Federal Court of Appeal | Cour d'appel fédérale

Date: 20240430

Docket: A-243-22

Citation: 2024 FCA 83

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

BETWEEN:

TPINE LEASING CAPITAL CORPORATION

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on January 16, 2024.

Judgment delivered at Ottawa, Ontario, on April 30, 2024.

REASONS FOR JUDGMENT BY: WEBB J.A.

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

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The issue in this appeal is, if a taxpayer is successful in challenging the denial of a particular deduction, does subsection 152(9) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) allow the Minister of National Revenue (the Minister) to advance an alternative basis or argument that the assessment should still be supported on the basis that a related deduction, which was allowed, exceeded the amount that should have been allowed.

[2] In its 2015 income tax return, TPine Leasing Capital Corporation (TPine) claimed a deduction for the cost of goods sold and a deduction for capital cost allowance (CCA). The initial assessment issued by the Minister was based on both deductions being allowed. TPine was subsequently reassessed to deny the deduction for CCA and a penalty under subsection 163(2) of the Act was also assessed. In the Minister's view, the assets included in Class 10 and Class 16 (on which the CCA was claimed) included the same equipment that TPine had sold (the cost of which was deducted as cost of goods sold).

[3] The Tax Court (*per* Wong J., 2022 TCC 134) allowed certain proposed amendments to the reply filed by the Crown to include the following alternative argument or basis: if TPine is successful in challenging the denial of the CCA, TPine's appeal to the Tax Court should still be dismissed on the basis that TPine should not have been allowed to claim the full amount of cost of goods sold that was allowed by the Minister.

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

[5] In these reasons references to assessing or an assessment should be read, where necessary as including reassessing or a reassessment.

I. Background

[6] TPine is in the business of loan and equipment financing. The Tax Court Judge stated that the business also included the sale of lease receivables and equipment while TPine, in its

memorandum at paragraph 2, described this aspect of its business as securitizing “leases which it reported as a sale of leases receivable”.

[7] There does not appear to be any dispute that TPine claimed an amount for CCA and an amount for cost of goods sold in 2015. There is a dispute regarding whether TPine is entitled to claim both deductions.

[8] A deduction for CCA is not claimed on any particular asset, but rather it is based on the undepreciated capital cost of a particular class of assets. In this appeal, the relevant classes of assets are Class 10 and Class 16 (trucks and trailers). Therefore, the CCA would have been claimed based on the undepreciated capital cost of these two classes of assets, not on any particular asset. For ease of reference and brevity, these reasons will refer to the CCA claimed on particular assets rather than CCA being claimed based on a determination of the undepreciated capital cost of Class 10 and Class 16 assets that did not reflect a disposition of certain assets during the taxation year.

[9] In initially assessing TPine’s 2015 taxation year on June 23, 2016, the Minister allowed a deduction for CCA claimed on Class 10 and Class 16 assets (trucks and trailers) in the amount of $5,887,282, based on the assumption that certain assets were owned by TPine at the end of its taxation year. It is not clear whether the amount disallowed as CCA was the entire amount of CCA claimed for these two classes or only a portion of the amount of CCA claimed for Class 10 and Class 16.

[10] As set out in the amended reply, in initially assessing TPine's 2015 taxation year an additional deduction of $17,604,192 for cost of goods sold (in relation to the same equipment on which the Minister alleges CCA was claimed) was also allowed.

[11] TPine was subsequently reassessed on June 19, 2019. While a number of adjustments were made, the only adjustment that is relevant in this appeal is the denial of the deduction for CCA. No adjustment was made to the cost of goods sold that was claimed by TPine. It is the Minister's view that these two amounts were claimed in relation to the same assets. Whether the amount claimed for the cost of goods sold is for the same assets on which an amount was claimed for CCA is a matter to be determined by the Tax Court.

[12] TPine filed an appeal with the Tax Court. The Minister subsequently reassessed TPine on November 30, 2020 to disallow the carry-back of certain non-capital losses. TPine filed a fresh as amended notice of appeal. The Crown's reply (and a corrected version thereof) were both filed on April 27, 2021.

[13] Following the filing of the replies and the exchange of the lists of documents, but before examinations for discovery were commenced, the Crown brought a motion to amend the reply. The proposed amendments are set out in paragraph 9 of the Crown's memorandum in this appeal:

> a. revised paragraphs 32 and 34 to add to the assessing history that the Assessment allowed the Appellant's claim for a [cost of goods sold] deduction and the Reassessment maintained it.

b. added subparagraph 40(c.l) to correct the amount of the Appellant's claimed [cost of goods sold] deduction ($17,604,192), because the Minister had assumed an incorrect amount ($17,901,764).

c. added paragraph 41.1, which raises the following alternative issue:

> In the alternative, if the Appellant is entitled to the Denied CCA, is the amount of tax assessed in the Reassessment too high because it allowed the Appellant a deduction for [cost of goods sold] for the Subject Equipment?

d. revised paragraph 42 to add sections 10 and 54 of the Act to the statutory provisions on which the Respondent intends to rely.

e. added paragraphs 44.1 and 44.2 and the subheading preceding them. They introduce and advance the alternative argument. They read:

> 44.1 The ultimate issue in any appeal to this Court is whether the amount of tax assessed is too high.
>
> 44.2 An alternative issue is therefore, if the Appellant remained the owner of the Subject Equipment, whether the tax assessed in the Reassessment is too high. It is not. The Reassessment allowed the Appellant's claimed [cost of goods sold] deduction of $17,604,192 for the Subject Equipment. Pursuant to paragraph 18(1)(b) of the Act and paragraph 1102(l)(b) of the *Regulations*, the Appellant is not entitled to claim both [cost of goods sold] and CCA for the same property.

II. Subsection 152(9) of the Act

[14] Subsection 152(9) of the Act allows the Minister to advance an alternative argument or basis in support of an assessment. This subsection was added to the Act in 1999 and amended in 2016. The original and revised versions of this subsection are as follows:

Subsection 152(9) as added in 1999

(9) The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act	**(9)** Le ministre peut avancer un nouvel argument à l'appui d'une cotisation après l'expiration de la période normale de nouvelle cotisation, sauf si, sur appel interjeté en vertu de la présente loi :
(*a*) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and	*a*) d'une part, il existe des éléments de preuve que le contribuable n'est plus en mesure de produire sans l'autorisation du tribunal;
(*b*) it is not appropriate in the circumstances for the court to order that the evidence be adduced.	*b*) d'autre part, il ne convient pas que le tribunal ordonne la production des éléments de preuve dans les circonstances.

Subsection 152(9) as amended in 2016

(9) At any time after the normal reassessment period, the Minister may advance an alternative basis or argument — including that all or any portion of the income to which an amount relates was from a different source — in support of all or any portion of the total amount determined on assessment to be payable or remittable by a taxpayer under this Act unless, on an appeal under this Act	**(9)** Après l'expiration de la période normale de nouvelle cotisation, le ministre peut avancer un nouveau fondement ou un nouvel argument — y compris un fondement ou un argument selon lequel tout ou partie du revenu auquel une somme se rapporte provenait d'une autre source — à l'appui de tout ou partie de la somme totale qui est déterminée lors de l'établissement d'une cotisation comme étant à payer ou à verser par un contribuable en vertu de la présente loi, sauf si, sur appel interjeté en vertu de la présente loi :
(*a*) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and	*a*) d'une part, il existe des éléments de preuve que le contribuable n'est

	plus en mesure de produire sans l'autorisation du tribunal;
(*b*) it is not appropriate in the circumstances for the court to order that the evidence be adduced.	*b*) d'autre part, il ne convient pas que le tribunal ordonne la production des éléments de preuve dans les circonstances.

III. Decision of the Tax Court

[15] The Tax Court Judge made the following finding with respect to whether the revised version of subsection 152(9) of the Act was relevant in this matter:

> [6] The introductory portion of subsection 152(9) was amended in 2016 to apply to appeals instituted after December 15, 2016. The amendment seems to have expanded or clarified the scope of alternative bases or arguments which may be made by the Minister. Specifically, the change focuses on source-based issues so the distinction between the previous and current wording is not relevant to the present motion.

[16] The Tax Court Judge then referred to the decision of this Court in *Walsh v. Canada*, 2007 FCA 222 (*Walsh*), which set out certain conditions in relation to subsection 152(9) of the Act. The decision in *Walsh* related to the version of subsection 152(9) of the Act prior to the 2016 amendments.

[17] The Tax Court Judge found that the proposed amendments to paragraphs 32 and 34 of the reply simply clarified the assessing history and the new paragraph 40(c.1) of the reply corrected the amount that the Minister had allowed as the cost of goods sold. Paragraph 42 was revised to include additional references to statutory provisions.

[18] The new paragraphs (41.1, 44.1 and 44.2) set out the alternative argument that if TPine continued to own the equipment in issue, its appeal should still be dismissed because the amount allowed as a deduction for cost of goods sold exceeded the amount denied as a deduction for CCA. The Tax Court Judge allowed this amendment on the basis that "[i]t is a consideration in every appeal as to whether the Court's decision puts the taxpayer in a worse position but in the circumstances, it is better for both the trier of fact and the appellant to have this argument expressly laid out than for the argument to remain underlying" (paragraph 20).

IV. Issue and Standard of Review

[19] The issue in this appeal is whether subsection 152(9) of the Act allows the Minister to rely on the following alternative argument or basis: if TPine is successful in challenging the denial of the amount claimed as CCA, its appeal should still be dismissed because the amount that was allowed as a deduction for cost of goods sold exceeded the amount that was denied as a deduction for CCA.

[20] Since the issue in this appeal is the interpretation of subsection 152(9) of the Act, the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33).

V. Analysis

[21] TPine appealed the allowance of all of the proposed amendments to the reply. In my view, there is no basis to challenge the Tax Court Judge's decision to allow the amendments made to paragraphs 32, 34, 40(c.1) and 42 of the reply.

[22] In their submissions in this appeal, the parties focused on the amendments related to the alternative argument or basis (new paragraphs 41.1, 44.1 and 44.2). These reasons will also focus on these amendments.

[23] The proposed new paragraphs (41.1, 44.1 and 44.2) would mean that if TPine is successful in establishing that it was entitled to claim the CCA that was denied, and if the amount allowed as a deduction for the cost of goods sold was a deduction for the same equipment on which the CCA was claimed, TPine's appeal would be dismissed.

[24] In this matter, the amount of the CCA deduction that was denied was $5,887,282. The amount that was allowed as a deduction for the cost of goods sold was $17,604,192. If TPine is entitled to the deduction of $5,887,282 for CCA, to keep TPine's tax liability at the same amount that was reassessed (and hence dismiss TPine's appeal), it would be as if the amount allowed for cost of goods sold was reduced by $5,887,282.

A. *Obstacles to reassessing now*

[25] If the Minister were to now reassess TPine to reduce the amount allowed for cost of goods sold by $5,887,282, the Minister would face two obstacles.

[26] First, subsection 152(5) of the Act imposes a limitation on reassessments after the expiration of the normal reassessment period:

(5) There shall not be included in computing the income of a taxpayer for a taxation year, for the purpose of an assessment, reassessment or additional assessment made under this Part after the taxpayer's normal reassessment period in respect of the year, any amount that was not included in computing the taxpayer's income for the purpose of an assessment, reassessment or additional assessment made under this Part before the end of the period.	**(5)** N'est pas à inclure dans le calcul du revenu d'un contribuable pour une année d'imposition en vue de l'établissement, après la période normale de nouvelle cotisation qui lui est applicable pour l'année, d'une cotisation, d'une nouvelle cotisation ou d'une cotisation supplémentaire en vertu de la présente partie le montant qui n'a pas été inclus dans le calcul de son revenu en vue de l'établissement, avant la fin de cette période, d'une cotisation, d'une nouvelle cotisation ou d'une cotisation supplémentaire en vertu de cette partie.

[27] By reassessing TPine to deny a portion of the deduction for the cost of goods sold, the Minister would be including in TPine's income an amount that was not included in computing its income prior to the expiration of the normal reassessment period. Since TPine's 2015 taxation year was originally assessed on June 23, 2016, the normal reassessment period has expired.

[28] Subsection 152(5) of the Act does not apply if TPine made a misrepresentation as contemplated by subparagraph 152(4)(*a*)(i) of the Act. Since the Minister allowed the deduction for the full amount claimed as cost of goods sold, it may be difficult for the Minister to establish that TPine made the requisite misrepresentation in relation to the claim for the cost of goods sold. The comments of the Tax Court Judge in *Last v. The Queen*, 2012 TCC 352 (*Last TCC*), are apropos.

[29] In *Last TCC*, the taxpayer had been assessed on the basis that the gain realized on a disposition of certain shares was a capital gain. The taxpayer appealed to the Tax Court claiming that the gain on the disposition of the shares was an income gain, as the taxpayer was also claiming certain deductions. The taxpayer was unsuccessful with respect to his claimed deductions. While the Tax Court Judge found that there was ample evidence to support a finding that the gain realized by the taxpayer was an income gain, the Tax Court Judge, in relation to an argument that the taxation year was not statute barred (and therefore the taxpayer could be reassessed on the basis that the gain was an income gain) stated:

> [54] The question, then, is whether a reassessment that changes the ISTO gains from capital to income would be statute barred. In my view it would be. The limitation period will have expired unless the appellant has made a careless or negligent misrepresentation in the income tax return. It would be difficult for the Crown to suggest that he has when the Crown's primary argument in this appeal is that the gains are on capital account.

[30] Since the Minister's primary argument in this matter is that TPine is entitled to deduct the amount claimed as cost of goods sold, it may be difficult for the Minister to argue that TPine

made a misrepresentation that was attributable to neglect, carelessness or wilful default in claiming this deduction for cost of goods sold.

[31] The second obstacle that the Minister would face in reassessing TPine to reduce its cost of goods sold by $5,887,282 is that this would still leave a deduction of $11,716,910 ($17,604,192 - $5,887,282) for cost of goods sold. How could a reduction of the cost of goods sold by approximately one-third be defensible based on the facts and the law?

[32] Stratas J.A., writing on behalf of this Court in *CIBC World Markets Inc. v. Canada*, 2012 FCA 3, summarized the guiding principles that restrict the Minister to assessing in accordance with the facts and the law:

> [22] This Court is bound by its decision in *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 (C.A.). In that decision, Jackett C.J., writing for the unanimous Court, stated (at page 602) that "the Minister has a statutory duty to assess the amount of tax payable on the [facts] as he finds them in accordance with the law as he understands it." In his view, "it follows that he cannot assess for some amount designed to implement a compromise settlement." The Minister is obligated to assess "on the facts in accordance with the law and not to implement a compromise settlement." See also *Cohen v. The Queen*, [1980] C.T.C. 318 (F.C.A.).
>
> [23] More recently, this Court reaffirmed *Galway* in *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.). Sexton J.A., writing for the unanimous Court, stated (at paragraph 37) that "the Minister of National Revenue is limited to making decisions based solely on considerations arising from the Act itself" and cannot make "deals" divorced from those considerations. To similar effect, see *Longley v. Minister of National Revenue* (1992), 66 B.C.L.R. (2d) 238 (C.A.) at page 455.
>
> [24] CIBC World Markets cites *1390758 Ontario Corporation v. The Queen*, 2010 TCC 572 at paragraph 36 and *Smerchanski v. Minister of National Revenue*, [1977] 2 S.C.R. 23 for the proposition that courts have enforced settlements that apply tax law to agreed facts. That is true. But the Minister's power to agree to facts is limited by the *Galway* principle — the Minister cannot agree to an

> assessment that is indefensible on the facts and the law. Nothing in *1390758 Ontario* and *Smerchanski* undercuts the *Galway* principle.
>
> [emphasis added]

[33] The principle that the Minister must assess in accordance with the facts and the law was confirmed by the Supreme Court of Canada in *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26, at paragraph 26.

[34] If, as the Minister alleges, the same assets were included in the classes of assets on which CCA was claimed, and for which a deduction was claimed for cost of goods sold, and if those assets were not sold, there does not appear to be any basis to support a denial of approximately one-third of the amount claimed for cost of goods sold. It would appear that a reassessment that reduced the cost of goods sold by $5,887,282 would not be defensible on the facts and the law.

B. *Subsection 152(9) of the Act*

[35] In this appeal, however, the Minister is not seeking to reassess TPine to reduce the cost of goods sold, but rather is seeking to ask the Tax Court to dismiss TPine's appeal in relation to the CCA claimed if TPine is successful in establishing that it was entitled to deduct the CCA that was denied, and if the amount for cost of goods sold was claimed in relation to the same assets. In effect, the Minister is attempting to have the amount of taxes payable by TPine determined as if a portion of the amount claimed for the cost of goods sold was disallowed without reassessing TPine to disallow this amount.

[36] The question is whether subsection 152(9) of the Act allows the Minister to support the assessment of TPine's 2015 taxation year if TPine is successful in establishing that it was entitled to the CCA that was denied, but there is an offsetting related deduction that was allowed by the Minister for cost of goods sold which, in the Minister's view, should not have been allowed. The Minister would not be attempting to have the taxes determined as if the full amount claimed for cost of goods sold was denied. Rather, in effect, the Minister would be asking to have TPine's appeal dismissed on the basis that the taxes payable by TPine would be equal to (or greater than) the amount as reassessed if TPine is entitled to the CCA claim that was denied and is not entitled to claim the amount allowed as cost of goods sold.

[37] A textual, contextual and purposive analysis is required to determine the interpretation of subsection 152(9) of the Act (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at para. 10). While there are several decisions that address the interpretation of subsection 152(9) of the Act as it was worded prior to the amendments made in 2016, neither party was able to locate any decision addressing this subsection following the 2016 amendments. The parties were given the opportunity to provide further written submissions concerning the interpretation of this subsection and, in particular, whether the amendments overturned the decision of this Court in *Petro-Canada v. Canada*, 2004 FCA 158 (*Petro-Canada*), which is discussed further below. The parties filed their additional submissions on January 31, 2024, February 14, 2024 and February 21, 2024.

[38] Three changes were made to subsection 152(9) of the Act in 2016:

(a) the addition of an alternative “basis” (the previous version only referred to an alternative argument);

(b) the addition of the following words after an alternative basis or argument — “including that all or any portion of the income to which an amount relates was from a different source”; and

(c) the change in wording from “in support of an assessment” to “in support of all or any portion of the total amount determined on assessment to be payable or remittable by a taxpayer under this Act”.

[39] These changes would not result in any alternative argument that could have been raised, based on the prior version of subsection 152(9) of the Act, now being unavailable. Since there are a number of decisions that address the prior version of subsection 152(9) of the Act, the starting point will be to determine if the proposed amendments to the Minister’s reply would have been allowed under the prior version of subsection 152(9) of the Act. If so, then since the amended version of subsection 152(9) of the Act does not impose any further restrictions on what alternative argument may be raised, there would be no need to consider what additional argument or basis would be permitted based on the amended version of subsection 152(9) of the Act.

[40] The following decisions will be addressed:

(a) *Continental Bank of Canada v. Canada*, [1998] 2 S.C.R. 358, [1998] 4 C.T.C. 77 (*Continental Bank*);

(b) *Pedwell v. Canada*, [2000] 4 F.C. 616, 2000 D.T.C. 6405 (C.A.) (*Pedwell*);

(c) *Canada v. Anchor Pointe Energy Ltd.*, 2003 FCA 294 (*Anchor Pointe*);

(d) *Canada v. Loewen*, 2004 FCA 146 (*Loewen*);

(e) *Petro-Canada*;

(f) *Walsh*; and

(g) *Canada v. Last*, 2014 FCA 129 (*Last*).

C. *Continental Bank*

[41] Subsection 152(9) was added to the Act following the decision of the Supreme Court of Canada in *Continental Bank* and the related decision in *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, [1998] 4 C.T.C. 119.

[42] Continental Bank of Canada (Continental Bank) and Continental Bank Leasing Corp. (CB Leasing) entered into a number of transactions that included:

(a) the transfer of certain assets by CB Leasing to a newly formed partnership in exchange for a 99% partnership interest in that partnership;

(b) an election being made under subsection 97(2) of the Act in relation to this transfer of assets by CB Leasing to the partnership;

(c) the winding-up of CB Leasing into Continental Bank (which resulted in a transfer of the partnership interest to Continental Bank); and

(d) a sale of this partnership interest by Continental Bank to subsidiaries of Central Capital Leasing (693396 Ontario Limited and 693397 Ontario Limited).

[43] CB Leasing filed its tax returns on the basis that it had filed a valid election under subsection 97(2) of the Act in relation to the transfer of assets to the partnership and that subsection 88(1) of the Act applied on its winding-up into Continental Bank. As a result, while Continental Bank reported a capital gain on its sale of the partnership interest, CB Leasing did not report any tax liability resulting from the transfer of assets to the partnership or its winding-up.

[44] CB Leasing was reassessed on the basis that the partnership was not a valid partnership and that the true nature of the transactions was a sale of depreciable capital property by CB Leasing to the subsidiaries of Central Capital Leasing. As a result, CB Leasing was reassessed to include recaptured CCA in its income.

[45] Continental Bank was also reassessed, in the alternative, on the basis that the gain reported on the disposition of the partnership interest was not a capital gain, but rather an income gain.

[46] The majority of the Supreme Court found that the partnership was a valid partnership and the transactions were to be taxed as reported by Continental Bank and CB Leasing. The comments of the Supreme Court with respect a new argument raised by the Crown are relevant in this matter:

> 18 The next event occurred on December 29, 1986 when the Bank transferred its interest in the partnership to 693396 and 693397. The Minister cannot argue that the Bank could not transfer its partnership interest at this stage. The Minister must accept that this transfer took place because his assessment of the Bank was based on the assumption that the Bank disposed of its partnership interest. I agree with Bastarache J. that the Minister's argument that the Bank sold depreciable leasing assets or was otherwise liable for recapture of capital cost allowance pursuant to s. 88(1) of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended, raised for the first time in this Court, cannot be entertained. The Minister should not be allowed to advance a new basis for a reassessment after the limitation period has expired.
>
> [emphasis added]

[47] The Supreme Court found that the Minister cannot not raise a new basis for a reassessment after the limitation period has expired. The Supreme Court also uses "argument" and "basis" interchangeably as the first reference is to the "Minister's argument", and in the immediately following sentence the Court concludes that the "Minister should not be allowed to advance a new basis for a reassessment".

[48] Following the addition of subsection 152(9) to the Act, there were a number of cases that considered whether this subsection would allow the Minister to raise a new argument.

D. *Pedwell*

[49] In *Pedwell*, the taxpayer was assessed on the basis that he had appropriated certain sums from his company which were included in his income. The Tax Court found that the taxpayer had not appropriated the sums in issue, but rather that he had appropriated different amounts.

[50] Rothstein J.A., as he then was, writing for this Court, found that the Minister was bound by the basis of the assessment issued by the Minister:

> [15] While the parties referred to a number of older authorities on the issue, Continental Bank now makes it clear (subject to subsection 152(9) [*Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 (as am. by S.C. 1999, c. 22, s. 63.1)] which applies to appeals disposed of after June 17, 1999 and is not relevant here in any event) that the Minister is bound by his basis of assessment. While this case does not involve the Minister advancing a different basis of assessment, I think the principle in Continental Bank is applicable to a judicial determination on a basis different from that in the notice of reassessment.
>
> [emphasis added]

[51] This Court found that the Minister was bound by his basis of assessment as a result of the decision of the Supreme Court in *Continental Bank*.

[52] Rothstein J.A. rejected the Crown's arguments that any argument that did not change the amount of tax payable was acceptable:

> [21] The Minister advances two arguments. The first is that the issue in a tax appeal is whether the tax is too high. The implication of this argument is that anything can be argued in the Tax Court and the Tax Court Judge is limited only to the amount of the assessment. In other words, as long as a finding does not exceed the amount of the tax assessed by the Minister, the Tax Court Judge is free to find liability against the taxpayer on any basis, whether included in the notice of reassessment or not, provided the taxpayer has notice and an opportunity to respond.
>
> [22] I think *Continental Bank* is dispositive on this point. The Crown and therefore the Court are bound by the assessment appealed from, unless it has been amended, or adequate notice given of an intention to rely on a different basis for it, within the limitation period and certainly before judgment is rendered by the Tax Court. This was not the case here.

> [23] The second of the Crown's arguments is that what transpired is all part of one scheme; that the acquisition of the 84 acres, the sale to Eulers and the deposit received from Landpark cannot be separated for tax purposes. However, what transpired were three separate transactions involving different parties:
>
> (1) the acquisition of the 84 acres;
>
> (2) the sale of one lot to Eulers; and
>
> (3) the deposit received from Landpark for 16 lots.
>
> This is seen in the Minister's notice of reassessment. In the October 1, 1994 reassessment, the appropriation of the 84 acres is listed, followed by the alleged unreported profit on the Euler sale. On the April 4, 1996 notice of reassessment, the Euler transaction is eliminated. The necessary implication is that the appellant need have no further worry that the Euler proceeds constituted an appropriation to him and that he may concentrate on the acquisition of the 84 acres. This was confirmed before the Tax Court Judge in the excerpt from the transcript quoted above. Finally, nowhere on the reassessments is there any mention of the Landpark deposit of $22,500.
>
> [24] I do not say that the Minister might not base an assessment on a scheme consisting of more than one transaction. However, taxation is transaction-based (or perhaps deemed transaction-based) and if more than one transaction is to form the basis of assessment, the assessment must reflect that fact. Where the basis of the Minister's assessment is one transaction, the Court cannot, *ex post facto*, broaden the scope of the assessment to include other transactions.
>
> [emphasis added]

[53] Although subsection 152(9) of the Act applied to appeals disposed of after June 17, 1999 (and the Tax Court appeal in *Pedwell* was disposed of on October 29, 1998), *Pedwell* is cited in a number of subsequent decisions addressing subsection 152(9) of the Act. In *Pedwell*, the Minister was not attempting to raise a new argument on appeal to this Court, but rather was attempting to support the alternative basis on which the Tax Court Judge relied in rendering his decision. Rothstein J.A.'s comment that subsection 152(9) "is not relevant here in any event"

indicates that this subsection was considered but would not have assisted the Minister if it had been applicable.

[54] The finding that the Minister cannot include transactions that did not form the basis of an assessment reappears in subsequent decisions, including *Walsh*, discussed further below.

E. *Anchor Pointe*

[55] In *Anchor Pointe*, Anchor Pointe Energy Ltd. (Anchor Pointe) was reassessed to reduce the amount that it had claimed as Canadian exploration expenses (CEE) on the basis that the fair market value of certain seismic data was less than the amount as claimed by Anchor Pointe. After the expiration of the normal reassessment period for Anchor Pointe, this Court released its decision in *Global Communications Limited v. The Queen*, [1999] 3 C.T.C. 537, 99 D.T.C. 5377 (F.C.A.) (*Global*). In *Global*, this Court found that seismic data acquired for resale did not qualify as CEE for the purposes of the Act. The Minister then raised an additional argument in Anchor Pointe's appeal based on the decision of this Court in *Global*. The issue before this Court was whether the parts of the reply filed with the Tax Court, that referred to the argument based on *Global*, should be struck.

[56] It should be noted that the Minister had allowed a deduction for CEE. If the Minister's argument that Anchor Pointe had acquired the seismic data for resale would have been successful, Anchor Pointe would not have been entitled to any deduction for CEE (which would result in an increase in income if the amount allowed as a deduction for CEE was reduced to nil).

[57] Rothstein J.A. found that the Minister could raise this argument. The Minister had acknowledged that the result of this new argument could not be an increase in Anchor Pointe's liability under the Act and, based on subsection 152(5) of the Act, the Court agreed (paragraphs 34 and 35).

[58] In addressing subsection 152(9) of the Act, the Court stated:

> [37] Subsection 152(9) permits the Minister to rely upon an alternative argument in support of an assessment after the normal reassessment period. There is no suggestion here that Anchor Pointe is no longer able to adduce relevant evidence with respect to the Minister's new basis or argument. Therefore, if the *Global* decision constitutes a new basis or argument in support of the reassessment, the Minister may rely upon it even though it was not relied upon prior to expiry of the normal reassessment period.
>
> [38] Anchor Pointe tries to distinguish between a new basis of assessment and a new argument in support of an assessment. I do not find that semantical argument productive. The question is whether the Minister is purporting, through reliance on the *Global* decision, to increase the amount of Anchor Pointe's income that was not included in an assessment or reassessment made within the normal reassessment period.
>
> [39] In my opinion, he was not. This case is unlike cases such as *Pedwell v. The Queen*, 2000 DTC 6050 (F.C.A.), where the Minister sought to take into account different transactions than the ones that formed the basis of the reassessments that were made within the normal reassessment period. I do not say that taking into account other transactions is the only thing the Minister cannot do after expiry of the normal reassessment period. Anything that increases tax payable from what would have been the case prior to expiry of the normal reassessment period would be objectionable.
>
> [40] Here, the Minister does not seek to rely on *Global* to increase Anchor Pointe's taxes payable over what was included in the Minister's reassessment prior to expiry of the normal reassessment period. The reassessment increased taxes payable by reducing CEE deductions by the difference between the amount claimed and the amount based on the Minister's estimation of the fair market value of the seismic data. On confirming the reassessment, the Minister does not seek to increase that amount. He is not introducing a new transaction. He is only

> relying on an additional argument, that there is no CEE deduction allowed where the acquisition of the seismic data is for resale or licensing.
>
> [emphasis added]

[59] In *Anchor Pointe*, the dispute was focused on the one component of the deduction for CEE that was claimed and which was the subject of the reassessment — the amount included for certain seismic data in determining the CEE of Anchor Pointe. The Minister was not seeking to increase the tax liability of the taxpayer, nor was the Minister seeking to introduce a new transaction.

[60] In *Anchor Pointe*, this Court, in paragraph 38, also rejected the argument that a distinction should be drawn between whether the Minister is raising a new argument or a new basis.

[61] In *Pedwell*, this Court found that the Minister was bound by the basis of his assessment. In *Anchor Pointe*, an exception to this general principle was adopted. The Minister was not bound to accept that Anchor Pointe was entitled to any CEE, even though an amount for CEE had been allowed. The Minister was, in effect, permitted to appeal the assessment on the basis that no amount should have been allowed as CEE, provided that the amount of tax payable was not increased. This alternative argument arose following the decision of this Court in *Global* which was issued after Anchor Pointe was assessed and only arose in relation to the particular amount in dispute — the amount included in CEE for particular seismic data.

F. *Loewen*

[62] In *Loewen*, this Court relied on *Anchor Pointe* to find that the Crown could raise a new argument related to a claim for CCA. The taxpayer had claimed a deduction for CCA in relation to certain software. The Minister reassessed the taxpayer to reduce the deduction for CCA on the basis that the fair market value of the software was less than the amount as stated by the taxpayer. After the expiration of the normal reassessment period, the Minister raised an argument that the software had not been acquired for the purpose of earning income. Although this argument would result in no CCA being allowed as a deduction, the Minister was not raising this argument to reduce the CCA to nil but, rather to defend the assessment:

> [46] In Mr. Loewen's case, the Crown wishes to argue that Mr. Loewen did not acquire his interest in the software for the purpose of gaining or producing income. If that argument is valid, Mr. Loewen should not have been permitted to deduct any capital cost allowance. Because the statutory limitation period has passed, the Minister cannot now reassess to increase Mr. Loewen's tax liability by reducing his capital cost allowance deduction. However, the Crown is not seeking to reduce the capital cost allowance deduction to nil, but only to defend the Minister's reassessment, which reduced the deduction to reflect what the Minister alleges is the fair market value of Mr. Loewen's interest in the software. That is essentially what the Crown was permitted to do in *Anchor Pointe*.

[63] As in *Anchor Pointe*, the new argument focused on the one deduction in issue — the CCA deduction in relation to certain software.

[64] In *Loewen*, the exception to the principle that the Minister is bound by the basis on which the assessment was made and cannot appeal the assessment was expanded slightly. In *Loewen*, there was no change in the law or court decision that prompted the alternative argument. When the taxpayer was assessed, the law was the same as it was at the time of the hearing (and is

today) — if a taxpayer did not (and does not) acquire an asset for the purpose of gaining or producing income, no CCA could (or can) be claimed in relation to that asset.

[65] Even though the taxpayer was assessed on the basis that he was entitled to claim CCA (albeit less than the amount claimed by the taxpayer), the Minister was allowed to advance an alternative argument that was inconsistent with the assessment. The Minister was allowed to advance the argument that no CCA should have been allowed as a deduction. This alternative argument was again premised on there being no increase in the tax liability of the taxpayer and arose in relation to the particular amount in dispute — the amount claimed as CCA for particular software. The Minister was effectively granted a limited right of appeal from the assessment as the Minister was allowed to advance an argument that was inconsistent with the basis on which the assessment was issued.

G. *Petro-Canada*

[66] Shortly after *Loewen* was issued, Sharlow J.A. (who wrote the reasons for the Court in *Loewen*) rendered the decision on behalf of the Court in *Petro-Canada*. *Petro-Canada* also involved a claim for CEE. Petro-Canada claimed a deduction for CEE which was reduced on reassessment by the Minister. On appeal to the Tax Court, the Minister argued that the expenditures included as CEE did not satisfy the definition of CEE. This argument would mean that no amount could have been deducted as CEE (even though an amount had been allowed as a deduction by the Minister).

[67] The Tax Court Judge in *Petro-Canada*, [2002] T.C.J. No. 640, [2003] 2 C.T.C. 2087, found that the amount that had been allowed as a deduction for CEE was greater than the amount that should have been allowed. However, the Tax Court Judge acknowledged that he could not increase the tax liability of Petro-Canada.

[68] The appeal to the Tax Court included a separate claim for scientific research and experimental development (SRED) expenses that had been disallowed. Prior to the hearing of the appeal at the Tax Court, the parties had agreed that Petro-Canada should be allowed this deduction and they executed a consent to judgment allowing Petro-Canada a deduction of $772,448 for these SRED expenses. The Tax Court Judge refused to allow the additional deduction for the SRED expense. The Tax Court Judge reasoned that since, based on his findings, Petro-Canada had been allowed a claim for CEE that exceeded the amount that it should have been allowed to claim by over $4 million, the additional deduction for SRED expense should not be allowed. Petro-Canada's appeal to the Tax Court was dismissed.

[69] On appeal to this Court, Sharlow J.A. acknowledged if no deduction should have been allowed for CEE, the taxes payable by Petro-Canada would be increased. However, the result of an appeal cannot be an increase in the tax liability of the taxpayer:

> [23] In the Tax Court, the Crown argued that the cost of the seismic data purchased by the joint exploration corporations did not meet the statutory definition of "Canadian exploration expense". If that argument is correct, the cost of the seismic data to the joint exploration corporations did not qualify for renunciation to Petro-Canada, and Petro-Canada should not have been allowed even the $8,884,497 deduction that was the subject of Petro-Canada's appeal.
>
> [24] However, the Crown could not and did not argue in the Tax Court that Petro-Canada should be reassessed to disallow the $8,884,497 deduction, because

> the Crown is not permitted to appeal an assessment: *Harris v. Minister of National Revenue*, [1965] 2 Ex. C.R. 653, [1964] C.T.C. 562, 64 D.T.C. 5332 (Ex. Ct.), affirmed on other grounds, [1966] S.C.R. 489, [1966] C.T.C. 226, 66 D.T.C. 5189 (S.C.C.). (The record does not disclose the date of the expiry of the normal reassessment period under subsection 152(4) of the *Income Tax Act*.)

[70] This Court agreed with the definition of CEE as found by the Tax Court Judge and his other findings related to the CEE in issue. Thus, this Court confirmed that Petro-Canada had been allowed a claim for CEE that exceeded the amount that it should have been allowed to claim.

[71] However, notwithstanding that Petro-Canada had been allowed a greater deduction for CEE than would be permitted under the Act, this Court found that the Tax Court Judge erred by not allowing Petro-Canada to deduct the SRED expense that was the subject of the consent judgment:

> [68] The Judge was correct when he concluded that Petro-Canada had been allowed a deduction that exceeded its entitlement. The only implication of that conclusion was that the Judge could not grant Petro-Canada the remedy it sought, which was an increased deduction for the cost of the seismic data. The Judge was precluded by *Harris* from requiring the Minister to reduce the deduction because, in effect, that would allow the Crown to appeal the assessment.
>
> [69] However, the Judge refused to require the Minister to give effect to the consent judgment. Refusing Petro-Canada's rightful claim to the deduction for scientific research and experimental development had the same effect as an order allowing that claim but reducing Petro-Canada's seismic expense deduction by the same amount. It is as though the Judge had allowed, in part, the Crown's appeal of the seismic data deduction. The Judge was doing indirectly what he could not have done directly. In my view, the Judge erred in failing to give effect to the consent judgment.

[72] As a result, Petro-Canada was able to deduct the amount of CEE that the Minister had allowed in reassessing Petro-Canada and the SRED expense that the parties had agreed should be allowed as a deduction. These were two separate transactions: the transactions that resulted in the SRED expense and the transactions on which the claim for CEE was based. The Minister could not defend the amount of taxes payable as a result of the reassessment by arguing that even though Petro-Canada was entitled to the SRED expense, this additional deduction was more than offset by the additional CEE that should not have been allowed as a deduction.

[73] As in *Anchor Pointe* and *Loewen*, the Minister was permitted to raise an argument that was inconsistent with the basis of the assessment. Since Petro-Canada had been allowed to deduct CEE (albeit less than the amount it had claimed), the argument that it was not entitled to deduct any amount for CEE was inconsistent with the basis of the assessment which had allowed an amount for CEE. The argument was related to the same seismic data that was in dispute.

H. *Walsh*

[74] In *Walsh*, the taxpayers were reassessed to include certain amounts in their income arising as a result of the exercise of certain stock options to acquire shares in Bre-X Minerals Ltd. and Bresea Resources Ltd. The taxpayers, in their notices of appeal to the Tax Court, alleged that they were not residents of Canada. In the initial replies filed by the Minister, the Minister relied on sections 5 and 7 and subsection 2(1) of the Act on the assumption that the taxpayers were residents of Canada. The Minister subsequently sought to amend the replies to

include paragraph 115(1)(*a*) of the Act (which would be applicable if the taxpayers were not residents of Canada).

[75] The amendments were allowed. This Court emphasized that, based on paragraph 40 of *Anchor Pointe*, the Minister was not attempting to introduce a new transaction. Rather, the Minister was simply raising an additional argument in support of the taxes as assessed, in the event the taxpayers were not residents of Canada:

> [13] Through the reliance on paragraph 115(1)(a) of the Act, which deal [*sic*] with taxable income earned in Canada by non-residents, the Minister is not seeking to increase the amount of the appellants' income that was not included in an assessment or reassessment made within the normal period. Rather, the Minister is seeking to support exactly the same amount of tax liability flowing from the same Stock Option Benefits as assessed to the appellants, with an additional argument.

[76] In *Walsh*, this Court identified the following conditions related to subsection 152(9) of the Act:

> [18] The following conditions apply when the Minister seeks to rely on subsection 152(9) of the Act:
>
> 1) the Minister cannot include transactions which did not form the basis of the taxpayer's reassessment;
>
> 2) the right of the Minister to present an alternative argument in support of an assessment is subject to paragraphs 152(9)(a) and (b), which speak to the prejudice to the taxpayer; and
>
> 3) the Minister cannot use subsection 152(9) to reassess outside the time limitations in subsection 152(4) of the Act, or to collect tax exceeding the amount in the assessment under appeal.

I. *Last*

[77] In *Last*, there were a number of issues related to various activities of the taxpayer. One issue related to the gain realized on the disposition of the shares of InternetStudios.com, Inc. (ISTO). The taxpayer was assessed on the basis that the gain that he realized on the disposition of these shares was a capital gain. On appeal to the Tax Court, the taxpayer took the unusual position of arguing that the gain on these shares was an income gain and not a capital gain. The taxpayer was claiming that he had incurred expenses that would reduce the income arising from the sale of shares.

[78] After finding that the taxpayer was not entitled to a deduction for the payments that he had claimed, the Tax Court Judge found that the taxpayer's position that the gain on the disposition of the shares was an income gain "appears to be amply supported by the evidence" (paragraph 48).

[79] The Minister argued that the Tax Court could order the Minister to reassess the taxpayer on the basis that the gain realized on the disposition of the shares was an income gain so long as the total amount of taxes assessed for 2002 did not exceed the amount of the assessment under appeal (paragraph 49).

[80] The Tax Court Judge concluded that she could not grant the requested order:

> [51] In my view, it is not appropriate for the Court to require a reassessment that changes the character of the gains from capital to income, because the effect

> of this would be for the Minister to reassess beyond the limitation period set out in s. 152(4) and (4.01) of the ITA.
>
> [52] The applicable principle applies equally to a new basis of assessment and a new argument pursuant to s. 152(9).
>
> [emphasis added]

[81] It should also be noted that in paragraph 52 of the Tax Court Judge's reasons the Tax Court Judge refers to a new basis and a new argument in relation to subsection 152(9) of the Act even though, at that time, subsection 152(9) only referred to an alternative argument.

[82] The decision of the Tax Court was upheld on appeal. This Court based its decision on *Petro-Canada*:

> [31] In my view, *Petro-Canada* is dispositive of the Crown's appeal in this case. The Minister originally assessed the taxpayer's proceeds from the sale of the ISTO shares as a capital gain. By characterizing the proceeds as a capital gain, the Minister set the taxpayer's liability from the source of income that was the ISTO shares. The Tax Court's conclusion that the proceeds of disposition were on account of income, not property, could not result in an increase of the taxpayer's liability from that source because the Minister cannot appeal from her own assessment.
>
> [32] Put another way, the proceeds of disposition on the sale of the ISTO shares were $601,135. Treating the transaction as being on account of business income would increase the taxpayer's taxable income by approximately $300,565. Had the Tax Court simply dismissed the taxpayer's appeal, the taxpayer would have been deprived of additional, unrelated deductions of $265,070. The effect would be to increase the taxpayer's income by the difference between $300,565 and $265,070. This is inconsistent with the principle that the Minister cannot appeal from her own assessment.

[83] The reference to “unrelated deductions of $265,070” is presumably to other deductions either allowed by the Tax Court Judge or by the Minister, on consent, that were not related to the sale of the shares.

J. *Application of the Prior Version of subsection 152(9) of the Act in this appeal*

[84] In interpreting and applying subsection 152(9) of the Act, the Tax Court and this Court have balanced the right of the Minister to raise an alternative argument against the principles that the Minister cannot appeal an assessment and the Minister cannot reassess after the expiration of the normal reassessment period, absent a misstatement as contemplated by subparagraph 152(4)(*a*)(i) of the Act or a waiver as contemplated by subparagraph 152(4)(*b*)(i) of the Act. The concern is that since the Minister cannot reassess after the expiration of the normal reassessment period, the Minister should not be allowed to do indirectly what the Minister cannot do directly. These Courts have rejected the proposition that the Minister can raise any argument or basis in support of an assessment so long as the tax liability of the taxpayer is not increased.

[85] This Court has not allowed the Minister to raise a new argument based on a transaction that did not form the basis on which a taxpayer was assessed. When the Minister attempted to support an assessment of tax by denying a taxpayer a right to a deduction (to which the taxpayer was entitled and which would have reduced the amount of tax payable) by arguing that the taxpayer had received the benefit of another unrelated deduction that exceeded the amount that should have been allowed, this Court has not allowed the Minister to offset the two amounts. In those cases, there was also no dispute that the taxpayer was entitled to the other deductions.

[86] In this case, the allegation of the Minister is that it is the same equipment that resulted in the CCA claim and in the deduction for the cost of goods sold. If the particular equipment was not sold, TPine would be entitled to CCA as claimed. However, if TPine claimed an amount as the cost of goods sold for this same equipment, it would follow that TPine cannot claim an amount as cost of goods sold for goods that were not sold. Whether it is the same equipment that resulted in the CCA claimed and on which cost of goods sold was also claimed is a matter for the Tax Court to determine.

[87] This Court has also confirmed that the Minister is not barred from making an argument in support of an assessment that is contrary to the position taken by the Minister in assessing a taxpayer. In *Anchor Pointe, Loewen,* and *Petro-Canada* the Minister was allowed to make an argument that would result in no amount being deductible for CEE (in *Anchor Pointe* and *Petro-Canada*) or CCA (in *Loewen*), even though an amount had been allowed for CEE or CCA in assessing these taxpayers. The claim for CEE or CCA was in issue before the Courts and, in particular, the amount included for certain seismic data in determining CEE was in issue in *Anchor Pointe* and *Petro-Canada* and the amount included for certain software in determining CCA was in issue in *Loewen*.

[88] In this matter, the issue is whether TPine sold the particular assets on which CCA was claimed. The consequences that would flow from finding that TPine had not sold these assets are a finding that the claim for CCA was a valid claim and no amount should have been claimed for the cost of goods sold (if it was the same equipment). Both consequences flow from the same "transaction" — the retention (and not a sale) — of the same assets. The allowance of a

deduction for cost of goods sold in this case would not preclude the Minister from making an argument that no amount should have been allowed as a deduction for cost of goods sold for the same equipment for which a claim for CCA had been denied, subject to the general restriction that the tax liability of TPine cannot be increased from the amount as assessed.

VI. Conclusion

[89] As a result, in my view, the Minister would have been allowed to make this alternative argument based on the prior version of subsection 152(9) of the Act and since the amendments would not restrict the Minister from making this argument, the proposed amendments to the reply should be allowed.

[90] To what extent the amendments to subsection 152(9) of the Act would allow the Minister to advance an alternative basis or argument will be decided on a case-by-case basis. The principles that the Minister cannot appeal an assessment and the Minister cannot reassess beyond the expiration of the normal reassessment period are still valid principles that would need to be taken into account in determining what alternative basis or argument the Minister may advance. In interpreting and applying the previous version of subsection 152(9) of the Act, this Court has also limited an alternative argument to the same transaction that is in dispute. It is not clear how the amendments would alter this principle.

[91] I would dismiss this appeal, with costs.

"Wyman W. Webb"
J.A.

"I agree.
Donald J. Rennie J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-243-22
STYLE OF CAUSE:	TPINE LEASING CAPITAL CORPORATION v. HIS MAJESTY THE KING
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 16, 2024
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	RENNIE J.A. LOCKE J.A.
DATED:	APRIL 30, 2024

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