

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160304

Docket: A-132-15

Citation: 2016 FCA 74

**CORAM: RYER J.A.
WEBB J.A.
RENNIE J.A.**

BETWEEN:

BAKORP MANAGEMENT LTD.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on February 10, 2016.

Judgment delivered at Ottawa, Ontario, on March 4, 2016.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**RYER J.A.
RENNIE J.A.**

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Bakorp Management Ltd. (Bakorp) has appealed the decision of Pizzitelli J. of the Tax Court of Canada (2015 TCC 36) in relation to his interpretation of subsection 187(2) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the *Act*) in relation to the facts of this case.

[2] For the reasons that follow, I would dismiss this appeal.

I. Background

[3] The facts in this case are not in dispute. Bakorp filed its tax returns for 1993 and 1995 and reported a Part IV tax liability in each return. The balance due date for the purposes of the *Act* for the payment of Bakorp's Part IV tax liability for 1995 was June 30, 1995. Bakorp, in its tax return for 1995, determined that its Part IV tax liability for that year was \$13,333,059. On June 10, 1995 (which was before the balance due date), Bakorp paid the balance that it had determined was due for 1995 (the 1995 Final Payment). The Part IV tax liability for 1993 and 1995 was originally assessed as filed.

[4] However, as a result of subsequent reassessments, the Part IV tax liability for 1993 was increased significantly and the Part IV tax liability for 1995 was reduced by \$6,333,059 (the Overpayment). On February 3, 2000, the Minister applied the Overpayment to the outstanding Part IV tax liability for 1993. The Overpayment was less than the 1995 Final Payment.

[5] The Tax Court Judge determined that, for the purposes of calculating the amount of interest payable under subsection 187(2) of the *Act* in relation to the amounts reassessed for 1993, the "day of payment" of the Overpayment was February 3, 2000.

II. Statutory Provision

[6] The relevant provision of the *Act* is subsection 187(2) which provides that:

<p>187(2) Where a corporation is liable to pay tax under this Part and has failed to pay all or any part thereof on or before the day on or before which the tax was required to be paid, it shall pay to the Receiver General interest at</p>	<p>187(2) Une société qui n'a pas payé tout ou partie d'un impôt dont elle est redevable en vertu de la présente partie, au plus tard à la date où elle était tenue de le payer, doit verser au receveur général des intérêts sur le</p>
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<p>the prescribed rate on the amount that it failed to pay computed from the day on or before which the tax was required to be paid to the day of payment.</p>	<p>montant qu'elle n'a pas payé, calculés au taux prescrit pour la période allant de la date où elle était tenue de payer l'impôt jusqu'à la date du paiement.</p>
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III. Issue

[7] The only issue in this appeal is whether the interest charged in relation to the amounts reassessed for the Part IV tax liability for 1993 should be calculated on the basis that the “day of payment” of the Overpayment is the date that the Overpayment was applied to the Part IV tax liability for 1993 (February 3, 2000) or the earlier date (June 10, 1995) on which Bakorp paid the 1995 Final Payment to the Minister of National Revenue (Minister), albeit on account of its 1995 Part IV tax liability at that time.

IV. Analysis

[8] Bakorp acknowledges that under Part IV of the *Act*, each year is assessed separately. Bakorp also acknowledges that the Overpayment was not applied to its 1993 Part IV tax liability until February 3, 2000. However, Bakorp submits that a distinction should be drawn between when the Overpayment was applied and the day of payment of that amount. Bakorp submits that the 1995 Final Payment was greater than the Overpayment and the “day of payment”, for the purposes of determining the interest amount under subsection 187(2) of the *Act* in relation to the reassessment issued for 1993, should be June 10, 1995.

[9] On the issue of statutory interpretation, the Supreme Court of Canada in *The Queen v. Canada Trustco Mortgage Company*, 2005 SCC 54, 2005 D.T.C. 5523 (*Canada Trustco*), has given us this guidance:

[10] It has been long established as a matter of statutory interpretation that 'the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament': see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. 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 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 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.

[10] Bakorp submits that the words “day of payment” refer to the date that Bakorp made the 1995 Final Payment – June 10, 1995. However, Bakorp does acknowledge that it may be possible to also interpret “day of payment” as the day that the payment amount is applied to the tax liability for 1993 – February 3, 2000.

[11] Bakorp then submits that any such ambiguity can be resolved by the contextual analysis. In this case, Bakorp refers to subsection 161(1) of the *Act* as support for its argument that “paid” should be distinguished from “applied”. This subsection provides that:

161(1) Where at any time after a taxpayer's balance-due day for a taxation year

161(1) Dans le cas où le total visé à l'alinéa a) excède le total visé à l'alinéa b) à un moment postérieur à la date d'exigibilité du solde qui est applicable à un contribuable pour une année d'imposition, le contribuable est tenu de verser au receveur général des intérêts sur l'excédent, calculés au taux prescrit pour la période au cours de laquelle cet excédent est impayé :

(a) the total of the taxpayer's taxes payable under this Part and Parts I.3, VI and VI.1 for the year

a) le total des impôts payables par le contribuable pour l'année en vertu de la présente partie et des parties I.3, VI et VI.1;

exceeds

(b) the total of all amounts each of which is an amount paid at or before that time on account of the taxpayer's tax payable and applied as at that time by the Minister against the taxpayer's liability for an amount payable under this Part or Part I.3, VI or VI.1 for the year,

b) le total des montants représentant chacun un montant payé au plus tard à ce moment au titre de l'impôt payable par le contribuable et imputé par le ministre, à compter de ce moment, sur le montant dont le contribuable est redevable pour l'année en vertu de la présente partie ou des parties I.3, VI ou VI.1.

the taxpayer shall pay to the Receiver General interest at the prescribed rate on the excess, computed for the period during which that excess is outstanding.

[12] Bakorp submits that because paragraph 161(1)(b) of the *Act* refers to both “an amount paid” and “applied”, that two different actions are contemplated. Although section 161 does not apply to Part IV, Bakorp submits that Parliament still contemplated two different actions for the purposes of the *Act*. Since subsection 187(2) of the *Act* only refers to “payment”, Bakorp submits that only the action of payment is relevant for that subsection.

[13] I am unable to accept the argument of Bakorp for two reasons. One is related to the history of subsection 161(1) of the *Act* and the other is related to the wording of subsection 164(3) of the *Act*.

[14] Prior to April 20, 1983, subsection 161(1) of the *Act* only referred to the “day of payment” and provided that the ending date for the calculation of interest on overdue amounts was the “day of payment”. It was amended, applicable after April 19, 1983, following the decision of this Court in *Rath v. The Queen*, [1983] 1 F.C. 42, [1982] F.C.J. No. 71. In *Rath* this Court addressed the interpretation of the former subsection 161(1) of the *Act* which provided as follows:

161(1) Where the amount paid on account of tax payable by a taxpayer under this Part for a taxation year before the expiration of the time allowed for filing the return of the taxpayer's income is less than the amount of tax payable for the year under this Part, the person liable to pay the tax shall pay interest at a prescribed rate per annum on the difference between those two amounts from the expiration of the time for filing the return of income to the day of payment.

161(1) Lorsque la somme, versée au titre de l'impôt payable par un contribuable pour une année d'imposition en vertu de la présente Partie avant l'expiration du délai accordé pour l'envoi de la déclaration de revenu du contribuable, est inférieure au montant de l'impôt payable pour l'année en vertu de la présente Partie, la personne responsable du paiement de l'impôt doit acquitter des intérêts, au taux annuel prescrit, sur la différence entre ces deux sommes, pour la période allant de l'expiration du délai imparti pour la déclaration du revenu au jour du paiement.

[15] The taxation years in issue in that case were 1974 and 1975. For each year Mr. Rath was an employee. His employer deducted amounts from his salary and remitted such amounts on his behalf as payment towards his tax liability for those years. In filing his returns for those years he claimed significant amounts for moving expenses which initially were accepted as deductions in computing his income. As a result, he received refunds for each year.

[16] Mr. Rath was later reassessed and he was required to repay the refunds (or a significant part of such refunds). In applying subsection 161(1) of the *Act*, as it was then worded, this Court

simply compared the amount that he had paid, as a result of the source deductions, towards his tax liability for 1974 and 1975 to his tax liability for those years, as finally determined. This Court found that interest could only be charged on the difference between those two amounts, even though Mr. Rath had received a refund for both 1974 and 1975 that he had to subsequently repay. As a result, he was not required to pay interest on the amount that he had received as a refund and which he was required to repay, for the period that he had such refund.

[17] Subsection 161(1) of the *Act* was amended in 1983 to refer to amounts that not only had been paid but also, at the particular time in question, had been applied against a tax liability. For the period of time that Mr. Rath had his “refund”, this amount would not have been applied, at that time, against his tax liability.

[18] Since subsection 161(1) of the *Act* was amended to address a particular situation which is not applicable in this case, I do not agree that its use of “paid” and “applied” should inform the interpretation of “day of payment” for the purposes of subsection 187(2) of the *Act*.

[19] The second reason that I am unable to accept Bakorp’s argument is also related to the contextual analysis contemplated by *Canada Trustco*. While subsection 161(1) of the *Act* does not apply for the purposes of Part IV, subsection 164(3) of the *Act* does apply for the purposes of Part IV as a result of the provisions of subsection 187(3) of the *Act*.

[20] Subsection 164(3) of the *Act* provides for the payment of interest on amounts that are refunded, repaid or applied to another liability of a taxpayer. Therefore, this provision will apply

to the Overpayment in relation to 1995. In reading “the provisions of an Act as a harmonious whole”, it is necessary to consider how interest will be calculated on the Overpayment for 1995 to determine whether Bakorp could be getting an unintended benefit if its interpretation of subsection 187(2) of the *Act* is adopted in relation to 1993.

[21] This subsection is as follows:

164(3) If, under this section, an amount in respect of a taxation year (other than an amount, or a portion of the amount, that can reasonably be considered to arise from the operation of section 122.5 or 122.61) is refunded or repaid to a taxpayer or applied to another liability of the taxpayer, the Minister shall pay or apply interest on it at the prescribed rate for the period that begins on the day that is the latest of the days referred to in the following paragraphs and that ends on the day on which the amount is refunded, repaid or applied:

(a) if the taxpayer is an individual, the day that is 30 days after the individual’s balance-due day for the year;

(b) if the taxpayer is a corporation, the day that is 120 days after the end of the year;

(c) if the taxpayer is

(i) a corporation, the day that is 30 days after the day on which its return of income for the year was filed under

164(3) Si, en vertu du présent article, une somme à l’égard d’une année d’imposition est remboursée à un contribuable ou imputée sur tout autre montant dont il est redevable, à l’exception de tout ou partie de la somme qu’il est raisonnable de considérer comme découlant de l’application des articles 122.5 ou 122.61, le ministre paie au contribuable les intérêts afférents à cette somme au taux prescrit ou les impute sur cet autre montant, pour la période commençant au dernier en date des jours visés aux alinéas ci-après et se terminant le jour où la somme est remboursée ou imputée :

a) si le contribuable est un particulier, le trentième jour suivant la date d’exigibilité du solde qui lui est applicable pour l’année;

b) si le contribuable est une société, le cent vingtième jour suivant la fin de l’année;

c) si le contribuable est :

(i) une société, le trentième jour suivant celui où sa déclaration de revenu pour l’année a été produite en conformité avec

section 150, unless the return was filed on or before the corporation's filing-due date for the year, and

(ii) an individual, the day that is 30 days after the day on which the individual's return of income for the year was filed under section 150;

(d) in the case of a refund of an overpayment, the day on which the overpayment arose; and

(e) in the case of a repayment of an amount in controversy, the day on which an overpayment equal to the amount of the repayment would have arisen if the total of all amounts payable on account of the taxpayer's liability under this Part for the year were the amount by which

(i) the lesser of the total of all amounts paid on account of the taxpayer's liability under this Part for the year and the total of all amounts assessed by the Minister as payable under this Part by the taxpayer for the year

exceeds

(ii) the amount repaid.

l'article 150, sauf si la déclaration a été produite au plus tard à la date d'échéance de production qui lui est applicable pour l'année,

(ii) un particulier, le trentième jour suivant celui où sa déclaration de revenu pour l'année a été produite en conformité avec l'article 150;

d) dans le cas du remboursement d'un paiement en trop d'impôt, le jour où il y a eu paiement en trop;

e) dans le cas du remboursement d'une somme en litige, le jour où il y aurait eu un paiement en trop égal à la somme remboursée si le total des sommes payables sur ce dont le contribuable est redevable en vertu de la présente partie pour l'année était égal à l'excédent du total visé au sous-alinéa (i) sur la somme visée au sous-alinéa (ii) :

(i) le total des sommes versées sur ce dont il est redevable en vertu de la présente partie pour l'année ou, s'il est moins élevé, le total des sommes qui, selon la cotisation établie par le ministre, sont à payer en vertu de la présente partie par le contribuable pour l'année,

(ii) la somme remboursée.

[22] Although the exact date for the commencement of the interest paid to Bakorp in relation to the Overpayment for 1995 is not certain, it was before February 3, 2000 as Bakorp acknowledged that it had been paid interest in relation to the Overpayment. Bakorp's argument

related to the “day of payment”, in applying subsection 187(2) of the *Act* to the calculation of interest payable by Bakorp in relation to Bakorp’s Part IV tax liability for 1993, would not affect the commencement date for the payment of interest by the Crown to Bakorp under subsection 164(3) of the *Act* in relation to the Overpayment for 1995.

[23] Subsection 164(3) of the *Act* provides that the ending date for the payment of interest for 1995 is the date the Overpayment is applied to another liability of Bakorp (in this case Bakorp’s liability for 1993). The date the Overpayment was applied to Bakorp’s liability for 1993 was February 3, 2000. Therefore, if Bakorp’s argument that the “day of payment” of the Overpayment is June 10, 1995 when applying subsection 187(2) of the *Act* to its 1993 Part IV tax liability, then Bakorp would not only have the benefit of a reduction in interest payable by it for its liability for 1993 based on the amount of the Overpayment from June 10, 1995, but it would also have the benefit of a payment of interest to it for 1995 for a significant overlapping period in relation to the same amount. It could not have been the intention of Parliament that a single amount could, for the same period of time, give rise to both a reduction of interest payable on overdue taxes for one year and also give rise to refund interest for another year.

[24] As a result, in my view, in reading “the provisions of an Act as a harmonious whole”, the “day of payment” in subsection 187(2) of the *Act* is the day that payment is applied to the particular taxation year in issue. Since the Overpayment was treated as a payment towards the 1993 Part IV tax liability of Bakorp on February 3, 2000, this is the day of payment for the purposes of applying subsection 187(2) of the *Act* to determine the amount of interest payable by Bakorp on its Part IV tax liability for 1993.

[25] I would therefore, dismiss the appeal with costs.

"Wyman W. Webb"

J.A.

"I agree.

C. Michael Ryer J.A."

"I agree.

Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-132-15

**(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE PIZZITELLI
OF THE TAX COURT OF CANADA DATED FEBRUARY 12, 2015, DOCKET
NUMBER 2013-2882(IT)G)**

STYLE OF CAUSE: BAKORP MANAGEMENT LTD.
v. THE MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 10, 2016

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RYER, RENNIE JJ.A.

DATED: MARCH 4, 2016

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