Federal Court of Appeal  Cour d'appel fédérale

Date: 20180622

Docket: A-439-16

Citation: 2018 FCA 121

CORAM: **GAUTHIER J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

TUSK EXPLORATION LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on March 15, 2018.

Judgment delivered at Ottawa, Ontario, on June 22, 2018.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: GAUTHIER J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This appeal arises as a result of the imposition of Part XII.6 tax under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA) in relation to certain amounts that Tusk Exploration Ltd. (Tusk Exploration) indicated that it was renouncing to certain individuals with whom it did not deal at arm's length. The appeal of Tusk Exploration from the assessments or reassessments for its 2002, 2003, 2004, 2005 and 2006 taxation years imposing this tax for each of these years was

dismissed by the Tax Court of Canada (2016 TCC 238) (TCC), except for certain adjustments that the Crown acknowledged should be made.

[2] The only issue that Tusk Exploration has raised in this appeal is whether the TCC's interpretation of "purported to renounce" for the purposes of section 211.91 of the ITA is correct. Section 211.91 is the only section in Part XII.6 of the ITA.

[3] For the reasons that follow I would dismiss the appeal.

I. Background

A. *Summary of the Provisions of the ITA related to this Appeal*

[4] A Canadian exploration expense (CEE) is defined in subsection 66.1(6) of the ITA as an expense that is described in paragraphs (*a*) to (*i*) of that definition. Any expenditure described in paragraphs (*j)* to (*o*) of that definition is excluded from the definition of CEE. Generally, CEE is an expense incurred to determine the existence, location, extent or quality of an accumulation of petroleum or natural gas or the existence, location, extent or quality of a mineral resource and certain other expenses as enumerated in this definition. Any CEE incurred during a year is added to the cumulative Canadian exploration expense (CCEE) (as defined in subsection 66.1(6) of the ITA) and any balance in this CCEE pool at the end of the year is deductible as determined under subsections 66.1(2) and (3) of the ITA. For certain principal-business corporations (as defined in subsection 66(15) of the ITA) and for any person who is not a principal-business corporation, the

deduction that is allowed for CEE is generally the amount of CCEE of that person at the end of the year.

[5] Since CEE is generally incurred before any commercial production of the related resource, junior resource companies that want to incur CEE may not have the financial resources to do so and also may have expenses in excess of revenue at that time. Subsection 66(12.6) of the ITA permits a principal-business corporation that has issued a flow-through share (as defined in subsection 66(15) of the ITA) to renounce to the holders of the flow-through shares certain amounts included in CEE that have been incurred by that corporation. Although subsection 66(12.6) of the ITA only refers to a "corporation", since only a "principal-business corporation" can issue a flow-through share (as a result of the definition of flow-through share), only a principal-business corporation can renounce CEE under subsection 66(12.6) of the ITA. By allowing a principal-business corporation to renounce CEE to shareholders who have purchased flow-through shares, such a corporation can raise the funds it needs to do the exploration work.

[6] Subsections 66(12.6) and 66(12.61) of the ITA provide that any CEE renounced to a shareholder (who has acquired flow-through shares) is deemed to be CEE of that person. This allows that person to add that CEE to their CCEE account and, at the end of the year, to claim a deduction based on the balance of CCEE of that person. The total amount of CEE that can be renounced to a shareholder is the lesser of the amount paid for the flow-through shares and the balance of CCEE of the corporation on the effective date of the renunciation, after deducting certain other CEE renounced to other shareholders on the same day.

[7] Furthermore, subsection 66(12.66) of the ITA deems a corporation to have incurred certain CEE (as set out in paragraph 66(12.66)(*b*) of the ITA) before that CEE was actually incurred, provided that certain conditions are met. In particular, any such CEE must be renounced under subsection 66(12.6) of the ITA during the first three months of a particular calendar year (paragraph 66(12.66)(*e*) of the ITA) and the total amount renounced must be incurred by the end of that calendar year (paragraph 66(12.66)(*a*) of the ITA). It is also a requirement that the corporation and the person to whom the expenses are renounced deal with each other at arm's length throughout the particular year (paragraph 66(12.66)(*d*) of the ITA). Any CEE to which subsection 66(12.66) of the ITA applies is deemed to be incurred on the last day of the previous year. A renunciation of CEE under subsection 66(12.6) of the ITA because of the application of subsection 66(12.66) of the ITA was referred to by the TCC as a "Look-Back Renunciation".

[8] The combined effect of subsections 66(12.6) and (12.66) of the ITA is that the shareholders will be deemed to have incurred CEE as of the end of the year preceding the year in which such CEE is actually incurred by the corporation. This allows a taxpayer to not only claim CEE that has been incurred by another person but to also claim that CEE for the year before it is actually incurred.

[9] One of the consequences of utilizing subsection 66(12.66) of the ITA is that Part XII.6 tax will be payable by the corporation in relation to any CEE that is incurred after February of the particular year. The amount of tax imposed by Part XII.6 is determined by a formula set out in subsection 211.91(1) of the ITA. This subsection imposes a tax, calculated on a monthly basis,

starting with February, on any CEE that a corporation purported to renounce and that was not incurred by the end of that month.

[10] If by the end of the particular calendar year the corporation has not incurred all of the CEE that it purported to renounce during the first three months of that year, the formula in subsection 211.91(1) of the ITA adds an additional amount and the corporation will be required to file a statement to reflect this under subsection 66(12.73) of the ITA. The amount that the shareholders are entitled to claim for the previous calendar year will be reduced to reflect the actual amount of CEE that was incurred by the corporation. In this situation, although the amount that had been claimed in a previous year is reduced for that year, any taxpayer who deals with the corporation at arm's length will not be charged interest in relation to the CEE that was not incurred by the corporation as a result of the definition of "specified future tax consequence" in subsection 248(1) of the ITA and subsection 161(6.2) of the ITA (provided that all of the conditions imposed by the definition of "specified future tax consequence" are satisfied).

B. *Facts Related to Tusk Exploration*

[11] In this case, Tusk Exploration was not aware that in order to realize the benefit of subsection 66(12.66) of the ITA, the person to whom the corporation was renouncing CEE under subsection 66(12.6) of the ITA had to be a person with whom it was dealing at arm's length. Over the course of several years, from 2002 to 2006, Tusk Exploration filed forms indicating it was renouncing significant amounts of CEE under subsection 66(12.6) of the ITA because of the application of subsection 66(12.66) of the ITA to shareholders with whom it was not dealing at arm's length. Of the total amount of $6,350,000 of CEE that Tusk Exploration indicated it was

so renouncing over these years, $6,185,000 (97%) was to shareholders with whom Tusk Exploration was not dealing at arm's length.

[12] Although Tusk Exploration was required to complete and file a return in relation to Part XII.6 tax, it did not do so. When Tusk Exploration was audited, it was discovered that significant amounts of CEE that Tusk Exploration had indicated that it was renouncing under subsection 66(12.6) of the ITA because of the application of subsection 66(12.66) of the ITA were renounced to shareholders with whom Tusk Exploration was not dealing at arm's length. It was also discovered that the total amount of CEE incurred by the end of the calendar year during which Tusk Exploration had filed the forms indicating it was renouncing such CEE was less than the total amount of CEE Tusk Exploration indicated it was renouncing.

[13] Tusk Exploration then filed the statement as provided in subsection 66(12.73) of the ITA to reduce the amounts that were renounced under subsection 66(12.6) of the ITA because of the application of subsection 66(12.66) of the ITA to only those amounts that were actually incurred during the relevant taxation years and which were renounced to shareholders with whom Tusk Exploration was dealing at arm's length. The shareholders with whom Tusk Exploration was not dealing at arm's length were reassessed to deny the claims for CEE that had been renounced under subsection 66(12.6) of the ITA because of the application of subsection 66(12.66) of the ITA and were assessed interest on the resulting increase in tax liability. These non-arm's length shareholders were allowed to claim CEE for the year in which the CEE was actually incurred (provided that it was incurred within 24 months of the date that the agreement for the issuance of the flow-through shares was made (subsection 66(12.6) of the ITA)).

II. Decision of the TCC

[14] Justice V. Miller of the TCC, in thorough and thoughtful reasons, analysed the provisions related to the flow-through of CEE and Part XII.6, and concluded based on a textual, contextual, and purposive analysis that Part XII.6 of the ITA imposed a tax on Tusk Exploration even though the non-arm's length shareholders were not permitted to claim a deduction in the previous year for the CEE that Tusk Exploration purported to renounce to them under subsection 66(12.6) of the ITA because of the application of subsection 66(12.66) of the ITA.

III. Issue

[15] The sole issue in this case is the interpretation of "purported to renounce" in subsection 211.91(1) of the ITA and whether Tusk Exploration purported to renounce CEE under subsection 66(12.6) of the ITA because of the application of subsection 66(12.66) of the ITA to its shareholders with whom it was not dealing at arm's length.

IV. Standard of review

[16] The issue in this appeal is a question of statutory interpretation and therefore the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

V. Analysis

[17] The expression "purported to renounce" that is in issue appears in subsection 211.91(1) of the ITA. This subsection provides that:

211.91(1) Every corporation shall pay a tax under this Part in respect of each month (other than January) in a calendar year equal to the amount determined by the formula

(A + B/2 - C - D/2) × (E/12 + F/10)

Where

A is the total of all amounts each of which is an amount that the corporation purported to renounce in the year under subsection 66(12.6) or 66(12.601) because of the application of subsection 66(12.66) (other than an amount purported to be renounced in respect of expenses incurred or to be incurred in connection with production or potential production in a province where a tax, similar to the tax provided under this Part, is payable by the corporation under the laws of the province as a consequence of the failure to incur the expenses that were purported to be renounced);

B is the total of all amounts each of which is an amount that the corporation purported to renounce in the year under subsection 66(12.6) or 66(12.601) because of the application of subsection 66(12.66) and that is not included in the value of A;

C is the total of all expenses described in paragraph 66(12.66)(b) that are

(*a*) made or incurred by the end of the month by the corporation, and

(*b*) in respect of the purported renunciations in respect of which

211.91(1) Toute société doit payer en vertu de la présente partie pour chaque mois, sauf janvier, d'une année civile un impôt égal au résultat du calcul suivant :

(A + B/2 - C - D/2) × (E/12 + F/10)

où :

A représente le total des montants représentant chacun un montant auquel elle a censément renoncé au cours de l'année en vertu des paragraphes 66(12.6) ou (12.601) par l'effet du paragraphe 66(12.66), à l'exception d'un montant auquel il a censément été renoncé au titre de frais engagés ou à engager relativement à la production réelle ou éventuelle dans une province où un impôt, semblable à celui prévu par la présente partie, est payable par la société aux termes des lois provinciales par suite du défaut d'engager les frais auxquels il a censément été renoncé;

B le total des montants représentant chacun un montant auquel elle a censément renoncé au cours de l'année en vertu des paragraphes 66(12.6) ou (12.601) par l'effet du paragraphe 66(12.66) et qui n'est pas inclus dans la valeur de l'élément A;

C le total des frais visés à l'alinéa 66(12.66)b) qui, à la fois :

a) sont engagés ou effectués par la société au plus tard à la fin du mois,

b) se rapportent aux renonciations censément effectuées et

an amount is included in the value of A;	relativement auxquelles un montant est inclus dans la valeur de l'élément A;
D is the total of all expenses described in paragraph 66(12.66)(b) that are	D le total des frais visés à l'alinéa 66(12.66)b) qui, à la fois :
(*a*) made or incurred by the end of the month by the corporation, and	*a*) sont engagés ou effectués par la société au plus tard à la fin du mois,
(*b*) in respect of the purported renunciations in respect of which an amount is included in the value of B;	*b*) se rapportent aux renonciations censément effectuées et relativement auxquelles un montant est inclus dans la valeur de l'élément B;
E is the rate of interest prescribed for the purpose of subsection 164(3) for the month; and	E le taux d'intérêt prescrit pour le mois pour l'application du paragraphe 164(3);
F is	F:
(*a*) one, where the month is December, and	*a*) un, si le mois en question est décembre,
(*b*) nil, in any other case.	*b*) zéro, dans les autres cas.
(emphasis added)	(soulignement ajouté)

[18] The Supreme Court of Canada has set out the approach to be used in interpreting provisions such as the one in issue in this appeal in *Canada Trustco Mortgage Co. v. The Queen*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10:

> 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.

[19] Therefore "purported to renounce" is to be interpreted based on a textual, contextual and purposive analysis. Tusk Exploration did not appeal the findings of the TCC related to the ordinary meaning of "purported". The focus of these reasons will be on the arguments raised by Tusk Exploration in this appeal and also on the use of the expression "purported renunciation" in the definition of "specified future tax consequence", which was a definition to which Tusk Exploration referred in its memorandum of fact and law and during the hearing of this appeal.

[20] Tusk Exploration submitted that since "purports to renounce" appears in subsection 66(12.73) of the ITA, the use of this expression in that subsection should determine the meaning of "purported to renounce" in subsection 211.91(1) of the ITA. While I agree that the use of this expression in subsection 66(12.73) of the ITA is relevant, I do not agree that it has the meaning proposed by Tusk Exploration.

[21] Subsection 66(12.73) of the ITA provides that:

(12.73) Where an amount that a corporation purports to renounce to a person under subsection 66(12.6), 66(12.601) or 66(12.62) exceeds the amount that it can renounce to the person under that subsection,	(12.73) Dans le cas où un montant auquel une société a censément renoncé en faveur d'une personne en vertu des paragraphes (12.6), (12.601) ou (12.62) excède celui auquel elle pouvait renoncer en vertu de ces paragraphes, les règles suivantes s'appliquent :

(*a*) the corporation shall file a statement with the Minister in prescribed form where

(i) the Minister sends a notice in writing to the corporation demanding the statement, or

(ii) the excess arose as a consequence of a renunciation purported to be made in a calendar year under subsection 66(12.6) or 66(12.601) because of the application of subsection 66(12.66) and, at the end of the year, the corporation knew or ought to have known of all or part of the excess;

a) la société est tenue de présenter au ministre un état sur le formulaire prescrit si, selon le cas :

(i) le ministre lui en fait formellement la demande par écrit,

(ii) l'excédent découle d'une renonciation censément effectuée au cours d'une année civile en vertu des paragraphes (12.6) ou (12.601) par l'effet du paragraphe (12.66) et, à la fin de l'année, la société avait ou aurait dû avoir connaissance de tout ou partie de l'excédent;

(*b*) where subparagraph 66(12.73)(*a*)(i) applies, the statement shall be filed not later than 30 days after the Minister sends a notice in writing to the corporation demanding the statement;

b) en cas d'application du sous-alinéa *a*)(i), l'état doit être présenté au plus tard 30 jours après l'envoi de la demande;

(*c*) where subparagraph 66(12.73)(*a*)(ii) applies, the statement shall be filed before March of the calendar year following the calendar year in which the purported renunciation was made;

c) en cas d'application du sous-alinéa *a*)(ii), l'état doit être présenté avant mars de l'année civile subséquente;

(*d*) except for the purpose of Part XII.6, any amount that is purported to have been so renounced to any person is deemed, after the statement is filed with the Minister, to have always been reduced by the portion of the excess identified in the statement in respect of that purported renunciation; and

d) sauf pour l'application de la partie XII.6, tout montant ayant censément fait l'objet d'une renonciation en faveur d'une personne est réputé, une fois l'état présenté au ministre, avoir toujours été réduit de la partie de l'excédent indiquée dans l'état concernant cette renonciation;

(*e*) where a corporation fails in the statement to apply the excess fully

e) lorsqu'une société, dans l'état, n'applique pas la totalité de

to reduce one or more purported renunciations, the Minister may at any time reduce the total amount purported to be renounced by the corporation to one or more persons by the amount of the unapplied excess in which case, except for the purpose of Part XII.6, the amount purported to have been so renounced to a person is deemed, after that time, always to have been reduced by the portion of the unapplied excess allocated by the Minister in respect of that person.	l'excédent en réduction d'un ou plusieurs montants auxquels il a censément été renoncé, le ministre peut réduire le montant total auquel la société a censément renoncé en faveur d'une ou plusieurs personnes du montant de l'excédent inappliqué, auquel cas le montant auquel il a censément été renoncé en faveur d'une personne est réputé, après le moment de la réduction, sauf pour l'application de la partie XII.6, avoir toujours été réduit de la partie de l'excédent inappliqué que le ministre a attribuée à la personne.
(emphasis added)	(soulignement ajouté)

[22] In Tusk Exploration's view, the reference to "purports to renounce" in subsection 66(12.73) of the ITA was only to allow the Minister to reduce the amounts that shareholders may claim for a previous year if the corporation does not, in the particular calendar year, incur all of the CEE that it indicated in was renouncing to its shareholders in the first three months of that year.

[23] Tusk Exploration submitted that, for the purposes of subsections 66(12.73) and 211.91(1) of the ITA, amounts that a corporation "purports" or "purported" to renounce would only include "amounts that the corporation validly renounced in the year" (paragraph 43 of the memorandum of Tusk Exploration, emphasis added by Tusk Exploration). In paragraph 46 of its memorandum, Tusk Exploration stated that "[a] corporation can only purport to renounce amounts because of the application of s. 66(12.66) if all of the requirements of s. 66(12.66) are met."

[24] The requirements of subsection 66(12.66) of the ITA are as follows:

(12.66) Where	(12.66) Pour l'application du paragraphe (12.6) et pour l'application du paragraphe (12.601) et de l'alinéa (12.602)*b*), la société qui émet une action accréditive à une personne conformément à une convention est réputée avoir engagé des frais d'exploration au Canada ou des frais d'aménagement au Canada le dernier jour de l'année civile précédant une année civile donnée si les conditions ci-après sont réunies :
(*a*) a corporation that issues a flow-through share to a person under an agreement incurs, in a particular calendar year, Canadian exploration expenses or Canadian development expenses,	*a*) la société engage les frais au cours de l'année donnée;
(*a.1*) the agreement was made in the preceding calendar year,	*a.1*) la convention a été conclue au cours de l'année précédente;
(*b*) the expenses	*b*) les frais, selon le cas :
(i) are described in paragraph (*a*), (*d*), (*f*) or (*g.1*) of the definition Canadian exploration expense in subsection 66.1(6) or paragraph (*a*) or (*b*) of the definition Canadian development expense in subsection 66.2(5),	(i) sont des dépenses visées aux alinéas *a*), *d*), *f*) ou *g.1*) de la définition de frais d'exploration au Canada au paragraphe 66.1(6) ou aux alinéas *a*) ou *b*) de la définition de frais d'aménagement au Canada au paragraphe 66.2(5),
(ii) would be described in paragraph (*h*) of the definition Canadian exploration expense in subsection 66.1(6) if the reference to "paragraphs (*a*) to (*d*) and (*f*) to (*g.4*)" in that paragraph were read as "paragraphs (*a*), (*d*), (*f*) and (*g.1*)", or	(ii) seraient des dépenses visées à l'alinéa h) de la définition de frais d'exploration au Canada au paragraphe 66.1(6) si le passage « alinéas *a*) à *d*) et *f*) à *g.4*) » à cet alinéa était remplacé par « alinéas *a*), *d*), *f*) et *g.1*) »,

(iii) would be described in paragraph (*f*) of the definition Canadian development expense in subsection 66.2(5) if the words "any of paragraphs 66(12.66)(*a*) to (*e*)" were read as "paragraph 66(12.66)(*a*) or (*b*)",

(iii) seraient des dépenses visées à l'alinéa *f*) de la définition de frais d'aménagement au Canada au paragraphe 66.2(5) si le passage « à l'un des alinéas *a*) à *e*) » était remplacé par « aux alinéas *a*) ou *b*) »;

(*c*) before the end of that preceding year the person paid the consideration in money for the share to be issued,

c) la personne a payé l'action à émettre en argent avant la fin de l'année précédente;

(*d*) the corporation and the person deal with each other at arm's length throughout the particular year, and

d) la société et la personne n'ont entre elles aucun lien de dépendance tout au long de l'année donnée;

(*e*) in January, February or March of the particular year, the corporation renounces an amount in respect of the expenses to the person in respect of the share in accordance with subsection 66(12.6) or 66(12.601) and the effective date of the renunciation is the last day of that preceding year,

e) en janvier, février ou mars de l'année donnée, la société renonce à un montant au titre de ces frais, en ce qui concerne l'action, en faveur de la personne, conformément aux paragraphes (12.6) ou (12.601) et la renonciation prend effet le dernier jour de l'année précédente.

the corporation is, for the purpose of subsection (12.6), or of subsection (12.601) and paragraph (12.602)(*b*), as the case may be, deemed to have incurred the expenses on the last day of that preceding year.

[25] Paragraph 66(12.66)(*d*) of the ITA provides that one of the conditions for the application of subsection 66(12.66) of the ITA is that the corporation and the person to whom the corporation will be renouncing CEE deal with each other at arm's length. If this condition is not satisfied, in Tusk Exploration's view, there is no valid renunciation under subsection 66(12.6) of

the ITA because of the application of subsection 66(12.66) of the ITA and the non-arm's length shareholders could be reassessed without regard to subsection 66(12.73) of the ITA. Tusk Exploration submitted that subsection 66(12.73) of the ITA would not apply to any renunciation (including the one in this case) that is made (or attempted to be made) without the conditions of subsection 66(12.66) of the ITA being satisfied. In Tusk Exploration's submission, the expression "purports to renounce" in subsection 66(12.73) of the ITA only refers to CEE included in the renunciation forms that is not actually incurred by the end of the applicable calendar year.

[26] However, this argument appears to assume that the incurring of CEE in the applicable year is not also a condition of subsection 66(12.66) of the ITA. Paragraph 66(12.66)(*a*) of the ITA provides, as a condition for the application of subsection 66(12.66) of the ITA, that "a corporation that issues a flow-through share to a person under an agreement incurs, in a particular calendar year, Canadian exploration expenses". The condition is not that the corporation plans or intends to incur, but it is that the corporation "incurs". Therefore, any corporation that does not incur the CEE that it renounces will not satisfy the condition in paragraph 66(12.66)(*a*) of the ITA. As Tusk Exploration submitted that subsection 66(12.73) of the ITA would apply if a corporation does not incur, by the end of the applicable calendar year, all of the CEE that it renounced during the first three months of that year, it would mean that a corporation "purports to renounce" an amount when paragraph 66(12.66)(*a*) is not satisfied. Since a corporation "purports to renounce" when the requirements of paragraph 66(12.66)(*a*) of the ITA are not satisfied, it would logically follow that a corporation would also "purport to renounce" when the requirements of paragraph 66(12.66)(*d*) of the ITA are not satisfied.

[27] For both paragraphs 66(12.66)(*a*) and (*d*) of the ITA it may not be known when the renunciations are made (during the first three months of a particular year) whether the conditions of these paragraphs will be satisfied. All of the eligible CEE may not have (and probably has not) been incurred by that time. As well, since paragraph 66(12.66)(*d*) of the ITA provides that "the corporation and the person deal with each other at arm's length throughout the particular year", there could be a situation where a corporation is dealing at arm's length with a shareholder when the renunciation is made but later during that year that shareholder acquires control of that corporation. For the purposes of determining whether a corporation purports to renounce, it is irrelevant whether the corporation knew (or ought to have known) at the time that the corporation renounced the CEE that the condition in subsection 66(12.66)(*d*) of the ITA would not be satisfied or whether it was only after that time that the corporation realized that this condition would not be satisfied. In both situations, the corporation filed a form indicating that it was renouncing CEE (and therefore claimed that it was doing so) and the condition, as set out in paragraph 66(12.66)(*d*) of the ITA, was not satisfied. In both situations, the corporation purported to renounce CEE.

[28] I do not agree with the interpretation of "purports to renounce" as it appears in subsection 66(12.73) of the ITA as suggested by Tusk Exploration. Rather, the reference to "purports to renounce" in subsection 66(12.73) of the ITA is a reference to an amount that the corporation stated in the forms that it filed that it was renouncing and hence an amount that it claimed that it was renouncing. This would include amounts that were validly renounced and amounts that it could not renounce because any of the conditions of subsection 66(12.66) of the ITA were not satisfied. Furthermore, since subsection 66(12.73) of the ITA refers to both an amount that a

corporation “purports to renounce” and to an amount that a corporation “can renounce”, amounts that a corporation “purports to renounce” cannot be restricted to only amounts that it “can renounce”. Because Parliament has chosen to use two different expressions, it must mean that Parliament did not intend for the two expressions to be synonymous.

[29] It should also be noted that paragraph 66(12.73)(*d*) of the ITA provides that any reduction in the amounts renounced does not affect the calculation of the amount payable under Part XII.6 of the ITA. Therefore, Part XII.6 tax is not affected by any change in the amounts renounced as reflected in the statement filed with the Minister under subsection 66(12.73) of the ITA.

[30] With respect to the purpose of subsection 211.91(1) of the ITA, Tusk Exploration argued that the interpretation of the TCC would result in double taxation. Tusk Exploration argued that the purpose of Part XII.6 of the ITA was to compensate the Federal Government for allowing taxpayers to claim a deduction for CEE in a year prior to the year in which those expenses were incurred. The calculation of tax under Part XII.6 of the ITA was, in Tusk Exploration’s view, effectively interest for the loss of tax revenue in a year earlier than would otherwise be the case. The TCC accepted that “[t]he tax is essentially an interest charge as described by the Technical Notes ” (paragraph 55 of the reasons of the TCC). Although the TCC referred to the Technical Notes, Tusk Exploration was relying on a statement from the *Budget Plan*, as referred to below.

[31] Because the shareholders with whom Tusk Exploration was not dealing with at arm’s length were denied the CEE that they had claimed for the previous year, interest was imposed on

the resulting increased liability under the ITA of these shareholders for that year. Since Tusk Exploration was also taxed under Part XII.6 of the ITA, Tusk Exploration submitted that this effectively resulted in double taxation as the "interest" would be collected twice.

[32] Tusk Exploration referred to the statements made by the Minister of Finance, in the *Budget Plan* tabled in the House of Commons on March 6, 1996. The excerpt to which Tusk Exploration referred, is from page 167 of this *Budget Plan*:

> The budget proposes to extend the FTS look-back rule so that an FTS issuer can make renunciations in a calendar year in respect of eligible resource expenditures which the FTS issuer plans to incur in that year. The issuer will be required to pay deductible monthly charges in respect of any unspent funds. The monthly charge will be calculated, beginning with the month of February, as a specified percentage of the portion of FTS funds that has not been spent on qualifying resource expenditures as of the end of that month. The specified percentage is equal to 1⁄12 of the interest rate (which is presently 9 per cent) that is used for the purposes of determining refund interest under the Act. This charge effectively offsets the interest cost to the government of permitting a deduction in advance of an expense being incurred.
>
> (emphasis added)

[33] This indicates that the charge under Part XII.6 of the ITA was intended to effectively offset the interest cost arising as a result of allowing taxpayers to claim a deduction for CEE a year earlier than they would otherwise be allowed to claim this deduction. Tusk Exploration submitted that since the shareholders are paying (or have paid) interest in relation to the amounts that were denied as deductions for CEE for the previous year, there is no interest cost to the Federal Government in this case.

[34] However, the statement from the *Budget Plan* does not describe Part XII.6 tax as a calculation of the interest cost as a result of allowing shareholders to claim CEE a year before they would otherwise be allowed to claim that CEE. It only indicates that it will effectively offset this interest cost. In my view, while the calculation of the amount as set out in subsection 211.91(1) of the ITA is based on the prescribed rate of interest, it is not a calculation of the interest cost arising as a result of allowing shareholders to claim CEE a year before they would otherwise be allowed to claim such CEE.

[35] The interest cost of allowing taxpayers to claim an amount a year earlier than they would otherwise be allowed to claim that amount, is a fixed cost. The amount of the deduction is known, the amount of tax savings for a particular shareholder is a fixed amount and the length of time between the time when the deduction is allowed for the previous year and when it would otherwise have been allowed is also known (one year). Therefore, the amount of the interest cost can be calculated for each taxpayer and this amount will not change depending on which month the CEE is actually incurred. Tax returns are filed (and tax liability is determined) on an annual basis, not on a monthly basis.

[36] The calculation as set out in subsection 211.91(1) is a monthly calculation based on the amount that the corporation has not spent on CEE by the end of that month. The earlier in the year that the corporation spends the money on CEE, the lower the Part XII.6 tax. Therefore, while the Part XII.6 tax “offsets” the interest cost, it is not a direct calculation of this interest cost.

[37] There is also no indication that Parliament intended to put the parties back into the same position that they would have been in if the renunciations to the non-arm's length shareholders would not have been made. There are other provisions of the ITA dealing with non-arm's length parties where the result would effectively be double taxation. For example, under paragraph 69(1)(*a*) of the ITA, if a taxpayer has acquired anything from a person with whom that taxpayer is not dealing at arm's length for an amount in excess of the fair market value thereof, the adjustment under that paragraph is only made for the taxpayer who acquires the property. There is also a similar one-sided adjustment under paragraph 69(1)(*b*) of the ITA for dispositions of property for proceeds that are less than the fair market value of such property. As a result, double taxation could arise when the person who has acquired the property later sells it for an amount greater than the reduced cost (as determined under paragraph 69(1)(*a*) of the ITA) or the actual cost (since there is no adjustment for the purchaser who pays less than fair market value under paragraph 69(1)(*b*) of the ITA). Therefore, the potential for double taxation exists in the ITA when transactions are completed between parties who do not deal with each other at arm's length. The potential for double taxation in this case could be reduced if Tusk Exploration could benefit from the deduction in computing its income for a particular year provided in paragraph 20(1)(nn) of the ITA for any Part XII.6 tax paid in respect of that year.

[38] With respect to context, Tusk Exploration referred to the definition of "specified future tax consequence" in subsection 248(1) of the ITA, but not in relation to the use of "purported renunciation" as it appears in this definition. This definition is as follows:

specified future tax consequence for a taxation year means	conséquence fiscale future déterminée Quant à une année d'imposition :

(*a*) the consequence of the deduction or exclusion of an amount referred to in paragraph 161(7)(*a*),

a) la conséquence de la déduction ou de l'exclusion d'un montant visé à l'alinéa 161(7)*a*);

(*b*) the consequence of a reduction under subsection 66(12.73) of a particular amount purported to be renounced by a corporation after the beginning of the year to a person or partnership under subsection 66(12.6) or 66(12.601) because of the application of subsection 66(12.66), determined as if the purported renunciation would, but for subsection 66(12.73), have been effective only where

b) la conséquence de la réduction, prévue au paragraphe 66(12.73), d'un montant auquel une société a censément renoncé après le début de l'année en faveur d'une personne ou d'une société de personnes en vertu des paragraphes 66(12.6) ou (12.601) par l'effet du paragraphe 66(12.66), déterminée selon l'hypothèse que cette renonciation, n'eût été le paragraphe 66(12.73), aurait pris effet seulement si, à la fois :

(i) the purported renunciation occurred in January, February or March of a calendar year,

(i) la renonciation avait été effectuée en janvier, février ou mars d'une année civile,

(ii) the effective date of the purported renunciation was the last day of the preceding calendar year,

(ii) la renonciation avait pris effet le dernier jour de l'année civile précédente,

(iii) the corporation agreed in that preceding calendar year to issue a flow-though share to the person or partnership,

(iii) la société avait convenu, au cours de cette année précédente, d'émettre une action accréditive à une personne ou une société de personnes,

(iv) the particular amount does not exceed the amount, if any, by which the consideration for which the share is to be issued exceeds the total of all other amounts purported by the corporation to have been renounced under subsection 66(12.6) or 66(12.601) in respect of that consideration,

(iv) le montant n'avait pas dépassé l'excédent éventuel de la contrepartie de l'émission de l'action sur le total des autres montants auxquels la société a censément renoncé en vertu des paragraphes 66(12.6) ou (12.601) relativement à cette contrepartie,

(v) paragraphs 66(12.66)(*c*) and 66(12.66)(*d*) are satisfied with respect to the purported renunciation, and	(v) les conditions énoncées aux alinéas 66(12.66)*c*) et *d*) sont remplies en ce qui concerne la renonciation,
(vi) the form prescribed for the purpose of subsection 66(12.7) in respect of the purported renunciation is filed with the Minister before May of the calendar year, and	(vi) le formulaire requis par le paragraphe 66(12.7) relativement à la renonciation est présenté au ministre avant mai de l'année civile;
(*c*) the consequence of an adjustment or a reduction described in subsection 161(6.1);	*c*) la conséquence du rajustement ou de la réduction visés au paragraphe 161(6.1).
(emphasis added)	(soulignement ajouté)

[39] One of the conditions of this definition that must be satisfied is that "paragraphs 66(12.66)(*c*) and 66(12.66)(*d*) are satisfied with respect to the purported renunciation". Paragraph 66(12.66)(*d*) of the ITA requires that the corporation and the shareholders to whom it is renouncing CEE must be dealing with each other at arm's length. If, as Tusk Exploration has suggested, there is no "purported renunciation" if the condition in paragraph 66(12.66)(*d*) of the ITA is not satisfied, then this condition in subparagraph (v) of the definition of "specified future tax consequence" would be meaningless. Since Parliament does not speak in vain (*R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149, at para. 31) the logical conclusion is that Parliament had contemplated that a purported renunciation would include a renunciation that a corporation claimed that it was making under subsection 66(12.6) of the ITA because of the application of subsection 66(12.66) of the ITA to shareholders with whom that corporation was not dealing at arm's length. The meaning ascribed to "purported to renounce" in subsection 211.91(1) of the ITA should be the same as the meaning ascribed to "purported renunciation" in this definition.

VI. Conclusion

[40] As a result, I agree with the interpretation of “purported to renounce” in subsection 211.91(1) of the ITA as found by the TCC and I agree that Tusk Exploration purported to renounce the amounts that are issue in this case under subsection 66(12.6) of the ITA because of the application of subsection 66(12.66) of the ITA to its shareholders with whom it was not dealing at arm’s length in each of the years under appeal.

[41] I would dismiss the appeal with costs.

"Wyman W. Webb"
J.A.

“I agree
Johanne Gauthier J.A.”

“I agree
D. G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED OCTOBER 26, 2016, NO. 2013-3525(IT)G

DOCKET:	A-439-16
STYLE OF CAUSE:	TUSK EXPLORATION LTD. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 15, 2018
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	GAUTHIER J.A. NEAR J.A.
DATED:	JUNE 22, 2018

APPEARANCES:

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