Docket: 2018-646(IT)G

BETWEEN:

DALE WALLSTER,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard November 23, 2021 at Vancouver, British Columbia

Before: The Honourable Justice Bruce Russell

Appearances:

Counsel for the Appellant:	David Davies
Counsel for the Respondent:	David McCormick Selena Sit

AMENDED JUDGMENT

In accordance with the herein reasons for judgment the appeal is allowed, with costs, and the August 12, 2015 reassessment of the Appellant's 2011 taxation year is hereby vacated. The parties have thirty days from the issuance of this judgment within which to, if wished, file written submissions re costs.

Signed at Ottawa, Canada, this 1st day of November 2022.

"B. Russell"

Russell J.

Citation: 2022 TCC 124
Date: November 1, 2022
Docket: 2018-646(IT)G

BETWEEN:

DALE WALLSTER,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

AMENDED REASONS FOR JUDGMENT

Russell J.

I. Introduction:

[1] The appellant, Dale Wallster, appeals the reassessment of his 2011 taxation year that the Minister of National Revenue (Minister) raised August 12, 2015 under the federal *Income Tax Act* (Act). That reassessment disallowed $215,129 of a previously allowed $252,000 deduction for renounced Canadian Exploration Expenses (CEEs).

[2] Except where otherwise stated statutory references are provisions of the Act.

[3] It is common ground that this reassessment was not raised within the appellant's three year "normal reassessment period" per subsections 152(3.1) and (4). That period had expired July 3, 2015, shortly prior to the August 12, 2015 raising of this reassessment. The respondent asserts that the reassessment was raised on a timely basis citing subparagraph 152(4)(b)(v).

[4] The appellant submits that subparagraph 152(4)(b)(v) cannot apply, on the basis that a pre-condition for its application was not met.

II. Issue:

[5] The sole issue is whether subparagraph 152(4)(b)(v) was applicable.

III. Statutory Provisions:

[6] Subparagraph 152(4)(b)(v) and subsection 66(12.73) provide:

- Subparagraph 152(4)(b)(v): 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 taxes payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal assessment 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…
>
> > (v) is made as a consequence of a reduction under subsection 66(12.73) of an amount purported to be renounced under section 66…

- Subsection 66(12.73): Where an amount that a corporation purports to renounce to a person under subsection 66(12.6), 66(12.601) or 66(12.62) exceeds the amount that it can renounce to the person under that subsection,

> (a) the corporation shall file a statement with the Minister in prescribed form where
>
> > (i) the Minister sends a notice in writing to the corporation demanding the statement, or
> >
> > (ii) the excess arose as a consequence of a renunciation purported to be made in a calendar year under subsection 66(12.6) or 66(12.601) because of the application of subsection 66(12.66) and, at the end of the year, the corporation knew or ought to have known of all or part of the excess;
>
> (b) where subparagraph 66(12.73)(a)(i) applies, the statement shall be filed not later than 30 days after the Minister sends a notice in writing to the corporation demanding the statement;
>
> (c) where subparagraph 66(12.73)(a)(ii) applies, the statement shall be filed before March of the calendar year following the calendar year in which the purported renunciation was made;
>
> (d) except for the purpose of Part XII.6, any amount that is purported to have been so renounced to any person is deemed, after the statement is filed with the Minister, to have always been reduced by the portion of excess identified in the statement in respect of that purported renunciation; and

> (e) where a corporation fails in the statement to apply the excess fully to reduce the total one or more purported renunciations, the Minister may at any time reduce the total amount purported to be renounced by the corporation to one or more persons by the amount of the unapplied excess in which case, except for the purpose of Part XII.6, the amount purported to have been so renounced to a person is deemed, after that time, always to have been reduced by the portion of the unapplied excess allocated by the Minister in respect of that person. (underlining added)

IV. Evidence:

[7] There is no factual dispute. At all material times the corporation Quattro Exploration and Production Ltd. (Quattro) was engaged in the business of exploration for petroleum and natural gas. In 2011 the appellant subscribed for Quattro flow-through shares.

[8] On December 31, 2011 Quattro per subsection 66(12.6) purportedly renounced to the appellant $252,000 of resource expenditures qualifying as Canadian Exploration Expenses (CEEs). The appellant claimed that amount as a deduction in his 2011 taxation year. His 2011 taxation year was initially assessed July 3, 2012, with the deduction allowed.

[9] In 2014 the Minister determined that Quattro on December 31, 2011 had overstated by approximately 85% the total of CEEs it could validly have renounced.

[10] The Minister informed Quattro of this by letter dated November 20, 2014. Also in that letter the Minister gave Quattro notice, required by subparagraph 66(12.73)(a)(i), stating – “This letter will serve as written notice from the Minister that the corporation file the statement.”

[11] The statement Quattro was to file was a completed prescribed form T101B advising of Quattro’s distributed reduction amongst its flow-through shareholders including the appellant of the excess of purported CEEs it had renounced December 31, 2011.

[12] Paragraph 66(12.73)(b) requires the relevant corporation to file the said statement with the Minister within 30 days of the Minister having demanded it.

[13] Quattro did not comply. It never filed the demanded statement.

[14] Absent Quattro filing the demanded statement, a Canada Revenue Agency auditor (Mr. Osterman), without Quattro authorization, filed with the Minister a completed form T101B statement pertaining to Quattro, whereby the Minister reduced inter alia the appellant's total of CEEs Quattro had renounced to him in 2011. This reduction was the above-mentioned $215,219 of the purportedly renounced $252,000 total that the appellant had deducted in his 2011 taxation year.

V. Parties' Positions:

[15] The appellant's position is that subparagraph 152(4)(b)(v) (set out above) did not apply so as to extend the time period for reassessing to include the actual August 12, 2015 date of reassessment. This was on the basis of the appellant's assertion that the reassessment had not been, "made as a consequence of a reduction under subsection 66(12.73)", as required by subparagraph 152(4)(b)(v). The appellant maintains that no such "reduction under subsection 66(12.73)" occurred because Quattro never filed the statement (completed form T101B) that paragraph 66(12.73)(a) required be filed.

[16] The respondent Crown acknowledges that Quattro filed no statement as had been required but submits that a subsection 66(12.73) reduction nevertheless occurred. The respondent asserts that Quattro's non-filing of the demanded statement is "functionally" the same as had Quattro filed the required statement but in it had erroneously reduced the CEE amounts it purportedly had renounced.

VI. Analysis:

[17] This calls for statutory interpretation of subsection 66(12.73) that subparagraph 152(4)(b)(v) incorporates by reference.

[18] The general function of subsection 66(12.73) is to provide for reduction of any excess of previously renounced CEE amounts over valid CEE amounts that were able to be renounced. To initiate a reduction, paragraph 66(12.73)(a) provides that the particular corporation "shall file a statement with the Minister" (being prescribed form T101B).

[19] Paragraph 66(12.73)(a) has two subparagraphs – (i) and (ii). Subparagraph (i) provides for the Minister to send a demand to the applicable corporation for the statement.

[20] Subparagraph (ii) addresses excesses arising as a consequence of subsection (12.66) "look-back rule" renunciations. Subsection 66(12.66) provides for the look-back rule, enabling a qualified corporation to renounce exploration expenses it incurred up to a full year following the end of the calendar year in which the corporation had raised funding through subscriptions of flow-through shares. The renunciation in the case at bar was not a renunciation made per subsection 66(12.66).

[21] In any event what subparagraph (ii) requires is that a statement be filed by the corporation, not on demand by the Minister, but rather, per paragraph 66(12.73)(c), before March of the year following the calendar year in which the look-back rule purported renunciation had been made.

[22] In either situation the filed statement is to fully apply the excess total renounced CEEs over the total of qualifying CEEs, amongst the applicable flow-through shareholders (paragraph 66(12.73)(d)). However, if the filed statement failed to fully do so, the Minister may allocate the remainder (paragraph 66(12.73)(e)).

[23] However, there is no provision in subsection 66(12.73) addressing, at least explicitly, if the required statement is not filed at all, as is the case here.

[24] In *Canada Trustco Mortgage Corporation v. The Queen*, 2005 SCC 54, para. 10, the Supreme Court of Canada introduced the required "textual, contextual and purposive analysis" required for statutory interpretation, as follows:

> 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 CanLII 639 (SCC, [1999] 3 SCR 804 at para. 50). The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions often act as a harmonious whole. (underlining added)

[25] More recently the Supreme Court in *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51, para. 41, referenced that Court's *Canada Trustco* above

language, confirming the "textual, contextual and purposive analysis" approach to statutory interpretation in a tax context. Also that Court affirmed that, "[w]here the words of a statute are 'precise and unequivocal', their ordinary meaning will play a dominant role."

[26] Turning to the "textual" component of this analysis, the paragraph 66(12.73)(a) language (*viz*., "the corporation shall file a statement with the Minister in prescribed form") is clear and specific in requiring the corporation to file a statement (form T101B) with the Minister. This wording is neither ambiguous nor capable of any other reasonable meaning.

[27] Regarding the "contextual" component of the Supreme Court's analytical process, the appellant referenced subsections 163(2.21) and (2.22), saying that these penalty provisions would apply in a Quattro situation where the demanded statement was not filed. These provisions read (underlining added):

> (2.21) [False statement or omissions with respect to look-back rule] A person is liable to the penalty determined under subsection 2.22 where the person
>
> > (a) knowingly or under circumstances amounting to gross negligence has made or has participated in, assented to or acquiesced in the making of, a false statement or omission <u>in a document required to be filed under subsection 66(12.73) in respect of a renunciation purported to have been made because of the application of subsection 66(12.66)</u>; or
> >
> > (b) <u>fails to file the document</u> on or before the day that is 24 months after the day on or before which it was required to be filed.
>
> (2.22) For the purpose of subsection (2.21), the penalty to which a person is liable in respect of a document required to be filed under subsection 66(12.73) is equal to 25% of the amount, if any, by which
>
> > (a) the portion of the excess referred to in subsection 66(12.73) in respect of the document that was known or that ought to have been known by the person exceeds
> >
> > (b) where paragraph 2.21(b) does not apply, the portion of the excess identified in the document, and
> >
> > (c) in any other case, nil.

[28] The appellant asserts that these provisions,

> …deal specifically with two situations: first, an intentional (or grossly negligent) over-renunciation under the look-back rule; and second, corporations that do not file in response to a Ministerial demand for a statement in form T101B under subsection 66(12.73).[1] (underlining added)

[29] In my view these penalty provisions apply solely in respect of look-back rule renunciations. Paragraph 163(2.21)(a) requires the document to be filed be, "in respect of a renunciation purported to have been made because of the application of subsection 66(12.66)". As above referenced, subsection 66(12.66) provides for look-back rule renunciations.

[30] As well the paragraph 163(2.21)(b) phrase, "fails to file *the* document" (italics added), refers back to the "document" in paragraph 163(2.21)(a), regarding a look-back rule renunciation. This paragraph causes the penalties to apply if the corporation failed to file the document within 24 months of when it should have been filed.

[31] The appellant says that this legislation,

> …sheds light on what can happen where a corporation fails to file the required form under subsection 66(12.73). The Minister is able to not only reassess the flow-through investors within the normal reassessment period, she is also able to impose penalties upon the non-filing corporation without establishing gross negligence. The penalties in the case of a non-filer (of the T101B) are substantial…[2]

[32] My view is that these penalty provisions would apply to a corporation failing to file the document in respect of a look-back rule renunciation; but not, as is the case here, for a failure to file in the case here. The case here does not involve a look-back rule reduction, but does involve the Minister having demanded the statement filing.

[33] However, apart from the foregoing, there is an aspect of "context", for purposes of statutory interpretation analysis, demonstrated by paragraph 163(2.21)(b), in its utilization of the phrase "fails to file a document". Parliament's usage of that clear and concise phrasing well demonstrates explicit Parliamentary intent in reference to a failure to file situation.

[34] This shows that when Parliament wants to refer to a failure to file a document situation, it would simply and succinctly state same, as in paragraph 163(2.21)(b). It

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[1] *Ibid.*, para. 37
[2] *Ibid*., para. 38

follows that an absence of any such phrasing, as here in subsection 66(12.73), indicates Parliamentary non-intent to reference such a scenario.

[35] I anticipate Parliament would have used similar language in paragraph 66(12.73)(e) had it intended to include in subsection 66(12.73) the Quattro-type situation of failure to file the demanded form T101B.

[36] Finally, regarding the "purposive" element of the *Canada Trustco* analysis, the appellant submits that the earlier version of subsection 66(12.73) included an explicit reference to a non-filed statement, prior to amendment in 1997[3] to read as it presently does.

[37] The prior version of subsection 66(12.73) read:

> (12.73) Where the total of all amounts that a corporation purported to renounce to persons under subsection (12.6), (12.62) or (12.64) in respect of expenses incurred by it in any period ending on the effective date of the purported renunciation exceeds the total amount of those expenses in respect of which it may renounce amounts under those subsections, it shall reduce the amounts so renounced to one or more of those persons to effect a reduction in the total of the amounts so purported to be renounced by the amount of the excess and file a statement with the Minister indicating the adjustments made in the renunciations and if the corporation has failed to so reduce the amounts and file such a statement with the Minister within 30 days after notice in writing by the Minister has been forwarded to the corporation that such a reduction is or will be required for the purposes of any assessment of tax under this Part, the Minister may, for the purposes of this section, reduce the amounts purported to be renounced by the corporation to one or more of those persons to effect a reduction in the total of the amounts so purported to be renounced by the amount of the excess, and in any such case, notwithstanding subsections 12.61, 12.63 and 12.65, the amount renounced to each of the persons shall be deemed to be the amount as reduced by the corporation or the Minister, as the case may be. (underlining added)

[38] This language was clear that the Minister could proceed with reducing the [CEE] amounts purported to be renounced by the corporation where the Minister had given 30 days notice for the corporation to file with the Minister its document showing reduction of the previously renounced amounts, and no such document was filed. (That is akin to what was done in this instance, with the Canada Revenue Agency flow-through share auditor, Mr. Osterman, testifying that absent any form T101B being filed by Quattro as had been demanded, Mr. Osterman himself

[3] S.C. 1997, c. 25, subsection 13(23)

prepared and filed that required form, with the Minister then proceeding to reduce the prior renounced amounts.)

[39] This previous subsection 66(12.73) wording ("and if the corporation has failed to so reduce the amounts and file such a statement with the Minister") contrasts clearly with the current subsection 66(12.73) wording discussed above simply being (paragraph (e) "where a corporation fails in the statement to apply the excess fully…").

[40] These drafting changes are consistent with a Parliamentary intent to have the present subsection 66(12.73) address where corporations deficiently filed but not as well where there was no filing at all.

[41] As for Parliamentary scheme/purpose, it would seem that subparagraph 152(4)(b)(v), introduced into the Act with its extended reassessment period, complements the look-back rule type of renunciation per subsection 66(12.66), which allowed a full calendar year "look-back" time for renunciation. This seemingly addresses a concern of there being a reduced window in look-back rule renunciation cases to reassess within the normal reassessment period.

[42] Regarding the respondent's position that the two scenarios are "functionally" the same, I consider that Parliament's actual language, as discussed, recognizes a clear distinction between corporations that filed but inaccurately reduced the non-qualifying excess of renounced CEEs, and corporations that outright failed to file.

[43] Also I note that in this present case there was no obvious need for a reassessment period extended beyond the three year normal reassessment period. The appealed reassessment was raised August 12, 2015, slightly more than a month following the July 3, 2015 expiry of the appellant's normal reassessment period. Furthermore, the Minister had had approximately half a year - from late 2014 until July 3, 2015 – available to have reassessed the appellant within his normal reassessment period.

[44] In conclusion the textual, contextual and purposive analysis of *Canada Trust* shows that subsection 66(12.73), recognizing as part of that analysis the "dominant role" of clear and precise text, is not to be interpreted so as to include the "fails to file a document" scenario, as here with Quattro. Accordingly the reassessment here was not, "made as a consequence of a reduction under subsection 66(12.73) of an amount purported to be renounced under section 66", as required by

subparagraph 152(4)(b)(v). That is because the paragraph 66(12.73)(a) stipulation that the corporation have filed with the Minister a statement (completed form T101B) that the Minister had demanded, was not met. Accordingly, subparagraph 152(4)(b)(v) was not applicable, resulting in the appealed reassessment being statute-barred.

[45] There must be finality in the taxation appeal process. As the Supreme Court of Canada stated in *Markevich v. Canada*, 2003 SCC 9, para. 17: "[l]imitation periods…are meant to promote certainty, avoid stale evidence, encourage diligence, and bring repose."

VII. Conclusion:

[46] The appeal will be allowed, with costs. The August 12, 2015 reassessment of the appellant's 2011 taxation year will be vacated as being statute-barred and thus without legal effect.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated October 31st, 2022 in order to correct the words and figures underscored in XXXX hereof.

Signed at Ottawa, Canada, this 1st day of November 2022.

"B. Russell"

Russell J.

CITATION:	2022 TCC 124
COURT FILE NO.:	2018-646(IT)G
STYLE OF CAUSE:	DALE WALLSTER AND HIS MAJESTY THE KING
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