Federal Court of Appeal | Cour d'appel fédérale

Date: 20160505

Dockets: A-413-14
A-414-14

Citation: 2016 FCA 139

CORAM: **NOËL C.J.**
NEAR J.A.
SCOTT J.A.

Docket: A-413-14

BETWEEN:

IMPERIAL OIL RESOURCES LIMITED

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-414-14

AND BETWEEN:

IMPERIAL OIL RESOURCES VENTURES LIMITED

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Edmonton, Alberta, on January 18, 2016.

Judgment delivered at Ottawa, Ontario, on May 5, 2016.

REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	NEAR J.A.
	SCOTT J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] These are two appeals brought by Imperial Oil Resources Limited (IORL) and Imperial Oil Resources Ventures Limited (IORVL) (collectively, the appellants) from a decision of the Federal Court (2014 FC 839) wherein Gagné J. (the Federal Court judge) dismissed the appellants' respective applications for judicial review. Both appellants were seeking refund interest denied by the Minister of National Revenue (the Minister).

[2] At issue in Court files A-413-14 and A-414-14 is whether in computing the amounts paid by the appellants on account of their respective tax liability pursuant to the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (the ITA), the Minister was required to credit the amount of a tax debt remitted to them pursuant to the *Financial Administration Act*, R.S.C. 1985, c. F-11 (the FAA) and pay refund interest on the resulting overpayment. A further question arises in Court file A-414-14 as to whether IORVL's judicial review application was filed on time, and if not, whether an extension of time ought to have been granted by the Federal Court judge.

[3] For the reasons which follow, I have come to the conclusion that the Federal Court judge did not err in denying the respective applications and that both appeals should accordingly be dismissed.

[4] The provisions of the ITA and the FAA which are relevant to the analysis are set out in Annex 1 to these reasons. The references to the FAA are to the current provisions, the parties

having argued their case on the basis that these provisions are not materially different from those in force in 1976, when the remission was granted.

BACKGROUND

[5] In 1975, paragraphs 12(1)(*o*) and 18(1)(*m*) were added to the ITA effective in May, 1974, the effect of which was respectively to require the inclusion in income of royalties receivable by a province and prohibit the deduction of resource royalties payable to a province.

[6] A year later, the federal government decided to provide relief from paragraphs 12(1)(*o*) and 18(1)(*m*) with respect to the Syncrude Project, an oil sands development project in Alberta in which the appellants were participants. On May 6, 1976, the Governor in Council passed the *Syncrude Remission Order*, C.R.C., c. 794 (the SRO), which provides in part as follows:

2. In this Order,	**2.** Dans le présent décret,
…	[…]
royalty provisions means the provisions contained in paragraphs 12(1)(*o*) and 18(1)(*m*) … of the *Income Tax Act*;	***dispositions relatives aux redevances*** désigne les dispositions contenues aux alinéas 12(1)*o*), 18(1)*m*) […] de la *Loi de l'impôt sur le revenu*;
…	[…]
3(1) Subject to subsection (2), remission is hereby granted to each participant of any tax payable for a taxation year pursuant to Part I of the *Income Tax Act* as a result of the royalty provisions being applicable to	**3(1)** Sous réserve du paragraphe (2), remise est accordée à chaque participant de tout impôt payable pour une année d'imposition en vertu de la Partie I de la *Loi de l'impôt sur le revenu* et qui résulte de l'application des dispositions relatives aux redevances aux

(*a*) amounts receivable and the fair market value of any property receivable by the Crown as a royalty, tax, rental or levy with respect to the Syncrude Project, or as an amount however described, that may reasonably be regarded as being in lieu of any of the preceding amounts;	***a*)** montants à recevoir et à la juste valeur marchande des biens à recevoir par la Couronne à titre de redevance, d'impôt, de loyer ou de prélèvement à l'égard du projet Syncrude, ou à titre de montant, quelle que soit la manière dont il est décrit, qui peut raisonnablement être considéré comme remplaçant un des montants qui précèdent;
…	[…]

[7] The participants in the Syncrude Project obtained an advance tax ruling addressing how the SRO would be administered by the Minister (the ATR). In response to a request for clarification sought by ruling officials prior to the issuance of the ATR, the Department of Finance confirmed that the SRO was intended to "operate as an amendment to the [ITA] for all purposes" (Letter to Mr. Cliff Rounding dated April 28, 1976, Appeal Book, Vol. 2, p. 543).

[8] The next day, the ATR was issued as follows:

> A. As long as the remission order is in effect, its results for each taxation year will be that the tax remitted to Imperial will reduce the tax otherwise payable under the Income Tax Act of Canada to the amount which would be payable on the basis that:
>
> > 1. The 50% share of the Deemed Net Profit of the Alberta Joint Venture, and the leased substances taken in satisfaction thereof, and the proceeds of the disposition thereof, held by Alberta Royalty under the Alberta Crown Agreement, will not be taxable to Imperial or Syncrude [Canada Ltd.] under the provisions of paragraphs 12(1)(o) or 18(1)(m) of the Income Tax Act of Canada.
> >
> > 2. The gross production royalty reserved to Alberta Royalty under the Alberta Crown Agreement, and the proceeds of disposition thereof, will not be taxable to Imperial or Syncrude [Canada Ltd.] under the provisions of paragraphs 12(1)(o) or 18(1)(m) of the Income Tax Act of Canada.

> 3. The royalty prescribed to be paid to Alberta Royalty under the leases pursuant to the provisions of The Mines and Minerals Act of the Province of Alberta with respect to the Leased Substances and the proceeds of disposition thereof, will not be taxable to Imperial or Syncrude [Canada Ltd.] under the provisions of paragraphs 12(1)(o) or 18(1)(m) of the Income Tax Act of Canada.
>
> …
>
> C. The instalments and other payments of tax, interest and penalties required under the Income Tax Act of Canada for all relevant years will be computed in accordance with the rulings above.

[9] Throughout the years, various assessments were issued with respect to IORL's 1999 taxation year in which the remitted tax debt pursuant to the SRO and the ATR was determined by first computing the taxes payable pursuant to the ITA, and then making the same computation on the basis that paragraphs 12(1)(*o*) and 18(1)(*m*) did not apply. Using this approach, the Minister initially determined the amount of the remission for the 1999 taxation year to be $1,539,181 based on the tax return position adopted by IORL. This amount was revised to $885,918 by reassessment issued on December 7, 2004 and remained unchanged when the final reassessment was issued for the year, on September 27, 2007. The parties agree that $885,918 represents the amount of the tax debt ultimately remitted pursuant to the SRO for the 1999 taxation year.

[10] The record reveals that while the amount of the remission as assessed over the years was credited by the Minister as of the balance due date (i.e.: February 29, 2000) for the purpose of computing IORL's instalment obligations pursuant to section 157 of the ITA – thereby relieving IORL of the liability for arrears interest which would otherwise have accrued pursuant to section 161 – the Minister refused to provide the same treatment for the purpose of determining

whether IORL was entitled to refund interest pursuant to section 164. The Attorney General of Canada (the Attorney General or the respondent) explains this distinct treatment as follows (respondent's memorandum of fact and law, para. 16):

> In keeping with the SRO and the ATR, the Minister adopted an administrative accounting practice to relieve Imperial of arrears interest arising on late or deficient instalment payments to the extent of the remission granted under the SRO while also ensuring that refund interest was not paid on remitted amounts. Thus, while in law remission is not available until, by assessment, there is determination of a taxpayer's liability and an ascertainment of taxes payable, the Minister nevertheless credited remission against Imperial's tax liability as at the balance due date for administrative accounting purposes.

[11] IORL's contention in this appeal is that the Minister was bound to credit the remission for all purposes and to acknowledge the resulting overpayment of its tax liability for the year together with the consequential obligation to pay refund interest in conformity with subsection 164(3) of the ITA. An "overpayment" is defined by paragraph 164(7)(*b*) as "the total of all amounts paid on account of the corporation's liability under this Part [i.e.: Part I] or Parts I.3, VI or VI.1 for the year minus all amounts payable in respect thereof" (my emphasis).

[12] The amount of the alleged overpayment is based on the addition of the remitted tax debt to the instalment payments made by IORL and also takes into account a decrease in the taxes payable for the year resulting from a series of surtax carry backs. IORL sets the overpayment at $2,012,251. However, the record reveals that the Minister had already recognized the amount of $53,377 as an overpayment resulting from the carry backs (Statement of Interest dated October 5, 2007, Appeal Book, Vol. 2, pp. 573 and 575). The alleged overpayment would therefore appear to stand at $1,958,874 rather than $2,012,251.

[13] The decision of the Federal Court judge refusing to treat the amount of the remitted tax debt as having been paid on account of IORL's taxes payable and to order the payment of refund interest on the overpayment which would have resulted is the subject matter of IORL's appeal.

[14] In the companion appeal, IORVL seeks the same relief with respect to its 1996 taxation year. However in order to obtain this relief, it must first establish that the Federal Court judge erred in failing to recognize that its judicial review application was filed on time and if not, by refusing to grant the extension of time which it sought.

DECISION OF THE FEDERAL COURT

[15] The Federal Court judge began her analysis by addressing the standard of review. She held, citing *Canada (Attorney General) v. Imperial Oil Resources Limited and Imperial Oil Resources Ventures Limited*, 2009 FCA 325 [*Imperial Oil 2009*], that the question whether the SRO and the ITA have been properly construed is to be reviewed on a standard of correctness.

[16] Turning to the merits, the Federal Court judge found that the Minister properly determined that IORL was not entitled to refund interest on taxes remitted pursuant to the SRO. She provided several grounds in support of her conclusion.

[17] First, relying on *Imperial Oil 2009*, the Federal Court judge held that there is no statute or contract entitling IORL to refund interest as a result of a tax remission order, even where it gives rise to the refund of a tax debt that has been paid.

[18] Second, she noted that the ITA does not empower the Minister to remit tax otherwise payable and that only the FAA grants such power. The Federal Court judge further stated that a remission under the FAA does not create, in and of itself, an "overpayment" within the meaning of section 164 of the ITA but, rather, relieves a portion of a taxpayer's tax liability. She concluded that a remission under the SRO was not a payment on account of IORL's tax liability.

[19] Third, the Federal Court judge found that the application of section 164 of the ITA was not informed by the SRO, the ATR or the Minister's administrative practice.

[20] Finally, she held that the Minister had at her disposal different means of discharging her obligations pursuant to the SRO but that none resulted in refund interest being owed to IORL. The fact that the Minister chose to apply the remitted amount against IORL's tax liability does not alter this conclusion. Indeed, in her view, "[t]he [FAA] does not provide for the payment of interests on [an] amount that would remain outstanding once all amounts otherwise due and payable by both parties are offset, should the balance be in favour of the taxpayer" (reasons, para. 53).

[21] Turning to the application for judicial review brought by IORVL, the Federal Court judge found that the Minister first communicated her decision that there was no entitlement to refund interest through the notice of reassessment issued June 10, 2003 with respect to IORVL's 1996 taxation year. IORVL's objection did not extend the time for making an application for judicial review as the objection provisions under the ITA do not allow for a challenge being brought against a remission granted pursuant to the FAA. The 30-day delay under subsection 18.1(2) of

the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the FCA) had therefore lapsed by some seven years when IORVL filed its application on December 23, 2010.

[22] The Federal Court judge further found that granting an extension of time was not warranted, as none of the four criteria set out in *Canada (Attorney General) v. Hennelly*, [1999] F.C.J. No. 846 were met. First, by seeking refund interest through the objection process under the ITA, IORVL failed to demonstrate a continuing intention to pursue its application. Second, in light of her reasons in the companion application, the Federal Court judge concluded that IORVL's argument had no merit. Third, she held that "[t]he public interest is best served by bringing finality to administrative decisions" (reasons, para. 71). Finally, since IORL had initiated the proceedings on time in the companion application, there was no reasonable explanation for the delay between the June 10, 2003 notice of reassessment and December 23, 2010, the day on which IORVL finally made its application for judicial review.

[23] The Federal Court judge went on to dismiss both applications for judicial review.

POSITION OF THE PARTIES ON APPEAL

- *IORL*

[24] IORL takes the position that the applicable standard of review is correctness, as the interpretation of section 164 of the ITA gives rise to a question of law.

[25] On the merits, IORL submits that the Federal Court judge asked the wrong question, i.e.: whether interest was owed on the remission amount. Had she asked whether there was an "overpayment" that resulted in refund interest being owed by the Minister, she would have been bound to hold in favour of IORL. Specifically, by focussing her analysis on the remission granted to IORL, rather than turning her mind to the "overpayment" issue, the Federal Court judge ignored that refund interest is claimed not only on the remission amount of $885,918, but on the amount of $2,012,251 ($1,958,874 when regard is had to the Statement of Interest dated October 5, 2007). IORL contends that once the right question is asked, its entitlement to refund interest becomes apparent given the Federal Court judge's finding that the remission amount was applied on account of IORL's tax liability, as of February 29, 2000.

[26] This is the way in which the issue was framed in *Imperial Oil 2009* (IORL's memorandum of fact and law, para. 7, citing *Imperial Oil 2009*, para. 42):

> Imperial argues that it is entitled to refund interest for 1997 because it paid more on account of its 1997 tax liability than the amount of its 1997 tax liability as finally determined, taking into account the amount of Part I tax remitted for 1997 by the *Syncrude Remission Order*.

As the issue raised in the present case is no different, this Court should answer the question within the framework set out in *Imperial Oil 2009*.

[27] IORL further argues that the Attorney General's position that the remission amount should not be taken into account in determining whether there is an overpayment is contradicted by the Minister's own conduct. First, the Minister's systems treated the remission as a payment and counted it in the determination of any overpayment. Second, the notices of reassessment themselves, which are valid and binding documents pursuant to subsection 152(8) of the ITA,

show that an "overpayment" has been made. Third, the respondent's affiant acknowledged that the remission amount was applied against IORL's tax liability and treated as a payment.

[28] This is consistent, argues IORL, with the Federal Court judge's statement that the remission amount was applied against IORL's tax liability in order to "impact on Imperial Oil's instalment[s] and other payment[s] of tax … under the [ITA]" (IORL's memorandum of fact and law, para. 59, citing reasons, para. 51). The respondent's contention that the remission "only relieves [IORL] from collection" of the amount remitted cannot stand in light of these findings (*ibidem*).

[29] Finally, IORL submits that the flaws in the respondent's position become apparent once an alternative arrangement by way of cheques is considered (IORL's memorandum of fact and law, para. 62):

> There is no doubt that if the Minister had issued a cheque to Imperial in the amount of the remission and Imperial had issued an identical cheque to the Minister, the amount would count as a payment on account of Imperial's tax liability.

[30] Ultimately, what IORL is seeking is the same treatment as that given by the Minister in respect of its instalment obligations.

- *IORVL*

[31] IORVL adopts the arguments put forward by IORL in the companion appeal in support of the contention that it is also entitled to refund interest for its 1996 taxation year. The further

arguments put forward by IORVL are aimed at the Federal Court judge's conclusion that its application for judicial review was filed beyond the time period set out in subsection 18.1(2) of the FCA and her refusal to extend this delay.

[32] In essence, the position of IORVL is that the objection procedure had to be exhausted before the Minister could decide whether or not to honour its claim for refund interest (IORVL's memorandum of fact and law, paras. 24-26 and 37):

> To the extent [the interpretation and implementation of the remission order] involve[d] a decision that leads to or is part of a reassessment, the provisions of the ITA relating to the reassessments, including those relating to objections and appeals, are engaged.
>
> …
>
> It was only after Imperial had filed its objection and the Minister advised Imperial that no refund interest would be paid, that the Minister made a decision that could be the subject of an application for judicial review to the Federal Court.
>
> …
>
> The determination of interest depends in many ways upon findings of fact and law that must be made in determining the taxpayer's liability, potentially raising any number of issues that are the proper subject of an objection and appeal to the Tax Court once the tax liability is assessed. Where those issues are resolved satisfactorily by the objection but the resulting implications for interest remain in dispute, it is only the Federal Court that has the jurisdiction to resolve the dispute.
>
> …
>
> Whether refund interest is payable depends on whether the reassessment is correct or whether a refund should be made. This necessarily requires a finding regarding the taxpayer's tax liability.

[33] IORVL submits that requiring a taxpayer to file an application for judicial review within 30 days of receiving a reassessment denying refund interest inappropriately bestows to the

Federal Court the task of determining the correctness of the taxpayer's tax liability, a determination which falls within the exclusive jurisdiction of the Tax Court of Canada.

[34] Given this, the Minister cannot be said to have first communicated her decision on June 10, 2003, when the notice of reassessment for the 1999 taxation year was issued, but on December 13, 2010, when IORL was advised verbally that no refund interest would be paid. It follows that IORVL's judicial review application dated December 23, 2010 was filed within the 30-day period set out in subsection 18.1(2) of the FCA.

[35] Alternatively, the Federal Court judge should have extended the delay since the conditions precedent for this exercise of discretion were met. First, IORVL always had the intention to pursue the application and only sought relief through the objection process based on a reasonable perception that this was the only course open to it. Second, IORVL submits, for the reasons advanced in support of IORL's appeal, that its application has merits. Third, the respondent would not suffer any prejudice as IORVL's position with respect to the refund interest issue was known all along.

- *The Respondent*

[36] The respondent submits that the Federal Court judge properly identified and applied correctness as the standard against which the question raised in IORL's appeal must be assessed.

[37] Turning to the merits, the respondent essentially adopts the Federal Court judge's analysis as her own. Citing *Imperial Oil 2009*, the respondent argues that IORL is not entitled to refund interest on a payment made pursuant to a tax remission order under any statute or contract, even if the result is a refund of a tax debt that has been paid.

[38] The respondent provides several grounds in support of that view. First, the SRO does not engage the refund provisions of the ITA. A remission order is authorized under the FAA and is thus irrelevant in determining whether there is an "overpayment" under section 164 of the ITA. This Court correctly found in *Imperial Oil 2009* that it is impossible, as a matter of law, for a remission order to operate as an amendment to the ITA. Likewise, the ATR cannot inform the interpretation of the ITA.

[39] According to the respondent, a remission and a refund resulting from the "overpayment" of a tax liability are fundamentally different things (respondent's memorandum of fact and law, para. 47):

> Remission is premised upon the *existence of a tax liability* that is relieved by the authority of the [FAA]. This stands in contrast to a refund from an overpayment of tax, which contemplates the *absence of a tax liability* to the extent of the overpayment.
>
> [Emphasis in original.]

[40] While the determination of an "overpayment" is made in accordance with the provisions of the ITA, the respondent argues that the determination of a remission under the SRO requires that the tax liability under the ITA be first established and compared to the hypothetical tax liability premised upon the non-enactment of paragraphs 12(1)(*o*) and 18(1)(*m*). Indeed, "as

made clear in [*Canada v. Perley*, [1999] 3 C.T.C. 180 (F.C.A.), para. 5 [*Perley*]], remission requires as a condition precedent to its application that there be a determination of a taxpayer's liability and an ascertainment of the amount of tax owed by that taxpayer" (respondent's memorandum of fact and law, para. 48).

[41] The respondent is of the view that refund interest under subsection 164(3) of the ITA is payable only in respect of a refund under section 164 and that no such refund resulted from the remission.

[42] Second, the respondent submits that the wording of the ITA "encompasses only those amounts that are '*paid* on account of the taxpayer's liability', and not those amounts that are *applied* by the Minister against such liability as in the case of remission" [emphasis in original] (respondent's memorandum of fact and law, para. 54). To hold otherwise confuses the nature of the Minister's obligations with the way in which they can be carried out.

[43] The respondent further submits that the legal character of a remission under the SRO is not affected by the "Minister's administrative practice of crediting the remission amount against Imperial's assessed tax liability as at the balance due date, even though remission had not been determined or granted at that time" (respondent's memorandum of fact and law, para. 68). In any event, the fact that in the past refund interest was paid on remitted amounts or that remitted amounts were labelled as "refund" or "payment" does not create in law an entitlement to refund interest.

[44] With respect to the IORVL's appeal, the respondent submits that the Federal Court judge's decision refusing to grant an extension of time is discretionary in nature and should not be interfered with absent a misapprehension of the facts or an error of law. He adds that the role of this Court is to step into the shoes of the Federal Court judge and determine whether she correctly identified and applied the proper standard of review.

[45] The respondent submits that the Federal Court judge correctly held that IORVL's application was statute-barred and that an extension of time was not warranted. Indeed, "refund interest is not an assessed amount, and as such, does not fall within the [ITA's] provisions for objecting to, and appealing from, an assessment" (respondent's memorandum of fact and law, para. 46). Accordingly, the Minister did not have the ability to consider IORVL's objection with respect to refund interest.

[46] Relying on the reasons given, the respondent submits that the Federal Court judge's refusal to extend the time is the result of a proper exercise of discretion.

ANALYSIS

[47] On an appeal from a decision of the Federal Court disposing of an application for judicial review, this Court is required to determine "whether the court below identified the appropriate standard of review and applied it correctly" (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, para. 45, citing *Canada Revenue Agency v. Telfer*, 2009 FCA 23, para. 18).

[48] This Court has already determined that the interpretation of the SRO and the ITA gives rise to a question of law reviewable on the standard of correctness (*Imperial Oil 2009*, para. 2). Both parties support this view and I agree that correctness is the standard against which to assess the question which arises in the present case. That question is whether the remission of a tax debt pursuant to the FAA can give rise to an "overpayment" within the meaning of subsection 164(7) of the ITA.

[49] The same issue was raised by the appellants by way of cross-appeal in *Imperial Oil 2009*. However, the Court in that case noted that the record did not allow for the computation of the alleged overpayment. It therefore denied the appellants' claim without making a definite pronouncement as to whether an overpayment could result from the remitted amount (*Imperial Oil 2009*, paras. 45 and 46).

[50] In the present case, IORL properly asserts that the missing factual foundation has been established. It contends that the remission amount together with the other payments made on account of its taxes for the 1999 taxation year give rise to a proven overpayment on which refund interest is payable. In advancing this argument IORL submits that the remission amounts had to be credited against its taxes payable as of the balance due date the same way as they were for the purpose of computing its instalment obligations.

[51] I start from the basic premise that the correctness or validity of an assessed tax liability is not affected by a remission and must be determined on the basis of the relevant provisions of the ITA (*Imperial Oil 2009*, para. 27, citing *Perley*). For that reason, it is legally impossible for a

remission order "to operate as an amendment to the [ITA] for all purposes" (*Imperial Oil 2009*, para. 28, quoting the letter from the Department of Finance dated April 28, 1976, copy of which is also part of this record and relied upon by IORL). The effect of a remission order is limited to forgiving a debt once it has arisen pursuant to relevant provisions of the ITA, which would include in this case paragraphs 12(1)(*o*) and 18(1)(*m*) (*Perley*, para. 6; *Imperial Oil 2009*, para. 30).

[52] That this is the only effect which a remission order can have is made clear by the modes or forms of remission authorized by the FAA which are limited to foregoing collection of the debt (paragraph 23(4)(*a*) through (*d*)) or repaying it, if it has already been paid (paragraph 23(4)(*e*)).

[53] Referring to this last form of remission, IORL insists that if the Government had given effect to the remission by writing a cheque equal to the remitted debt and if IORL had used the proceeds to pay its taxes, "[t]here is no doubt … that … the amount would count as a payment on account of [IORL's] tax liability" (IORL's memorandum of fact and law, para. 62). No doubt that is so, but in order for this cheque to be issued at the balance due date, IORL had to discharge its tax liability beforehand since paragraph 23(4)(*e*) only allows for "repaying … money paid".

[54] A further complication would have been the amount of the refund cheque. Before this amount could be determined, the taxes payable for the 1999 taxation year had to be ascertained as the SRO by its own terms relieved IORL of "any tax payable pursuant to Part I as a result of the royalty provisions". The extent of this tax was not ascertained until December 7, 2004, when

the remission amount was reduced to $885,918 and did not become final until September 27, 2007, when the last reassessment for the 1999 taxation year was issued. That is when the possibility that further changes be brought to the computation of IORL's taxes payable pursuant to Part I came to an end (*Abrahams v. M.N.R.*, [1967] 1 Ex. C.R. 314, paras. 9 and 10). This is the process which the Federal Court judge alluded to when she said that "[b]y definition, in order for a debt or liability to be remitted, is has to be fully assessed and certain" (reasons, para. 50).

[55] A further, and in my view unsurmountable difficulty is that in order for the remission amount to be credited against IORL's tax liability for the 1999 taxation year pursuant to subsection 164(1), one would have to treat the remission order as reducing the taxes assessed for that year, contrary to *Perley*, or as having amended the ITA by eliminating the application of paragraphs 12(1)(*o*) and 18(1)(*m*), a proposition that runs counter to the conclusion reached in *Imperial Oil 2009*. It follows that the appeal cannot succeed.

[56] In so holding, I am mindful of the fact that the Minister relieved IORL from its liability for arrears interest by crediting the remission amount against IORL's instalment obligations with effect as of the balance due date. However, this treatment is not in issue in this appeal and I need not opine on it.

[57] As to the question that is in issue, it is clear that an overpayment of taxes payable cannot result without some form of payment being made beforehand, and no such payment can result from a remission order whose sole effect is to prevent the collection of what is, and remains, a validly assessed tax debt. Given that a remission order can do no more than that, no amount can

be said to have been "paid on account of [IORL's] liability" (paragraph 164(7)(*b*) of the ITA) by reason of the SRO.

[58] It follows that the Federal Court judge has not been shown to have erred in holding that IORL had no entitlement to the payment of refund interest, and in dismissing the application for judicial review on this basis.

[59] Given this conclusion, the appeal brought by IORVL becomes moot as it also hinges on this entitlement. However, I believe it useful to add in light of the reasons given in disposing of the first appeal, that there is no basis for IORVL's contention that the Minister's refusal to pay refund interest could only be challenged after the objection process had been exhausted (IORVL's memorandum of fact and law, paras. 24-26 and 37).

[60] I refer in particular to the above finding that a remission has no bearing on tax liability as assessed or reassessed, and therefore cannot be the subject matter of an assessment or reassessment.

[61] The objection procedure before the Minister and the subsequent right to bring an appeal before the Tax Court only applies to assessed amounts (*Perley*, paras. 1 and 7). An assessment determines or confirms the liability of a taxpayer to pay specified amounts. Pursuant to subsection 152(1) of the ITA, the only amounts that can be assessed are taxes, interest and penalties. To be clear, assessed interest is interest <u>claimed</u> by the Minister pursuant to the ITA (see for example section 161), and interest <u>payable</u> by the Minister pursuant to section 164 does

not come within that description. As explained by Rip J. (as he then was) in *McMillen Holdings Ltd v. M.N.R.*, [1987] 2 C.T.C. 2327 (T.C.C.) [*McMillen*], the amount of a refund resulting from an overpayment, although often set out on the notice of assessment, is not an assessed amount (*McMillen*, para. 47). The objection procedure does not apply to a contested refund and the Tax Court is therefore without jurisdiction to hear an appeal pertaining to its computation (*McMillen* , para. 51; see also *Topol v. Canada*, [2003] 4 C.T.C. 44 (F.C.T.), paras. 11 and 12, where the Federal Court came to the same conclusion).

[62] It follows that the Federal Court judge came to the correct conclusion when she held that the time within which IORVL could file its judicial review application began to run on June 10, 2003, when the Minister's refusal was first communicated with the result that IORVL's application was some seven years late in the making.

DISPOSITION

[63] I would dismiss both appeals with costs in each case.

"Marc Noël"
Chief Justice

"I agree.
D. G. Near J.A.

"I agree.
A.F. Scott J.A.

Annex 1

RELEVANT LEGISLATIVE PROVISIONS

Income Tax Act, R.S.C. 1985 (5th Supp.), c. 1, as applicable during IORL's 1999 taxation year	*Loi de l'impôt sur le revenu*, L.R.C. 1985 (5^{e} supp.), c. 1, telle qu'applicable durant l'année d'imposition 1999 d'IORL
Income inclusions	Sommes à inclure dans le revenu
12. (1) There shall be included in computing the income of a taxpayer for a taxation year as income from a business or property such of the following amounts as are applicable:	12. (1) Sont à inclure dans le calcul du revenu tiré par un contribuable d'une entreprise ou d'un bien, au cours d'une année d'imposition, celles des sommes suivantes qui sont applicables :
…	[…]
Royalties, etc.	Redevances
(*o*) any amount (other than an amount referred to in paragraph 18(1)(*m*), paid or payable by the taxpayer, or a prescribed amount) that, because of an obligation imposed by statute or a contractual obligation substituted for an obligation imposed by statute, became receivable in the year by	*o*) les sommes (sauf celles visées à l'alinéa 18(1)*m*), payées ou payables par le contribuable et sauf les sommes prescrites) qui, en vertu d'une obligation imposée par une loi ou d'une obligation contractuelle qui remplace une obligation imposée par une loi, sont devenues à recevoir au cour de l'année :
(i) Her Majesty in right of Canada or a province,	(i) par Sa Majesté du chef du Canada ou d'une province,
(ii) an agent of Her Majesty in right of Canada or a province, or	(ii) par un mandataire de Sa Majesté du chef du Canada ou d'une province,
(iii) a corporation, commission or association that is controlled by Her Majesty in right of Canada or a province or by an agent of Her Majesty in right of Canada or a province	(iii) par une société, une commission ou une association contrôlée par Sa Majesté du chef du Canada ou d'une province ou par un mandataire de Sa Majesté du chef du Canada ou d'une province,
as a royalty, tax (other than a tax or	à titre de redevance, de taxe (sauf une

portion of a tax that can reasonably be considered to be a municipal or school tax), lease rental or bonus or as an amount, however described, that can reasonably be regarded as being in lieu of any such amount, or in respect of the late receipt or non-receipt of any such amount, and that can reasonably be regarded as being in relation to

taxe ou une fraction de taxe qu'il est raisonnable de considérer comme une taxe municipale ou scolaire), de loyer ou de prime, ou au titre d'un montant, peu importe sa désignation, qu'il est raisonnable de considérer comme tenant lieu d'une telle somme ou comme se rapportant à la réception tardive ou à la non-réception d'une telle somme, qu'il est raisonnable de considérer comme rattachée :

(iv) the acquisition, development or ownership of a Canadian resource property of the taxpayer in respect of which the obligation imposed by statute or the contractual obligation, as the case may be, applied, or

(iv) soit à l'acquisition, l'aménagement ou la propriété d'un avoir minier canadien du contribuable assujetti à l'obligation légale ou contractuelle,

(v) the production in Canada

(v) soit à la production au Canada des produits ci-après sur lesquels le contribuable avait un droit assujetti à l'obligation légale ou contractuelle :

(A) of petroleum, natural gas or related hydrocarbons from a natural accumulation of petroleum or natural gas (other than a mineral resource) located in Canada or from an oil or gas well located in Canada,

(A) pétrole, gaz naturel ou hydrocarbures connexes, tirés d'un gisement naturel de pétrole ou de gaz naturel (sauf une ressource minérale) ou d'un puits de pétrole ou de gaz, situés au Canada,

(B) of sulphur from a natural accumulation of petroleum or natural gas located in Canada, from an oil or gas well located in Canada or from a mineral resource located in Canada,

(B) soufre tiré d'un gisement naturel de pétrole ou de gaz naturel, d'un puits de pétrole ou de gaz naturel ou d'une ressource minérale, situés au Canada,

(C) to any stage that is not beyond the prime metal stage or its equivalent, of metal, minerals (other than iron or petroleum or related hydrocarbons) or coal from a mineral resource located in Canada,

(C) métaux, minéraux (sauf le fer, le pétrole et les hydrocarbures connexes) ou charbon tirés de ressources minérales situées au Canada, jusqu'à un stade qui ne dépasse pas celui du métal primaire ou son équivalent,

(D) to any stage that is not beyond the pellet stage or its equivalent, of iron

(D) fer tiré de ressources minérales situées au Canada, jusqu'à un stade

from a mineral resource located in Canada, or

(E) to any stage that is not beyond the crude oil stage or its equivalent, of petroleum or related hydrocarbons from tar sands from a mineral resource located in Canada,

in respect of which the taxpayer had an interest to which the obligation imposed by statute or the contractual obligation, as the case may be, applied;

qui ne dépasse pas celui de la boulette ou son équivalent,

(E) pétrole ou hydrocarbures connexes extraits de sables asphaltiques, tirés de ressources minérales situées au Canada, jusqu'à un stade qui ne dépasse pas celui du pétrole brute ou son équivalent;

General limitations

18. (1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of

…

Royalties, etc.

(*m*) any amount (other than a prescribed amount) paid or payable by virtue of an obligation imposed by statute or a contractual obligation substituted for an obligation imposed by statute to

(i) Her Majesty in right of Canada or a province,

(ii) an agent of Her Majesty in right of Canada or a province, or

(iii) a corporation, commission or association that is controlled by Her Majesty in right of Canada or a province or by an agent of Her Majesty in right of Canada or a province

Exceptions d'ordre général

18. (1) Dans le calcul du revenu du contribuable tiré d'une entreprise ou d'un bien, les éléments suivants ne sont pas déductibles :

[…]

Redevances

m) toute somme (autre qu'une somme prescrite) payée ou payable en vertu d'une obligation imposée par une loi ou d'une obligation contractuelle qui remplace une obligation imposée par une loi :

(i) à Sa Majesté du chef du Canada ou d'une province,

(ii) à un mandataire de Sa Majesté du chef du Canada ou d'une province,

(iii) à une société, une commission ou une association contrôlée par Sa Majesté du chef du Canada ou d'une province ou par un mandataire de Sa Majesté du chef du Canada ou d'une province,

as a royalty, tax (other than a tax or portion of a tax that can reasonably be considered to be a municipal or school tax), lease rental or bonus or as an amount, however described, that can reasonably be regarded as being in lieu of any such amount, or in respect of the late payment or non-payment of any such amount, and that can reasonably be regarded as being in relation to

à titre de redevance, de taxe (sauf une taxe ou une fraction de taxe qu'il est raisonnable de considérer comme une taxe municipale ou scolaire), de loyer ou de prime, ou au titre d'un montant, peu importe sa désignation, qu'il est raisonnable de considérer comme tenant lieu d'une telle somme ou comme se rapportant à la réception tardive ou à la non-réception d'une telle somme, qu'il est raisonnable de considérer comme rattachée :

(iv) the acquisition, development or ownership of a Canadian resource property, or

(iv) soit à l'acquisition, l'aménagement ou la propriété d'un avoir minier canadien,

(v) the production in Canada

(v) soit à la production au Canada :

(A) of petroleum, natural gas or related hydrocarbons from a natural accumulation of petroleum or natural gas (other than a mineral resource) located in Canada or from an oil or gas well located in Canada,

(A) de pétrole, de gaz naturel ou d'hydrocarbures connexes, tirés d'un gisement naturel de pétrole ou de gaz naturel (sauf une ressource minérale) ou d'un puits de pétrole ou de gaz, situés au Canada,

(B) of sulphur from a natural accumulation of petroleum or natural gas located in Canada, from an oil or gas well located in Canada or from a mineral resource located in Canada,

(B) de soufre tiré d'un gisement naturel de pétrole ou de gaz naturel, d'un puits de pétrole ou de gaz naturel ou d'une ressource minérale, situés au Canada,

(C) to any stage that is not beyond the prime metal stage or its equivalent, of metal, minerals (other than iron or petroleum or related hydrocarbons) or coal from a mineral resource located in Canada,

(C) de métaux, de minéraux (sauf le fer, le pétrole et les hydrocarbures connexes) ou charbon tirés de ressources minérales situées au Canada, jusqu'à un stade qui ne dépasse pas celui du métal primaire ou son équivalent,

(D) to any stage that is not beyond the pellet stage or its equivalent, of iron from a mineral resource located in Canada, or

(D) de fer tiré de ressources minérales situées au Canada, jusqu'à un stade qui ne dépasse pas celui de la boulette ou son équivalent,

(E) to any stage that is not beyond the crude oil stage or its equivalent, of

(E) de pétrole ou d'hydrocarbures connexes extraits de sables

petroleum or related hydrocarbons from tar sands from a mineral resource located in Canada;

asphaltiques, tirés de ressources minérales situées au Canada, jusqu'à un stade qui ne dépasse pas celui du pétrole brute ou son équivalent;

Assessment deemed valid and binding

Présomption de validité de la cotisation

152. (8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.

152. (8) Sous réserve des modifications qui peuvent y être apportées ou de son annulation lors d'une opposition ou d'un appel fait en vertu de la présente partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée être valide et exécutoire malgré toute erreur, tout vice de forme ou toute omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi

Refunds

Remboursement

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

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*) may,

a) peut faire ce qui suit :

(i) before mailing the notice of assessment for the year, where the taxpayer is a qualifying corporation (as defined in subsection 127.1(2)) 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 the year,

(i) avant de poster l'avis de cotisation pour l'année – si le contribuable est une société admissible au sens du paragraphe 127.1(2) 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 total visé à l'alinéa *d*) de cette définition, quant au contribuable pour l'année,

(ii) before mailing 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

(ii) avant de poster 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) on or after mailing the notice of assessment for the year, refund an overpayment for the year, to the extent that the overpayment was not refunded pursuant to subparagraph (i) or (ii); and

(iii) lors de la mise à la poste 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);

…

Interest on refunds and repayments

164. (3) Where under this section an amount in respect of a taxation year (other than an amount or portion thereof that can reasonably be considered to arise from the operation of section 122.5, 122.61 or 126.1) is refunded or repaid to a taxpayer or applied to another liability of the taxpayer, the Minister shall pay or apply interest on it at the prescribed rate for the period beginning on the day that is the latest of

(*a*) where the taxpayer is an individual, the day that is 45 days after the individual's balance-due day for the year,

(*b*) where the taxpayer is a corporation, the day that is 120 days after the end of the year,

(*c*) where the taxpayer is

(i) a corporation, the day on which its return of income for the year was filed under section 150, unless the return was filed on or before the corporation's filing-due date for the year, and

(ii) an individual, the day that is 45 days after the day on which the

[…]

Intérêts sur les sommes remboursées

164. (3) Lorsque, en vertu du présent article, une somme à l'égard d'une année d'imposition est remboursée à un contribuable ou imputée sur un autre montant dont il est redevable, à l'exception de tout ou partie de la somme qu'il est raisonnable de considérer comme découlant de l'application des articles 122.5, 122.61 ou 126.1, le ministre paie au contribuable les intérêts afférents à cette somme au taux prescrit ou les impute sur ce montant, pour la période allant du dernier en date des jours visés aux alinéas suivant jusqu'au jour où la somme est remboursée ou imputée, sauf si les intérêts ainsi calculés sont inférieurs à 1 $, auquel cas aucun intérêt n'est payé ni imputé en vertu du présent paragraphe :

a) le quarante-cinquième jour suivant la date d'exigibilité du solde qui est applicable au contribuable pour l'année, s'il est un particulier;

b) le 120e jour suivant la fin de l'année, si le contribuable est une société;

c) si le contribuable est :

(i) une société, le jour où sa déclaration de revenu pour l'année a été produite en conformité avec l'article 150, sauf si la déclaration a été produite au plus tard à la date d'échéance de production qui lui est applicable pour l'année,

(ii) un particulier, le quarante-cinquième jour suivant celui où sa

individual's return of income for the year was filed under section 150,

(*d*) in the case of a refund of an overpayment, the day the overpayment arose, and

(*e*) in the case of a repayment of an amount in controversy, the day an overpayment equal to the amount of the repayment would have arisen if the total of all amounts payable on account of the taxpayer's liability under this Part for the year were the amount by which

(i) the lesser of the total of all amounts paid on account of the taxpayer's liability under this Part for the year and the total of all amounts assessed by the Minister as payable under this Part by the taxpayer for the year

exceeds

(ii) the amount repaid,

and ending on the day the amount is refunded, repaid or applied, unless the amount of the interest so calculated is less than $1, in which event no interest shall be paid or applied under this subsection.

…

Definition of "overpayment"

(7) In this section, "overpayment" of a taxpayer for a taxation year means

déclaration de revenu pour l'année a été produite en conformité avec l'article 150;

d) dans le cas d'un remboursement d'un paiement en trop d'impôt, le jour où il y a eu paiement en trop;

e) dans le cas d'un remboursement d'une somme en litige, le jour où il y aurait eu un paiement en trop égal à la somme remboursée si le total des montant payables sur ce dont le contribuable st redevable en vertu de la présente partie pour l'année était égal à l'excédent du montant visé au sous-alinéa (i) sur la somme visée au sous-alinéa (ii) :

(i) le moindre du total des sommes versées sur ce dont il est redevable en vertu de la présente partie pour l'année et du total des montants qui, selon la cotisation établie par le ministre, sont payables en vertu de la présente partie par le contribuable pour l'année,

(ii) la somme remboursée.

[…]

Sens de paiement en trop

(7) Au présent article, un paiement en trop fait par un contribuable pour une année d'imposition est égal au

	montant suivant :
…	[…]
(*b*) where the taxpayer is a corporation, the total of all amounts paid on account of the corporation's liability under this Part or Parts I.3, VI or VI.1 for the year minus all amounts payable in respect thereof.	*b*) si le contribuable est une société, le total des sommes versées sur les montants dont la société est redevable en vertu de la présente partie ou des parties I.3, VI ou VI.1 pour l'année, moins ces mêmes montants.
Financial Administration Act, R.S.C. 1985, c. F-11, as amended	*Loi sur la gestion des finances publiques*, L.R.C. 1985, c. F-11, telle que modifiée
Form of remission	Idem
23. (4) A remission pursuant to this section may be granted	23. (4) Ces remises peuvent être accordées sur :
(*a*) by forbearing to institute a suit or proceeding for the recovery of the tax, penalty or other debt in respect of which the remission is granted;	*a*) abstention de toute action en recouvrement des sommes en cause;
(*b*) by delaying, staying or discontinuing any suit or proceeding already instituted;	*b*) ajournement, suspension ou abandon de l'action;
(*c*) by forbearing to enforce, staying or abandoning any execution or process on any judgment;	*c*) abstention, suspension ou abandon de toute voie d'exécution forcée;
(*d*) by the entry of satisfaction on any judgment; or	*d*) constat judiciaire d'acquittement de l'obligation;
(*e*) by repaying any sum of money paid to or recovered by the Receiver General for the tax, penalty or other debt.	*e*) remboursement de sommes payées au receveur général ou recouvrées par lui au titre des taxes, pénalités ou autres dettes.
…	[…]
Effect of remission	Effet de la remise
(6) A conditional remission, on	(6) Une remise conditionnelle, une

fulfilment of the condition, and an unconditional remission have effect as if the remission were made after the tax, penalty or other debt in respect of which it was granted had been sued for and recovered.

fois la condition remplie, et une remise absolue ont le même effet que s'il y avait eu remise après recouvrement, sur action en justice des sommes en cause.

Federal Courts Act, R.S.C. 1985, c. F-7, as amended

Loi sur les Cours fédérales, L.R.C. 1985, c. F-7, telle que modifiée

Time limitation

18. (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Délai de présentation

18. (2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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