Federal Court of Appeal Cour d'appel fédérale

**Date: 20210714**

**Docket: A-199-20**

**Citation: 2021 FCA 142**

**CORAM:** **NOËL C.J.**
**DE MONTIGNY J.A.**
**LASKIN J.A.**

**BETWEEN:**

**1455257 ONTARIO INC.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard by online video conference hosted by the Registry on June 21, 2021.

Judgment delivered at Ottawa, Ontario, on July 14, 2021.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: DE MONTIGNY J.A.
LASKIN J.A.

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**REASONS FOR JUDGMENT**

**NOËL C.J.**

[1] This is an appeal from a decision of St-Hilaire J. (the Tax Court judge), cited as 2020 TCC 64, confirming an assessment issued by the Minister of National Revenue (the Minister) against 1455257 Ontario Inc. (the appellant or the transferee) pursuant to subsection 160(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act).

[2] Subsection 160(1) provides that when a person transfers property to a non-arm's length person, the transferee and transferor are jointly and severally liable to pay any amount that the transferor was liable to pay under the Act for the taxation year in which the transfer occurred and any preceding years. The transferee's liability is limited to the excess of the fair market value of the property transferred over the fair market value of the consideration given for the property.

[3] The prime issue turns on the calculation of the transferor's tax liability for the year of the transfer and prior years. The appellant maintains that the transferor was entitled to reduce its tax liability by applying its unused non-capital losses against it, and that the Tax Court judge erred in not reducing its derivative liability accordingly (*Gaucher v. Canada*, 2000 D.T.C. 6678, [2001] 1 C.T.C. 125 (F.C.A.) at paras. 6-7).

[4] A further issue is whether subsection 160(1) makes the transferee jointly and severally liable for interest accruing on the transferor's liability from the beginning of the transferor's taxation year following the year of the transfer until the issuance of the subsection 160(1) assessment (Period B as referred to by the Tax Court judge). The appellant maintains that subsection 160(1) creates no such liability.

[5] For the reasons that follow, I am of the view that the Tax Court judge properly held that the unused non-capital losses could not be applied to reduce the transferor's tax liability because no carry-back was requested. I am also of the view that the Tax Court judge did not err in holding that subsection 160(1) makes the appellant liable to pay interest accruing on the transferor's liability during Period B.

[6] The statutory provisions that bear on the analysis are set out at the end of these reasons.

[7] The matter proceeded on the basis of an agreed statement of fact which was supplemented by the testimony of various witnesses. A summary of the salient facts follows.

**FACTS**

[8] On January 3, 2003, a non-arm's length corporation, 1473661 Ontario Inc. (661 or the transferor), transferred to the appellant an amount of $998,460 for no consideration. At the time of the transfer and at all times relevant to this appeal, Mr. Enrico Lisi was the sole shareholder, director and officer of both corporations. On October 18, 2010, the Minister, relying on this transfer, assessed the appellant pursuant to subsection 160(1) for the amount $702,374.01, representing the full amount of 661's liability under the Act as of that day. It is common ground that the better part of this liability is made up of interest.

[9] 661's liability arises entirely from its 2000 taxation year. Its taxable income for that year was initially assessed at $8,469,700. During its 2001, 2002 and 2003 taxation years, 661 incurred non-capital losses as a partner in the Grosvenor Services 2000 Limited Partnership (the Partnership) and requested that they be carried back to reduce its taxable income for that year:

- For its 2001 taxation year, 661 had Partnership losses of $6,566,808 and requested that they be carried back to its 2000 taxation year, thus reducing its 2000 taxable income to $1,902,892. On April 24, 2002, the Minister reassessed 661 taxable income for the 2000 taxation year to reflect this loss carry-back.

- For its 2002 taxation year, 661 had Partnership losses of $2,147,666 and requested that part of the losses in the amount of $1,902,892 be carried back to reduce its 2000 taxable income to nil. On October 23, 2003, the Minister reassessed 661's taxable income for the 2000 taxation year to reflect this loss carry-back. This left 661 with a non-capital losses closing balance of $244,797 for its 2002 taxation year.

- In 2004, following an audit of the Partnership and as a result of a subsequent loss determination agreed to by the partners (the Grosvenor Loss Determination), 661's Partnership losses for its 2001 taxation year were reduced to $4,033,959.71 (a decrease of $2,532,848.29) and its losses for its 2002 taxation year were increased to $2,412,306 (an increase of $264,640 that brought 661's non-capital losses closing balance for that year to $509,437). On January 14, 2005, the Minister reassessed 661's taxable income for its 2000 taxation year to reflect the net result of the Grosvenor Loss Determination. The effect of the adjustment was to increase 661's taxable income for its 2000 taxation year to $2,532,848.29.

- For its 2003 taxation year, 661 had Partnership losses in the amount of $1,827,051 and requested that they be carried back to its 2000 taxation year. The notice of reassessment indicated a non-capital loss closing balance of $509,437, which the parties agree, arose from 661's 2002 taxation year (Notice of Reassessment – 1473661 Ontario Limited (Re: January 31, 2003 Tax Year) Dated November 20, 2008, Appeal Book, vol. 4 at 777; Reasons at para. 25). On November 20, 2008, the Minister reassessed 661's 2000 taxation year in order to give effect to this loss carry-back.

[10] As a result of these carry-backs and the adjustment following the Grosvenor Loss Determination, 661's taxable income for its 2000 taxation year was reduced from $8,469,700 (as originally assessed) to $705,797.29, and 661 was left with the non-capital loss closing balance of $509,437.

[11] Despite having received numerous letters from the Canada Revenue Agency (CRA) pointing to 661's outstanding tax liability and the existence of unused losses, Mr. Lisi testified that it is only when he received the subsection 160(1) assessment in 2010 that he became aware of 661's outstanding tax liability for the 2000 taxation year and the unused non-capital losses. He essentially explained that he had always instructed his accountant to apply all of 661's available losses to offset its taxable income and wrongly assumed that this had been done (Reasons at paras. 57-60; Transcripts of Tax Court Proceedings, Appeal Book, vol. 2 at 283-285, 311; see also Letter from CRA to Enrico Lisi dated April 2, 2004, Appeal Book, vol. 4 at 783; Letter from CRA to Enrico Lisi dated August 28, 2006, Appeal Book, vol. 4 at 879; Notice of Reassessment – 1473661 Ontario Limited (Re: January 31, 2003 Tax Year) Dated November 20, 2008, Appeal Book, vol. 4 at 776-777).

[12] The appellant objected to the subsection 160(1) assessment on January 14, 2011, and upon confirmation by the Minister an appeal was brought before the Tax Court. The appellant, which had been dissolved in 2007, was revived for the purpose of pursuing this appeal (*1455257 Ontario Inc. v. Canada*, 2016 FCA 100, [2016] 4 F.C.R. 375).

**DECISION UNDER APPEAL**

[13] The Tax Court judge identified the first issue to be decided as follows: whether 661 requested that the unused losses that arose during its 2002 taxation year be applied to reduce its taxable income for its 2000 taxation year (Reasons at para. 33). She premised her question on the fact that nothing in paragraph 111(1)(*a*)—the provision that allows for the carry-back of non-capital losses—authorizes the Minister to determine how taxpayers should allocate their losses (Reasons at paras. 30-32).

[14] After noting that subsection 152(6)—the provision under which taxpayers may request the carry-back of non-capital losses—contemplates the use of a prescribed form, and that no such form was filed (Reasons at paras. 41, 45), she rejected the appellant's contention that an implied request was made in this case (Reasons at paras. 47-49).

[15] The Tax Court judge also looked into CRA's audit policy that allows taxpayers to amend their original carry-back request in circumstances where an internal adjustment results in an increase in income in a given year and a loss from another year has been applied to that year (Reasons at paras. 51-53).

[16] She found that this policy could not assist 661 because the Minister was not provided with sufficient information to rely on in order to apply the 2002 taxation year's unused losses to the 2000 taxation year (Reasons at para. 60). She therefore held that the subsection 160(1) assessment issued against the appellant could not be reduced to take into account the unused losses that arose during 661's 2002 taxation year (Reasons at para. 61).

[17] The Tax Court judge then turned to the question whether subsection 160(1) allowed the Minister to recover from the transferee the interest that accrued on 661’s liability during Period B, i.e. from the beginning of the taxation year following the year of the transfer (February 1, 2003) to the date of the issuance of the subsection 160(1) assessment (October 18, 2010) (Reasons at paras. 62-65). She held that the wording of subsection 160(1) is unambiguous and made the appellant liable for this amount (Reasons at paras. 73-74).

[18] The Tax Court judge went on to dismiss the appellant’s argument that similar provisions in other legislation operate differently, holding that nothing suggests that subsection 160(1) should apply in the same manner (Reasons at para. 75). She further found that although the decision of the Tax Court in *Currie v. The Queen*, 2008 TCC 338 [*Currie*] supports the position of the appellant, the case law over the last ten years favours the opposite view (Reasons at paras. 76, 81-82).

[19] The Tax Court judge went on to dismiss the appeal.

**POSITION OF THE PARTIES**

[20] The appellant submits that the Tax Court judge erred in holding that a loss-carry back could not take place without a prescribed form being filed or a request being made (Memorandum of the Appellant at paras. 35-36). It submits that when a carry-back has been given effect to in the past to fully offset taxable income in a given year, the Minister should infer that the taxpayer intends to do the same when subsequent adjustments result in taxable income for that year (Memorandum of the Appellant at paras. 52-53).

[21] Turning to the question whether subparagraph 160(1)(*e*)(ii) made the appellant liable for the interest that accrued on the transferor's liability during Period B, the appellant refers to a number of statutes that create a derivative liability in similar circumstances, but which do not make the transferee liable to pay this amount. It submits that the coherent interpretation of related federal legislation requires that subsection 160(1) be construed the same way (Memorandum of the Appellant at paras. 81-83, citing *Excise Tax Act*, R.S.C. 1985, c. E-15, ss. 325(1); *Excise Act, 2001*, S.C. 2002, c. 22, ss. 297(1); *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), ss. 97.29(1); *Softwood Lumber Products Export Charge Act, 2006*, S.C. 2006, c. 13, ss. 96(1); *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, ss.161(1)).

[22] The appellant adds that the principled approach to the interpretation of bilingual legislation required the Tax Court judge to hold that the narrower words "pour une de ces années" in the French text of subparagraph 160(1)(*e*)(ii) should prevail over the broader words "in or in respect of" that or those taxation years (Memorandum of the Appellant at para. 80). According to the appellant, the effect of the French text, in contrast with the English text, is to limit the transferee's joint and several liability to the amount owed by the transferor at the end of the taxation year in which the transfer takes place.

[23] The appellant adds that the ambiguity that results from the use of these words has given rise to a rift in the jurisprudence of the Tax Court (Memorandum of the Appellant at paras. 68-70). On the one hand, the decision in *Currie*—adopted with approval in *Provost v. The Queen*, 2009 TCC 585—holds that a transferee is liable to pay the interest that accrued on the transferor's liability up to the end of the taxation year in which the transfer takes place and

nothing more (*Currie* at para. 22). On the other hand, *Montreuil v. Canada*, [1994] T.C.J. No. 418 [*Montreuil*], followed by *Gagnon v. The Queen*, 2010 TCC 482 and *Richard v. The Queen*, 2011 TCC 136, holds that this liability extends to interest accruing during Period B (Memorandum of the Appellant at paras. 68-70).

[24] The appellant submits that the Tax Court judge erred in following *Montreuil* and asks that we repudiate this line of cases and confirm that *Currie* was correctly decided (Memorandum of the Appellant at para. 87).

[25] The Crown for her part essentially adopts as her own the reasoning of the Tax Court judge and submits that the appellant has failed to demonstrate that this reasoning is in any way flawed or incorrect.

## ANALYSIS

[26] There are two issues to address in this appeal. The first is whether 661's tax liability for the year of the transfer and for prior taxation years stood at $702,374.01 as was found by the Tax Court judge. This in turn requires that we determine whether she properly held that 661's taxable income for its 2000 taxation year cannot be reduced by the unused non-capital losses arising in 661's 2002 taxation year. The second issue is whether the Tax Court judge properly held that the appellant, as the transferee, is liable for the interest accruing on 661's liability during Period B pursuant to subsection 160(1).

A. *Standard of review*

[27] Questions of law are to be reviewed on a standard of correctness whereas pronouncements on questions of fact or questions of mixed fact and law cannot be overturned in the absence of a palpable and overriding error, unless it involves an extricable question of law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 8, 26-37).

B. *661's Tax Liability*

[28] The appellant maintains that the Tax Court judge erred in failing to hold that 661's tax liability for its 2000 taxation year is to be reduced by $509,437, being the amount of 661's unused non-capital losses at the close of its 2002 taxation year. It submits that its derivative liability should be reduced accordingly. This contention rests on the proposition that 661 did not have to request that its non-capital losses be carried back to its 2000 taxation year in order for the Minister to do so and that, in any event, such a request was made by 661 on the facts of this case.

[29] Independently of the questions raised by the appellant, I note that 661's tax liability for the taxation years in issue must be computed by reference to the last validly issued reassessment for those years. Amongst these prior reassessments, the one dated November 20, 2008, with respect to 661's 2000 taxation year was issued after August 13, 2007, that is after the extended six-year limitation period set out in subparagraph 152(4)(*b*)(i) had expired. A reassessment that is statute-barred, if that be the case, is of no force or effect. This would significantly increase 661's tax liability as this reassessment gives effect to a loss carry-back in the amount of $1,827,051.

[30] When asked to comment by way of a pre-hearing Direction, the parties confirmed that the reassessment was indeed issued after the limitation period had expired, but both indicated that it was likely issued after a waiver had been filed. They cautioned that this could not be established with certainty as the validity of this reassessment was never in dispute, but that in any event the context in which the reassessment was issued would have triggered CRA's implied waiver policy (CRA Technical Interpretation Letter – October 31, 1994, "Reassessment of Statute-Barred Return", Views Doc 9412337, Joint Book of Authorities, vol. 4 at 1245-1247). According to this policy, when a request to carry back losses is filed at a time when the target year remains open, but the Minister does not give effect to the request within that time, an implied waiver will be considered to have been given so as to allow the Minister to give effect to the requested carry-back.

[31] Given the parties common position on this point, the Court is willing to conduct its analysis on the basis that 661's 2000 taxation year was covered by a waiver.

(1) Must a request be made before non-capital losses can be carried back and, if so, in what form?

[32] The Tax Court judge found both that a request must be made in order for non-capital losses to be carried back and that this request must be made in prescribed form (Reasons at para. 50). It is common ground that no prescribed form was filed. She also considered whether a request could be said to have been made otherwise than by the filing of a prescribed form and found that no such request had been made (Reasons at paras. 41, 51, 60). I can see no error in this regard.

[33] Nothing in the carry-back statutory scheme allows the Minister to determine when and how non-capital losses should be applied. This framework effectively grants taxpayers the exclusive right to determine when and how their non-capital losses are to be applied. The wording of paragraph 111(1)(*a*) and subsection 152(6) is clear to this effect and provides for a result that is consistent with the object of these provisions and the intention of Parliament (see *CCLI (1994) Inc. v. R.*, 2007 FCA 185 at para. 42):

- Paragraph 111(1)(*a*) provides that a "taxpayer may claim", in computing its taxable income, unused losses up to three taxation years preceding the year in which they are incurred.

- Pursuant to subsection 152(6), a deduction under section 111 in respect of a loss incurred in a subsequent taxation year can be "claimed by the taxpayer" by filing with the Minister a prescribed form no later than six months after the end of that subsequent taxation year (paragraph 150(1)(*a*)). In such a case, the Minister shall reassess the taxpayer's tax for any relevant taxation year.

[34] It follows that in order to apply its non-capital losses against its taxable income for its 2000 taxation year, 661 had to comply with subsection 152(6) within the six-month time frame, that is on or before July 31, 2002. The appellant properly notes that the Minister had the capacity to waive the requirement to file a prescribed form (see subsection 220(2.1)). However, even if the Minister was willing to waive this requirement, it remained that a loss carry-back had to be claimed within this time frame.

[35] The appellant contends that this gives rise to an absurd result in the present case. Specifically, it argues that 661 could not possibly have claimed the unused losses resulting from the Grosvenor Loss Determination within that timeframe as the subsection 152(6) time limit had already expired when the adjustment to 661's non-capital loss balance for the 2002 taxation year was made (Memorandum of the Appellant at paras. 32-33, 36).

[36] However, the appellant overlooks the fact that the Minister may still give effect to such a request after that period has expired. Pursuant to subparagraph 152(4)(*b*)(i), the period for requesting a carry-back of non-capital losses is extended to three years following the end of the normal reassessment period for the taxation year in which the loss is sought to be applied (see also subsection 152(3.1)). In the present case, this period would have ended on August 13, 2007, six years after the issuance of the original assessment for 661's 2000 taxation year, well in time for the impact of the Grosvenor Loss Determination to be taken into account.

[37] The Minister's decision to give effect to such a request is arguably discretionary given the use of the word "may" in subparagraph 152(4)(*b*)(i) but even then, this discretion would have to be properly exercised. A request made pursuant to subparagraph 152(4)(*b*)(i) cannot be arbitrarily refused. It follows that there is no basis for the appellant's contention that construing subsection 152(6) as the Tax Court judge did left it without any recourse insofar as the losses resulting from the Grosvenor Loss Determination are concerned.

[38] Furthermore, I agree with the Tax Court judge that a request to carry back losses cannot be inferred from a pattern of prior conduct (Reasons at para. 49). The Minister cannot assume

that because a taxpayer has applied losses to erase taxable income in the past, its intention will be the same in the future. As is the case for all discretionary deductions (e.g. capital cost allowance), only the taxpayer can direct when and how its losses are to be applied.

[39] The appellant's initial ground for challenging the Tax Court judge's decision must accordingly be rejected.

(2) In reassessing 661's 2000 taxation year in order to give effect to the Grosvenor Loss Determination, was the Minister required to carry back 661's unused non-capital losses?

[40] Regardless of the preceding discussion, the appellant argues that the Minister, in reassessing 661's 2000 taxation year under subsection 152(1.7) in order to make the changes necessary to give effect to the subsection 152(1.4) Grosvenor Loss Determination, had the obligation to carry back 661's unused losses to that year (Memorandum of the Appellant at paras. 44-48).

[41] There is no basis for this contention. Nothing in the wording of subsections 152(1.4) or 152(1.7) requires the Minister to apply non-capital losses when giving effect to a partnership loss determination. Pursuant to these provisions, such a determination is binding on the Minister and each member of the partnership and the Minister is given the power to reassess the members of the partnership "as may be necessary to give effect to" it.

[42] This is what occurred here. Following the Grosvenor Loss Determination, the Minister reassessed 661 to adjust its taxable income and non-capital losses for the 2000, 2001 and 2002

taxation years. However, when and how non-capital losses resulting from the Grosvenor Loss Determination were to be applied remained subject to 661's direction, which, as the Tax Court judge found, was never given (Reasons at para. 60).

[43] It follows that the Tax Court judge committed no error in holding that the Minister had no obligation to reassess 661's 2000 taxation year in order to apply its unused non-capital losses from 2002 against its taxable income for its 2000 taxation year.

C. *The extent of the transferee's liability pursuant to subsection 160(1)*

[44] The appellant submits that the Tax Court judge erred in holding that its derivative liability extended to the approximate amount of $530,000 being the interest that accrued on 661's liability during Period B, i.e. from the beginning of the taxation year following the taxation year in which the transfer took place (February 1, 2003) to the time of the issuance of the subsection 160(1) assessment (October 18, 2010) (Memorandum of the Appellant at para. 58).

[45] I first note that the reference made by the appellant to other statutes that create a similar derivative liability without creating a liability for interest accruing during Period B is of no assistance as the provisions to which it points do not bear the same language as subparagraph 160(1)(*e*)(ii) (Memorandum of the Appellant at paras. 81-83). This is particularly so when regard is had to the numerous changes brought to the wording of subsection 160(1) over the years, which were not reflected in any of these other statutes and which evidence a distinct treatment (*An Act to Amend the Statute Law Relating to Income Tax (No. 2)*, S.C. 1980-81-82-83, c. 140, s. 107; *An Act to Amend the Income Tax Act, a Related Act, the Canada Pension Plan and the*

*Unemployment Insurance Act, 1971*, S.C. 1987, c. 46, s. 52; *Technical Tax Amendments Act, 2012*, S.C. 2013, c. 34, s. 313).

[46] The appellant's main contention is that a principled interpretation of bilingual legislation—specifically the words "in respect of" in the English text of subparagraph 160(1)(*e*)(ii) and the word "pour" in the French text—leads to the conclusion that the narrower French text should prevail (Memorandum of the Appellant at para. 80). However, I fail to see the discrepancy on which this contention is based. The phrase "in respect of" is broad and all encompassing (see *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 39, as applied in a pure income tax context in *Butler v. Canada*, 2016 FCA 65 and *Canada v. Stapley*, 2006 FCA 36), and the word "pour" in the French text can have a similarly broad meaning. In this respect, I agree with the Tax Court judge that *Montreuil* correctly identifies the meaning of those words given the context in which they are used:

> [T]he Grand Robert de la langue française gives particularly to the word "pour" the meaning of "en ce qui concerne" and "par rapport à". The English expression used in subparagraph 160(1)(*e*)(ii) "in respect of" has the same meaning… (citations omitted)
>
> (*Montreuil* at para. 41)

[47] It can be seen that both texts can be read so as to capture interest that accrues on the transferor's liability from the year of the transfer onwards. This aligns with the purpose of subsection 160(1) which is to allow for the collection of "the total of all amounts" that the transferor is liable to pay under the Act without any distinction as to the makeup of these amounts (see *Loates v. Canada,* 2016 FCA 47 at para. 11) and without any time limitation. Nothing in the text, context and purpose of this provision supports a reading that would prevent

the recovery of interest accruing during Period B. Indeed, I can think of no reason why Parliament would have imposed such a limitation.

[48] The appellant did make the argument that construing subsection 160(1) so as to allow interest to continue to accrue "behind the scenes" and "unbeknownst" to the transferee with no time limitation was fundamentally unfair as it exposes the transferee to a liability that could in theory grow indefinitely (Memorandum of the Appellant at footnote 85). I accept that subsection 160(1) can be seen as harsh in many respects (*Canada v. 9101-2310 Québec Inc.*, 2013 FCA 241 at para. 60), but the liability to which the transferee is exposed under that provision can never exceed the difference between the fair market value of the property transferred and the fair market value of the consideration given. Keeping in mind that we are dealing with a collection measure, this limit strikes the right balance as it allows for the recovery of what would have been available to the Minister for attachment in the hands of the transferor in the absence of the transfer, without depriving the transferee of anything more than the value of the advantage derived from the transfer.

[49] In summary, *Montreuil* correctly held that the broad language of subparagraph 160(1)(*e*)(ii) makes the transferee liable to pay interest accruing on the transferor's liability up to the time of the issuance of the subsection 160(1) assessment.

[50] I note in closing that *Montreuil* left open the question whether interest accrues on the liability of the transferee once a subsection 160(1) assessment has been issued (*Montreuil* at para. 42). This issue became controversial when the Tax Court held that interest does not accrue

during this period (*Algoa Trust v. Canada*, [1998] T.C.J. No. 292) and this Court later expressed the contrary view in the course of an *obiter dictum* (*Zen v. Canada (National Revenue)*, 2010 FCA 180 at paras. 42-46). Although this issue does not arise here, I believe that it is useful to say that it was conclusively settled by the amendment brought to the closing paragraph of subsection 160(1) in 2013, which confirms in express terms that interest accrues on an assessment issued under this provision.

**DISPOSITION**

[51] I would dismiss the appeal with costs.

"Marc Noël"
Chief Justice

"I agree.
Yves de Montigny J.A."

"I agree.
J.B. Laskin J.A."

**ANNEX**

***Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)**

**PART I — INCOME TAX**

**DIVISION C — COMPUTATION OF TAXABLE INCOME**

**Lump-sum Payments**

**Losses deductible**

**111 (1)** For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such portion as the taxpayer may claim of the taxpayer's

**Non-capital losses**

**(a)** non-capital losses for the 7 taxation years immediately preceding and the 3 taxation years immediately following the year;

…

**DIVISION I — RETURNS, ASSESSMENTS, PAYMENT AND APPEALS**

**Returns**

**Filing returns of income — general rule**

**150 (1)** Subject to subsection (1.1), a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer,

**Corporations**

**(a)** in the case of a corporation, by or on behalf of the corporation within six months after the end of the year…

…

**Assessment**

**Determination in respect of a partnership**

***Loi de l'impôt sur le revenu*, L.R.C. 1985, c. 1 (5e suppl.)**

**PARTIE I — IMPÔT SUR LE REVENU**

**SECTION C — CALCUL DU REVENU IMPOSABLE**

**Paiements forfaitaires**

**Pertes déductibles**

**111 (1)** Pour le calcul du revenu imposable d'un contribuable pour une année d'imposition, peuvent être déduites les sommes appropriées suivantes :

**Pertes autres que des pertes en capital**

**a)** ses pertes autres que des pertes en capital subies au cours des 7 années d'imposition précédentes et des 3 années d'imposition suivantes;

[…]

**SECTION I — DÉCLARATIONS, COTISATIONS, PAIEMENT ET APPELS**

**Déclarations**

**Déclarations — règle générale**

**150 (1)** Sous réserve du paragraphe (1.1), une déclaration de revenu sur le formulaire prescrit et contenant les renseignements prescrits doit être présentée au ministre, sans avis ni mise en demeure, pour chaque année d'imposition d'un contribuable :

**Sociétés**

**a)** dans le cas d'une société, par la société, ou en son nom, dans les six mois suivant la fin de l'année […]

[…]

**Cotisation**

**Montant déterminé relativement à une société de personnes**

**152 (1.4)** The Minister may, within 3 years after the day that is the later of

**(a)** the day on or before which a member of a partnership is, or but for subsection 220(2.1) would be, required under section 229 of the Income Tax Regulations to make an information return for a fiscal period of the partnership, and

**(b)** the day the return is filed,

determine any income or loss of the partnership for the fiscal period and any deduction or other amount, or any other matter, in respect of the partnership for the fiscal period that is relevant in determining the income, taxable income or taxable income earned in Canada of, tax or other amount payable by, or any amount refundable to or deemed to have been paid or to have been an overpayment by, any member of the partnership for any taxation year under this Part.

…

**Binding effect of determination**

**152 (1.7)** Where the Minister makes a determination under subsection 152(1.4) or a redetermination in respect of a partnership,

**(a)** subject to the rights of objection and appeal of the member of the partnership

**(1.4)** Le ministre peut déterminer le revenu ou la perte d'une société de personnes pour un exercice de celle-ci ainsi que toute déduction ou tout autre montant, ou toute autre question, se rapportant à elle pour l'exercice qui est à prendre en compte dans le calcul, pour une année d'imposition, du revenu, du revenu imposable ou du revenu imposable gagné au Canada d'un de ses associés, de l'impôt ou d'un autre montant payable par celui-ci, d'un montant qui lui est remboursable ou d'un montant réputé avoir été payé, ou payé en trop, par lui, en vertu de la présente partie. Cette détermination se fait dans les trois ans suivant le dernier en date des jours suivants :

**a)** le jour où, au plus tard, un associé de la société de personnes est tenu par l'article 229 du Règlement de l'impôt sur le revenu de remplir une déclaration de renseignements pour l'exercice, ou serait ainsi tenu si ce n'était le paragraphe 220(2.1);

**b)** le jour où la déclaration est produite.

[…]

**Ministre et associés liés**

**(1.7)** Les règles suivantes s'appliquent lorsque le ministre détermine un montant en application du paragraphe (1.4) ou détermine un montant de nouveau relativement à une société de personnes :

**a)** sous réserve des droits d'opposition et d'appel de l'associé de la société de personnes

referred to in subsection 165(1.15) in respect of the determination or redetermination, the determination or redetermination is binding on the Minister and each member of the partnership for the purposes of calculating the income, taxable income or taxable income earned in Canada of, tax or other amount payable by, or any amount refundable to or deemed to have been paid or to have been an overpayment by, the members for any taxation year under this Part; and

**(b)** notwithstanding subsections 152(4), 152(4.01), 152(4.1) and 152(5), the Minister may, before the end of the day that is one year after the day on which all rights of objection and appeal expire or are determined in respect of the determination or redetermination, assess the tax, interest, penalties or other amounts payable and determine an amount deemed to have been paid or to have been an overpayment under this Part in respect of any member of the partnership and any other taxpayer for any taxation year as may be necessary to give effect to the determination or redetermination or a decision of the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada.

…

**Definition of normal reassessment period**

**152 (3.1)** For the purposes of subsections (4), (4.01), (4.2), (4.3), (5) and (9), the normal reassessment period for a taxpayer in respect of a taxation year is

**(a)** where at the end of the year the taxpayer is a mutual fund trust or a corporation other than a Canadian-controlled private corporation, the period that ends 4 years after the earlier of the day of mailing of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of mailing

visé au paragraphe 165(1.15) relativement au montant déterminé ou déterminé de nouveau, la détermination ou nouvelle détermination lie le ministre ainsi que les associés de la société de personnes pour ce qui est du calcul, pour une année d’imposition, du revenu, du revenu imposable ou du revenu imposable gagné au Canada des associés, de l’impôt ou d’un autre montant payable par ceux-ci, d’un montant qui leur est remboursable ou d’un montant réputé avoir été payé, ou payé en trop, par eux, en vertu de la présente partie;

**b)** malgré les paragraphes (4), (4.01), (4.1) et (5), le ministre peut, avant la fin du jour qui tombe un an après l’extinction ou la détermination des droits d’opposition et d’appel relativement au montant déterminé ou déterminé de nouveau, établir les cotisations voulues concernant l’impôt, les intérêts, les pénalités ou d’autres montants payables et déterminer les montants réputés avoir été payés, ou payés en trop, en vertu de la présente partie relativement à un associé de la société de personnes et à tout autre contribuable pour une année d’imposition pour tenir compte du montant déterminé ou déterminé de nouveau ou d’une décision de la Cour canadienne de l’impôt, de la Cour d’appel fédérale ou de la Cour suprême du Canada.

[…]

**Période normale de nouvelle cotisation**

**152 (3.1)** Pour l’application des paragraphes (4), (4.01), (4.2), (4.3), (5) et (9), la période normale de nouvelle cotisation applicable à un contribuable pour une année d’imposition s’étend sur les périodes suivantes :

**a)** quatre ans suivant soit le jour de mise à la poste d’un avis de première cotisation en vertu de la présente partie le concernant pour l’année, soit, s’il est antérieur, le jour de mise à la poste d’une première notification portant qu’aucun impôt n’est payable par lui pour l’année, si, à la fin de l’année, le contribuable

of an original notification that no tax is payable by the taxpayer for the year; and

est une fiducie de fonds commun de placement ou une société autre qu'une société privée sous contrôle canadien;

**(b)** in any other case, the period that ends 3 years after the earlier of the day of mailing of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of mailing of an original notification that no tax is payable by the taxpayer for the year..

**b)** trois ans suivant le premier en date de ces jours, dans les autres cas.

…

[…]

**Assessment and reassessment**

**152 (4)** The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

…

**(b)** the assessment, reassessment or additional assessment is made before the day that is 3 years after the end of the normal reassessment period for the taxpayer in respect of the year and

**(i)** is required under subsection (6) or (6.1), or would be so required if the taxpayer had claimed an amount by filing the prescribed form referred to in the subsection on or before the day referred to in the subsection,

…

**Cotisation et nouvelle cotisation**

**152 (4)** Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :

[…]

**b)** la cotisation est établie avant le jour qui suit de trois ans la fin de la période normale de nouvelle cotisation applicable au contribuable pour l'année et, selon le cas :

**(i)** est à établir en vertu du paragraphe (6) ou (6.1), ou le serait si le contribuable avait déduit une somme en présentant le formulaire prescrit visé à ce paragraphe au plus tard le jour mentionné à ce paragraphe,

[…]

**Reassessment where certain deductions claimed**

**152 (6)** Where a taxpayer has filed for a particular taxation year the return of income

**Nouvelle cotisation en cas de nouvelles déductions**

**152 (6)** Lorsqu'un contribuable a produit la déclaration de revenu exigée par l'article 150

required by section 150 and an amount is subsequently claimed by the taxpayer or on the taxpayer's behalf for the year as

…

**(c)** a deduction under section 118.1 in respect of a gift made in a subsequent taxation year or under section 111 in respect of a loss for a subsequent taxation year,

…

by filing with the Minister, on or before the day on or before which the taxpayer is, or would be if a tax under this Part were payable by the taxpayer for that subsequent taxation year, required by section 150 to file a return of income for that subsequent taxation year, a prescribed form amending the return, the Minister shall reassess the taxpayer's tax for any relevant taxation year (other than a taxation year preceding the particular taxation year) in order to take into account the deduction claimed.

…

**Payment of Tax**

**Tax liability re property transferred not at arm's length**

**160 (1)** Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

**(a)** the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,

**(b)** a person who was under 18 years of age, or

**(c)** a person with whom the person was not dealing at arm's length,

the following rules apply:

pour une année d'imposition et que, par la suite, une somme est demandée pour l'année par lui ou pour son compte à titre de :

[…]

**c)** déduction, en application de l'article 118.1, relativement à un don fait au cours d'une année d'imposition ultérieure ou, en application de l'article 111, relativement à une perte subie pour une année d'imposition ultérieure;

[…]

en présentant au ministre, au plus tard le jour où le contribuable est tenu, ou le serait s'il était tenu de payer de l'impôt en vertu de la présente partie pour cette année d'imposition ultérieure, de produire en vertu de l'article 150 une déclaration de revenu pour cette année d'imposition ultérieure, un formulaire prescrit modifiant la déclaration, le ministre doit fixer de nouveau l'impôt du contribuable pour toute année d'imposition pertinente (autre qu'une année d'imposition antérieure à l'année donnée) afin de tenir compte de la déduction demandée.

[…]

**Paiement de l'impôt**

**Transfert de biens entre personnes ayant un lien de dépendance**

**160 (1)** Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :

**a)** son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;

**b)** une personne qui était âgée de moins de 18 ans;

**c)** une personne avec laquelle elle avait un lien de dépendance,

les règles suivantes s'appliquent :

**(d)** the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and

**d)** le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement d'une partie de l'impôt de l'auteur du transfert en vertu de la présente partie pour chaque année d'imposition égale à l'excédent de l'impôt pour l'année sur ce que cet impôt aurait été sans l'application des articles 74.1 à 75.1 de la présente loi et de l'article 74 de la *Loi de l'impôt sur le revenu*, chapitre 148 des Statuts revisés du Canada de 1952, à l'égard de tout revenu tiré des biens ainsi transférés ou des biens y substitués ou à l'égard de tout gain tiré de la disposition de tels biens;

**(e)** the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of

**e)** le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

**(i)** the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and

**(i)** l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,

**(ii)** the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

**(ii)** le total des montants représentant chacun un montant que l'auteur du transfert doit payer en vertu de la présente loi (notamment un montant ayant ou non fait l'objet d'une cotisation en application du paragraphe (2) qu'il doit payer en vertu du présent article) au cours de l'année d'imposition où les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années.

but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.

Toutefois, le présent paragraphe n'a pas pour effet de limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi ni celle du bénéficiaire du transfert quant aux intérêts dont il est redevable en vertu de la présente loi sur une cotisation établie à l'égard du montant qu'il doit payer par l'effet du présent paragraphe.

…

[…]

**Assessment**

**Cotisation**

**160 (2)** The Minister may at any time assess a taxpayer in respect of any amount payable because of this section, and the provisions of this Division (including, for greater certainty, the provisions in respect of interest payable) apply, with any modifications that the circumstances require, in respect of an assessment made under this section as though it had been made under section 152 in respect of taxes payable under this Part.

**160 (2)** Le ministre peut, en tout temps, établir une cotisation à l’égard d’un contribuable pour toute somme à payer en vertu du présent article. Par ailleurs, les dispositions de la présente section, notamment celles portant sur les intérêts à payer, s’appliquent, avec les adaptations nécessaires, aux cotisations établies en vertu du présent article comme si elles avaient été établies en vertu de l’article 152 relativement aux impôts à payer en vertu de la présente partie.

## PART XV — ADMINISTRATION AND ENFORCEMENT

### Administration

### Waiver of filing of documents

**220 (2.1)** Where any provision of this Act or a regulation requires a person to file a prescribed form, receipt or other document, or to provide prescribed information, the Minister may waive the requirement, but the person shall provide the document or information at the Minister’s request.

## PARTIE XV — APPLICATION ET EXÉCUTION

### Application

### Renonciation

**220 (2.1)** Le ministre peut renoncer à exiger qu’une personne produise un formulaire prescrit, un reçu ou autre document ou fournisse des renseignements prescrits, aux termes d’une disposition de la présente loi ou de son règlement d’application. La personne est néanmoins tenue de fournir le document ou les renseignements à la demande du ministre.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-199-20 |

**APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE GABRIELLE ST-HILAIRE DATED JULY 22, 2020, DOCKET NO. 2012-4138(IT)G**

| | |
|---|---|
| **STYLE OF CAUSE:** | 1455257 ONTARIO INC. v. HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | HEARD BY ONLINE VIDEOCONFERENCE |
| **DATE OF HEARING:** | JUNE 21, 2021 |
| **REASONS FOR JUDGMENT BY:** | NOËL C.J. |
| **CONCURRED IN BY:** | DE MONTIGNY J.A.<br>LASKIN J.A. |
| **DATED:** | JULY 14, 2021 |

**APPEARANCES:**

| | |
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