new issues (*British Columbia Transit v. The Queen*[3]);

(d) if the proposed additional argument would result in the large corporation seeking greater relief than was previously sought, the courts are more likely to consider the argument to be a new issue rather than a reason (*Potash*; *Telus Communications (Edmonton) Inc. v. The Queen*[4]);

(e) if the proposed additional argument would result in the large corporation seeking the same relief that was previously sought, the courts are more likely to consider the argument to be the same issue (*British Columbia Transit*; *Canadian Imperial Bank of Commerce v. The Queen*[5]); and

(f) if the proposed additional argument would result in the large corporation seeking completely different relief than was previously sought, the courts are more likely to consider the argument to be a new issue rather than a reason (*Bakorp Management Ltd. v. The Queen*[6]).

Application of the Law

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2 2003 FCA 471.
3 2006 TCC 437.
4 2005 FCA 159.
5 2013 TCC 170.
6 2014 FCA 104.

[12] In order to determine whether Devon's alternative arguments represent new issues or new reasons, I must first determine what issue was set out in Devon's Notices of Objection and then determine whether those alternative arguments represent alternative reasons in support of that issue or whether they represent alternative issues.

[13] Devon's Notices of Objection make no reference to paragraphs 20(1)(*b*) and (*e*) or subsection 111(5.2). The issue and statutory provisions are described as follows in one of the Notices of Objection[7]:

> **ISSUE TO BE DECIDED**
>
> The issue to be decided is whether the Stock Option payment of $20,884,041 is a deductible business expense under section 9 and not denied by section 18 of the Act for [predecessor company's] February 11, 2001 tax year, thus reducing the taxable income by an amount of $15,663,031 ($20,884,041 less an associated resource allowance adjustment of $5,221,010).
>
> **STATUTORY PROVISIONS RELIED ON**
>
> [Predecessor company] relies on, *inter alia*, subsections 3, 9, and paragraph 20(1)(v.1) of the *Act*.

[14] There is a similar description of the issue and statutory provisions in the other Notice of Objection[8].

[15] In my view, the sole issue set out in the Notices of Objection is whether Devon can deduct the Surrender Payments. The Notices of Objection propose one reason why the deduction should be permitted but that does not preclude Devon from raising other reasons in its Notices of Appeal.

[16] In reaching this conclusion, I am fully aware that, prior to the Supreme Court of Canada's decision to refuse leave to appeal in *Imperial Tobacco Canada Ltd. v. The Queen*[9], Devon was making no argument other than its primary argument and that it was only after leave was refused that Devon sought to introduce the alternative arguments. I am also aware of the fact that Devon's counsel was also counsel in *Imperial Tobacco* and that Devon's objection had

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7 Affidavit of Michael Henry Juhasz, appeal number 2013-1327(IT)G, Exhibit "E".

8 The only significant variation in the descriptions of the issue and statutory provisions relates to the fact that the other objection dealt with the loss determination. Nothing turns on this.

9 [2012] SCCA 11 seeking leave to appeal 2011 FCA 308.

effectively been held in abeyance pending the outcome of *Imperial Tobacco*. These facts do nothing to change my view that the issue in this Appeal has not changed. The setback that Devon suffered after the *Imperial Tobacco* decision merely caused it to consider alternative reasons that it could use to support its claim for deduction. In *Potash*, the Federal Court of Appeal quoted from a paper prepared by R.M. Beith entitled "Draft Legislation on Income Tax Objections and Appeals" that was presented at the 1994 Canadian Tax Foundation Annual Conference[10]. In that paper, Mr. Beith expressed concerns about large corporations being "able to raise new issues based on emerging interpretations and the outcome of court decisions challenged by other taxpayers". My understanding is that Mr. Beith was concerned about taxpayers who were disputing one issue (say the deduction of legal fees) being able to add a completely different issue (say the calculation of resource allowances) to their appeal as a result of a favourable court decision obtained by another taxpayer. In my view, that is not what is happening in Devon's case. Devon has always been disputing the deduction of the Surrender Payments. It is still disputing that deduction. All that has changed as a result of the *Imperial Tobacco* decision is that Devon is now arguing that the Surrender Payments are deductible for different reasons.

[17] Having concluded that the sole issue has always been the deductibility of the Surrender Payments, I must now consider whether the alternative arguments put forward by Devon fall within that sole issue.

[18] I will consider Devon's paragraph 20(1)(*e*) argument first. The Minister denied the deduction of the Surrender Payments on the basis that they were capital in nature and thus that paragraph 18(1)(*b*) precluded their deduction. Devon's primary argument is that paragraph 18(1)(*b*) does not apply because the Surrender Payments were on income account. Paragraph 20(1)(*e*) is an exception to paragraph 18(1)(*b*). It simply permits certain types of financing expenses to be deducted despite the fact that they would otherwise be on capital account. In essence, Devon's primary argument is that the Surrender Payments were on income account because that was their nature and its alternative argument is that they were on income account because paragraph 20(1)(*e*) says so. Devon's paragraph 20(1)(*e*) argument is therefore nothing more than an alternative reason why the Minister should permit the deduction of the Surrender Payments. There is nothing in the themes that have emerged from the caselaw that would cause me to question this conclusion. In fact, Devon's case falls squarely in line with the

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10 Report of Proceedings of the Forty-Sixth Tax Conference, 1994 Conference Report (Toronto: Canadian Tax Foundation, 1995), 34:2; see also *Potash* at paragraph 4.

reasoning in the decisions in *Canadian Imperial Bank of Commerce* and *British Columbia Transit*.

[19] I will now turn to Devon's paragraph 20(1)(*b*) and subsection 111(5.2) argument. If Devon were simply claiming a deduction in respect of the Surrender Payments under paragraph 20(1)(*b*), I would accept that no new issue was being raised for the same reasons that I reached that conclusion in respect of the paragraph 20(1)(*e*) argument as paragraph 20(1)(*b*) is simply another exception to paragraph 18(1)(*b*). However, this is not what Devon is doing. Devon is also claiming a deduction under subsection 111(5.2). That deduction is not optional. It must be claimed if certain preconditions are met. The preconditions have been met in Devon's case. As a result, if Devon convinced a trial judge that the Surrender Payments should be added to its cumulative eligible capital, subsection 111(5.2) would cause Devon to be entitled to a deduction in respect of other amounts in its cumulative eligible capital that are totally unrelated to the Surrender Payments. The Federal Court of Appeal was clear in *Potash* that there will be a new issue if a taxpayer attempts to deduct additional amounts even if those amounts fall within the same category of deductions. Based on the foregoing, I find that Devon's paragraph 20(1)(*b*) and subsection 111(5.2) alternative argument is a new issue that cannot be raised at appeal.

[20] In reaching this conclusion on the paragraph 20(1)(*b*) and subsection 111(5.2) argument, I have given consideration to Devon's submission that the Supplemental Memo had the effect of amending its Notices of Objection to include the argument. I do not accept Devon's position. There is no mechanism in the *Act* that would permit a large corporation to amend its Notice of Objection. Reading in such a mechanism would defeat the entire purpose of the large corporation rules.

Did Devon Adequately Describe the Relief Sought?

[21] Having concluded that Devon reasonably described the sole issue in its Notices of Objection and that its section 9 and paragraph 20(1)(*e*) arguments were merely reasons, I must now consider whether Devon adequately described the relief sought. Paragraph 165(1.11)(*b*) requires a large corporation to specify the relief in respect of each issue, not in respect of each reason. However, the Respondent argues that because the relief sought would be different for each reason, Devon should nonetheless have specified that the issue itself could result in different potential relief.

[22] Devon did not describe the relief sought in respect of its paragraph 20(1)(*e*) argument. Devon's Notices of Objection did not specify any relief other than allowing the deduction in full. The Respondent submits that the total relief sought under paragraph 20(1)(*e*) is greater than the relief sought under section 9 and that Devon should not be permitted to increase the amount of relief sought. Devon acknowledges that the relief sought under paragraph 20(1)(*e*) would be greater over a 5 year period but submits that the relief sought in the years in question is far less than the relief sought under its section 9 argument. Devon argues that the relief for the purposes of subsection 165(1.11) is the relief in the year in question, not the relief over time. I accept Devon's position on this point. I find that the relief sought under the paragraph 20(1)(*e*) argument is less than the relief sought under the section 9 argument.

[23] In *Potash*, the Federal Court of Appeal implicitly accepted that if a certain amount of relief is specified in a Notice of Objection, a less favourable amount of relief is automatically included[11]:

> … I prefer to leave open the question of whether the obligation to "specify in respect of each issue, the relief sought, expressed as the amount of a change in a balance (within the meaning assigned by subsection 152(4.4)) or a balance of undeducted outlays, expenses or other amounts of the corporation" <u>necessarily binds a large corporation to the stated amount, or a less favourable amount</u>. It is arguable that there may be situations where an amendment to a notice of appeal could be permitted if the amendment goes only to quantum and does not entail the raising of a new issue.

[emphasis added]

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11 *Potash* at paragraph 27.

[24] This approach is logical. If a large corporation's appeal involves numerous small expenses some of which may ultimately be allowed and some of which may not, it would be unreasonable to expect the large corporation to express its relief sought in its Notice of Objection on an expense-by-expense basis. It would seem to be sufficient if the large corporation simply stated the total relief sought; it being understood that the relief would decrease for every expense it was not permitted to deduct. Similarly, an absurd result would ensue if a large corporation were expected to express alternative relief in a valuation case. I cannot imagine that Parliament would have intended a large corporation to have to state that it would like $X of relief if a certain asset was valued at $4,000,000 (being the valuation favoured by the large corporation), $Y of relief if the asset was valued at $3,999,999, $Z of relief if the asset was valued at $3,999,998 and so on all the way down to whatever value the Minister believed the asset to be worth.

[25] I do not see a significant difference between the foregoing examples and Devon's situation. Devon seeks to deduct the Settlement Payments. Deduction under paragraph 20(1)(*e*) would result in less relief in the years in question but I do not think that it was necessary for Devon to spell that relief out in detail.

[26] Based on the foregoing, I find that Devon's paragraph 20(1)(*e*) argument complies with the requirement to specify the relief sought.

<u>Devon's Alternative Argument</u>

[27] As set out above, Devon argues that if the Minister confirms a reassessment on a basis that differs from the basis upon which a large corporation objected, then the large corporation may appeal to court in respect of that new basis despite the restrictions in subsection 169(2.1). As I have concluded that Devon was in compliance with respect to its paragraph 20(1)(*e*) argument, I will only consider this alternative argument in respect of the paragraph 20(1)(*b*) and subsection 111(5.2) argument.

[28] Parliament has contemplated a situation where the Minister assesses a large corporation in respect of certain issues, the large corporation objects to those issues and then the Minister reassesses the same year but adds new issues. Subsection 165(1.14) and paragraph 169(2.1)(*b*) together allow the large corporation to appeal to court in respect of the new issues despite the fact that those issues were not described in the original Notice of Objection.

[29] There appears, however, to be a gap in the *Act* in the somewhat unlikely situation where the Minister assesses a large corporation in respect of certain issues, the large corporation objects to those issues and then the Minister confirms the assessment, but on an entirely different basis than the basis of the original assessment[12]. I am unaware of anything in the *Act* that would specifically allow the large corporation to appeal on the basis of the new issues in this situation.

[30] Devon submits that it is caught by the foregoing scenario. Devon says that, when the Minister confirmed the reassessments, the Minister relied on paragraph 20(1)(*b*) and subsection 111(5.2) as an alternative basis for the confirmation. Devon therefore asks me to address the perceived gap in the *Act* by effectively reading in to paragraph 169(2.1)(*b*) the ability for Devon to appeal in respect of any alternative issue relied upon by the Minister in confirming the reassessments.

[31] While there may be an argument to be made for that type of relief in a different case, this is not an appropriate case to do so. This is not a case where the Minister has abandoned the original basis of assessment and substituted a new one. The Minister still maintains that its original basis of assessment is correct. The Minister merely added the additional explanation regarding paragraph 20(1)(*b*) and subsection 111(5.2) to address the points raised by Devon in the Supplemental Memo. In fact, the Notices of Confirmation only mention those provisions when describing the arguments raised by Devon. The stated reason for confirming the reassessments is paragraph 18(1)(*b*). While the Reports on Objection make it clear that the Minister considered Devon's argument, they in no way indicate that the Minister abandoned the Minister's original argument.

[32] Based on the foregoing, I am not prepared to allow Devon to appeal the paragraph 20(1)(*b*) and subsection 111(5.2) issue on the basis of this alternative submission.

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12 A possible example of how this could occur would be if the Minister assessed a large corporation on the basis that it had $500,000 of unreported revenue. The large corporation then objected to that issue and provided evidence that it did not, in fact, have unreported income. However, in the course of the objection, the Minister became aware of the fact that the large corporation had improperly claimed $500,000 in expenses. Since the tax resulting from $500,000 in extra revenue would be the same as the tax resulting from $500,000 in improperly claimed expenses, the Minister would presumably just issue a Notice of Confirmation rather than issuing a reassessment. The large corporation, having objected to the revenue issue but not the expense issue, would arguably be prevented from appealing to court in respect of the expense issue.

Conclusion

[33] Based on all of the foregoing, the Respondent's Motion is allowed on the following basis.

[34] The following portions of the Notice of Appeal in appeal number 2013-1066(IT)G are hereby struck:

(a) the phrase "as eligible capital expenditures ("ECEs") under subsection 14(5) and paragraph 20(1)(*b*), or" in paragraph 8;

(b) the phrase "as ECEs under subsection 14(5) and paragraph 20(1)(*b*), or" in paragraphs 16 and 19;

(c) the references to section 14, paragraph 20(1)(*b*) and subsection 111(5.2) in paragraph 17; and

(d) the phrase "as ECEs at the time of the acquisition of control pursuant to subsection 111(5.2) and paragraph 20(1)(*b*), or" in paragraph 20(a).

[35] The following portions of the Notice of Appeal in appeal number 2013-1327(IT)G are hereby struck:

(a) the phrase "as eligible capital expenditures ("ECEs") under subsection 14(5) and paragraph 20(1)(*b*), or" in paragraph 8;

(b) the phrase "as ECEs under subsection 14(5) and paragraph 20(1)(*b*), or" in paragraphs 15 and 18;

(c) the references to section 14, paragraph 20(1)(*b*) and subsection 111(5.2) in paragraph 16; and

(d) the phrase "as ECEs at the time of the acquisition of control pursuant to subsection 111(5.2) and paragraph 20(1)(*b*), or" in paragraph 19(a).

Costs

[36] Given the mixed success of the parties, costs of the Motion in appeal number 2013-1066(IT)G are awarded in the cause. Since the two Motions are virtually

identical, no costs are awarded in respect of the Motion in appeal number 2013-1327(IT)G other than disbursements.

Signed at Ottawa, Canada, this 29th day of August 2014.

"David E. Graham"

Graham J.

CITATION:	2014 TCC 255
COURT FILE NOS.:	2013-1066(IT)G; 2013-1327(IT)G
STYLE OF CAUSE:	DEVON CANADA CORPORATION AND HMQ
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 14, 2014
REASONS FOR ORDER BY:	The Honourable Justice David E. Graham
DATE OF ORDER:	August 29, 2014

APPEARANCES:

Counsel for the Appellant:	Al Meghji Pooja Samtani
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