

Dockets: 2012-1020(IT)G,
2012-4808(IT)G

BETWEEN:

RIO TINTO ALCAN INC.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motions heard on April 3, 2014, at Montréal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the applicant: Yves St-Cyr

Counsel for the respondent: Nathalie Labbé
Susan Shaughnessy

ORDER

UPON the motions filed by the applicant to obtain orders confirming that the reassessments made against the applicant for the 2006 and 2007 taxation years constitute additional assessments and not reassessments for the purposes of the *Income Tax Act*;

AND UPON submissions by counsel and the documents submitted;

THE COURT ORDERS the following in accordance with the attached Reasons for Order:

1. the motions are dismissed without costs;

2. the applicant is allowed to amend, by January 7, 2015, its notice of appeal to challenge the its reassessment dated April 19, 2013, for the 2006 taxation year in accordance with section 54 of the *Tax Court of Canada Rules (General Procedure)* (Rules);
3. the applicant is allowed to amend, by January 7, 2015, its notice of appeal to challenge the its reassessments dated September 3, 2013, and October 3, 2013, for the 2007 taxation year, in accordance with section 54 of the Rules, as long as the applicant first specifies in its notice of objection the relief sought with respect to the reassessments dated September 3, 2013, and October 3, 2013.

Signed at Ottawa, Canada, this 7th day of October 2014.

“Réal Favreau”

Favreau J.

Translation certified true
on this 18th day of June 2015

François Brunet, Revisor

Citation: 2014 TCC 288
Date: 20141007
Dockets: 2012-1020(IT)G,
2012-4808(IT)G

BETWEEN:

RIO TINTO ALCAN INC.,

Applicant,

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HER MAJESTY THE QUEEN,

Respondent.

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REASONS FOR ORDER

Favreau J.

[1] The applicant brought two motions to obtain orders of the Court that confirm that the reassessments made against it for the taxation years ending December 31, 2006, and October 31, 2007, constitute additional assessments and not reassessments vacating the previous assessments.

[2] The distinction between “reassessments” and “additional assessments” is important for the applicant to ensure that the requirements set out in subsections 165(1.11) and 169(2.1) of the *Income Tax Act*, R.S.C. (1985) c. 1 (5th Supp.), as amended (Act), are met in the context of its notice of objection and its appeals to the Tax Court of Canada.

[3] Because the applicant was a large corporation during the taxation years in dispute, specific requirements apply to objections made by it. Those requirements are set out at subsection 165(1.11) of the Act and its failure to comply could result in it losing its right to appeal to the Tax Court of Canada. Subsection 165(1.11) reads as follows:

Objections by large corporations — Where a corporation that was a large corporation in a taxation year (within the meaning assigned by subsection

225.1(8)) objects to an assessment under this Part for the year, the notice of objection shall

- (a) reasonably describe each issue to be decided;
- (b) 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; and
- (c) provide facts and reasons relied on by the corporation in respect of each issue.

[4] Subsection 169(2.1) specifies that only an issue raised in a notice of objection that meets the requirements of subsection 165(1.11) may be appealed to the Tax Court of Canada. Subsection 169(2.1) reads as follows:

Limitation on appeals by large corporations — Notwithstanding subsections 69(1) and 169(2), where a corporation that was a large corporation in a taxation year (within the meaning assigned by subsection 225.1(8)) served a notice of objection to an assessment under this Part for the year, the corporation may appeal to the Tax Court of Canada to have the assessment vacated or varied only with respect to

- (a) an issue in respect of which the corporation has complied with subsection 165(1.11) in the notice, or
- (b) an issue described in subsection 165(1.14) where the corporation did not, because of subsection 165(7), serve a notice of objection to the assessment that gave rise to the issue

and, in the case of an issue described in paragraph 169(2.1)(a), the corporation may so appeal only with respect to the relief sought in respect of the issue as specified by the corporation in the notice.

[5] However, subsection 165(7) of the Act sets out that a notice of objection to a reassessment or to an additional assessment is not required when the reassessment or additional assessment concerns an issue addressed in the notice of objection served to an assessment. Subsection 165(7) reads as follows:

Notice of objection not required — Where a taxpayer has served in accordance with this section a notice of objection to an assessment and thereafter the Minister reassesses the tax, interest, penalties or other amount in respect of which the notice of objection was served or makes an additional assessment in respect thereof and sends to the taxpayer a notice of the reassessment or of the additional

assessment, as the case may be, the taxpayer may, without serving a notice of objection to the reassessment or additional assessment,

(a) appeal therefrom to the Tax Court of Canada in accordance with section 169;
or

(b) amend any appeal to the Tax Court of Canada that has been instituted with respect to the assessment by joining thereto an appeal in respect of the reassessment or the additional assessment in such manner and on such terms, if any, as the Tax Court of Canada directs.

A. Facts relating to the taxation year ending December 31, 2006 - docket 2012-1020(IT)G

[6] The applicant is currently conducting an appeal to the Tax Court of Canada (docket 2012-1020(IT)G) from an assessment of it by the Minister of National Revenue (Minister) made on July 14, 2011, for the 2006 taxation year (first assessment).

[7] The examinations for discovery were completed by the parties before April 2, 2013, regarding the most important part of the appeal, that is, the audit process and the eligibility of the expenses claimed as scientific research and experimental development expenditures incurred by the applicant and disallowed by the first assessment. The undertakings in that respect have almost all been completed.

[8] On April 19, 2013, the Minister assessed the applicant again for its 2006 taxation year (second assessment) to disallow the foreign affiliate losses deducted by the applicant.

[9] On July 18, 2013, the applicant served on the Minister a notice of objection to the second assessment on the ground that it was an additional assessment and not a reassessment.

[10] According to the respondent, the applicant's assessment dated April 19, 2013, made under subparagraph 152(4)(b)(iii) of the Act for the 2006 taxation year is a reassessment and not an additional assessment.

[11] The respondent's position is based on Monique Poirier's affidavit, filed pursuant to section 68 of the Rules. Ms. Poirier also completed form T7W-C explaining the changes made to the applicant's taxable income. Said form T7W-C was filed as an exhibit to the Canada Revenue Agency (CRA) auditor's affidavit.

[12] As stated in form T7W-C, the starting point for the reassessment dated April 19, 2013, is the [TRANSLATION] "previously assessed net income for income tax purposes" in the amount of \$1,694,939,106, which included the adjustments made by the previous assessment dated July 14, 2011, for the applicant's 2006 taxation year. No change was made to those adjustments.

[13] An amount of \$1,681,804 was added to the [TRANSLATION] "previously assessed net income for income tax purposes" as "foreign accrual property income" under subsection 91(1) of the Act. Because the deduction set out in subsection 91(4) of the Act in the amount of \$281,696 was disallowed, \$1,963,500 was added to the applicant's income. The applicant's revised net income for income tax purposes was established at \$1,696,902,606.

[14] From the revised net income amount, taxable dividends, non-capital losses, capital losses and donations were subtracted to the effect that the applicant's revised taxable income for its 2006 taxation year was \$169,828,709.

[15] The case law and the doctrine are in agreement in a situation where the revised taxable income of a taxpayer was increased taking into account previous adjustments, in that that is a very clear indication for characterizing the assessment as a "reassessment" instead of an "additional assessment".

[16] *Parent v. Canada*, [2003] T.C.J. No. 445 (TCC)(QL), *Walkem v. M.N.R.*, 71 DTC 5288 (F.C.T.D.) and *Lucien Rémillard v. Her Majesty the Queen*, 2011 TCC 327 answer the question raised by the applicant in its motion and enable the Court to find that the assessment dated April 19, 2013, is indeed a reassessment.

[17] Similarly, doctrinal authors who have discussed the distinction between a "reassessment" and an "additional assessment" consider that the increase in total taxable income on a notice of assessment indicates that it is a reassessment and not an additional assessment (see in this regard C. Campbell, whose treatise entitled *Administration of Income Tax 2013* was cited by the Supreme Court of Canada in *Agence du Revenu v. Services Environnementaux AES*, [2013] 3 S.C.R. p. 859,

(2013) page 398; B. Russell, “Assessments, Reassessments and Waivers, 2012 Tax Dispute Resolution Compliance and Administration”, Conference Report (Toronto: Canadian Tax Foundation, 2013) 26: 1-15; and D. Smith “Reassessments, Waivers, Amended Returns and Refunds”, Corporate Management Tax Conference 1988, at page 8:8).

[18] Since, by its notice of objection dated July 18, 2013, the applicant duly objected to the adjustments that were the subject of the reassessment made on April 19, 2013, for the 2006 taxation year and the requirements set out in subsections 165(1.11) and 169(2.1) of the Act were met, the Court authorizes the applicant to amend, by January 7, 2015, its notice of appeal to challenge its reassessment for the 2006 taxation year, in accordance with section 54 of the Rules.

B. Facts related to the taxation year ending October 31, 2007 - docket 2012-4808(IT)G

[19] The reassessments dated September 3, and October 3, 2013, were made by the Minister after an adjustment request from the applicant and those reassessments resulted in a decrease in the tax payable by the applicant.

[20] Under the reassessment dated September 3, 2013, the total federal tax to be paid by the applicant under Part I of the Act was decreased by \$5,492,114 with respect to the taxes payable according to the reassessment dated May 11, 2012.

[21] According to the reassessment dated October 3, 2013, the total amount of federal tax to be paid by the applicant under Part I of the Act was decreased by an additional \$1,053,087 with respect to the amount of tax payable according to the reassessment dated May 11, 2012.

[22] Following those reassessments dated September 3, 2013, and October 3, 2013, the tax payable on the income under Part I of the Act went from \$99,413,327 to \$92,867,526, according to the reassessment dated May 11, 2012.

[23] According to the above-mentioned principles in section A for the 2006 taxation year, the reassessments made on September 3, 2013, and October 3, 2013, regarding the taxation year ending October 31, 2007, are “reassessments”.

[24] On November 29, 2013, the applicant served a notice of objection to the reassessments dated September 3 and October 3, 2013, with respect to the taxation year ending October 31, 2007. The notice of objection specifically refers to the reassessments dated September 3 and October 3 in its title and at paragraphs 221, 262 to 268 and 432. However, paragraphs 262 to 268 do not contain a sufficiently detailed description of the adjustments made by the Minister to make the reassessments dated September 3 and October 3, 2013.

[25] Paragraph 264 of the notice of objection states that an amount of \$18,356,946 was added to the applicant's income as "foreign accrual property income" but there is no specification that the changes were made to the applicant's 2005 taxation year. The inclusion of that \$18,356,946 in the applicant's income for the 2005 taxation year resulted in a decrease of \$15,664,647 in the "non-capital loss balance" for the 2005 taxation year. Consequently, that had an impact on the amount of "non-capital losses" that the applicant may apply to the 2007 taxation year under paragraph 111(1)(a) of the Act.

[26] During the hearing, counsel for the respondent suggested that the applicant specify in its notice of objection the relief described in the previous paragraph, as stated in subsection 165(1.11) of the Act, to enable it to appeal the adjustments in the reassessments dated September 3, and October 3, 2013, to the Tax Court of Canada.

[27] In the light of the foregoing, the Court authorizes the applicant to amend, by January 7, 2015, its notice of appeal to challenge its reassessments for the 2007 taxation year, in accordance with section 54 of the Rules, as long as the applicant first specifies in its notice of objection the relief sought with respect to the reassessments dated September 3, and October 3, 2013.

[28] For these reasons, the applicant's motions are dismissed without costs.

Signed at Ottawa, Canada, this 7th day of October 2014.

“Réal Favreau”

Favreau J.

Translation certified true
on this 18th day of June 2015

François Brunet, Revisor

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PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: April 3, 2014

REASONS FOR ORDER BY: The Honourable Justice Réal Favreau

DATE OF ORDER: October 7, 2014

APPEARANCES:

Counsel for the applicant: Yves St-Cyr
Counsel for the respondent: Nathalie Labbé
Susan Shaughnessy

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