**Date: 20080715**

**Docket: T-243-07**

**Citation: 2008 FC 871**

**Vancouver, British Columbia, July 15, 2008**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**FMC TECHNOLOGIES COMPANY**

**Applicant**

**and**

**MINISTER OF NATIONAL REVENUE**
**FOR HER MAJESTY THE QUEEN**

**Respondents**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] FMC Technologies Company seeks judicial review of a decision of the Minister of National Revenue refusing the company's request for the refund of an overpayment of $2,821,050.33 for taxes allegedly paid on the company's account for the 1999-2002 taxation years.

[2] For the reasons that follow, I am of the view that this matter is beyond the jurisdiction of this Court. Moreover, in the event that this Court does in fact have jurisdiction to deal with this application, the applicant has not persuaded me that the Minister has committed a reviewable error

in rejecting the company's request for a refund. As a consequence, the application for judicial review will be dismissed.

**The Applicant and its Related Companies**

[3] FMC Technologies Company is a Nova Scotia company, which was previously known as FMC Offshore Canada Company. On January 1, 2007, FMC Technologies Company was amalgamated with FMC Technologies Company Canada, and continued under the name FMC Technologies Company. For ease of reference, the applicant, in its various incarnations, will be referred to throughout these reasons as "FOCC".

[4] Throughout the 1999-2002 tax years, FOCC was a wholly-owned subsidiary of a non-resident Swiss company by the name of FMC International, A.G. ("FMCI"). A second wholly-owned subsidiary of FMCI is also involved in the events giving rise to this proceeding, namely FMC Offshore Canada Inc. ("FOCI").

**Background**

[5] In 1996, a consortium of companies (collectively referred to as the "owners"), sought proposals for the development of the petroleum resources in the Terra Nova oil field, located on the Grand Banks of Newfoundland. One of the owners was Petro-Canada.

[6] Together with a number of other joint venturers, FOCC and FOCI submitted a proposal to the owners for the performance of certain work with respect to the Terra Nova project, which proposal was accepted.

[7] As of January 6, 1997, FOCC and FOCI, along with the other members of the joint venture, entered into the Terra Nova Development Project Alliance Agreement with the owners (the "Terra Nova Agreement"), which established the rights and obligations of the parties to the agreement. Petro-Canada was designated as the operator of the project, and was to act as agent for the other owners in relation to the project.

[8] Effective February 6, 1997, FOCI assigned all of its rights and obligations under the Terra Nova Agreement to FOCC. Such an assignment was provided for under the terms of the Agreement.

[9] Pursuant to the terms of the Terra Nova Agreement, FOCC was obliged to provide project management with respect to certain aspects of the Terra Nova project.

[10] Section 14.2 of the Terra Nova Agreement permitted FOCC to assign all, but not less than all, of its interests, rights and obligations under the Terra Nova Agreement to a third party. In accordance with this provision, effective January 6, 1997, FOCC assigned all of its obligations under the Terra Nova Agreement to FMCI. The assignment documentation included notice of the assignment, together with Petro-Canada's consent to the assignment.

[11] Article 4 of the Assignment document provides that “FMCI cedes to FOCC Canadian in-country responsibility for services, installations and materials procurement as more full defined in the Management Services Agreement”.

[12] Contract deliverables to be supplied by FMCI under the Terra Nova Agreement included a service component, part of which was to be performed in Canada, and the balance of which was to be performed off-shore.

[13] Because FOCC had the capacity to perform the in-Canada services, whereas FMCI only had the capacity to perform the off-shore services, effective February 6, 1997, FMCI and FOCC entered into a subcontract arrangement, whereby FOCC agreed to provide the contract deliverables with respect to the in-Canada services.

[14] Under the terms of the subcontract, FOCC was to invoice Petro-Canada directly for the in-Canada services provided with respect to the Terra Nova project. The subcontract further provided that the amount of these invoices was to be calculated in accordance with a fixed formula, which included the pro-rata share of the total fixed profit allocated to FMCI in relation to the in-Canada services under the provisions of the Terra Nova Agreement.

[15] As had been the case with FOCC, FMCI was not entitled to assign part of its interests, rights or obligations under the Terra Nova Agreement to a third party. It was, however, entitled to assign monies due to it under the Terra Nova Agreement, subject to receiving the consent of Petro-Canada.

[16] Effective January 1, 1999, and with the consent of Petro-Canada, FMCI assigned a portion of the contractual payments due to FMCI under the Terra Nova Agreement to FOCC. These payments related to the actual in-Canada portion of the work performed by FOCC pursuant to the subcontract between FMCI and FOCC. At the same time, FMCI relinquished any claim that it might have against Petro-Canada for the payment of these separately invoiced amounts, subject only to the provision that the payments were actually made to FOCC.

[17] FOCC then provided in-Canada services in relation to the Terra Nova project in accordance with the terms of its subcontract with FMCI, invoicing Petro-Canada the sum of $886,341.84 in 1999, $3,790,752.60 for 2000, $8,795,023.10 for 2001 and $5,334,879.61 for 2002. The total amount invoiced by FOCC over the years in issue thus came to $18,806,997.15.

[18] On February 12, 2004, the Canada Revenue Agency issued assessments to Petro-Canada in its capacity as operator of the Terra Nova project for the 1999-2002 taxation years. Included in these assessments was an amount payable totaling $2,821,050.33, or 15% of $18,806,997.15.

[19] According to the Minister, these amounts had, in law, been paid to FMCI rather than FOCC for the in-Canada services provided under the Terra Nova Agreement. Given that FMCI was not resident in Canada, the Minister was of the view that Petro-Canada should have withheld 15% of the payments made with respect to this work, in accordance with Regulation 105 of the *Income Tax Regulations*.

[20] The relevant portion of Regulation 105 is subsection 105(1), which provides that:

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| 105. (1) Every person paying to a non-resident person a fee, commission or other amount in respect of services rendered in Canada, of any nature whatever, shall deduct or withhold 15 per cent of such payment. | 105. (1) Quiconque verse à une personne non-résidente un honoraire, commission ou autre montant à l'égard de services rendus au Canada, de quelque nature que ce soit, doit déduire ou retrancher 15 pour cent de ce versement. |

[21] Petro-Canada filed a Notice of Objection with respect to these assessments. By Notice of Confirmation dated July 10, 2006, the Minister confirmed the Regulation 105 assessments. Petro-Canada did not appeal this decision to the Tax Court, and in February of 2004, Petro-Canada paid the Receiver General the assessed amount of $2,821,050.33, together with interest and penalties, bringing the entire payment to $3,728,153.

[22] It is admitted by the CRA that the amounts paid by Petro-Canada related to work performed by FOCC in Canada.

[23] FOCC subsequently indemnified Petro-Canada for the $3,728,153 that Petro-Canada had paid to the Receiver General in accordance with the February 12, 2004 assessments.

[24] In the meantime, the monies paid by Petro-Canada to FOCC had been included in FOCC's income for the 1999-2002 taxation years, and Part I tax had been paid by FOCC on these amounts.

[25] It is FOCC's position on this application that the $2,821,050.33 in withholding tax paid by Petro-Canada should have been paid to the credit of FOCC's tax account, as opposed to that of FMCI. Because this was not done, FOCC has effectively paid $2,821,050.33 in taxes twice on the same earned income.

[26] In an effort to recoup the monies that it believes that it is owed, FOCC filed a Notice of Appeal with the Tax Court with respect to Petro-Canada's Regulation 105 assessments. By Order dated February 1, 2007, the Tax Court quashed FOCC's appeal on the basis that FOCC was not the taxpayer who had been subject to the assessments in issue, and thus had no standing to challenge these assessments.

[27] On November 23, 2006, FOCC applied to the Minister under the provisions of section 164(1) and 164(1.1) of the *Income Tax Act* for a refund of its alleged overpayment of tax for the 1999-2002 taxation years in the amount of $3,728,153, namely the principal amount of withholding tax paid, plus the interest and penalties that had also been paid by Petro-Canada. These provisions are lengthy, but have been attached as an appendix to this decision for ease of reference.

[28] FOCC argued that by virtue of section 153(1)(g) of the Act, the monies paid in relation to withholding taxes were paid "on account of the payee's tax for that year". Section 153(1)(g) provides that:

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| 153. (1) Every person paying at any time in a taxation year … | 153. (1) Toute personne qui verse au cours d'une année d'imposition l'un des montants suivants … |

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| (*g*) fees, commissions or other amounts for services, other than amounts described in subsection 115(2.3) or 212(5.1) … | *g*) des honoraires, commissions ou autres sommes pour services, à l'exception des sommes visées aux paragraphes 115(2.3) ou 212(5.1) … |
| shall deduct or withhold from the payment the amount determined in accordance with prescribed rules and shall, at the prescribed time, remit that amount to the Receiver General on account of the payee's tax for the year under this Part or Part XI.3, as the case may be, and, where at that prescribed time the person is a prescribed person, the remittance shall be made to the account of the Receiver General at a designated financial institution. | doit en déduire ou en retenir la somme fixée selon les modalités réglementaires et doit, au moment fixé par règlement, remettre cette somme au receveur général au titre de l'impôt du bénéficiaire ou du dépositaire pour l'année en vertu de la présente partie ou de la partie XI.3. Toutefois, lorsque la personne est visée par règlement à ce moment, la somme est versée au compte du receveur général dans une institution financière désignée. |

[29] FOCC submitted that it was the payee in law of the Petro-Canada payments, and not FMCI. As a result, FOCC argued that the assessed amounts paid by Petro-Canada as withholding tax, interest and penalties were in fact paid on account of FOCC's Part I tax for the tax years in question, and should, therefore, have been credited to FOCC in the calculation of FOCC's outstanding tax balance.

[30] FOCC further submitted that as it had already paid all of its taxes payable under Part I of the *Income Tax Act* in full for the 1999-2002 taxation years, there had been a double payment of tax on the same earned income. As a consequence, FOCC contended that it was entitled to a refund in the amount of $3,728,153.

**The Minister's Decision**

[31] By letter dated January 8, 2007, the Minister refused FOCC's request for a refund. In the Minister's view, FOCC was not the payee of the Petro-Canada payments in law. According to the Minister, FMCI was indeed the payee, with the result that the withholding amounts had properly been assessed on account of FMCI.

[32] The Minister also noted that FMCI had itself sought a refund of the $2,821,050.33 in withholding tax paid by Petro-Canada on the basis that it did not have a permanent establishment in Canada, but that this request had been refused, as it had been filed beyond the three years time period allowed for requests to be made for the refund of overpayments as provided for in section 164(1) of the *Income Tax Act*.

[33] Finally, the Minister observed that FMCI was considering applying for a remission order in order to recover the overpayment made with respect to its 1999-2002 taxation years.

[34] It is the Minister's decision refusing FOCC's request for a refund that underlies this application for judicial review.

**Issues**

[35] There are three issues on this application for judicial review. The first is whether this Court has jurisdiction to entertain FOCC's application, or whether the matter is one that is within the exclusive purview of the Tax Court.

[36] Assuming that this Court does have jurisdiction to deal with this matter, the second issue that then arises is the appropriate standard of review to be applied with respect to the Minister's decision.

[37] The final issue for determination is whether the Minister erred in concluding that FOCC was not entitled to a refund in the amount of $2,821,050.33 as an overpayment of tax for FOCC's 1999-2002 taxation years.

**Jurisdiction**

[38] The Minister submits that this Court does not have the jurisdiction to grant FOCC the relief that it is seeking in this case. FOCC has not challenged its own tax assessments for the 1999-2002 taxation years, and thus it cannot be said that FOCC has overpaid its taxes for these years.

[39] Moreover, the respondent points out that one taxpayer cannot challenge another taxpayer's assessment. To allow FOCC to claim that an overpayment was made by Petro-Canada would effectively require that this Court vacate Petro-Canada's income tax assessments. Only the Tax Court has the jurisdiction to hear and determine appeals from tax assessments pursuant to the *Income Tax Act*.

[40] FOCC argues that it is not seeking to challenge its own tax assessments, as there is no dispute about the amount of tax that was payable by FOCC for the 1999-2002 taxation years. This is because FOCC acknowledges having received the $18,806,997.15 paid to it by Petro-Canada for the work that FOCC did in connection with the Terra Nova project. According to FOCC, the only matter that is in dispute is how much money had been paid on account of FOCC's tax payable for these years.

[41] That is, FOCC says that the question for determination on this application is whether the Minister erred in failing to recognize that the $2,821,050.33 in withholding tax paid by Petro-Canada should have been credited to FOCC's tax account rather than that of FMCI. Even though the assessments made against Petro-Canada were based upon the Minister's finding that the monies paid by Petro-Canada were paid in law to FMCI, FOCC submits that it cannot be bound by the reasoning underlying the assessment of another taxpayer.

[42] Moreover, FOCC contends that it cannot obtain the relief that it is seeking from the Tax Court, as it is not seeking to challenge the amount of tax that has been assessed as payable by the company. According to FOCC, only the Federal Court can review the refusal of the Minister to issue a refund to a taxpayer in circumstances such as this.

[43] In assessing whether this Court has jurisdiction to entertain FOCC's application for judicial review, the starting point for the Court's analysis must be section 18.5 of the *Federal Courts Act*, which provides that:

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| 18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to [...] the Tax Court of Canada [...] from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act. | 18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi. |

[44] As the Supreme Court of Canada has recently made it clear, this Court must be cautious in assuming jurisdiction in tax matters, so as not to encroach on the jurisdiction of the Tax Court.

[45] That is, in *Canada v. Addison & Leyen Ltd. et al.***,** [2007] S.C.J. No. 33, 2007 SCC 33, the Supreme Court stated at paragraph 11 that:

> Reviewing courts should be very cautious in authorizing judicial review in such circumstances. The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of

> incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.

[46] In determining whether this application for judicial review is properly before this Court, or whether it represents an attempt to encroach on or circumvent the jurisdiction of the Tax Court, it is necessary to identify the fundamental basis for the application.

[47] This application for judicial review is styled as a review of the Minister's refusal to refund an overpayment of tax allegedly owing to FOCC.

[48] As was noted above, it is FOCC's position it has overpaid its taxes as the $2,821,050.33 in withholding tax paid by Petro-Canada should have been credited to FOCC's tax account rather than that of FMCI.

[49] The payment of the $2,821,050.33 in withholding tax, together with interest and penalties, was paid by Petro-Canada as a result of the assessments of Petro-Canada which held that 15% of the monies paid to FMCI under the provisions of the Terra Nova Agreement should have been withheld and remitted by Petro-Canada in accordance with Regulation 105, because FMCI was a non-resident company.

[50] I agree with the respondent that when all is said and done, what FOCC is essentially trying to do indirectly through this application for judicial review is to challenge the withholding tax assessment levied against Petro-Canada. Indeed, FOCC appears to have understood that this is the

case, as is evidenced by the company's abortive attempt to appeal Petro-Canada's tax assessments to the Tax Court.

[51] Leaving aside the question of whether one taxpayer may challenge the assessment of another taxpayer, what is clear is that this Court does not have the jurisdiction to review tax assessments. Such reviews are within the exclusive purview of the Tax Court.

[52] This finding is sufficient to dispose of this application. Nevertheless, I will deal briefly with the other issues raised by FOCC, in the event that a reviewing Court may disagree with my jurisdictional finding.

**Standard of Review**

[53] If this Court were found to have jurisdiction to entertain this application for judicial review, then the issue to be determined is whether the Minister erred in finding that FOCC had not made an overpayment of tax that would necessitate the payment of a refund. This is a question of mixed fact and law, requiring as it does an assessment of the factual circumstances giving rise to the request for a refund, as well as the legal effects of the various contractual arrangements between the parties.

[54] Taking the various factors relevant to the standard of review analysis, and, in particular, the nature of the question and the Minister's expertise in matters relating to taxation, I am of the view that the Minister's decision should be reviewed against the standard of reasonableness.

[55] In reviewing a decision against the reasonableness standard, a reviewing court must consider the justification, transparency and intelligibility of the decision-making process. The court must also consider whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47.

[56] That said, the choice of the standard of review in this case is not determinative of the outcome of the case, as I am satisfied that the Minister's decision was the correct one.

**Did FOCC Overpay its Taxes for the 1999-2002 Taxation Years?**

[57] As a preliminary matter, it should be observed that although FOCC contended in its submissions to the Minister that it was entitled to a refund in the amount of $3,728,153, in its submissions to this Court, FOCC asks that the matter be referred back for a new decision on the basis that it is entitled to a refund of Part I taxes in the amount of $2,821,050.33.

[58] That is, it does not appear that at this stage, FOCC is seeking credit for the penalties and interest paid by Petro-Canada.

[59] In a nutshell, FOCC says that as a result of the assignment of revenues entered into by FMCI and FOCC with respect to the revenues associated with the in-Canada portion of the work performed in relation to the Terra Nova Agreement, FOCC became the legal payee of the monies paid by Petro-Canada in this regard. As a consequence, the monies remitted by Petro-Canada as

a result of the Regulation 105 assessments for the 1999-2002 taxation years should have been credited to FOCC's tax account, and not that of FMCI.

[60] I do not agree.

[61] First of all, FOCC has not challenged the tax assessments levied against it for the 1999-2002 taxation years. These assessments are thus final and conclusive as to the amount of tax that was payable by FOCC, as well as the computation of the refund owing as a nil amount: see subsection 152(8) of the *Income Tax Act*.

[62] I accept that the fact that the Notices of Confirmation issued by the Minister with respect to Petro-Canada held that FMCI was the payee of the payments made by Petro-Canada for the in-Canada work is not determinative of the issue as it relates to FOCC. This is because FOCC cannot be bound by the Minister's reasoning as it relates to a different taxpayer: see, for example, *Gaucher v. The Queen*, [2000] F.C.J. No. 1869, at paragraphs 6 to 9.

[63] That said, having examined the issue for myself, I am not persuaded that FOCC was the legal payee of the payments made by Petro-Canada, such that it should receive credit for the monies withheld by Petro-Canada. Indeed, I am of the view that the Minister was correct in finding that FMCI was the payee of the monies in issue.

[64] The owners' contractual obligations with respect to the work to be done in relation to the Terra Nova project – both in Canada and outside of Canada – were with FMCI, and not FOCC.

[65] The fact that FMCI may have entered into a subcontract with FOCC, and may also have assigned a portion of the contractual payments due to FMCI to FOCC (representing the value of the in-Canada portion of the work provided by FOCC), does not change the fact that it was FMCI that was the payee under the Terra Nova Agreement, and not FOCC.

[66] Indeed, the Terra Nova Agreement specifically prohibited FMCI from assigning any of its rights, interests or obligations to a third party such as FOCC. While the Terra Nova Agreement did authorize FMCI to assign monies due to it under the Agreement, the assignment of revenues to FOCC by FMCI did not create any contractual rights or obligations as between FOCC and Petro-Canada.

[67] It is noteworthy that under the provisions of the assignment of revenues, FMCI specifically reserved its right to sue Petro-Canada in the event that Petro-Canada did not pay FOCC. This was necessary, as FOCC would not have had any contractual remedies against Petro-Canada, in the event that its invoices were not paid. Indeed, in the absence of any contractual relationship between FOCC and Petro-Canada, FOCC's remedies for non-payment would have been against FMCI under the terms of the subcontract between FMCI and FOCC, and not against Petro-Canada.

[68] As a consequence, it is clear that the legal payee of the monies disbursed by Petro-Canada with respect to the in-Canada portion of the work performed on the Terra Nova project in the course of the 1999-2002 taxation years was FMCI. Given that FMCI was admittedly a non-resident

company, Regulation 105 obligated Petro-Canada to withhold 15% of the monies paid to FMCI, and to remit them to the taxation authorities, to the credit of FMCI's account.

[69] As a result, there has been no overpayment of tax by FOCC.

[70] It may be that FMCI has overpaid its Canadian taxes, given that it appears that all of the monies received by FMCI in relation to the Terra Nova project may have been expensed out to FOCC. However, it is only the non-resident company that can seek a refund of the withholding tax paid by Petro-Canada: see *Sentinel Hill No. 29 v. Canada (Attorney General)*, 89 O.R. (3d) 30, (Ont. C.A.), at paragraph 10.

[71] That is, it would have been open to FMCI to seek a return of the amounts withheld by Petro-Canada by filing Canadian income tax returns reflecting the monies received from Petro-Canada and deducting the amounts paid to FOCC. FMCI's failure to do so in a timely manner does not create a right on the part of FOCC to recoup the monies that may be owing to FMCI through the refund process.

[72] At the end of the day, it appears that the source of FOCC's difficulties is not the Canada Revenue Agency or the Minister of National Revenue. The fact that FOCC may have paid out the sum of $2,821,050.33 twice in relation to the same earned income does not result from an overpayment of taxes made by FOCC. Rather it results from FOCC's decision to indemnify Petro-Canada for the $3,728,153 in taxes, penalties and interest that it paid in relation to the withholding

tax that the Minister claimed was owing in relation to the payments made by Petro-Canada for the work done in accordance with the Terra Nova Agreement.

**Conclusion**

[73] For these reasons, FOCC has not persuaded me that the Minister erred in rejecting its request for a refund, and the application for judicial review will be dismissed, with costs.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** this application for judicial review is dismissed, with costs

"Anne Mactavish"
Judge

**APPENDIX**

164. (1) If the return of a taxpayer's income for a taxation year has been made within 3 years from the end of the year, the Minister

(*a*) may,

(i) before mailing the notice of assessment for the year, where the taxpayer is, for any purpose of the definition "refundable investment tax credit" (as defined in subsection 127.1(2)), a qualifying corporation (as defined in that subsection) and claims in its return of income for the year to have paid an amount on account of its tax payable under this Part for the year because of subsection 127.1(1) in respect of its refundable investment tax credit (as defined in subsection 127.1(2)), refund all or part of any amount claimed in the return as an overpayment for the year, not exceeding the amount by which the total determined under paragraph (*f*) of the definition "refundable investment tax credit" in subsection 127.1(2) in respect of the taxpayer for the year exceeds the total determined under paragraph (*g*) of that definition in respect of the taxpayer for the year,

(ii) before mailing the notice of assessment for the year, where the taxpayer is a qualified corporation (as defined in subsection 125.4(1)) or an eligible production corporation (as defined in subsection 125.5(1)) and an amount is deemed under

164. (1) Si la déclaration de revenu d'un contribuable pour une année d'imposition est produite dans les trois ans suivant la fin de l'année, le ministre :

*a*) peut faire ce qui suit :

(i) avant de poster l'avis de cotisation pour l'année — si le contribuable est, pour l'application de la définition de «crédit d'impôt à l'investissement remboursable » au paragraphe 127.1(2), une société admissible au sens de ce paragraphe qui, dans sa déclaration de revenu pour l'année, déclare avoir payé un montant au titre de son impôt payable en vertu de la présente partie pour l'année par l'effet du paragraphe 127.1(1) et relativement à son crédit d'impôt à l'investissement remboursable au sens du paragraphe 127.1(2) — rembourser tout ou partie du montant demandé dans la déclaration à titre de paiement en trop pour l'année, jusqu'à concurrence de l'excédent du total visé à l'alinéa *c*) de la définition de «crédit d'impôt à l'investissement remboursable » au paragraphe 127.1(2) sur le total visé à l'alinéa *d*) de cette définition, quant au contribuable pour l'année,

(ii) avant de poster l'avis de cotisation pour l'année — si le contribuable est une société admissible, au sens du paragraphe 125.4(1), ou une société de production admissible, au sens du paragraphe 125.5(1) et si un montant

subsection 125.4(3) or 125.5(3) to have been paid on account of its tax payable under this Part for the year, refund all or part of any amount claimed in the return as an overpayment for the year, not exceeding the total of those amounts so deemed to have been paid, and

est réputé par les paragraphes 125.4(3) ou 125.5(3) avoir été payé au titre de son impôt payable en vertu de la présente partie pour l'année — rembourser tout ou partie du montant demandé dans la déclaration à titre de paiement en trop pour l'année, jusqu'à concurrence du total des montants ainsi réputés avoir été payés,

(iii) on or after mailing the notice of assessment for the year, refund any overpayment for the year, to the extent that the overpayment was not refunded pursuant to subparagraph (i) or (ii); and

(iii) lors de la mise à la poste de l'avis de cotisation pour l'année ou par la suite, rembourser tout paiement en trop pour l'année, dans la mesure où ce paiement n'est pas remboursé en application des sous-alinéas (i) ou (ii);

(*b*) shall, with all due dispatch, make the refund referred to in subparagraph (*a*)(iii) after mailing the notice of assessment if application for it is made in writing by the taxpayer within the period within which the Minister would be allowed under subsection 152(4) to assess tax payable under this Part by the taxpayer for the year if that subsection were read without reference to paragraph 152(4)(*a*).

*b*) doit effectuer le remboursement visé au sous-alinéa *a*)(iii) avec diligence après avoir posté l'avis de cotisation, si le contribuable en fait la demande par écrit au cours de la période pendant laquelle le ministre pourrait établir, aux termes du paragraphe 152(4), une cotisation concernant l'impôt payable en vertu de la présente partie par le contribuable pour l'année s'il n'était pas tenu compte de l'alinéa 152(4)*a*).

Repayment on objections and appeals

Remboursement sur opposition ou appel

(1.1) Subject to subsection 164(1.2), where a taxpayer

(1.1) Sous réserve du paragraphe (1.2), lorsqu'un contribuable demande au ministre, par écrit, un remboursement ou la remise d'une garantie, alors qu'il a :

(*a*) has under section 165 served a notice of objection to an assessment and the Minister has not within 120 days after the day of service confirmed or varied the assessment or made a reassessment in respect thereof, or

*a*) soit signifié, conformément à l'article 165, un avis d'opposition à une cotisation, si le ministre, dans les 120 jours suivant la date de signification, n'a pas confirmé ou modifié la cotisation ni établi une nouvelle cotisation à cet

égard;

(*b*) has appealed from an assessment to the Tax Court of Canada,

*b*) soit appelé d’une cotisation devant la Cour canadienne de l’impôt,

and has applied in writing to the Minister for a payment or surrender of security, the Minister shall, where no authorization has been granted under subsection 225.2(2) in respect of the amount assessed, with all due dispatch repay all amounts paid on account of that amount or surrender security accepted therefor to the extent that

le ministre, si aucune autorisation n’a été accordée en application du paragraphe 225.2(2) à l’égard du montant de la cotisation, avec diligence, rembourse les sommes versées sur ce montant ou remet la garantie acceptée pour ce montant, jusqu’à concurrence de l’excédent du montant visé à l’alinéa *c*) sur le montant visé à l’alinéa *d*):

(*c*) the lesser of

*c*) le moins élevé des montants suivants :

(i) the total of the amounts so paid and the value of the security, and

(i) le total des sommes ainsi versées et de la valeur de la garantie,

(ii) the amount so assessed

exceeds

(ii) le montant de cette cotisation;

(*d*) the total of

*d*) le total des montants suivants :

(i) the amount, if any, so assessed that is not in controversy, and

(i) la partie du montant de cette cotisation qui n’est pas en litige,

(ii) where the taxpayer is a large corporation (within the meaning assigned by subsection 225.1(8)), 1/2 of the amount so assessed that is in controversy.

(ii) si le contribuable est une grande société, au sens du paragraphe 225.1(8), la moitié de la partie du montant de cette cotisation qui est en litige.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-243-07 |
| **STYLE OF CAUSE:** | FMC TECHNOLOGIES COMPANY v. MINISTER OF NATIONAL REVENUE FOR HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | April 29, 2008 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | MACTAVISH, J. |
| **DATED:** | July 15, 2008 |

**APPEARANCES:**

| | |
|---|---|
| Mr. Roger Taylor<br>Mr. Al-Nawaz Nanji | FOR THE APPLICANT |
| Ms. Josée Tremblay | FOR THE RESPONDENTS |

**SOLICITORS OF RECORD:**

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| John H. Sims, Q.C.<br>Deputy Attorney General of Canada | FOR THE RESPONDENTS |