Federal Court of Appeal | Cour d'appel fédérale

Date: 20240227

Docket: A-160-22

Citation: 2024 FCA 35

CORAM: **WEBB J.A.**
LASKIN J.A.
LOCKE J.A.

BETWEEN:

POTASH CORPORATION OF SASKATCHEWAN INC.

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Ottawa, Ontario, on November 23, 2023.

Judgment delivered at Ottawa, Ontario, on February 27, 2024.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: LASKIN J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The issue in this appeal is whether Potash Corporation of Saskatchewan Inc. (PCS) was entitled, in computing its income for the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) for its taxation years 1999 to 2002, to deduct base payments paid to the province of Saskatchewan under *The Mineral Taxation Act, 1983*, S.S. 1983-84, c. M-17.1 (MTA) and *The Potash Production Tax Schedule* (PPTS) to the MTA.

[2] The Tax Court of Canada (*per* Justice Owen, 2022 TCC 75) found that PCS was not entitled to deduct these base payments in computing its income for the taxation years under appeal.

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

I. Background

[4] The PPTS imposed a tax on potash produced from any lands in Saskatchewan that was sold or otherwise disposed of. There were two components of the tax: a base payment and a profit tax. Only the base payment is in issue in this appeal.

[5] Section 5 of the PPTS set out the formula used to determine the amount of the base payment. The base payment was the rate of tax determined in accordance with the PPTS multiplied by the number of tonnes of potash sold or otherwise disposed of, minus certain permitted deductions (subsection 5(2) of the PPTS).

[6] The rate of tax was based on a prescribed percentage of the profits for a particular year divided by the number of tonnes of potash sold or otherwise disposed of in that year (subsection 5(3) of the PPTS). The PPTS prescribed a maximum and a minimum rate of tax (subsections 5(4) and 5(5) of the PPTS). To determine whether the rate of tax for PCS for a particular year fell within or outside the range between the minimum and maximum rate of tax, PCS determined the prescribed percentage of its profits for that year and then divided this amount by the number of

tonnes of potash that it sold in that year. The rate of tax for PCS as calculated in accordance with the formula for each year under appeal exceeded the maximum rate of tax as prescribed. Therefore, the maximum rate of tax prescribed by the PPTS was used as the rate of tax for each year.

[7] PCS paid the following base payments for the years under appeal:

Taxation Year	**Base Payment**
1999	$14,643,226
2000	$16,454,834
2001	$14,673,344
2002	$13,655,538

[8] PCS did not claim a deduction for the base payments in filing its tax returns for the years under appeal. Following the decision of the Tax Court in *Cogema Resources Inc. v The Queen*, 2004 TCC 750 (*Cogema*) (which was affirmed on appeal (2005 FCA 316)), PCS requested a reduction in its income to reflect the base payments. This request was refused by the Minister of National Revenue (the Minister), which resulted in the appeal that was heard by the Tax Court.

II. Decision of the Tax Court

[9] PCS argued before the Tax Court that it was entitled to deduct the base payments in computing its profit for the purposes of subsection 9(1) of the Act and that neither paragraph 18(1)(*a*) nor paragraph 18(1)(*m*) of the Act applied to deny this deduction. If either paragraph

18(1)(*a*) or paragraph 18(1)(*m*) of the Act applied to deny this deduction, that would have been sufficient to dismiss PCS' appeal.

[10] Paragraph 18(1)(*a*) of the Act is a general prohibition on claiming a deduction for an outlay or expense except to the extent that it was made for the purpose of earning income:

18 (1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of	**18 (1)** Dans le calcul du revenu du contribuable tiré d'une entreprise ou d'un bien, les éléments suivants ne sont pas déductibles :
(*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;	***a*)** les dépenses, sauf dans la mesure où elles ont été engagées ou effectuées par le contribuable en vue de tirer un revenu de l'entreprise ou du bien;

[11] The Tax Court Judge found that the deduction of the base payments was denied pursuant to paragraph 18(1)(*a*) of the Act because either:

(a) the base payment was a tax "on the income of a producer from sales or other dispositions of potash mined in Saskatchewan" (paragraph 72 of his reasons); or

(b) "the base payment is not incurred by [PCS] for the purpose of gaining or producing income from its potash mining business; rather, it is a tax that is applied only after the conclusion of the process of earning income from that business" (paragraph 73 of his reasons).

[12] Paragraph 18(1)(*m*) of the Act was repealed in 2003, effective for taxation years that began after 2007. For the purposes of this appeal, paragraph 18(1)(*m*) of the Act would have

prohibited the deduction by PCS of the base payment if the base payment could reasonably have been considered to be in relation to the production of potash by PCS. Paragraph 18(1)(*m*) of the Act was amended during the taxation years under appeal. The full text of the two versions of paragraph 18(1)(*m*) of the Act that were applicable during the taxation years under appeal are set out in paragraphs 75 and 76 of the Tax Court Judge's reasons.

[13] Although it was not necessary to consider whether paragraph 18(1)(*m*) of the Act applied, the Tax Court Judge summarizes his conclusion that the base payment was made in relation to the production of potash:

> [86] I similarly have no difficulty concluding that a "sale or other disposition of" potash is an activity that relates to the production of that potash. There is a direct and immediate connection between the production of potash and the subsequent sale or disposition of that potash. To find otherwise would be to ignore the commercial objective of any mining venture, which is to mine and produce minerals to obtain the value of those minerals through sale, consumption, or use. The fact that the base payment arises after a sale or other disposition of potash does not preclude it being in relation to the production of that potash.

[14] As a result, the Tax Court dismissed the appeal of PCS.

III. Issue and Standard of Review

[15] The issues raised by PCS in this appeal are:

(a) whether paragraph 18(1)(*a*) of the Act precluded PCS from deducting the base payments in computing its income; and

(b) whether paragraph 18(1)(*m*) of the Act precluded PCS from deducting the base payments in computing its income.

[16] PCS is not challenging any findings of fact made by the Tax Court Judge. The only issue is the interpretation of these provisions of the Act. As a result, the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33).

IV. Analysis

[17] In order for PCS to be successful in this appeal, it would be necessary to find that neither paragraph 18(1)(*a*) of the Act nor paragraph 18(1)(*m*) of the Act prohibited the deduction of the base payments by PCS.

[18] As noted above, paragraph 18(1)(*a*) of the Act is a general limitation that restricts a deduction for an outlay or expense to the amount thereof that was made or incurred for the purpose of gaining or producing income from a business or property. If the base payments were not made or incurred for the purpose of gaining or producing income from the business being carried on by PCS, then they cannot be deducted in computing the income of PCS.

[19] The formula to calculate the base payment was the rate of tax multiplied by the quantity of potash sold or otherwise disposed of (subsection 5(2) of the PPTS). While the PPTS prescribed a minimum rate of tax (and therefore, even if there was no profit, there would still be a rate of tax), there was no prescribed minimum quantity of potash sold or otherwise disposed of.

If no potash was sold or otherwise disposed of in a particular year, there would be no base payment for that year.

[20] Therefore, in order to incur the base payment, PCS had to sell or otherwise dispose of potash. As noted by the Tax Court Judge (at paragraph 6 of his reasons), PCS only produced potash for sale. The witness for PCS at the Tax Court hearing also confirmed that the base payment was calculated based on the quantity of potash that was sold. As a result, the base payment was only incurred by PCS as a result of a sale of potash by PCS. There was no "other disposition" of potash by PCS.

[21] Since the issue in this appeal is whether PCS can deduct the base payment in determining its income for the purposes of the Act, what resulted in the base payment being incurred by PCS is relevant. The application of the base payment to a different taxpayer, who may have incurred the base payment as a result of some other event that would be considered to be a disposition for the purposes of the PPTS, is not relevant in determining whether PCS is entitled to the deduction. The tax consequences to PCS are to be determined based on what PCS did that resulted in it incurring the base payment. As noted by the Supreme Court of Canada in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, 4 C.T.C. 313, at paragraph 45:

> Unless the Act provides otherwise, a taxpayer is entitled to be taxed based on what it actually did, not based on what it could have done, and certainly not based on what a less sophisticated taxpayer might have done.

[22] PCS labels as "red herrings" the Tax Court Judge's focus on the base payment only being incurred on a sale of potash and the requirement to use the profit of PCS to determine if the rate

of tax would be the minimum tax rate, the maximum tax rate or somewhere in between. PCS argues that it could not carry on business if it did not pay the base payment.

[23] However, the argument that not paying the base payment could result in PCS not being able to continue to carry on its business is based on the consequences of not paying the base payment, and not on whether the base payment was incurred for the purpose of gaining or producing income. The same argument concerning the consequences of failing to pay the base payment could also be made with respect to provincial income taxes. If a person were to not pay provincial income taxes incurred as a result of carrying on a business, the particular province may well commence collection actions, which could result in the closure of the business.

[24] However, there is no dispute that provincial income taxes are not deductible in computing income for the purposes of the Act. In *Roenisch v. Canada (Minister of National Revenue - M.N.R.)* (1930), [1931] Ex.C.R. 1, at page 4, [1931] 2 D.L.R. 90, (*Roenisch*) Justice Audette stated:

> It is self-evident that the amount of the income tax paid to the province is not an expense for the purpose of earning the income, within the meaning of 6a [now paragraph 18(1)(*a*)]. When such payment of taxes is made to the province, it is not so made to earn the income, it is paid because there is an income showing gain and profit.

[25] This argument that the failure to pay a tax that could lead to the possible consequence of losing a business is not sufficient, in and of itself, to establish that the base payment was incurred for the purpose of gaining or producing income.

[26] PCS, in paragraph 47 of its memorandum, submits that the Tax Court should have considered the following paragraph from *Roenisch*, [1931] Ex.C.R. 1, at page 5:

> As was said, in the case of *The Crown v. D. and W. Murray Ltd.* [(1909) 11 W.A. Law Reports 92, at p. 95], the remarks made by Sir Henry James, when Attorney-General, in the case of *Last v. London Assurance Corporation* [(1885) 10 A.C. 438], apply to the present case. He says:
>
> > The test is this — if there is an expenditure which would be made in any case, from which profits may accrue, the expenditure may be deducted; but an expenditure which will not be incurred unless there is a profit is not an expenditure in order to earn a profit.
>
> [emphasis was added by PCS in its memorandum]

[27] PCS, in addressing this test in its memorandum, does not refer to the first part of the test which described "an expenditure which would be made in any case, from which profits may accrue". Therefore, PCS does not address how income or profits could accrue from making the base payment.

[28] Instead, PCS focuses on the obligation to pay the base payment even if PCS did not realize a profit (because the PPTS prescribed a minimum rate of tax). There are two responses to this argument.

[29] First, this argument does not take into account the second component of the formula to determine the amount of the base payment. The base payment is the rate of tax multiplied by the number of tonnes of potash sold or otherwise disposed of. PCS only incurred the base payment

because it sold potash, which resulted in income being gained. If PCS did not sell any potash, then no base payment would be incurred.

[30] The second response to PCS' argument related to *Roenisch* is that the argument appears to equate income with profit for the purposes of paragraph 18(1)(*a*) of the Act. However, paragraph 18(1)(*a*) of the Act refers to income. The word profit does not appear in this paragraph. The test under paragraph 18(1)(*a*) of the Act is whether the base payment was made or incurred for the purpose of gaining or producing income. Therefore, the meaning of "income" for the purposes of paragraph 18(1)(*a*) of the Act is relevant.

[31] In *Ludco Enterprises Ltd. v. Canada*, 2001 SCC 62, the Supreme Court noted that the Act does not define "income":

> [57] The *Income Tax Act* does not define the term "income". The Act speaks of "net income", "taxable income", and income from different sources, but it neither identifies nor describes the legal characteristics of "income"; it only speaks of what is to be included or excluded from income. Similarly, tax theorists have proposed many different definitions of "income" distinguishable by their varying degrees of inclusiveness. The common feature of all the definitions of income, whether derived from tax law, economic theory or the dictionary, is that "income" is a measure of gain: see V. Krishna, *The Fundamentals of Canadian Income Tax* (6th ed. 2000), at pp. 97-100.

[32] The Supreme Court concluded, at paragraph 61, that "income", for the purposes of paragraph 20(1)(*c*) of the Act, "does not refer to net income, but to income subject to tax. In this light, it is clear that 'income' in s. 20(1)(*c*)(i) refers to income generally, that is, an amount that would come into income for taxation purposes, not just net income".

[33] In *Novopharm Ltd. v. Canada*, 2003 FCA 112, Justice Rothstein, writing on behalf of this Court, concluded that the comments of the Supreme Court in *Ludco* applied equally to the meaning of "income" in paragraph 18(1)(*a*) of the Act:

> [20] The Minister submits that paragraph 18(1)(*a*) is generally aimed at deductions of outlays which are not profit motivated. However, I think the rationale outlined by Iacobucci J. in *Ludco*, as to why income in subparagraph 20(1)(*c*)(i) is not equivalent to profit or net income, is equally applicable to paragraph 18(1)(*a*). Nowhere in the language of paragraph 18(1)(*a*) is a quantitative test suggested. Nor is there any support in the words of paragraph 18(1)(*a*) that suggests a judicial assessment of the sufficiency of income. And, as with subparagraph 20(1)(*c*)(i), such an assessment would be too subjective where certainty is to be preferred. For these reasons, I am of the opinion that the view of Pigeon J. in *Lipson, supra*, to the extent that it may have been applied to paragraph 18(1)(*a*), must now be considered to have been superseded by the rationale in *Ludco*.

[34] Therefore, "income", for the purposes of paragraph 18(1)(*a*) of the Act, does not mean "profit" or "net income". Rather, "income", for the purposes of paragraph 18(1)(*a*) of the Act, means an amount that would be included in computing income for the purposes of the Act. As a result, in applying the test adopted by the Exchequer Court in *Roenisch* ("an expenditure which will not be incurred unless there is a profit is not an expenditure in order to earn a profit") to paragraph 18(1)(*a*) of the Act, the references to "profit" must be read as "income". The test would then be:

> … if there is an expenditure which would be made in any case, from which [income] may accrue, the expenditure may be deducted; but an expenditure which will not be incurred unless there is [income] is not an expenditure in order to earn [income].

[35] For PCS, the base payment was an expenditure that would not have been incurred unless it sold potash, which produced income. The base payment was therefore not an expenditure in order to earn income.

[36] PCS refers to the decision of the English Court of Appeal in *Harrods (Buenos Aires), Ltd. v. Taylor-Gooby (Inspector of Taxes)* (1964), 41 T.C. 450, 43 A.T.C. 6 (CA). In that case, Harrods (Buenos Aires), Ltd. (Harrods) was incorporated in the United Kingdom and carried on business in Argentina. Argentina imposed a tax on the capital of corporations that carried on business in Argentina through an "*empresa estable*". The premises where Harrods carried on its business was an "*empresa estable*". The tax was paid regardless of whether the corporation earned a profit.

[37] All three judges of the Court of Appeal, in separate reasons, agreed that the tax was deductible by Harrods in computing its income for the purposes of the *Income Tax Act* (UK), 1952, 15 & 16 Geo VI & I Eliz II, c. 10. Wilmer, L.J., stated at page 466:

> It was the establishment of the "*empresa estable"* which attracted the tax, which was payable regardless of whether profits were, in fact, made … Liability to the tax in the present case was an incident to the establishment of the Company's "*empresa estable*", and as such it was a liability incurred wholly and exclusively for the purposes of the trade carried on there.

[38] Harrods' liability to pay the tax did not arise on the sale of any products, but rather simply by having the establishment in Argentina. Diplock, L.J. confirmed the significance of the imposition of the tax in Argentina as a result of Harrods having an establishment there (at page 469):

> Liability to the tax does not depend upon whether profits are made or not. It is a payment which the company is compelled to make if it has a business establishment in the Argentine at all, and it must have a business establishment if it is to carry on its trade.

[39] The tax was imposed in Argentina as a result of Harrods simply having an establishment in that country. Therefore, there is a significant distinction between the tax under consideration in *Harrods (Buenos Aires), Ltd. v. Taylor-Gooby (Inspector of Taxes)* and the base payment imposed by the Province of Saskatchewan. While in both cases the tax is imposed regardless of whether the taxpayer has a profit, the triggering event for the imposition of the tax in Argentina was the establishment of a store in Argentina by Harrods. In this appeal, the triggering event is not the establishment of a mine in Saskatchewan, but the sale of potash. PCS gained or produced its income by selling potash. The base payment was not incurred for the purpose of making the sale of potash; rather, it was incurred as a consequence of the sale of potash.

[40] PCS also argues that *Cogema* confirms that a tax on the value of potash sold is deductible. In *Cogema*, the amounts in issue were paid under *The Corporation Capital Tax Act* (Saskatchewan), S.S. 1979-80 c. C-38.1 (the surcharge). The surcharge in *Cogema* was imposed on the value of the sales of uranium yellowcake. As noted by the Tax Court Judge, at paragraph 6, "[t]he surcharge was not paid at the time of production of the ore or of the yellowcake. It was paid at the time of sale of that yellowcake".

[41] The only provision of the Act that was in issue in *Cogema* was paragraph 18(1)(*m*). In particular, the issue was whether the surcharge was paid in relation to the production of

minerals. The Tax Court Judge found that the surcharge was in relation to the sale of minerals and not the production of minerals:

> [15] … the surcharge related to Cogema's actual sale of the mineral and not its right to remove the mineral from the ground. The surcharge was a sales tax and was in relation to the sale of minerals, not the production of minerals.

[42] Paragraph 18(1)(*a*) of the Act was not considered by the Tax Court in *Cogema*. The Tax Court Judge simply referred the matter back to the Minister of National Revenue for reconsideration and reassessment. The Tax Court Judge did not state that the amounts in issue were deductible in computing Cogema's income:

> [16] The appeals are allowed and these matters are referred back to the Minister of National Revenue for reconsideration and reassessment pursuant to these Reasons.

[43] In dismissing the appeal in *Cogema*, this Court provided brief reasons supporting the conclusion that the surcharge was a tax in relation to the sale of minerals and not the production of minerals:

> [1] We have not been persuaded that the amounts paid by the respondent pursuant to the *Corporation Capital Tax Act of Saskatchewan* (the *Saskatchewan Act*) in respect of which the respondent sought a deduction under the *Income Tax Act* constitute amounts that may reasonably be regarded as being in relation to the production in Canada of minerals.
>
> [2] Rather, we agree with Beaubier J., that the amounts paid by the respondent to the Province of Saskatchewan under the *Saskatchewan Act* were taxes in relation to sales of minerals and not the production of minerals.

[44] Since in *Cogema* neither the Tax Court nor this Court considered paragraph 18(1)(*a*) of the Act, *Cogema* does not assist in determining whether a tax in relation to the sale of minerals was incurred for the purpose of gaining or producing income.

[45] In this appeal, PCS gained or produced income by selling potash. The base payments were imposed based on the quantity of potash sold by PCS in a particular year. The base payments were not made or incurred for the purpose of making any sale of potash, but rather as a consequence of making such sale. Hence, the base payments were not made or incurred for the purpose of gaining or producing income but rather as a result of PCS gaining or producing income by selling potash.

[46] Since paragraph 18(1)(*a*) of the Act results in a denial of the deduction in issue, there is no need to consider whether paragraph 18(1)(*m*) of the Act would also have denied such deduction.

[47] As a result, I would dismiss the appeal with costs.

"Wyman W. Webb"
J.A.

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

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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