Docket: 2008-3556(IT)G

BETWEEN:

BARRINGTON LANE DEVELOPMENTS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 4, 2010, at Halifax, Nova Scotia

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Bruce S. Russell, Q.C. and Karen D. Stilwell
Counsel for the Respondent:	Deanna M. Frappier

AMENDED JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year is allowed.

Costs are awarded to the Appellant.

Signed at Ottawa, Canada, this **13th** day of **September** 2010.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2010 TCC 388
Date: 20100719
Docket: 2008-3556(IT)G

BETWEEN:

BARRINGTON LANE DEVELOPMENTS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli J.

[1] There are two issues to be decided in this matter in relation to the Appellant's 2004 taxation year. The first is whether the Minister of National Revenue's (the "Minister") notice of reassessment dated January 10, 2008 was mailed within the normal assessment period or whether it is statute barred. The second is whether the Minister properly included the sum of $793,876 in the Appellant's income as income from the business or property or whether it should have been included as a capital gain as originally filed by the Appellant.

[2] Since the determination of the first issue was necessary before the Court could proceed to entertain the more substantial second issue, the first issue was addressed and my judgment on the matter was rendered before proceeding with the second issue. I decided that the Minister's notice of assessment dated January 10, 2008 was mailed within the normal assessment period and in order to expedite the trial the parties were advised that I would provide detailed reasons for such decision in the judgment which now follows.

[3] The underlying facts pertaining to the first issue are largely agreed upon between the parties. The Minister issued a notice of reassessment in respect of the taxpayer's 2004 taxation year by notice of reassessment dated January 10, 2008.

The Respondent admitted in its pleadings, as amended, that notwithstanding the date of the reassessment being January 10, 2008, the reassessment was mailed out on January 14, 2008. The parties are in agreement that the normal assessment would otherwise have expired on January 12, 2008 but that since such date fell on a Saturday or a "holiday" within the meaning of sections 26 and 35 of the *Interpretation Act*, R.S.C., c. I-21, as amended, in conjunction with applicable regulations under the Manitoba Court of Queen's Bench Rules that the normal assessment would as a result fall on January 14, 2008.

[4] There was also no dispute that since the date of the notice of reassessment was stated to be January 10, 2008 and the Respondent agreed it was not mailed on such date, instead arguing it was mailed January 14, 2008, that the assumption under subsection 244(14) of the *Income Tax Act* (the "*Act*") that it shall be presumed to be mailed on the date of the notice has been rebutted. The issue becomes whether the notice of reassessment was mailed on January 14, 2008 which by agreement would fall within the normal reassessment and hence not be statute barred.

[5] Subsections 244(14) and (15) read as follows:

> 244(14) For the purposes of this *Act*, where any notice or notification described in subsection 149.1(6.3), 152(3.1), 165(3) or 166.1(5) or any notice of assessment or determination is mailed, it shall be presumed to be mailed on the date of that notice or notification.
>
> (15) Where any notice of assessment or determination has been sent by the Minister as required by this *Act*, the assessment or determination is deemed to have been made on the day of mailing of the notice of the assessment or determination.

[6] The presumptions in such subsections are rebuttable presumptions. Since the Minister pleaded that the notice was not mailed on the date of the notice of reassessment, the presumption under subsection 244(14) above has clearly been rebutted by admission. The onus then falls upon the Minister to prove the date of mailing was within the normal assessment period, which, as agreed, would be until January 14, 2008.

[7] The position of the Respondent is that the notice of reassessment was mailed on January 14, 2008 and hence within the agreed upon normal assessment period. The Appellant takes the position that the Respondent has not proven such mailing.

[8] The evidence of the Respondent, who called two Canada Revenue Agency ("CRA") employees of the Winnipeg Manitoba Printing and Mail site to testify, was that there are only two printing and mail sites serving Canada, one of which is based in Winnipeg, Manitoba, and the other in Summerside, Prince Edward Island. The process for mailing notices was described as follows: one of the two sites is selected by CRA's Ottawa headquarters and instructions are sent electronically to one of the sites. Once instructions are received, the notices of assessment or reassessment are printed on site and transferred to a production control desk where the notices are folded and inserted manually into a pre-printed registered mail envelope with the name and address of the taxpayer. The registered mail envelopes are then scanned to create a log of registered mail, setting out the date of shipping, tracking number, the name of the taxpayer and a cycle number referencing the batch of notices which were initially electronically downloaded as a group. Each notice page sent to a taxpayer contains a sequential number which can be cross-referenced to the cycle number as well. The envelopes are then deposited into a Canada Post container located on site and picked up by Canada Post with a statement of mailing printed by CRA showing the date of mailing and payment therefore, a copy of which is given to Canada Post.

[9] With respect to this particular notice of reassessment, the testimony of the CRA witnesses was that instructions from Ottawa to print out the batch which contained the notice of reassessment, described as cycle No. 2644, were received January 10, 2008 and the registered mail envelopes were scanned on January 14, 2008, containing as indicated the same cycle number, date of shipping, tracking number and name of the taxpayer.

[10] The Appellant's position is that the general process described by the CRA witnesses employed at the CRA Printing and Mail site does not constitute evidence the envelopes were actually mailed. Counsel for the Appellant obtained admission from one of the witnesses that he did not cross-reference the cycle No. 2644 found on the CRA's Distribution Flow Control Card to the sequential numbers found on the notice of reassessment dated January 10, 2008, and obtained an admission from the other witness, who was involved in scanning the registered mail envelopes, that the scanned log shows the date it was to be mailed but she did not follow up further after the envelopes were put in the Canada Post container. The position of the Appellant is that only Canada Post could with any certainty testify they mailed the envelopes.

[11] With respect to counsel for the Appellant, I do not agree with his position. In my view, the detailed and documented processes dealing with the electronic

downloading, printing and mailing of the notices of assessment/reassessment constitute, on a balance of probabilites, *prima facie* proof that they are mailed. Notwithstanding that, there is also hard evidence that the taxpayer's registered mail envelope was scanned and the log which received the electronic scan admitted as evidence clearly shows it was shipped January 14, 2008. The evidence of the CRA witness involved in mailing was that the envelopes are deposited immediately after the scan into the Canada Post container provided by Canada Post to CRA which, like a normal mailbox, is a receptacle which accepts the mail. Consequently, I find the Respondent has made a *prima facie* case that the Appellant's notice of reassessment was mailed and, pursuant to subsection 244(15), the reassessment is deemed to have been made on the day of mailing. The Respondent having satisfied the onus of proving the notice was mailed on January 14, 2008, the onus would then shift to the Appellant to prove otherwise on the balance of probabilities and the Appellant tendered no evidence whatsoever on the matter. Certainly, the Appellant could have subpoenaed someone from Canada Post to testify to the contrary if it had any such evidence, but it did not do so and frankly, I am not convinced any such testimony would have constituted any more than testimony on the general practices of the post office as well in their dealings with CRA and subsequent delivery.

[12] It should also be noted that the Appellant pleaded that it received, by registered mail, the notice of reassessment on January 17, 2008, three days after the alleged mailing, which in my view also supports the view it was mailed within the required time.

[13] Having found that the notice of the reassessment was mailed within the normal assessment, I now turn to the substantial issue as to whether the Minister erred in including the sum of $793,876 in the Appellant's income as opposed to treating it as a capital gain as requested by the Appellant.

[14] Facts pertaining to the second issue are not in dispute. The Appellant was in the business of real estate development, particularly in the construction and renovation of apartment buildings and had a May 31st year-end. Between 1996 and 1998, the Appellant loaned at least $793,076 to a related corporation known as Brookshire Developments Ltd. ("Brookshire"). Both the Appellant and Brookshire were owned by two brothers, Solomon Ghosn and Nassim Ghosn, on a 50-50 shareholding basis and both brothers were directors and officers of the corporations, with Nassim as President and Solomon as Vice President. The funds were advanced by the Appellant to Brookshire for the purpose of enabling Brookshire to construct a commercial mall in Bedford, Nova Scotia.

[15] In 1998, on the advice of its accountants and lawyers, the Appellant determined that Brookshire would not be able to repay the loan and accordingly wrote it off. The accountants for the Appellant, Grant Thornton, prepared both the financial statements and corporate tax return for the Appellant. In the financial statements, the loan was recorded as a bad debt expense and a large capital gain was also disclosed which included the recognition of the loan as a capital loss as well within its calculation. The tax return correctly showed the loan write-off treated as a capital loss through schedules attached to the tax return but no addition equal to the amount of the loan shown as a bad debt expense in the financial statements was brought into income in such T2S1 schedules, effectively reducing the Corporation's income by the amount of the bad debt expense. Much was said in evidence relating to the error by the accountants in the completion of the schedules to the tax return and the fact the Appellant had no intention to claim the amount other than as a capital loss; however, it is clear that the Appellant claimed both a capital loss and a loss of income with respect to the same write-off, effectively taking a double deduction.

[16] There appears to be no question that the error was not intentional and that the directors of the Appellant did not catch it in the financial statements or tax returns, which they acknowledged the President signed but did not review. They testified they did not even become aware of the issue until the 2004 year-end audit was conducted by CRA. Even the Respondent in argument acknowledged the CRA did not become aware of the double deduction until such time and could not act upon it due to the 1998 taxation year of the Appellant having become statute barred. There was also evidence both the brothers had completed grade 12 and that one had a few years of university but did not finish, presumably to suggest their level of education was not such as would make them readily cognisant of the error or that would suggest they had good reason to rely heavily on their accountants without questioning them or reviewing their work. While based on their testimony there would be no reason to question the intentions of the two brothers or the Appellant and the Respondent did not do so, the Respondent instead argues that it is for all intents and purposes irrelevant in that there is no question of penalties being assessed for that situation, and in fact the 1998 tax returns were accepted as filed and not reassessed with the Appellant having been given the benefit of both deductions. Moreover, the tax auditor on the file confirmed such issue was not the reason behind the audit.

[17] In November of 2003, the Appellant loaned sufficient funds to Brookshire, part of which were used to repay the initial loan previously written off in full,

hence giving rise to an inclusion into income due to the recovery of the loan. In effect, the only issue to be decided in this case is whether the sum in question is a recovery of the bad debt taxable pursuant to paragraph 12(1)*(i)* of the *Act* or whether it should be treated as a capital loss pursuant to subsection 40(1) of the *Act*.

Position of the Parties

[18] The position of the Appellant is that subsection 40(1) should be used instead of paragraph 12(1)*(i)* for the following reasons:

1. The initial loan made to Brookshire by the Appellant, who was not in the business of lending money, was a capital asset of the Appellant, used by Brookshire to build a capital asset. The loss therefrom was filed in 1998 properly as a capital loss consistent with the intentions of the Appellant, while the recording of it in the financial statements as a bad debt expense not reversed on the tax return schedules was in error. In effect, the Appellant argues such error does not change the character of the loan as being capital in nature and the error in the 1998 filing cannot flow through to the 2004 return which must be assessed in accordance with the applicable law, making it a capital loss.

2. The two provisions are not applicable to the same subject matter, with paragraph 12(1)*(i)* applying to income from business or property and subsection 40(1) applying to capital gains, the distinction in these types of income being a fundamental premise of the *Act*; and

3. Even if one considered them applicable to the same subject matter, paragraph 12(1)*(i)* cannot be considered more specific than subsection 40(1) as both are general provisions dealing with different types of income.

[19] The position of the Respondent is that the intention of the Appellant is irrelevant and that, since the Appellant did in fact claim the loss as a bad debt expense, the provisions of paragraph 12(1)*(i)* work to treat the repayment of the loan as a recovery of ordinary income. In addition, while both provisions of the *Act* might apply, subsection 248(28) prohibits the Minister from double taxing the recovery in both ways, and hence, since paragraph 12(1)*(i)* is a specific clause dealing with the subject matter of the recovery, it must have priority in application

over the more general provisions of subsection 40(1) based on such doctrine of interpretation.

The Law

[20] Paragraph 12(1)*(i)* reads as follows:

> 12(1) There shall be included in computing the income of a taxpayer for a taxation year as income from a business or property such of the following amounts as are applicable:
>
> …
>
> (*i*) any amount, other than an amount referred to in paragraph 12(1)*(i.1)*, received in the year on account of a debt or a loan or lending asset in respect of which a deduction for bad debts or uncollectable loans or lending assets was made in computing the taxpayer's income for a preceding taxation year; …

[21] Subsection 40(1) reads as follows:

> 40(1) Except as otherwise expressly provided in this Part
>
> (*a*) a taxpayer's gain for a taxation year from the disposition of any property is the amount, if any, by which
>
> (i) if the property was disposed of in the year, the amount, if any, by which the taxpayer's proceeds of disposition exceed the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition, or
>
> (ii) if the property was disposed of before the year, the amount, if any, claimed by the taxpayer under subparagraph 40(1)(*a*)(iii) in computing the taxpayer's gain for the immediately preceding year from the disposition of the property,
>
> exceeds

(iii) subject to subsection 40(1.1), such amount as the taxpayer may claim

(A) in the case of an individual (other than a trust) in prescribed form filed with the taxpayer's return of income under this Part for the year, and

(B) in any other case, in the taxpayer's return of income under this Part for the year,

as a deduction, not exceeding the lesser of

(C) a reasonable amount as a reserve in respect of such of the proceeds of disposition of the property that are payable to the taxpayer after the end of the year as can reasonably be regarded as a portion of the amount determined under subparagraph 40(1)(*a*)(i) in respect of the property, and

(D) an amount equal to the product obtained when 1/5 of the amount determined under subparagraph 40(1)(*a*)(i) in respect of the property is multiplied by the amount, if any, by which 4 exceeds the number of preceding taxation years of the taxpayer ending after the disposition of the property; and

(*b*) a taxpayer's loss for a taxation year from the disposition of any property is,

(i) if the property was disposed of in the year, the amount, if any, by which the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition, exceeds the taxpayer's proceeds of disposition of the property, and

(ii) in any other case, nil.

[22] Subsection 248(28) reads as follows:

248(28) Unless a contrary intention is evident, no provision of this *Act* shall be read or construed

(*a*) to require the inclusion or permit the deduction, either directly or indirectly, in computing a taxpayer's income, taxable income or taxable income earned in Canada, for a taxation year or in computing a taxpayer's income or loss for a taxation year from a particular source or from sources in a particular place, of any amount to the extent that the amount has already been directly or indirectly included or deducted, as the case may be, in computing such income, taxable income, taxable income earned in Canada or loss, for the year or any preceding taxation year;

(*b*) to permit the deduction, either directly or indirectly, in computing a taxpayer's tax payable under any Part of this *Act* for a taxation year of any amount to the extent that the amount has already been directly or indirectly deducted in computing such tax payable for the year or any preceding taxation year; or

(*c*) to consider an amount to have been paid on account of a taxpayer's tax payable under any Part of this *Act* for a taxation year to the extent that the amount has already been considered to have been paid on account of such tax payable for the year or any preceding taxation year.

[23] Subsection 3(a) and (b) read as follows:

3 The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:

(*a*) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,

(*b*) determine the amount, if any, by which

(i) the total of

(A) all of the taxpayer's taxable capital gains for the year from dispositions of property other than listed personal property, and

(B) the taxpayer's taxable net gain for the year from dispositions of listed personal property,

exceeds

> (ii) the amount, if any, by which the taxpayer's allowable capital losses for the year from dispositions of property other than listed personal property exceed the taxpayer's allowable business investment losses for the year,

[24] Paragraph 9 reads as follows

> 9(1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.
>
> (2) Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying the provisions of this *Act* respecting computation of income from that source with such modifications as the circumstances require.
>
> (3) In this *Act*, "income from a property" does not include any capital gain from the disposition of that property and "loss from a property" does not include any capital loss from the disposition of that property.

[25] The position of the Respondent is that since subsection 40(1) starts with the words "Except as otherwise expressly provided in this Part ..." it is a general provision in effect making way for more specific provisions that may deal with the subject matter of, in this case, debt recovery. The Respondent says that since paragraph 12(1)*(i)* does not have similar exclusionary language and deals with the recovery into income of bad debts previously expensed, it must have priority over subsection 40(1).

[26] The Respondent relies on the case of *National Bank Life Insurance v. Canada*, 2006 FCA 161, [2006] G.S.T.C. 60 (F.C.A.) where Létourneau J.A. of the Federal Court of Appeal set out this doctrine of interpretation in paragraph 9:

> 9 One of the fundamental principles of legislative construction is that a statute or provision of a statute which deals specifically with a subject-matter must take priority over, and override, any general legislation or provision dealing with the same subject-matter. …

[27] This principle of statutory interpretation relied upon by the Respondent and referred to in the above case is summarized in *Sullivan and Driedger on the Construction of Statutes*, 4th ed.(Butterworths: Markham, Ontario 2002) at page 273:

> When two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. …

[28] It is, as the Appellant has pointed out in argument, a strategy for resolution of conflict and is only applied when two provisions are in conflict.

[29] I certainly do not disagree with the well-accepted doctrine but first it must be found whether they are in fact in conflict by dealing with the same subject matter and then if so, as Létourneau J.A. stated, whether one of the provisions is specific and one general.

[30] As evident from the wording of the Statutory Provisions above, the *Income Tax Act* contemplates different taxation of different types of income, and in the above sections, clearly distinguishes between the taxation of income from a source that is business or property or employment or office for that matter and that which is capital in nature. Paragraph 3(a) of the *Act* immediately recognizes this dichotomy by including income from sources "other than a taxable capital gain", which is addressed for inclusion in paragraph 3(b). Subsection 9(1) provides that a taxpayer's income from a business or property is the taxpayer's profit from the business or property and subsection 9(3) specifically provides that a taxpayer's income or loss from property does not include a capital gain or capital loss from its disposition.

[31] In *Friesen v. Canada*, [1995] 3 S.C.R. 103, in deciding whether a deduction was a deduction from business income or a capital loss, Major J., in paragraph 28, confirmed the dichotomy:

> 28 The second problem with the interpretation proposed by the respondent is that it is inconsistent with the basic division in the *Income Tax Act* between business income and capital gain. As discussed above, subdivision b of Division B of the *Act* deals with business and property income and subdivision c of Division B deals with capital gains. The *Act* defines two types of property, one of which applies to each of these sources of revenue. Capital property (as defined in s. 54(b)) creates a capital gain or loss upon disposition. Inventory is property the cost or value of which is relevant to the computation of business income. The *Act* thus creates a simple system which recognizes only two broad categories of property. The characterization of an item of property as inventory or capital property is based primarily on the type of income that the property will produce.

[32] The starting point then must be in determining the character of the subject matter loan, i.e., is it capital or income from business or property? In the case at hand, there is no dispute that the Appellant was not in the business of lending money and hence did not have a source of business income by making the loans to its affiliated company. The Respondent itself acknowledged that if the Appellant had only deducted the amount as a capital loss it would have been a capital loss, i.e., a loss from the disposition of capital property. His argument that since he also deducted the bad loan as an income loss also makes it a loss from business or property is inconsistent with the dichotomy of the *Act* and the need to characterize such income as one or the other as well as inconsistent with his position that it is also a capital property.

[33] It should also be noted that, notwithstanding error made in claiming the deduction as both a capital loss and bad debt expense being a deduction from business income, or any errors in the assessment of such deductions by the Minister, such errors do not change the character of the property or required tax treatment thereof in future non statute-barred years. In *Leola Purdy, Sons Ltd. v. Canada*, 2009 TCC 21, 2009 DTC 1042, the Appellant incorrectly reported gains of disposition of index futures trading contracts in 1998 as a capital loss which the Minister did not reassess and reported gains from the same source in her 2002 taxation year as a capital gain for which the Minister did reassess as business income. The Appellant agreed with the characterization of such gains as business income in 2002 but argued he should be allowed to recharacterize the loss in 1998, a statute-barred year, as a business loss as well. Chief Justice Rip, in deciding against the Appellant, relied on and quoted paragraph 23 of former Chief Justice Bowman's decision in *Coastal Construction and Excavating Limited. v. Canada*, [1996] 3 C.T.C. 2845:

> 23 … The Minister is obliged to assess in accordance with the law. If he assesses a prior year incorrectly and that year becomes statute-barred this will prevent his reassessing tax for that year, but it does not prevent his correcting the error in a year that is not statute–barred, even though it involves adjusting carry-forward balances from previous years, …

[34] This obligation of the Minister to assess each year on the basis of the law is, I suggest, trite law and referenced in decisions of all levels of the Courts, as argued by the Respondent, ranging from the Supreme Court of Canada's decision in *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147, the Federal Court of Appeal's decision in *Papiers Cascades Cabano Inc. v. Canada*, 2006 FCA 419, [2007] 5 C.T.C. 26 (F.C.A.) to the Tax Court of Canada's decisions in

Trom Electric Co. Ltd. v. Canada, 2004 TCC 727, 2005 DTC 62, *170635 Canada Ltée v. Canada (Minister of National Revenue - M.N.R.)*, 93 DTC 1120 and *Coastal Construction* above. In *Krauss v. Canada*, 2009 TCC 597, 2009 DTC 1394, McArthur J. stated at paragraph 26:

> 26 … Although it is arguably logical to allow the $70,571 deduction to maintain the symmetry of the Appellant's treatment of the original $198,617, the Minister must assess according to law. In other words, the Minister must not, and this Court must not, perpetuate an error in a future year in order to arrive at a result consistent with a prior year in which a taxpayer erred. …

[35] In paragraph 27 of *Trom Electric* above, Paris J. confirmed that even if the proper application of the law results in the taxpayer escaping taxation or, as I reason, generally obtaining a benefit he would not otherwise be entitled to under the *Act* because of his error in reporting past transactions incorrectly in statute-barred years, such is the price of applying the law correctly in future years:

> 27 The fact that the Appellant may escape taxation on the amount in issue in this appeal unless the reassessment is upheld is not relevant. …

[36] Having regard to the above cases, it is clear that if the character of the loan would properly have been on capital account in 2004, which I find is the case, the Minister cannot rely on the fact the Appellant also included it as a bad debt expense in 1998, in error, as justification for recharacterizing the source of income as being from business or property, regardless of the obvious double deduction the Appellant enjoyed.

[37] It is clear that the proper characterization of the income in 2004 is that of the repayment of loan which was a repayment on account of capital. It is equally clear that paragraph 12(1)*(i)* only deals with inclusion of income from business or property, by including into income a recovery of a bad debt that was previously expensed. Subsection 40(1) deals with capital gains and capital losses and hence with the actual subject matter of the capital loan. As between the two sections, the only rational conclusion that can be reached is that subsection 40(1), being the only one that deals with capital items, must be the only, let alone the more specific, of the sections dealing with the capital gain subject matter of the capital loan recovery. Such being the case, I cannot conclude there is any conflict between the two provisions so as to bring into play the doctrine of interpretation suggested by the Respondent.

[38] I feel obliged to add that I agree with the Respondent that the interpretation of the two sections, in determining whether they are in conflict, must go beyond their strict textual provisions in this case. The Supreme Court of Canada in paragraph 21 of *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, adopted the modern approach of statutory interpretation cited in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536:

> 21 … this Court rejected the strict approach to the construction of taxation statutes and held that the modern approach applies to taxation statutes no less than it does to other statutes. That is, “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” …

[39] The Respondent appears to rely on the strict wording of paragraph 12(1)*(i)* which basically says that if you claimed a bad expense before you must include it into income, to which the Appellant says is an interpretation taken out of the context of such section’s dealing with business or property income matters. As set out in *Friesen* above, the dichotomy of capital versus income from business or property is highlighted by their containment in different subdivisions of Division B of Part I of the *Act*. Accordingly, seen in their contextual placement, the dichotomy is emphasized and supports the Appellant’s position that paragraph 12(1)*(i)*, in subdivision b of Division B entitled “Income or loss from a Business or Property”, deals with matters outside the scope of subdivision c entitled “Taxable Capital Gains and Allowable Capital Allowances” under which subsection 40(1) falls.

[40] It may well be in the more general sense that both provisions deal with bad debt, but one in its context deals with bad debt in relation to a source of income that is business or property while the other in its context deals with the bad debt from the disposition or deemed disposition (through the workings of subsection 50(1) of the *Act*) of capital property; different subject matters. As Iacobucci J. stated in paragraph 29 of *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559:

> 29 … an ambiguity must be “real” (*Marcotte*, *supra*, at p. 115). The words of the provision must be “reasonably capable of more than one meaning” (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the “entire context” of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.’s statement in *CanadianOxy Chemicals Ltd. v. Canada* (Attorney General), [1999] 1 S.C.R. 743, at para. 14, is apposite: “It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the

> courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

[41] Moreover, I have some serious concerns about the position of the Respondent that if the Appellant filed as a capital loss here it would be a capital loss and if he filed as a bad debt expense it would be a deduction from business income, hence where he filed as both, let us go to the rule of statutory interpretation based on specific provisions trumping general provisions. With this approach, any taxpayer would be encouraged to intentionally file all losses from loans as a bad debt expense, regardless of whether the loan was on account of capital or not, and risk not being caught by the auditor because even if he was caught, he could rely on the Respondent's position to suggest there was no misrepresentation or deceit on his part to avoid penalties. This interpretation would lead to an absurd result.

[42] The Respondent relied upon the decision of the Federal Court of Appeal in the case of *Imperial Oil Ltd. v. Canada*, 2004 FCA 361, 2004 DTC 6702 (F.C.A.), as supporting its position that the *Act* may specifically treat an item of income as both capital and as business income, notwithstanding the dichotomy, in which case due to the rule against double taxation or deduction set out in subsection 248(28) above, one must resort to the doctrine of relying on the specific as opposed to general provision in the *Act*. In *Imperial Oil*, the issue was the deductibility of foreign exchange losses as a cost of borrowing and specifically whether the cost of redeeming its discounted debentures expressed in U.S. dollars, which increased from the date of issuance to the date of redemption due to a fall in the value of the Canadian dollar, should be treated as a capital loss or an expense as the cost of borrowing, pitting the expense treatment of paragraph 20(1)*(f)* of the *Act* against the capital loss provisions of subsection 39(2). The Federal Court of Appeal decided subparagraph 20(1)*(f)*(ii) was a more specific provision that applied.

[43] Unfortunately for the Respondent here, he failed to take notice that such decision was overturned by the Supreme Court of Canada in *Imperial Oil Ltd. and Inco Ltd. v. Canada,* 2006 DTC 6639 (S.C.C.). At paragraphs 67 and 68, LeBel J. states:

> 67 In my view, s. 20(1)*(f)* was never intended to apply to foreign exchange losses. … The interpretation advanced by the respondents in these appeals, on the other hand, turns s. 20(1)*(f)* into a broad provision allowing for the deductibility of a wide range of costs attendant upon financing in foreign currency, in the absence of any mention of such costs in the text of the *ITA*, and despite the fact that such costs are usually regarded as being on capital account.

> 68 The respondents' interpretation thus conflicts with the general treatment of capital gains and losses in the *ITA*. In particular, it indicates a failure to properly appreciate the role of s. 39. …

[44] In my view, the Supreme Court of Canada has clearly acknowledged the dichotomy of treatment between capital and non-capital income and deductions and clarified that the characterization of such items is a precondition to determining the nature of their subject matter

[45] Accordingly, this appeal is allowed with costs to the Appellant.

Signed at Ottawa, Canada, this 19th day of July 2010.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2010 TCC 388
COURT FILE NO.:	2008-3556(IT)G
STYLE OF CAUSE:	BARRINGTON LANE DEVELOPMENTS LIMITED and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	June 4, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice F.J. Pizzitelli
DATE OF JUDGMENT:	July 19, 2010

APPEARANCES:

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Counsel for the Respondent:	Deanna M. Frappier

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