Federal Court  Cour fédérale

Date: 20130618

Docket: T-835-12

Citation: 2013 FC 676

Ottawa, Ontario, June 18, 2013

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

CLOVER INTERNATIONAL PROPERTIES (L) LTD.

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENTAND JUDGMENT

[1] This is an application for judicial review of a decision of the Minister of National Revenue determining that she lacked statutory authority, by way of subsection 221.2(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (the Act), to re-appropriate a corporate income tax overpayment to a tax year where no tax was owing or likely to be owed as this would result in a prohibited refund. The application is brought pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

Background

[2] The Applicant is a non-resident corporation. During its 1996 taxation year it was a limited partner in Cascadia 1 Real Estate Limited Partnership (Cascadia LP) and Barnet Real Estate Limited Partnership (Barnet LP), each of which were engaged in real estate development in Vancouver.

[3] Although it anticipated that projected non-resident income of Cascadia LP allocated to the Applicant would be offset by allocated losses incurred by Barnet LP, the Applicant made obligatory instalment income tax payments to the Canada Revenue Agency (the CRA) during its 1996 tax year totalling $386,406.63. The Applicant did not, however, file T2 Corporate Income Tax Returns (T2 Returns) for its 1996, 1997 and 1998 taxation years until May 24, 2000. At that time, CRA assessed the Applicant as owing $49,208.91 due to taxes of $413,628.00, penalties and interest arrears of $7,428.48, minus the $386,406.63 paid by way of instalments in 1996.

[4] On February 6, 2002, at the Applicant's request, CRA reassessed the Applicant's 1996 tax year to carry back 1997 non-capital losses to the 1996 taxation year which resulted in the elimination of the Applicant's 1996 tax liability and creation of a credit of $420,876.48 (being $413,628 total tax plus arrears and an interest adjustment in the Applicant's favour of $7,248.48). The credit amount became $371,664.57 after subtracting the $49,208.91 owed by the Applicant after the initial assessment, late filing penalties and accrued interest (the 1996 Overpayment).

[5] CRA indicated in its February 6, 2002 reassessment that, pursuant to subsection 164(1) of the Act, it was precluded from issuing a refund of the 1996 Overpayment as the Applicant had not

filed its T2 Return within three years from the end of the 1996 reporting period, being from the Applicant's fiscal year end on December 31, 1996.

[6] The next decade saw a lengthy exchange of correspondence and two rounds of nascent litigation concerning the treatment of the 1996 Overpayment. This is described in full in the parties' motion records, the most relevant events are summarized below.

[7] On October 17, 2002 the Applicant requested that the Minister exercise his discretion and appropriate the 1996 Overpayment to the 1999 and 2000 tax years pursuant to section 221.2 of the Act. That request was denied by CRA on September 18, 2003 on the basis that allowing such an appropriation under section 221.2 would be contrary to the intent of subsection 164(1) which permits an overpayment refund only if a tax return for the tax year in question has been made within three years from the end of that tax year.

[8] On March 3, 2004 and on April 19, 2006, the Applicant requested reconsideration of that decision. CRA denied this request on May 23, 2006. The Applicant brought an application for judicial review in this Court (T-1032-06) on June 20, 2006. On consent of both parties the matter was referred back to CRA for reconsideration on March 7, 2007.

[9] On September 15, 2009, the Appeals Division, Ottawa Tax Services Office, on behalf of the Minister, granted the Applicant's request in part by re-appropriating some of the 1996 Overpayment to the 1999 and 2000 taxation years. Because the Minister's records indicated that the Applicant's balance owing for the 1999 and 2000 taxation years was $5058.00 and $1281.72, respectively, the

Minister agreed to exercise his subsection 221.2(1) discretion and re-appropriate $6339.72 from the 1996 taxation year to the 1999 and 2000 taxation years to reduce those years' balances. This resulted in reducing the tax liability in those years to nil.

[10] On April 8, 2010 the Applicant requested the Minister to re-appropriate the remainder of the 1996 Overpayment ($345,702.50) to satisfy any amounts owing by the Applicant under the Act, to then re-appropriate any further remaining amount to the 1999 tax year, creating a tax credit, and then issue a refund of that amount pursuant to subsection 164(1) of the Act.

[11] By way of a Non-Resident Tax Statement of Account dated December 21, 2010, CRA re-appropriated $22,316.06 from the 1996 Overpayment to satisfy that amount, which was owing by the Applicant pursuant to Part XIII of the Act, thereby reducing that liability to nil.

[12] After some delay, with meetings, considerable correspondence and two further applications for judicial review in the interim (the first of which resulted in an order referring the matter back to the Minister for review of the Applicant's request on consent (T-89-11) and the second being withdrawn pending the Minister's decision in response to the April 8, 2010 request (T-1912-11), the Minister ultimately denied the request to re-appropriate the remainder of the 1996 Overpayment on March 30, 2012 (the Decision). That Decision is the subject of this judicial review.

Decision Under Review

[13] The Decision was issued by way of a letter to the Applicant from a CRA official exercising delegated Ministerial authority and stated, in part:

> Subsection 221.2(1) of the *Act*, states that "[w]here a particular amount was appropriated to an amount that is or may become payable by a person under any enactment referred to in paragraphs 223(1)(a) to (d), the Minister may, on application by the person, appropriate the particular amount, or a part thereof, to another amount that is or may become payable under such enactment". The appropriation may also be applied to amounts that is or may become payable by a person under subsection 221(2) of the *Act*. However, these provisions cannot be applied to produce a refund which is already statute-barred under subsection 164(1) of the *Act*.
>
> Subsection 221.2(1) only allows for the transfer of an amount from one debt to another. The wording of 221.2 intends that a re-appropriation can only be made to a year in which a recognized tax amount is either payable or may become payable. Therefore, a section 221.2 re-appropriation does not permit a taxpayer to circumvent the three-year time limitation period to apply for a refund under subsection 164(1) by triggering a non-statute-barred refunded in another year or tax amount.

[14] Accordingly, the Applicant's request for re-appropriation of the remainder of the 1996 Overpayment from its 1996 taxation year to its 1999 taxation year and the issuance of a refund of a credit balance thereby created was denied. The Minister advised that the remaining non-appropriated balance would remain a tax asset which the Applicant could use in the future to apply to any indebtedness which might arise as contemplated by the Act. Further, that subsection 221.2(1)(a) does not provide for interest to accrue on un-appropriated amounts not applied to another tax year or tax account. There are also no refund interest implications on the statute barred amounts.

Issues

1. What is the standard of review?

2. Did the Minister err in concluding subsection 221.2(1) does not permit a re-appropriation of an overpayment from the Applicant's 1996 taxation year to its 1999 taxation year and the issuance of a refund of a credit balance thereby created?

Standard of Review

[15] Where previous jurisprudence has satisfactorily determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 57).

[16] The Minister's Decision is based on her interpretation of section 221.2 and subsection 164(1) of the Act. Specifically, whether pursuant to those provisions she has statutory authority to grant the Applicant's re-appropriation and refund requests and whether interest accrues on the 1996 Overpayment.

[17] The Respondent submits that the standard of review is correctness, for the reasons given by Justice Dawson in *Sheldon Inwentash and Lynn Factor Charitable Trust v Canada*, 2012 FCA 136 at para 23, which also concerned the Minister's interpretation of the Act:

> [23] Finally, this Court has previously applied the standard of correctness to the review of extricable questions of law decided by the Minister (see for example, *Action by Christians for the Abolition of Torture v. Canada*, 2002 FCA 499, 302 N.R. 109 at paragraphs 23 to 24). This conclusion is also consistent with the recent decision of this Court in *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40, [2012] F.C.J. No. 157 at paragraphs 6 and 65 and following. In *Georgia Strait* this Court held that the reasonableness standard of review does not apply to the interpretation of a statute by a minister responsible for its implementation unless Parliament has provided otherwise.

[18] I agree with that submission. The dispute in this case is similarly an extricable question of law decided by the Minister and, therefore, should be reviewed on a correctness standard.

Did the Minister err?

Positions of the Parties

[19] There is little dispute as to the factual background of this matter. This issue is purely one of the interpretation and application of subsection 164(1) and section 221.2 of the Act.

The Applicant

[20] The Applicant submits that it overpaid its 1996 taxes and that the result it seeks, the section 221.2 re-appropriation of the 1996 Overpayment to the 1999 tax year followed by a refund pursuant to subsection 164(1) with associated interest, is a permissible and appropriate result supported by a textual, contextual and purposive approach to the interpretation of subsection 221.2(1).

[21] The Applicant's position revolves around the phrase "may become payable" in subsection 221.2(1). The Applicant submits that while there is no amount for the 1999 taxation year currently payable, the legislation does not require that there be an amount currently owing. Further, an amount *may* become payable if the Minister were to re-assess and, therefore, that the 1996 tax year is eligible to be re-appropriated to, even in the absence of such a re-assessment. To the Applicant, this is the mechanism by which it can be refunded the 1996 Overpayment which the Respondent agrees is not owed as a tax liability. Further, there is no legislative basis to support the

application of a threshold test that requires there to be a sufficient amount of certainty that the Minister will reassess causing an amount to become payable with respect to the taxation year to which the re-appropriation is sought. A threshold anticipation of indebtedness as a condition of re-appropriation would require this Court, on judicial review of the Decision, to make a determination regarding tax liability, a function reserved to the Tax Court of Canada.

[22] In short, as the Minister could reassess the 1999 taxation year in future, it is possible that an amount may become payable to the Applicant. Therefore, the Minister has the ability to re-appropriate the requested amount to the 1999 taxation year.

[23] The Applicant submits that the context surrounding its request for re-appropriation as well as the purpose of the re-appropriation provision supports its interpretation of the text of subsection 221.1(1). The context being that the 1996 Overpayment is acknowledged by the Minister as not being owed as a tax liability. The Applicant submits that the text of section 221.1 also supports its interpretation of that provision, however, to the extent that there is any ambiguity, it is to be resolved in manner that prevents the Crown from retaining more than it is legally entitled to (*Sherway Centre Ltd v Canada*, 2003 FCA 26, [2003] FCJ No 67 at paragraph 43). Further, that the Tax Court has described the Crown's retention of overpayments as a deplorable confiscation of property (*Chalifoux v Minister of National Revenue*, [1991] 2 CTC 2243, [1991] TCJ No 422 at para 11).

[24] Textually, the Applicant interprets section 221.1 as allowing the Minister to re-appropriate the amount to another amount that is or may become payable. While the Minister has not reassessed

the Applicant to show an amount owing in respect of the 1999 taxation year, it is still possible that this could occur because the Minister is not statute-barred, for example, from reassessing Part XIII of the Act. The text of the provision makes no mention of a reasonable anticipation of indebtedness or a requirement that an amount currently be owed. This would have to be read into the provision. Further, the word "may" suggests a broad scope.

[25] Contextually, the Applicant submits that this situation favours its position because, in the absence of such a re-appropriation power, the Crown will retain funds it has no claim over. The Applicant relies on a Technical Note published by the Department of Finance which refers to transferring payments "from one year to another" without any mention of a threshold of likeliness of re-assessment.

[26] The Applicant submits that allowing a refund for the 1999 taxation year would not circumvent subsection 164(1), which precludes refunds for tax years where the taxpayer did not file its tax return within three years of the statutory deadline. The Applicant submits that it filed its 1999 return within three years. Thus, if the 1996 Overpayment is re-appropriated from its 1996 taxation year (in which its T2 Return was not filed within the required three year period) this would not produce a refund which is statute barred under subsection 164(1). Rather, the Applicant would then be entitled as of right to any refund for its 1999 taxation year.

[27] Further, the record shows that the Minister has already determined that the Applicant's case is unique, portions of the 1996 Overpayment have already been re-appropriated by the Minister to amounts previously re-assessed and, in this situation, re-appropriation of the remainder of the

1996 Overpayment is an appropriate exercise of the Minister's discretion and is not an automatic "backdoor" to subsection 164(1).

The Respondent

[28] The Respondent maintains that the Act only authorizes the Minister to refund the 1996 Overpayment if the Applicant had filed its T2 Return for that year within the specified three year period. As the Applicant failed to do so, the Minister is statute barred from issuing a refund of the 1996 Overpayment. It is beyond the Minister's statutory authority to use the section 221.1 re-appropriation provision to transfer the 1996 Overpayment to the Applicant's 1999 tax year, in which no debt exists nor can reasonably be expected to arise, in order to create a credit balance in that year. To refund such a credit balance would be to do indirectly that which the Act prohibits the Minister from doing directly. While the Act prohibits interest to accrue on the 1996 Overpayment, it remains a tax asset of the Applicant to use to eliminate certain future debts.

[29] The Respondent submits that the text of section 221.2, in context and having regard to its purpose, only grants the Minister the authority to appropriate and apply amounts to another amount in a tax year or account to satisfy any current or anticipated debt in respect to the specified legislation. The Applicant's request that the Minister appropriate and apply the 1996 Overpayment to the 1999 taxation year, in order to create a credit balance in that year available for refund, is unsupported by a textual, contextual and purposeful analysis of section 221.2 of the Act (*Canada Trustco Mortgage Co v Canada*, 2005 SCC 54, [2005] 2 SCR 601).

[30] The Respondent submits that the word "amount" is defined in the Act as meaning "money, rights or things expressed in terms of the amount of money or the value in terms of money of the right or thing". Therefore, the use of the word "amount" in section 221.2 requires the existence of a current or anticipated debt and as such a discernable amount to be offset. There must be some identifiable liability against which the appropriation can be made. "Payable" has been interpreted to mean "under an obligation to make a payment" (*Canada (Attorney General) v Yannelis*, 130 DLR (4th) 632, [1995] FCJ No 1530 (FCA)). Therefore, on a textual analysis, the use of the term "payable" in the phrase "may become payable" must mean an anticipated obligation on the Applicant to satisfy an indebtedness imposed in respect of one or more of the specified statutes for the purpose of section 221.1 of the Act. No amount was payable or anticipated to be payable in respect of the 1999 taxation year, therefore, the Minister was without authority to appropriate any amount of the 1996 Overpayment and transfer it to that year.

[31] The Respondent similarly argues that context of the Act supports this interpretation. The phrase "may become payable" ensures that the appropriation applies not only to liabilities once fixed, but also to payments in anticipation of these liabilities. Further, the drafting of this text was in recognition of the fact that the Act requires certain taxpayers to make monthly or quarterly instalment payments in anticipation of liability arising at the end of the taxation year.

[32] The Respondent describes the Applicant's interpretation of section 221.2 as inconsistent with achieving consistency, predictability and fairness. Further, that its suggestion that a theoretical reassessment is possible at any time is speculative and without merit in law or fact. The Applicant is requesting the Court to read into section 221.1 an authority to appropriate a particular amount to a

taxation year in respect of which some unascertained amount may become payable in the future if reassessed by the Minister. At the same time, to read out the term "amount" in the phrase "appropriate the particular amount, or apart thereof, to another amount that is or may become payable". However, section 221.1 requires the existence of an ascertained "another amount" on to which the Minister can appropriate the particular amount.

[33] For the Respondent, the deeming rules in paragraphs (a), (b), and (c) of subsections 221.2(1) and (2) can only have application if section 221.2 refers to the existence of a discernable debt, as they treat the re-appropriated amount as if it been originally in respect of "another amount" to which the Minster can appropriate and apply the particular amount.

[34] The Respondent notes that the Minister's authority to reassess the Applicant's 1999 tax liability is circumscribed by the Act. Pursuant to subsection 152(4), after December 13, 2005, the Minister is only authorized to reassess if the Applicant filed a waiver before that date or if the Applicant made misrepresentations or committed fraud in filing its return for that year. There is no evidence of a waiver having been filed and the Minister has not alleged any misrepresentations.

[35] The Respondent also submits that the Applicant's assertion that the Minister may assess it for Part III tax at any time is conjecture. Although the Minister is authorized to issue a Part XIII assessment "at any time" she cannot do so if the Applicant's income was from a source already subject to tax under Part I of the Act. Further, she is only authorized to assess an amount payable under Part XIII by a person resident in Canada, who is under the obligation to withhold from the amount paid or credited to the non-resident, the tax and remit it to government on behalf of the non-

resident. As such, the Minister is without authority to assess the Applicant any Part XIII tax directly. The Respondent submits that there is no amount payable or that may become payable in respect of Part XIII that would permit the application of the appropriation provisions.

[36] Further, on the Applicant's interpretation, section 221.1 could apply to any taxation year. If only a possibility of an income tax liability is required, this would create significant uncertainty in the administration and enforcement of that provision.

[37] The Respondent relies on the legislative history of sections 164 and 221.2. It notes that since 1951 the Minister's authority to issue a refund of an overpayment under the Act has required, as a pre-requisite, the taxpayer to have filed an income tax return before the prescribed deadline. Since 1994 the Act has conferred on the Minister the discretion to issue refunds of overpayments where a taxpayer's income tax return was filed beyond the three year limitation period but only in respect to certain classes of taxpayers. Parliament intentionally excluded corporate taxpayers from that category. Subsection 164(1.5) has subsequently been amended on four occasions but it has not extended the Minister's discretionary authority to include corporate taxpayers.

[38] There is a presumption of coherence in statutory interpretation which means that in enacting section 221.1 Parliament did not intend to confer on the Minister the authority to indirectly circumvent the section 164 direct refund prohibition.

[39] The Respondent also relies on extrinsic materials to show that the purpose of section 221.2 was to allow the Minister to transfer amounts between tax years to improve the cash flow of businesses. The purpose was not to allow the refunds that were otherwise statute-barred.

[40] The Respondent also maintains there is no authority for the payment of interest because interest cannot accrue on statute-barred over payments. Because a refund of the 1996 Overpayment is precluded by subsection 164(1), the Minister is without authority to pay or apply interest in respect of those funds. Further, interest does not accrue on the un-appropriated balance of the 1996 Overpayment. Subsections 221.(2)(1)(a) and 221.(2)(a) of the Act treat amounts paid on the first debt as though they had never been made and instead had been paid in respect of the second debt. Section 221.2 does not provide for the accrual of interest and because the legislation deems the first payment not to have been made, it would be inconsistent for interest to accrue from the time of the initial overpayment.

Analysis

[41] The Applicant submits, and I agree, that subsection 221.2(1) is not a model of clarity.

221.2 (1) Where a particular amount was appropriated to an amount (in this section referred to as the "debt") that is or may become payable by a person under any enactment referred to in paragraphs 223(1)(a) to 223(1)(d), the Minister may, on application by the person, appropriate the particular amount, or a part thereof, to another amount that is or may become payable under any such enactment and, for the purposes	**221.2** (1) Lorsqu'un montant est affecté à une somme (appelée « dette » au présent article) qui est ou peut devenir payable par une personne en application d'une loi visée aux alinéas 223(1)a) à d), le ministre peut, à la demande de la personne, affecter tout ou partie du montant à une autre somme qui est ou peut devenir ainsi payable. Pour l'application de ces lois :

of any such enactment,

(*a*) the later appropriation shall be deemed to have been made at the time of the earlier appropriation;

a) la seconde affectation est réputée effectuée au même moment que la première;

(*b*) the earlier appropriation shall be deemed not to have been made to the extent of the later appropriation; and

b) la première affectation est réputée ne pas avoir été effectuée jusqu'à concurrence de la seconde;

(*c*) the particular amount shall be deemed not to have been paid on account of the debt to the extent of the later appropriation.

c) le montant est réputé ne pas avoir été payé au titre de la dette jusqu'à concurrence de la seconde affectation.

(2) Where a particular amount was appropriated to an amount (in this section referred to as the "debt") that is or may become payable by a person under this Act, the *Excise Tax Act*, the *Air Travellers Security Charge Act* or the *Excise Act*, 2001, the Minister may, on application by the person, appropriate the particular amount, or a part of it, to another amount that is or may become payable under any of those Acts and, for the purposes of any of those Acts,

(2) Lorsqu'un montant est affecté à une somme (appelée « dette » au présent article) qui est ou peut devenir payable par une personne en application de la présente loi, de la *Loi sur la taxe d'accise*, de la *Loi sur le droit pour la sécurité des passagers du transport aérien* ou de la *Loi de 2001 sur l'accise*, le ministre peut, à la demande de la personne, affecter tout ou partie du montant à une autre somme qui est ou peut devenir ainsi payable. Pour l'application de ces lois :

(*a*) the later appropriation is deemed to have been made at the time of the earlier appropriation;

a) la seconde affectation est réputée effectuée au même moment que la première;

(*b*) the earlier appropriation is deemed not to have been made to the extent of the later appropriation; and

b) la première affectation est réputée ne pas avoir été effectuée jusqu'à concurrence de la seconde;

(*c*) the particular amount is deemed not to have been paid on account of the debt to the extent of the later appropriation.	c) le montant est réputé ne pas avoir été payé au titre de la dette jusqu'à concurrence de la seconde affectation.

[42] In interpreting that provision, both parties agree that there is a two step analysis to be applied:

i) there must be a particular amount that was appropriated to an amount that is or may become payable by the Applicant;

ii) an application must be made by the Applicant, and be granted by the Minister, to re-appropriate all or a part of the particular amount to another amount that "is or may become payable" under any enactment described therein.

[43] With respect to the first step, the parties agree that the four instalment payments of income tax made by the Applicant in 1996 in respect of its anticipated tax liability for that year ($386,406.63) is the "particular amount" that was appropriated to an amount that "is or may become payable" by the Applicant, the latter being its anticipated tax liability.

[44] This dispute arises with respect to the second step of the analysis. The issue being whether the provision, when correctly interpreted, permits the Minister to appropriate a particular amount, the remainder of the 1996 Overpayment, to "another amount" that "is or may become payable" by the Applicant in respect of its 1999 taxation year.

[45] As will be recalled from the background facts above, the Applicant did not file its 1996 T2 Return within three years of its December 31, 1996 year end. Accordingly, it is not eligible to seek a refund of the 1996 Overpayment pursuant to subsection 164(1). Instead, the Applicant seeks to re-appropriate the remainder of the 1996 Overpayment to its 1999 tax year, a year in which it did file its T2 Return within the three year time limit, thereby creating a credit balance, and then obtain a refund of same pursuant to subsection 164(1).

[46] The crux of the dispute as to second step analysis being whether the Minister may re-appropriate the remainder of the 1996 Overpayment to the Applicant's 1999 tax year, given that no amount is actually or anticipated to become payable with respect to that tax year, and then issue a refund of its 1996 Overpayment, as a 1999 credit balance, pursuant to subsection 164(1).

[47] In the absence of jurisprudence that interprets subsection 221.2(1) in circumstances such as these or considers similar provisions, it is necessary to rely on the general principles of statutory interpretation in addressing this issue.

[48] The interpretative approach has recently been confirmed by the Supreme Court of Canada in *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para 136:

> [136] The issue we confront is one of statutory interpretation and the well-settled approach is 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": E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. […]

[49] There, the Supreme Court considered the grammatical and ordinary sense of the words at issue, the scheme of the act under consideration, the legislative history and evolution of the provisions in issue and the purpose of the legislation.

[50] In *Bell Express Vu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, the Supreme Court held that it is necessary in every case for the court charged with interpreting a provision to undertake the preferred contextual and purposeful interpretation approach before determining if the words are ambiguous. This requires reading the words of the legislation in issue 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. It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that a court must resort to external interpretive aids.

[51] Here, the word "amount" is defined by section 248 of the Act to mean "money, rights or things expressed in terms of the amount of money or the value in terms or money of the right or things...". However, I do not think that this definition assists in the interpretation of section 221.2.

[52] The term "payable" is not defined in the Act or its regulations. However, it is not a term of art and its ordinary sense is clear. As submitted by the Respondent, it means a sum of money that is to be paid; due; owing; falling due (*The Oxford English Dictionary*, Simpson JA and Weiner ESC, ed (1989 Clarendon Press, Oxford, 2nd ed)) or required to be paid (*Webster Third New International Dictionary*, Gove Babcock, Philip, ed. (1993 Merriam-Webster Inc, Springfield) which approach

has been adopted by the Federal Court of Appeal (see *Canada (Attorney General) v Yannelis*, [1995] FCJ No 1530 (FCA) at para 13).

[53] Again, however, this does not add a great deal to a textual analysis of section 221.2. It seems apparent that the phrase "is or may become payable" refers to an existing or future obligation to satisfy an indebtedness imposed or specified therein. This does not assist in determining if the Minister can re-appropriate the 1996 Overpayment where there is not currently an amount owing for the 1999 tax year but at least, theoretically, there may be if the year was reassessed.

[54] The scheme of the Act with respect to refunds and the legislative evolution and history of subsection 164(1) and section 221.2 are, to my mind, of more interpretive assistance.

[55] Subsection 164(1) requires the Minister to refund an overpayment made in a taxation year. The right to a refund is, however, conditional upon the tax payer having filed a tax return within three years of its financial year end for that taxation year. Thus, the availability of a refund is intended to be time limited.

[56] In the face of judicial concern (see *Chalifoux*, above) subsection 164(1) was amended in 1994 to confer on the Minister discretion to issue refunds of overpayments when a tax payer filed its return beyond the three year limit. Pursuant to subsection 164(1.5)(a), refunds can be issued where a tax return has been filed with ten years of the end of the tax year in issue but only if the tax payer is an individual or testamentary trust.

[57] Since 1994, subsection 164(1.5)(a) has been amended four times but the Minister's discretion to issue refunds beyond the three year limitation period has not been extended to corporate taxpayers. I agree with the Respondent that, in this context, had Parliament intended corporate taxpayers, like individual tax payers, to have the benefit of a discretionary extension of the refund time, it would have explicitly implemented this.

[58] The Respondent also points out that section 221.2 and subsection 164(1.5) were simultaneously enacted in 1994. Subsection 164(1.5) provides an explicit mechanism by which the Minister may exercise her discretion to issue a refund to individual taxpayers beyond the three year limitation period. Section 221.2 does not speak to refunds. Rather, it provides the Minister with the discretion to re-appropriate overpayments by transferring those amounts to satisfy certain other existing or prospective amounts owed by the taxpayer. It is available to all taxpayers. Again, in my view, had Parliament intended the Minister to have discretion to permit corporate taxpayers to obtain refunds in circumstances where they failed to file their returns within three years, this would be explicit. Viewing section 221.2 and subsection 164(1) together it seems unlikely that Parliament intended section 221.2 to be a vehicle by which corporate tax payers could obtain refunds of an overpayment otherwise statute barred by subsection 164(1), particularly as such a refund mechanism would then not be time limited. As noted by the Court of Appeal in *Sherway*, above, the contrary interpretation could actually hurt taxpayers, as it would "expose taxpayers to the uncertainty, and potential unfairness, caused by considerably longer reassessment limitation periods" as "[i]t is the nature of limitation periods that their application will sometimes cause taxpayers to pay either more, or less, than they were legally obliged to pay (at para 44).

[59] The Respondent also refers to *Friends of Oldman River v Canada (Minister of Transport)*, [1992] 1 SCR 3 where the Supreme Court stated "there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments" (at para 42). The Respondent submits that in enacting section 221.2, Parliament did not intend to confer on the Minister the authority to indirectly circumvent the refund restrictions contained in subsection 164(1) which preclude the refund of the 1996 Overpayment to the Applicant. While *Friends of Oldman River*, above, considered inconsistencies between acts of Parliament and inconsistent or conflicting subordinate legislation, the underlying rational is the same. Therefore, I agree with that submission.

[60] While the Applicant is correct that section 221.2 does not include a threshold test that requires there to be a sufficient amount of certainty that the Minister will re-assess such that an amount will become payable for a certain tax year, based on the above analysis, this does not assist the Applicant. Even if they are correct, in my view section 221.2 does not permit the Minister to indirectly issue a refund of the 1996 Overpayment when she is precluded by subsection 164(1) from doing so directly. In other words, while section 221.2 does permit re-appropriation of overpayments to satisfy debts owed or that will become due in other taxation years pursuant to identified legislation obligations, it does not go further and permit a statute-barred refund of a prior year's overpayment, in the guise of a newly created credit balance, in a non-statute barred taxation year.

[61] This is supported by a textual analysis of section 221.2 which permits the Minister to appropriate the particular amount, in this case the 1996 Overpayment, to another amount that is or may become payable. "Appropriate" is not defined in the Act but its ordinary meaning is to set apart or to devote to a specific purpose or use (*The Canadian Oxford Dictionary*, Katherine Barber

ed (1998 Oxford University Press, Toronto)). Therefore, what section 221 accomplishes is to permit the Minister to set apart an overpayment, the refund of which is statute barred, to be applied as payment of another debt that exists or may arise. However, this is at the Minister's discretion. If no amount is, or the Minister reasonably believes that no amount will become payable, the Minister may not make the re-appropriation. Further, even if an amount appropriated for that purpose does not become payable, this does not in my view, entitle the Minister to a refund that would otherwise be prohibited.

[62] This conclusion is in keeping with a contextual and purposeful approach to interpretation to "find meaning that harmonizes the wording, object, spirit and purpose of the provisions of the *Income Tax Act*" (*Canada TrustCo*, above, at para 47).

[63] As in *Sherway*, above, the Applicant advocates a broad interpretation, in part by invoking the principle that the Crown ought not to be able to retain funds paid to it by a taxpayer in excess of the amount of tax owing. There, as in this case, the Minister maintained that a narrow interpretation of the provisions promotes certainty in tax matters and enhances the integrity of the complex scheme created by Parliament for the administration of income tax.

[64] The applicant in *Sherway*, above, had failed to object to the original reassessments and the time for doing so had expired. The Court of Appeal held:

> [36] Despite the ingenuity of counsel's argument, I am not persuaded that subsection 165(1.1) applies to the facts of the present case. In my opinion, it would be very odd to conclude that Parliament intended subsection 165(1.1) to enable a taxpayer to appeal a reassessment made under subsection 152(4.3), on a ground on which subsection 152(4.3) does not permit the Minister to

> reassess. The interpretation of subsection 165(1.1) advanced by counsel would indirectly achieve a result that subsection 152(4.3) directly precludes.
>
> […]
>
> [43] For these reasons, I conclude that the Tax Court did not err in law when it held that the Minister had no power to reassess Sherway by allowing it to deduct from its income the participating interest payments made by it in 1989-91, even though ambiguities in tax legislation are presumptively resolved in a manner that prevents the Crown from retaining more than it was legally entitled to receive.
>
> [44] However, in my view, when viewed within the complex statutory scheme for assessments, reassessments and appeals, the meaning of the technical provisions in question in this case is sufficiently clear that the principle that ambiguities should be resolved in favour of the taxpayer is not engaged, especially since the interpretation propounded by Sherway could, in other circumstances, expose taxpayers to the uncertainty, and potential unfairness, caused by considerably longer reassessment limitation periods. It is the nature of limitation periods that their application will sometimes cause taxpayers to pay either more, or less, tax than they were legally obliged to pay.
>
> [45] By missing the limitation period for objecting to the reassessments for 1989-91, Sherway is, to a large extent, the author of its own misfortune. Apart from the adjustment of non-capital losses, the successful appeal of the 1987 and 1988 reassessments did not provide it with a novel ground on which to object to the 1999 reassessments for 1989-91 that did not exist in 1994 when it could have filed a notice of objection.

[65] In my view, in this instance, the Applicant was similarly the author of its own misfortune by failing to file its 1996 T2 Return within the three year requirement of subsection 164(1).

[66] The Minister did not err in law in concluding that subsection 221.2(1) does not permit a re-appropriation of the 1996 Overpayment to its 1999 tax year and the issuance of a refund, pursuant to subsection 164(1) of the resultant credit balance.

[67] While it is true that, in the result, the Minister retains an overpayment to which she has no entitlement, which on its face is offensive to the Applicant and likely others, there is nothing this Court or the Minister can do to avoid that result given the lack of statutory authority for a refund. In the absence of a constitutional impediment, Parliament's will must be adhered to:

> [53] […]
>
> > In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine […]. The prohibition, "Thou shalt not steal," has no legal force upon the sovereign body. […]
>
> [Emphasis in original]

(*Florence Mining Co v Cobalt Lake Mining Co* (1909), 18 OLR 275 at 279, cited in *Authorson v Canada (Attorney General)*, 2003 SCC 39, [2003] 2 SCR 40 at para 53).

[68] Should the Minister determine that there is an amount that is payable or may become payable by the Applicant, then there is a possibility the Applicant will realize the value of the 1996 Overpayment. Absent such a finding, the Minister has no basis on which to issue a refund.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

Costs are awarded to the Respondent in the amount of $2,660.

"Cecily Y. Strickland"
Judge

ANNEX

Relevant Statutory Provisions:

Federal Courts Act, RSC 1985, c F-7

18.1 […]	**18.1** […]
4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	*a*) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	*b*) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	*c*) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	*d*) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or	*e*) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(*f*) acted in any other way that was contrary to law.	*f*) a agi de toute autre façon contraire à la loi.

Income Tax Act, RSC 1985, c 1 (5th Supp)

164. (1) If the return of a taxpayer's income for a taxation year has been made within 3 years from the end of the year, the Minister

(*a*) may,

(i) before sending the notice of assessment for the year, where the taxpayer is, for any purpose of the definition "refundable investment tax credit" (as defined in subsection 127.1(2)), a qualifying corporation (as defined in that subsection) and claims in its return of income for the year to have paid an amount on account of its tax payable under this Part for the year because of subsection 127.1(1) in respect of its refundable investment tax credit (as defined in subsection 127.1(2)), refund all or part of any amount claimed in the return as an overpayment for the year, not exceeding the amount by which the total determined under paragraph (f) of the definition "refundable investment tax credit" in subsection 127.1(2) in respect of the taxpayer for the year exceeds the total determined under paragraph (g) of that definition in respect of the taxpayer for

164. (1) Si la déclaration de revenu d'un contribuable pour une année d'imposition est produite dans les trois ans suivant la fin de l'année, le ministre :

a) peut faire ce qui suit :

(i) avant d'envoyer l'avis de cotisation pour l'année — si le contribuable est, pour l'application de la définition de « crédit d'impôt à l'investissement remboursable » au paragraphe 127.1(2), une société admissible au sens de ce paragraphe qui, dans sa déclaration de revenu pour l'année, déclare avoir payé un montant au titre de son impôt payable en vertu de la présente partie pour l'année par l'effet du paragraphe 127.1(1) et relativement à son crédit d'impôt à l'investissement remboursable au sens du paragraphe 127.1(2) — rembourser tout ou partie du montant demandé dans la déclaration à titre de paiement en trop pour l'année, jusqu'à concurrence de l'excédent du total visé à l'alinéa c) de la définition de « crédit d'impôt à l'investissement remboursable » au paragraphe 127.1(2) sur le

the year,

(ii) before sending the notice of assessment for the year, where the taxpayer is a qualified corporation (as defined in subsection 125.4(1)) or an eligible production corporation (as defined in subsection 125.5(1)) and an amount is deemed under subsection 125.4(3) or 125.5(3) to have been paid on account of its tax payable under this Part for the year, refund all or part of any amount claimed in the return as an overpayment for the year, not exceeding the total of those amounts so deemed to have been paid, and

(iii) on or after sending the notice of assessment for the year, refund any overpayment for the year, to the extent that the overpayment was not refunded pursuant to subparagraph (i) or (ii); and

(*b*) shall, with all due dispatch, make the refund referred to in subparagraph (a)(iii) after sending the notice of assessment if application for it is made in writing by the taxpayer within the period within which the Minister would be allowed under subsection 152(4) to assess tax payable under this Part by the

total visé à l'alinéa d) de cette définition, quant au contribuable pour l'année,

(ii) avant d'envoyer l'avis de cotisation pour l'année — si le contribuable est une société admissible, au sens du paragraphe 125.4(1), ou une société de production admissible, au sens du paragraphe 125.5(1), et si un montant est réputé par les paragraphes 125.4(3) ou 125.5(3) avoir été payé au titre de son impôt payable en vertu de la présente partie pour l'année — rembourser tout ou partie du montant demandé dans la déclaration à titre de paiement en trop pour l'année, jusqu'à concurrence du total des montants ainsi réputés avoir été payés,

(iii) au moment de l'envoi de l'avis de cotisation pour l'année ou par la suite, rembourser tout paiement en trop pour l'année, dans la mesure où ce paiement n'est pas remboursé en application des sous-alinéas (i) ou (ii);

b) doit effectuer le remboursement visé au sous-alinéa a)(iii) avec diligence après avoir envoyé l'avis de cotisation, si le contribuable en fait la demande par écrit au cours de la période pendant laquelle le ministre pourrait établir, aux termes du paragraphe 152(4), une cotisation concernant l'impôt

taxpayer for the year if that subsection were read without reference to paragraph 152(4)(a).

[…]

221.2 (1) Where a particular amount was appropriated to an amount (in this section referred to as the "debt") that is or may become payable by a person under any enactment referred to in paragraphs 223(1)(a) to 223(1)(d), the Minister may, on application by the person, appropriate the particular amount, or a part thereof, to another amount that is or may become payable under any such enactment and, for the purposes of any such enactment,

(*a*) the later appropriation shall be deemed to have been made at the time of the earlier appropriation;

(*b*) the earlier appropriation shall be deemed not to have been made to the extent of the later appropriation; and

(*c*) the particular amount shall be deemed not to have been paid on account of the debt to the extent of the later appropriation.

payable en vertu de la présente partie par le contribuable pour l'année si ce paragraphe s'appliquait compte non tenu de son alinéa a).

[…]

221.2 (1) Lorsqu'un montant est affecté à une somme (appelée « dette » au présent article) qui est ou peut devenir payable par une personne en application d'une loi visée aux alinéas 223(1)a) à d), le ministre peut, à la demande de la personne, affecter tout ou partie du montant à une autre somme qui est ou peut devenir ainsi payable. Pour l'application de ces lois :

a) la seconde affectation est réputée effectuée au même moment que la première;

b) la première affectation est réputée ne pas avoir été effectuée jusqu'à concurrence de la seconde;

c) le montant est réputé ne pas avoir été payé au titre de la dette jusqu'à concurrence de la seconde affectation.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ian S. MacGregor Peter Macdonald	FOR THE APPLICANT
Ifeanyi Nwachukwu Tanis Halpape	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Osler, Hoskin & Harcourt LLP Ottawa, Ontario	FOR THE APPLICANT
Department of Justice Tax Law Services Section Ottawa, Ontario	FOR THE RESPONDENT