Docket: 2013-2882(IT)G

BETWEEN:

BAKORP MANAGEMENT LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 10 and 11, 2015, at Toronto, Ontario

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant: Matthew G. Williams
Counsel for the Respondent: Jenny P. Mboutsiadis

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 1993 taxation year is dismissed with costs to the Respondent.

Signed at Toronto, Ontario, this 12th day of February 2015.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2015 TCC 36
Date: 20150212
Docket: 2013-2882(IT)G

BETWEEN:

BAKORP MANAGEMENT LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli J.

[1] This matter involves the legal interpretation of subsection 187(2) of the *Income Tax Act*, a provision that charges arrears interest on outstanding Part IV tax under the *Act* and in particular is a dispute regarding the end date to which interest is to be calculated.

[2] The parties filed an Agreed Statement of Facts in this matter and there are really no facts in dispute. The Appellant was assessed Part IV taxes in connection with dividends received for its 1993 and 1995 taxation years, initially as filed. There is no dispute that the balance due date for payment of Part IV taxes for the 1993 year was June 30, 1993 and that the balance due date for payment of such taxes for the 1995 year was June 30, 1995. There is also no dispute that the Appellant tendered payment of $13,333,059 on account of such taxes payable in 1995 when he filed his 1995 T2 tax return on June 10, 1995.

[3] On January 31, 2000 the Minister of National Revenue (the "Minister") reassessed the Appellant for both its 1993 and 1995 taxation years with the effect that the Minister increased the Appellant's Part IV taxes for 1993 substantially but reduced the Appellant's 1995 Part IV taxes by $6,333,059 (the "Overpayment"). On February 3, 2000 the Minister applied the Overpayment to the Appellant's 1993 taxation year without having been asked to do so prior to that time as she was permitted. The Appellant objected to the reassessments which were confirmed, and after several reassessments and objections thereto in respect of the 1993 taxation

year, the final reassessment in 2012 assessed the Appellant's 1993 Part IV taxes at $11,221,656 more than originally filed in 1993, which is not in dispute, as well as arrears of interest pursuant to subsection 187(2). With respect to the Overpayment, the Minister treated the said sum as "paid" on February 3, 2000 for the purpose of calculating the arrears interest for the 1993 taxation year under said provision and the Appellant appeals on the basis that an amount equal to said sum should be treated as having been paid on June 10, 1995 being the date of its actual initial payment in respect of the 1995 taxation year which was subsequently found to have been overpaid and applied to its 1993 tax bill.

[4] Subsection 187(2), found under Part IV of the *Act*, reads as follows:

> 187(2) Interest. 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 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.

[5] In effect, the Appellant takes the position that on the plain reading of the subsection, interest is computed from the day it was required to be paid, being June 30, 1993 to the date of payment, which it says was June 10, 1995 with respect to a portion of the tax liability equal to the Overpayment. There is no question interest on the increased liability in excess of the Overpayment is subject to interest under 187(2). The Appellant argues that regardless of the date on which the Minister decided to apply the Overpayment in 1995 to the 1993 taxation year, being February 3, 2000, the amount was actually paid on June 10, 1995 and thus the Minister had the use of the money from such time and it would be unfair and contrary to the policy of interest obligations to pay interest on an amount already in the Minister's possession. Moreover says the Appellant, subsection 187(2) does not contain a requirement that the Minister must apply the payment as does subsection 161(1) which deals with interest on arrears of Part I and other Parts, but not Part IV. By analogy argues the Appellant, if Parliament intended that the amount in the Minister's possession must be applied to a specific year or Part IV assessment, it should have said so. The Respondent, argues the Appellant, is ignoring the distinction between amounts "paid" and amounts "applied" both found in subsection 161(1) and not in subsection 187(2) which does not require that the Minster must apply the payment to any year or account. In fact, subsection 161(1) reads as follows:

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

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

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,

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.

[6] The Appellant relied on the decision of this Court in *Livergant v Minister of National Revenue*, [1989] TCJ No. 502, 89 DTC 362 where an appellant who submitted instalments that exceeded the amount of tax for which he was reassessed, argued he should not pay interest on that portion of the instalments that were erroneously refunded to him. Goetz J. found that such position would be untenable after the April 19, 1983 amendment to subsection 161(1), which amendment required that the Minister actually apply those amounts paid to the taxes owing. In paragraph 23 the learned Justice paraphrased the amended subsection as follows:

> …the subsection provides that where, at any time, a taxpayer's tax payable for a taxation year exceeds the aggregate of those amounts paid by the taxpayer on account of his tax payable and applied as such by the Minister, interest shall be payable on the difference.

[7] As there was no requirement for the Minister to apply such refund to taxes owing prior to the 1983 amendment, Goetz found that when the Minister issued a refund in error of taxes already paid and hence didn't apply those funds to the taxes, the Minister could not claim interest on the refunded amount until the date of its reassessment setting aside the refund.

[8] I have some difficulty accepting that the subsection 161(1) changes should be assumed to inform the interpretation of subsection 187(2). Firstly, the *Livergant* decision dealt with whether interest should be charged on an erroneously refunded amount of Part 1 tax. This case has nothing to do with taxes that are not by their nature intended to be refunded and that were refunded in error and so there is no factual similarity to that case. In the case at hand, we are dealing with Part IV taxes, which by their nature are intended to be refunded in the future through the workings of the refundable dividend tax on hand provisions of section 129 of the

Act that effectively returns these Part IV taxes when dividends are paid out by the corporation receiving them. The Part IV tax is inherently a refundable tax. It stands to reason that subsection 161(1) deals with Part I and other Parts of the *Act* in assessing arrears interest but does not specifically deal with Part IV taxes. I am not satisfied with the Appellant's argument that I should accept that the failure of subsection 187(2) to have a requirement to "apply" the taxes paid by the Minister as does subsection 161(1) as reason enough to interpret subsection 187(2) in the manner suggested.

[9] On the plain meaning of the words "to the date of payment" as the end date for the calculation of arrears interest, I am not swayed that the initial date of payment in respect of an entirely different year, i.e. 1995, should apply as the date of payment for a year, 1993, two years before the payment was even made. Frankly, this suggests an illogical and ridiculous result suggesting the plain meaning of date of payment cannot be as the Appellant suggests. Moreover, as the term "payment" is not defined in the *Act*, it seems equally plausible that it can refer to an amount paid on behalf of an outstanding debt, such as the application of the 1995 tax year refund to the 1993 debt at the Minister's choosing pursuant to subsection 164(2) of the *Act*. It seems far more logical to assume that the application of the Overpayment that crystallized on January 31, 2000 due to the reassessment of the 1995 taxation year is the "payment" in question contemplated by subsection 187(2) rather than the initial payment in 1995 which until such reassessment stood as owing on account of the 1995 taxation year assessed as filed by the Appellant. It defies logic that the same amount can be said to contemporaneously apply to two different debts. In my opinion, the reasonable and plain meaning of "date of payment" refers to the date the debt in question was extinguished; the date the Appellant received a reduction in its 1993 tax liability due to the Minister's decision to apply the 1995 Overpayment to such debt.

[10] In fact, the Minister did not and could not apply the Overpayment to the Appellant's 1993 tax liability until it exercised it rights to do so under subsection 164(2) on February 3, 2000, a few days after the Overpayment crystallized on January 31, 2000, being the date of the last reassessment for the 1995 taxation year in question. Until such time, the prior assessment for the 1995 taxation year is deemed to be valid and binding according to the provisions of subsection 152(8) and subsection 248(2) treats the tax payable by a taxpayer to be fixed by an assessment. Accordingly, the tax paid by the Appellant on June 10, 1995 assessed as filed, was fixed for the 1995 tax year and not any other year and did not and could not become an overpayment until the date of reassessment for such year on January 31, 2000. In short, an overpayment did not exist prior to January 31, 2000

so no amount existed to be applied to an assessment fixed for 1993. Parliament has in fact said so through the above provisions. Accordingly, the date of payment could simply not have been June 10, 1995 for the purposes of crediting the Overpayment to the taxpayer's 1993 tax liability.

[11] I frankly do not agree with the Appellant's interpretation of the plain meaning of subsection 187(2) and find no ambiguity in the interpretation of same; however even if I agree that the Appellant's position creates an ambiguity in interpretation, I could not find in the Appellant's favour based on a textual, contextual and purposeful approach to interpretation for several of the reasons the Respondent has well argued.

[12] Both parties relied on the Supreme Court of Canada's decision in *Canada Trustco Mortgage Co v Canada*, [2005] 2 SCR 601, 2005 SCC 54 for the principles of statutory interpretation found at paragraph 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 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.

[13] Firstly, I do not agree with the Appellant's argument that using the textual, contextual and purposive approach to interpretation that the Respondent's position on subsection 187(2) would render the amendments to subsection 161(1) meaningless and result in contradictory and unharmonious interest on arrears schemes. As I stated above, the two sections deal with different parts of the *Act* with different roles and so there is justification for a different approach and no need for concern that the two subsections conflict in any way. Subsection 187(2) specifically deals only with Part IV taxes and subsection 161(1) with Part I and other specific parts.

[14] Secondly, taking a simple contextual approach to Part IV, which only consists of a few sections, namely from section 186 through 187, it is clear that the

liability to pay tax under Part IV is a liability to pay tax for a specific year so that the arrears of interest are calculated with respect to that specific year.

[15] Subsection 186(1) is the provision that imposes Part IV taxes on assessable dividends and reads as follows:

> 186(1) Tax on assessable dividends. Every corporation (in this section referred to as the "particular corporation") that is at any time in a taxation year a private corporation or a subject corporation shall, on or before its balance-due day for the year, pay a tax under this Part for the year equal to the amount. …

[16] It is clear the liability to pay tax is by the balance due date "for the year" and the tax is to be paid "for the year". I agree with the Respondent that there is no ambiguity in that Part IV tax is tied to a particular year. Likewise, the obligation to pay arrears interest under subsection 187(2) is in respect to "liability to pay tax under this Part", which under subsection 186(1) is for a particular year, where there has been a failure to pay it by a required date, namely under subsection 186(1), the balance due date. The two subsections are contextually linked and must be read together with the logical and reasonable result that the "day of payment" referred to in subsection 187(2) must be the day the corporation's liability for a particular year was paid.

[17] The Appellant admits in paragraph 5 of the Agreed Statement of Facts that the June 1995 payment was "on account of its 1995 taxation year's Part IV tax liability on the amounts it reported under Part IV of the Act." Moreover, the Appellant's T2 income tax return entered into evidence shows the payment made on account of 1995 and the parties agree it was paid on June 10, 1995.

[18] Accordingly, based on a textual, contextual and purposive approach, it would be inconsistent and unharmonious to interpret subsection 187(2) to mean that any payment made in connection with a particular year can apply to any other year, as the Appellant alleges. There is no basis to assume that a payment made in regard to a particular year can concurrently be treated as a payment on account of another year, which is essentially the result of the Appellant's position, neither on a plain and reasonable meaning approach nor in the textual, contextual and purposive analysis dictated by the Supreme Court in *Canada Trustco*.

[19] Finally, I must agree with the Respondent that to interpret subsection 187(2) in a manner as to require application of funds as in subsection 161(1) discussed above, would result in rendering many other provisions of the *Act* inconsistent and useless or create unnecessary conflicts within the *Act*.

[20] As the Respondent has pointed out, section 221.2 of the *Act* is a specific section that allows the Minister, on application by the taxpayer, to transfer a payment made on account of one year to another year and treat the payment as if always having been made on account of the other year, the same result the Appellant is trying to reach here. Section 221.2 is a mechanism in the *Act* that allows just the result the Appellant here seeks, except that the Appellant has never made any such application before February 3, 2000 when the Minister applied the Overpayment in 1995 to the 1993 tax liability. If subsection 187(2) were to be read as automatically achieving this result as a matter of simple interpretation then there would be no need for section 221.2 and its existence would create conflict within the *Act*. As the Minister under section 221.2 may only exercise his discretion to reapportion a payment on application of the taxpayer, then to allow such apportionment to occur without application of the taxpayer under subsection 187(2) can lead to conflict and absurd results. Surely if the Minister argued that he could avail himself of such reapportionment of tax payments for Part IV tax so that an earlier payment should be applied to a later tax liability so as to create a greater arrears interest amount for the earlier year's tax liability this would be challenged as abusive. It certainly justifies why the taxpayer should have to ask for such treatment.

[21] Moreover, as the Respondent has also pointed out, many provisions of the *Act* contain similar interest charging language to "date of payment" found in subsection 187(2) including subsections 131(3.2), 132(2.2), 133(7.02), 159(7), paragraph 164(4)(b), subsections 185(2), 202(5), 227(8.3) and 227(9.3). It would seem these would all render section 221.2 redundant as well if they also allowed automatic reapportionment of payments between years or different tax accounts. I would agree that the Appellant's proposed interpretation cannot be intended by Parliament as both subsection 187(2) or any of the above referenced other provisions cannot regulate the reapportionment of the taxpayer's payments at the same time section 221.2 does. It is trite law as the Supreme Court of Canada informed us in *The King v Assessors of Sunny Brae (Town)*, [1952] 2 SCR 76 at 97 that "a statute is to be construed, if at all possible, so that there may be no repugnancy or inconsistency between its portions…". This goal is accomplished when reapportionment is allowed only under section 221.2 and not subsection 187(2) or any of the other above provisions mentioned that contain "to date of payment" language in calculating interest.

[22] It should also be noted that as section 221.2 is a specific provision dealing with reapportionment of payments, containing specific requisite elements such as the need for taxpayer request and specific outlined mechanisms including

rendering a past payment as never having been made; it is clear that such a specific provision should override an arguable general provision such as 187(2) which contains no prerequisite elements or mechanisms to achieve the goal of reapportionment. In fact, *Canada Trustco* at paragraph 11 stated:

> …Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

[23] Consequently, I agree with the Respondent that subsection 187(2) cannot operate to treat part of the June 1995 payment on account of the Appellant's 1995 tax liability as a concurrent payment on account of its 1993 Part IV tax liability, regardless of whether such part was an ultimate overpayment or not for such year.

[24] The Minister did not and could not apply the Overpayment to the Appellant's 1993 tax liability until it exercised it rights to do so under subsection 164(2) on February 3, 2000, as explained above so that the date of payment could simply not have been June 10, 1995 for the purposes of crediting the Overpayment to the taxpayer's 1993 tax liability and the Appellant did not apply for any reapportionment of the tax paid on account of the 1995 taxation year pursuant to section 221.2 at any time to allow it to do so.

[25] I also wish to comment on what I perceive to be the Appellant's main underlying argument in this matter, that it is patently unfair for the Minister to have been in possession of the Overpayment since January 10, 1995 and still allow the taxpayer to be assessed interest at a rate 2 percent higher on that sum of money than the Minister paid out due to the workings of interest calculation under Regulations 4301(a) and (b) respectively. The Appellant has not questioned the validity of these provisions nor am I aware of any basis for doing so. If there was no interest differential between interest charged on taxes owing to the Minister and interest paid on overpayments of tax liabilities, the Appellant would not have any reason to have appealed this reassessment. Unfortunately, such interest differential results in the Appellant being required to pay more in interest on the same amount he was paid interest on. This however is the law as enacted by Parliament to encourage prompt payment of taxes owing and only Parliament has the right to change it. This Court has no jurisdiction to allow a different calculation based outside the law.

[26] The appeal is dismissed with costs to the Respondent.

Signed at Toronto, Ontario, this 12th day of February 2015.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2015 TCC 36
COURT FILE NO.:	2013-2882(IT)G
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APPEARANCES:

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