Date: 20061222

Docket: A-410-05

Citation: 2006 FCA 419

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

PAPIERS CASCADES CABANO INC.

Respondent

Hearing held at Montréal, Quebec, on December 13, 2006.

Judgment delivered at Ottawa, Ontario, on December 22, 2006.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] The appellant is appealing a decision of Madam Justice Lamarre-Proulx (the judge) of the Tax Court of Canada. In her decision, the judge allowed the respondent's appeal of an assessment established by the Minister of National Revenue (the Minister) under the *Income Tax Act* (the Act) for the 1996 taxation year. This is the only taxation year in dispute.

The issue

[2] At the heart of the decision that the judge made and that we are called upon to make is the interpretation to be given to subsection 127(5) and to the definition of "investment tax credit" in paragraph 127(9)(*c*) of the Act. The parts of these provisions that are relevant to determining the appeal are as follows:

127. (5)	**127.** (5)
Investment tax credit.	**Crédit d'impôt à l'investissement.**
(5) There may be deducted from the tax otherwise payable by a taxpayer under this Part for a taxation year an amount not exceeding the lesser of	(5) Est déductible de l'impôt payable par ailleurs par un contribuable en vertu de la présente partie pour une année d'imposition un montant qui ne dépasse pas le moins élevé des montants suivants:
(*a*) the total of (i) the taxpayer's investment tax credit at the end of the year in respect of property acquired before the end of the year, of the taxpayer's flow-through mining expenditure for the year or a preceding taxation year, of the taxpayer's pre-production mining expenditure for the year or a preceding taxation year or of the taxpayer's SR&ED qualified expenditure pool at the end of the year or at the end of a preceding taxation year, and	*a*) le total des montants suivants: (i) le crédit d'impôt à l'investissement du contribuable à la fin de l'année au titre de biens acquis avant la fin de l'année, de sa dépense minière déterminée pour l'année ou pour une année d'imposition antérieure, de sa dépense minière préparatoire pour l'année ou pour une année d'imposition antérieure ou de son compte de dépenses admissibles de recherche et de développement à la fin de l'année ou d'une année d'imposition antérieure,
. . .	…
127. (9)	**127.** (9)
Investment tax credit.	**Crédit d'impôt à l'investissement.**
"investment tax credit" of a taxpayer at the end of a taxation year means the amount, if any, by which the total of	Le « crédit d'impôt à l'investissement » d'un contribuable à la fin d'une année d'imposition correspond à l'excédent éventuel du total des montants suivants:

(*a*) the total of all amounts each of which is the specified percentage of the capital cost to the taxpayer of certified property or qualified property acquired by the taxpayer in the year,	*a*) l'ensemble des montants représentant chacun le pourcentage déterminé du coût en capital, pour le contribuable, d'un bien admissible ou d'un bien certifié qu'il a acquis au cours de l'année;
(*a*.1) 20% of the amount by which the taxpayer's SR&ED qualified expenditure pool at the end of the year exceeds the total of all amounts each of which is the super-allowance benefit amount for the year in respect of the taxpayer in respect of a province,	*a*.1) 20 % de l'excédent du compte de dépenses admissibles de recherche et de développement du contribuable à la fin de l'année sur le total des montants représentant chacun l'avantage relatif à la superdéduction pour l'année relativement au contribuable et à une province;
(*b*) the total of amounts required by subsection 127(7) or 127(8) to be added in computing the taxpayer's investment tax credit at the end of the year,	*b*) l'ensemble des montants à ajouter, en vertu du paragraphe (7) ou (8), dans le calcul de son crédit d'impôt à l'investissement à la fin de l'année;
(*c*) the total of all amounts each of which is an amount determined under any of paragraphs (*a*) to (*b*) in respect of the taxpayer for any of the 10 taxation years immediately preceding or the 3 taxation years immediately following the year,	*c*) l'ensemble des montants représentant chacun la somme déterminée selon l'un des alinéas *a*) à *b*) relativement au contribuable pour l'une des 10 années d'imposition précédentes ou des 3 années d'imposition suivantes;
. . .	…
exceeds the total of	sur le total des montants suivants:
(*f*) the total of all amounts each of which is an amount deducted under subsection 127(5) from the tax otherwise payable under this Part by the taxpayer for a preceding taxation year in respect of property acquired, or an expenditure incurred, in the year or in any of the 10 taxation years immediately preceding or the 2 taxation years immediately following the year, or in respect of the taxpayer's SR&ED qualified expenditure pool at the end of such a year,	*f*) l'ensemble des montants représentant chacun un montant déduit en application du paragraphe (5) de l'impôt payable par ailleurs par le contribuable en vertu de la présente partie pour une année d'imposition antérieure relativement soit à un bien acquis, ou à une dépense engagée, au cours de l'année ou d'une des 10 années d'imposition précédentes ou des 2 années d'imposition suivantes, soit au compte de dépenses admissibles de recherche et de développement du contribuable à la fin d'une telle année;

(Emphasis added)

[3] More specifically, the issue is whether the definition of "investment tax credit" (ITC) in paragraph 127(9)(*c*) refers, and is limited, to the ITC amounts claimed by the respondent for the years prior to 1996, which the Minister took into account in the assessment that he issued for these preceding years, although it was later determined that these amounts did not qualify for ITC. This case involves amounts claimed for the years 1993, 1994 and 1995.

[4] The following table prepared by the Appeals Division and dated August 13, 2001, can be found in the appeal book, tab F, pages 109 and 110. The table shows the continuity of the respondent's investment tax credits and the amounts claimed:

Year	Computation of ITC in year	ITC deducted from tax	ITC at end of year
1987	$677,558	$351,463	$326,395
1988	1,542,906	0	1,869,301
1989	1,469,376	0	3,338,677
1990	2,040,266	320,948	5,057,995
1991	250,201	0	5,308,196
1992	851,274	595,667	5,563,803
1993	622,994	396,093	5,790,704
1994	568,843	2,319,692	4,039,855
1995	436,089	4,475,945	0
1996	493,672	493,672	0

[5] According to the appellant's interpretation of the definition of ITC in paragraph 127(9)(*c*), the amount of ITC available for the 1996 taxation year is $287,307, not $493,672 as claimed by the respondent for 1996. The difference between the two amounts results from the Minister's reassessment in 1996 of the ITC earned in the years 1993 to 1995 as well as amounts consequently

available at the end of those years. This difference appears in the following table prepared by the Minister, beginning with the year 1993:

Year	ITC earned in year	ITC deducted	ITC at end of year
1987	$677,558	$351,463	$326,395
1988	1,542,906	0	1,869,301
1989	1,469,376	0	3,338,677
1990	2,040,266	320,948	5,057,995
1991	250,201	0	5,308,196
1992	851,274	595,667	5,563,803
1993	512,225	396,093	5,679,935
1994	505,268	2,319,692	3,865,511
1995	404,069	4,475,945	(206,365)
Total 1987 to 1995:	**$8,253,443**	**$8,459,808**	**(206,365)**
1996	$493,672	$287,307	0

The Facts

[6] The facts are not in dispute in this case. The parties filed an agreement, which can be found in the appeal book, tab E, page 33. I will only mention those facts that are essential to understanding the dispute.

[7] Throughout the years 1993 to 1996, the respondent incurred various operating, scientific research and experimental development expenditures that qualified for ITC. The respondent deducted certain amounts.

[8] The Minister conducted an audit of the respondent's affairs, including whether certain expenditures and property qualified for ITC for the 1993 to 1996 taxation years. After disallowing expenditures relating to some class 1 and class 43 properties, the Minister recomputed the ITC balances at the end of each of the taxation years 1993 to 1996.

[9] The audit began on November 15, 1999. At that time, the 1993 and 1994 taxation years were statute-barred. The 1995 year was not, but was at the time the notice of reassessment was issued on March 26, 2001, for the years 1993 and 1994, without amending the tax payable by the respondent. The notice indicated:

> We have revised the T2 statement further to an audit. Where necessary, we have adjusted the subsequent years for carry-forward balances, interest and the balance due date.

A notice of assessment was also issued the same day for the 1996 taxation year.

[10] The respondent acknowledges that, had the years 1993 to 1995 not been statute-barred, the Minister could have refused to qualify the properties described in schedule A to the agreement for the taxation years 1993 to 1996.

[11] What follows is a brief summary of the parties' submissions and the judge's findings.

The judge's findings and the parties' submissions

[12] The essence of the judge's decision and of her reasons is found in paragraphs 20 to 22 and 35, which are reproduced below:

> [20] An ITC may be claimed as a deduction from tax payable for a taxation year or it may be carried forward for one of the 10 taxation years preceding or three taxation years immediately following the year. If the ITC is claimed, it becomes an amount that has been considered in the assessment for the taxation year. An assessment is presumed valid. It can only be corrected via another assessment.
>
> [21] The Respondent's position amounts to asserting that a taxpayer may have to pay back in a subsequent year an ITC that he or she claimed as a deduction from tax payable for a year and that was considered in the assessment for that year.
>
> [22] This is not the case for a loss carry-forward, an ITC carry-forward, or computation of undepreciated capital cost. These are not elements that were considered in the assessment for a given year.
>
> . . .
>
> [35] With regard to the first issue, that is, the amounts to include under paragraph (*c*) of the definition of an ITC at subsection 127(9) of the *Act*, in respect of *the total of all amounts each of which is an amount determined under paragraph (a), (a.1) or (b) in respect of the taxpayer for any of the 10 taxation years immediately preceding or the 3 taxation years immediately following the year*, when these amounts were deducted from tax otherwise payable by a taxpayer, these are the amounts that must be entered because they were assessed. The only way to change them is through reassessments for the years in question. The provisions of subsection 152(4) of the *Act* apply to those amounts.

[13] In short, the judge found that the amounts to be considered for purposes of the definition of ITC in subsection 127(9) are those that the respondent claimed and that the Minister took into account in his notice of assessment. These amounts can only be corrected by another notice of assessment and only if the year or years in dispute are not statute-barred.

[14] It goes without saying that the respondent asserts this position, which, it says, encourages taxpayers to invest, avoids the uncertainties created by the appellant's position and prevents the Minister from circumventing the limits of his power to assess set out in subsection 152(4) of the Act. In addition, the respondent maintains, the provisions of the Act are consistent with the judge's interpretation.

[15] Counsel for the appellant submits that the judge erred in law in holding that ITCs can be carried forward for the ten taxation years immediately preceding (or the three taxation years immediately following), while the Act provides for an annual calculation that considers qualifying property throughout the ten preceding years and amounts claimed as ITC for those same years.

[16] Counsel for the appellant maintains that the judge also erred in law in permitting ITCs to be claimed for properties that were neither qualified nor certified, and in permitting such properties to be considered in computing the respondent's ITC for his taxation year 1996.

Decision

[17] With respect for the opposing viewpoint, I believe the appellant is correct. The definition of ITC in paragraph 127(9)(*a*) refers to a percentage determined with respect to "certified property or qualified property" in the year the property was acquired. It is therefore essential that properties be qualified or certified in order to claim an ITC.

[18] For the years 1993 to 1995, the appellant revised the list of properties that the respondent listed as certified or qualified. The appellant excluded a certain number of them. The respondent does not take issue with this exclusion. Since excluded properties do not give rise to an ICT, the appellant adjusted the amount of ITC earned in each of the years in question.

[19] Two observations must be made about the appellant's revision. First, it is both required by the Act and complies with it. Under subsections 127(5) and 127(9), it appears that an ITC is allowed for a taxation year for property acquired during, but before the end of, that taxation year.

[20] Whether a property is certified or qualified is determined for each taxation year based on the Act and in accordance with it, not based on what a taxpayer claims or in accordance with what he or she wants. It follows that the qualifying amounts for ITCs are also computed for each taxation year based on the Act, not on what a taxpayer chooses to claim for each of those years. In other words, "qualifying for an ITC" must not be confused with "claiming an ITC". Such confusion results in either disregarding the wording of the Act or modifying the definition of ICT in paragraph 127(9)(*a*)

to read “the specified percentage… of property claimed” instead of “the specified percentage… of certified property or qualified property.”

[21] In *Her Majesty the Queen v. Bradley*, 98 DTC 6421, which involved calculating the aggregate of deductible charitable gifts with a possible carry-forward for the five years prior to the year in which the deduction was claimed, our Court reiterated the principle that determining the aggregate of gifts made in previous years must be confined to qualifying charitable gifts. At page 6422, Mr. Justice Strayer wrote:

> It appears to us that in, for example, an assessment made in respect of 1985 taxes the Minister is obliged, in considering the amount to be carried forward, to determine the aggregate of “gifts” made in previous years and this must in the context be confined to qualifying charitable gifts. In this case, the Tax Court Judge determined that the sum allegedly given to the Museum in 1984 (purportedly $98,867) was not a gift because there was no loan which could have been forgiven by the respondent. Therefore in calculating, for purposes of carry-forward in subsequent years, the aggregate of gifts made in 1984, as required by paragraph 110(1)(*a*), that aggregate cannot include the invalid amount of $98,867.
>
> (Emphasis added)

[22] The same principle applies under subsection 127(5) and paragraph 127(9)(*a*) in determining the possible total of the total of all amounts set out in this paragraph.

[23] Second, for the 1993 to 1995 taxation years, readjusting the qualified or certified property that the respondent claimed does not imply or require or constitute a new assessment of the tax payable for those years in question. The readjustment merely establishes the ITC balance that legally qualifies for a deduction at the end of each taxation year in which the property was acquired.

That was the conclusion reached by Mr. Justice Bowman (now Chief Justice) of the Tax Court of Canada in *Coastal Construction and Excavating Limited v. The Queen*, 97 DTC 27. I adopt the following statements that he wrote at page 31:

> Finally, the appellant contends that because the Minister, in prior years, had treated the operation as a "facility" as defined in the RDIA he was not entitled to change the investment tax credit carry-forward from those admittedly statute-barred years to affect the taxable income of a year that was not statute-barred to conform to his view that the property was qualified and not certified. This interpretation would involve a conclusion that a determination of the balance of a carry-forward of investment tax credits for a statute-barred year was tantamount to an assessment. I do not read section 152 of the *Income Tax Act* as supporting such a conclusion. The Minister is obliged to assess in accordance with the law. If he assesses a prior year incorrectly and that year becomes statute-barred this will prevent his reassessing tax for that year, but it does not prevent his correcting the error in a year that is not statute-barred, even though it involves adjusting carry-forward balances from previous years, whether they be loss carry-forwards or balances of investment tax credits. *New St. James Limited v. M.N.R.*, 66 DTC 5241; *Allcann Wood Suppliers Inc. v. The Queen*, 94 DTC 1475. No question of estoppel arises: *Goldstein v. The Queen*, 96 DTC 1029.
>
> (Emphasis added)

[24] The judge attempted to distinguish this decision by noting that, in the case before her, the ITC had not been assessed in the initial year. According to her, it is that initial assessment that would be modified illegally if the change proposed by the appellant in 1996 were permitted. With respect, only the ITCs that change the tax payable in 1996 are affected by the Minister's assessment, not those applicable to the preceding years.

Conclusion

[25] For these reasons, I would allow the appeal with costs, and I would set aside the decision of the Tax Court of Canada dated June 20, 2005. Granting the judgment that should have been made, I would dismiss, with costs, the respondent's appeal of the assessment determined under the Act for the 1996 taxation year.

"Gilles Létourneau"
J.A.

"I concur.
M. Nadon J.A."

I concur.
J.D. Denis Pelletier J.A."

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-410-05
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APPEARANCES:

Annick Provencher Pierre Cossette	FOR THE APPELLANT
Josée Pelletier Pierre Barsalou	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPELLANT
Barsalou Lawson Montréal, Quebec	FOR THE RESPONDENT