

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120208

Docket: A-90-11

Citation: 2012 FCA 46

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

BOMBARDIER INC.

Respondent

Heard at Montréal, Quebec, on January 16, 2012.

Judgment delivered at Ottawa, Ontario, on February 8, 2012.

REASONS FOR JUDGMENT BY:

LÉTOURNEAU J.A.

CONCURRED IN BY:

**PELLETIER J.A.
MAINVILLE J.A.**

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues

[1] Her Majesty the Queen (appellant) is appealing the decision by Justice Archambault of the Tax Court of Canada (judge) delivered on January 28, 2011, in respect of the notices of assessment issued by the Minister of National Revenue for 1990 to 2001 under Part 1.3 of the

Income Tax Act, R.S.C. c. 1 (5th Supp.) (Act). This Part concerns the capital tax on large corporations.

[2] The judge allowed the appeal of Bombardier Inc. (the respondent in this appeal), with costs. He referred the assessments back to the Minister for reconsideration, on the assumption that the only advances included in the appellant's capital under paragraph 181.2(3)(c) are the following:

1990 taxation year:	\$73,781,000;
1991 taxation year:	\$66,463,000;
1992 taxation year:	\$207,820,000;
1993 taxation year:	\$224,301,347;
1994 taxation year:	\$423,237,117;
1995 taxation year:	\$477,658,576;
1996 taxation year:	\$250,700,000;
1997 taxation year:	\$249,400,000;
1998 taxation year:	\$332,100,000;
1999 taxation year:	\$1,246,100,000;
2000 taxation year:	\$1,482,400,000; and
2001 taxation year:	\$1,304,100,000.

[3] For the 1990 to 1997 and 2000 taxation years, the judge gave effect to the consent to judgment agreed to by the parties and dated September 13, 2010.

[4] The appellant is appealing the judge's decision for the following reasons:

- (a) He erred in law in concluding that the taxable advances are only those that appear directly in the body of the balance sheet as liability elements, and not those shown

in assets reducing an asset element or in the supplementary notes which are an integral part of the financial statements; and

- (b) He erred in fact and in law in concluding that the advances received by the respondent and identified as advances in the notes to the financial statements were not advances within the meaning of paragraph 181.2(3)(c) of the Act.

[5] To be more specific, it is argued that the judge erred in concluding, first, that the advances received by the respondent lost their nature as advances as costs were incurred in performing the contract and, second, that they did not appear on the respondent's balance sheet for the years at issue.

[6] On appeal in the Tax Court of Canada, the judge dismissed the respondent's alternative argument that the amounts shown in liabilities on its balance sheet and those disclosed in the note on the Inventory had to be excluded from the respondent's capital as reserves in accordance with paragraph 181.2(3)(b) of the Act. The respondent is cross-appealing the dismissal of this ground for appeal which would have led to the appeal's being dismissed in the Tax Court of Canada if its appeal had not been allowed by the judge on the first ground of appeal. Since I conclude that this appeal must be dismissed, there is no need to rule on the cross-appeal.

[7] Before dealing with the issues and the parties' submissions, a brief summary of the facts is in order to better illustrate the problem.

Facts giving rise to the dispute

[8] The respondent is a business operating in the manufacture and sale of aircraft and public transportation equipment. The hearing in the Tax Court of Canada was conducted in reliance on a partial agreement on the facts reached by the parties, supplemented by the documentary and testimonial evidence of the parties at trial. This agreement is found at paragraph 8 of the trial decision, which I reproduce here:

[8] This is the statement of facts taken from the agreement as to the facts:

[TRANSLATION]

FACTS

1. The appellant operates, *inter alia*, (i) a business for the development, manufacture and sale of aircraft and aircraft parts and components; and (ii) a business for the manufacture and sale of public transportation equipment (train cars, etc.).⁹ (⁹ Footnotes are added; footnotes in the agreement are omitted.)
2. Its fiscal year and taxation year run from February 1 to January 31 of each year.
3. The contracts that the appellant enters into with its customers for the sale of aircraft and aircraft parts and components and public transportation equipment cover the usual points found in agreements of that nature: (i) a description of the item to be produced and delivered; (ii) the price and terms of payment; (iii) terms relating to delivery; (iv) the parties' liability; and (v) all of the other rights and obligations of the purchaser and the vendor. On this point, the parties agree that the contracts found at tabs 69 and 70 of the Compendium are standard form contracts that are representative of all contracts signed by the appellant during the period under appeal.
4. In accounting terms, the appellant recognizes its long-term contracts in accordance with the generally accepted accounting principles of Canada

(“GAAP”), to the extent that there is a note to the financial statements that explains the calculation of the inventory.

5. The appellant’s financial statements for the years in issue were prepared in accordance with GAAP.

Aerospace Division (aircraft sale contracts)

6. The income from contracts for aircraft sales is recognized as work progresses, on the basis of the delivery date.
7. Contracts for aircraft sales provide that amounts calculated on the basis of the purchase price must be paid by the purchaser on predetermined dates, according to a timetable that generally starts when the contract is signed and ends with delivery.¹⁰ (¹⁰ According to the standard form contract referred to by the parties during the hearing (Exhibit A-1, tab 69, section 5), the following amounts had to be paid as the purchase price for each aircraft (totalling four) provided for in the contract: \$50,000 down payment, 5% when the purchase contract is signed, 7.5% 12 months before delivery of the aircraft, and 7.5% six months before delivery of the aircraft.)
8. Subject to the additional details and information to be provided by the ordinary and expert witnesses called to testify, where applicable, the parties also state that the appellant presents those contracts as follows in its financial statements:

1990–1995 FISCAL YEARS¹¹ (¹¹ Bombardier admitted that for the calculation of the capital tax for 1990 to 1995, the amount of its advances must be calculated on the same basis as was used for the 1996 to 2001 fiscal years: each advance must be calculated aircraft by aircraft, not for all contracts. The consequence of that is to increase the amount of the advances that must be added in calculating Bombardier’s taxable capital for 1990 to 1995. See Exhibit A-5)

- (a) Before delivery, the amounts received from customers for all contracts are applied against the costs incurred;
- (b) The amount by which the costs incurred exceed the amounts received from customers for all contracts is shown in assets on the balance sheet under the item “inventory”. The amounts received from customers are shown in the note in the financial statements concerning inventory on the “advances received” line;

- (c) At delivery: (i) the total proceeds of the sale are recognized as income on the profit statement; and (ii) total costs of manufacturing are shown under the item “cost of sales and operating expenses” in the profit statement;

1996–2001 FISCAL YEARS

- (d) Before delivery, the amounts received from customers for a particular contract are applied against the costs incurred for the contract;
- (e) For a particular contract, if the costs incurred are greater than the amounts received from the customers, the excess is shown in **assets** on the balance sheet under the item “inventory”. The amounts received from customers are shown in the note in the financial statements concerning inventory on the “advances” or “advances and progress billings” line;
- (f) If the amounts received from the customers for a particular contract are greater than the costs incurred for the contract, the excess is shown in **liabilities** on the balance sheet under the item “advances” or “advances and progress billings in excess of related costs”; and
- (g) At delivery: (i) the total proceeds of the sale are recognized as income on the profit statement; and (ii) the total manufacturing costs are entered under the item “costs of sales and operating expenses” in the profit statement.

...

Transportation Division (public transportation equipment) and aircraft parts and components

10. Income from long-term contracts is recognized as work progresses, on the basis of costs incurred.
11. The sales contracts for public transportation equipment and aircraft parts and components provide that amounts must be paid by the purchaser on predetermined dates or at the occurrence of predetermined events generally referred to as “milestones”.
12. Subject to the additional details and information to be provided by the ordinary and expert witnesses called to testify, where applicable, the parties also state that the appellant presents those contracts as follows in its financial statements:

1990–1995 FISCAL YEARS

- (a) Before delivery, the amounts received from the customers for all contracts are applied against the costs incurred and the associated profit, where the funds are received;
- (b) The amount by which the costs incurred and the associated profit exceed the amounts received from the customers for all contracts is shown in assets on the balance sheet under the item “inventory”. The amounts received from customers are shown in the note in the financial statements concerning inventory on the “advances received” line;
- (c) Income is recognized in the profit statement as work progresses on the basis of the costs incurred. The related costs are entered under the item “cost of sales and manufacturing expenses” in the profit statement, generally as costs are incurred;

1996–2001 FISCAL YEARS

- (d) Before delivery, the amounts received from customers for a particular contract are applied against the costs incurred for and profits associated with the contract, when the money is received;
- (e) For a particular contract, if the costs incurred and the associated profits are greater than the amounts received from the customers, the excess is shown in assets on the balance sheet under the item “inventory”. The amounts received from customers are shown in the note in the financial statements concerning inventory on the “advances” or “advances and progress billings” line;
- (f) For a particular contract, if the amounts received from the customers are greater than the costs incurred and the associated profits, the excess is shown in liabilities on the balance sheet under the item “advances” or “advances and progress billings in excess of related costs”; and
- (g) Income is recognized in the profit statement as work progresses on the basis of the costs incurred. The related costs are entered under the item “costs of sales and operating costs” and the associated profit is shown in the profit statement, generally as costs are incurred.

[Emphasis added by the judge.]

[9] It can be seen from this agreement that the respondent has two divisions: the Aerospace Division (aircraft sale contracts) and the Transportation Division (public transportation equipment) and aircraft parts and components. It can also be seen that, in the Aerospace Division, as shown at paragraph 6 of the agreement, “[t]he income from contracts for aircraft sales is recognized as work progresses, on the basis of the delivery date, whereas in the Transportation Division, as shown in paragraph 10, “[i]ncome from long-term contracts is recognized as work progresses, on the basis of costs incurred”.

[10] In summary, in the Aerospace Division, financing for long-term work is obtained through advances of funds paid on dates predetermined in the contract of sale. The amounts of these advances do not depend on the work in progress or the work completed. They correspond to a portion of the selling price.

[11] Conversely, in the Transport Division, financing for work of the same nature is acquired through payments in amounts determined by progressive billing proportionate to the work completed.

[12] By mutual agreement, the parties chose the contract between Bombardier Inc. and Jersey European Airlines as a contract representative of the parties’ obligations and rights and of the payment of advances in the Aerospace Division: see Tab H of Volume 1 of the Appeal Book. According to counsel for the appellant, a reading of the contract reveals the following information:

- (a) The contract is a contract of sale at a fixed price, which the purchaser agrees to pay in accordance with the conditions and a timetable set out in the contract;
- (b) The purchaser must pay 5 percent of the selling price upon signing the contract, 7.5 percent twelve (12) months before the scheduled delivery date for the aircraft, 7.5 percent six (6) months before the scheduled delivery date and the balance of the selling price upon delivery;
- (c) The percentages may be higher in some contracts;
- (d) The respondent retains ownership of the work in progress and assumes the risks up to the time of delivery: see clauses 5.4 and 10.1 of the contract;
- (e) If the purchaser terminates the contract by reason of the respondent's failure to fulfill its obligations, the respondent must refund the advances received: see clauses 16.2(c) and 16.4 of the contract;
- (f) If the respondent terminates the contract by reason of the purchaser's failure to fulfill its obligations, the respondent may retain the advances received and apply them against the costs, expenses, losses and damages it incurred: see clauses 16.2(b) and 16.3(c) of the contract; and

- (g) With the exception of clause 16.3 mentioned above, nothing in the contract allows the respondent to apply the advances received against the costs incurred, even if those costs are identifiable.

I note in passing that clause (f) does not mean that the respondent can only apply the advances received against costs incurred when the respondent fails to fulfill its obligations. This clause determines the measure of the amounts it may keep in the event of default, the excess of costs over amounts received, and the damages incurred that must be reimbursed.

[13] The appellant stated that the respondent receives advances without issuing invoices, to which the respondent replies that the contract that provides for them serves as an invoice.

[14] The appellant also emphasizes the opposite state of affairs in the Transportation Division, where the ownership of property is transferred to the client as payments are received following the issue of invoices.

[15] The respondent does not dispute that the amounts it received are advances. The point of discord between the appellant and respondent springs from the accounting treatment given to the advances by the respondent, although the appellant and its expert recognize that the respondent's financial statements for each of the years at issue were prepared in accordance with the Generally Accepted Accounting Principles (GAAP). I will return to that issue. This leads me to

the judge's decision and the contentions of the parties. But first, I must preface this analysis with the legislative provisions relied on by the parties.

Relevant legislative provisions

[16] The relevant legislative provisions are paragraphs 12(1)(a) and 20(1)(m) and sections 181 to 181.2(6) of the Act, which deal with elements to be included in the income and taxable capital of a large corporation under Part 1.3. I have appended them to these reasons.

Analysis of the judge's decision and the contentions of the parties

(a) Appropriate standard of review

[17] Since this is an appeal of a decision by the Tax Court of Canada, the applicable standard of review is the one established in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235: the questions of law, including those that may be separated from a question of mixed fact and law, are reviewable on a standard of correctness, while the others, that is, the questions of fact or of mixed fact and law, are subject to the standard of palpable and overriding error.

(b) The purpose of Part 1.3 and the capital tax on large corporations

[18] The parties to the dispute agree on the purpose of Part 1.3. It is an additional minimum tax imposed on large corporations to ensure their contribution to the reduction of the deficit. This tax was to be temporary and, when it was brought into force in 1989, the rate was set at 0.175% of the capital in excess of \$10 million used in Canada by corporations: see the Budget Papers tabled in the House of Commons on April 27, 1989, at the item *Corporate Income Tax*, Joint Book of Authorities, Vol. II, Tab 37, at page 40.

[19] An important fact, as set out in the Budget Papers filed, is that “[t]he tax base [would] be calculated using the accounts of a corporation determined in accordance with the Generally Accepted Accounting Principles and presented on an unconsolidated basis” and “[c]urrent year-end balances [would] be used”: *ibidem*, at page 41 (emphasis added). Included in the tax base was the amount of all the loans and advances to the corporation at the end of the year. The method for computing the amounts is set out a subparagraph 181(3)(b)(i), and loans and advances are included at paragraph 181.2(3)(c) of the Act.

[20] In the absence of specific accounting rules for long-term contracts in Canada, the respondent, which is a business operating on an international scale, used the existing United States accounting standard SOP 81-1 for the disclosure of these types of contracts. Standard SOP 81-1 applies, among other things, to the accounting treatment given to and the disclosure of

advances received during long-term contracts: see the testimony of Mr. Paré, the respondent's vice-president of financial reporting, Appeal Book, Volume 7, at pages 76 and 84 to 86.

[21] The accounting principles used by the respondent in this case are recognized for long-term construction contracts by the American Institute of Certified Public Accountants, Inc. (AICPA), and by the Financial Accounting Standards Board. In the following excerpt drawn from standard SOP 81-1, and reproduced in the *AICPA Audit and Accounting Guide: Construction Contractors*, the respondent relies more specifically, by analogy, on clause 6.19, even if its contracts are not "cost-plus contracts":

Offsetting or Netting Amounts fn ‡(38)

6.16 A basic principle of accounting is that assets and liabilities should not be offset unless a right of offset exists. Thus the net debit balances for certain contracts should not ordinarily be offset against net credit balances relating to others, unless the balances relate to contracts that meet the criteria for combining in the SOP.

6.17 ARB No. 45, Long-Term Construction-Type Contracts, recognized the principle of offsetting in discussing the two accepted methods of accounting for long-term construction-type contracts. For the percentage-of-completion method, the bulletin states

... current assets may include costs and recognized income not yet billed, with respect to certain contracts; and liabilities, in most cases current liabilities, may include billings in excess of costs and recognized income with respect to other contracts.

In commenting on the completed-contract method, the bulletin states

... an excess of accumulated costs over related billings should be shown in the balance sheet as a current asset, and an excess of accumulated billings over related costs should be shown among the liabilities, in most cases as a current

liability. If costs exceed billings on some contracts, and billings exceed costs on others, the contracts should ordinarily be segregated so that the figures on the asset side include only those contracts on which costs exceed billings, and those on the liability side include only those on which billings exceed costs.

Offsetting should be applied in the same way under the percentage-of-completion method.

- 6.18** Although the suggested mechanics of segregating contracts between those on which costs exceed billings and those on which billings exceed costs do not indicate whether billings and related costs should be presented separately or combined (netted), separate disclosure in comparative statements is preferable because it shows the dollar volume of billings and costs (but not an indication of future profit or loss). In addition, grantors of credit, such as banks and insurance companies, have expressed a preference for separate disclosure. Disclosure may be made by short extension of the amounts on the balance sheet or in the notes to the financial statements. Thus, under the percentage-of-completion method, the current assets may disclose separately total costs and total recognized income not yet billed for certain contracts, and current liabilities may disclose separately total billings and total costs and recognized income for other contracts. The separate disclosure of revenue and costs in statements of income is the generally accepted practice. Only through comparable presentation of such data in the balance sheet can the reader adequately evaluate the contractor's comparative position.
- 6.19** An advance received on a cost-plus contract is usually not offset against accumulated costs unless it is definitely regarded as a payment on account of work in progress. Such advances generally are made to provide a revolving fund and are not usually applied as partial payment until the contract is nearly or fully completed. However, advances that are definitely regarded as payments on account of work in progress should be shown as a deduction from the related asset, and the amounts should be disclosed. Also, for advance payments on a terminated government contract, the financial statements of the contractor issued before collection of the claim should ordinarily reflect any balance of those advances as deductions from the claim receivable.

[Emphasis added.]

(c) The respondent's chosen method of accounting for work

[22] Given the nature and certain specificities of long-term construction contracts, such as those for the design and manufacture of aircraft, the accounting profession, as shown by the above-referenced U.S. standard, recognizes two methods of accounting for this work: the percentage-of-completion method and the completed-contract method: see Nadi Chlala, Louis Ménard et al., *Comptabilité intermédiaire*, 2nd ed., Éditions du Renouveau Pédagogique inc., Saint-Laurent, 2005, Appeal Book, Vol. 1, at page 9; Thomas H. Beechy and Joan E.D. Conrod, *Intermediate Accounting*, McGraw-Hill Ryerson Ltd., Toronto, Appeal Book, Vol. 1, at page 257.

[23] At pages 9 and 10 of their work, Messrs. Chlala, Ménard et al. describe, in the following terms, the accounting methods and the conditions required to use the percentage-of-completion method:

[TRANSLATION]

1. Percentage-of-completion method. Revenues and gross profit are recognized each period based on the progress of the construction, that is, the percentage of completion. The sum billed may not necessarily correspond to the revenues relating to construction progress. Construction costs plus gross profit earned to date are accumulated in an inventory account (Construction in Process) and progress billings are accumulated in a contra inventory account (Billings on Construction in Process).

2. Completed-contract method. Revenues and gross profit are recognized only when the contract is completed. Construction costs are accumulated in an inventory account (Construction in Process) and progress billings are accumulated in a contra inventory account (Billings on Construction in Process).

The rationale for using percentage-of-completion accounting is that, in most long-term construction contracts, the buyer and seller have obtained enforceable rights. The buyer has the legal right to require specific performance on the contract; the seller has the right to require progress payments that provide evidence of the buyer's ownership interest. As a result, the economics of the situation suggest that a continuous sale occurs as the work progresses, and revenue should be recognized accordingly.

The percentage-of-completion method is used (1) when performance consists of carrying out more than one act, (2) when the business can reasonably estimate the extent of progress toward completion, and (3) when the amount of consideration receivable is measurable with reasonable precision. If performance consists of only a single act, or if the above conditions are not met, then the completed-contract method should be used.

Furthermore, the accounting profession allows for the percentage-of-completion method to be used when reasonably reliable data on the extent of progress, on revenues and on expenses is available and when all of the following conditions are met:

1. The contract clearly stipulates the enforceable rights regarding the products and services to be provided and received by the parties, the consideration that is receivable and the terms of the arrangement and how the arrangement will be carried out.
2. It is reasonable to expect that the buyer will fulfill all of its contractual obligations.
3. It is reasonable to expect that the contractor will fulfill all of its contractual obligations.

The contract-completion method should only be used (1) when the entity mainly undertakes short-term contracts, or (2) when the conditions for using the percentage-of-completion method cannot be met, or (3) when there are inherent hazards in the contract beyond the normal, recurring business risks.

[Emphasis added.]

[24] Conversely, the completed-contract method, as the above-quoted excerpt shows, is used in short-term contracts, when the contract involves inherent hazards that exceed normal,

recurring business risks, or when the conditions for using the percentage-of-completion method cannot be fulfilled.

[25] The respondent was of the opinion that it fulfilled the conditions for using the percentage-of-completion method and that, unlike its competitors in the aircraft industry, such as Boeing, Textron, Gulf Stream and General Dynamics, it could use it. The respondent satisfied the going concern principle presumed in accounting. It dealt with the amounts received as payments on account for the work in progress. That was the opinion of Jean Paré, the respondent's vice-president, a chartered accountant (CA) who is also a chartered public accountant (CPA), which corresponds or is equivalent to the United States chartered accountant designation: see Appeal Book, Vol. 7, transcript, at pages 54 to 59 and 99 to 109. For seven years, Mr. Paré was a member of the Canadian Accounting Standards Board, responsible for deciding on the Canadian Generally Accepted Accounting Principles of the Canadian Institute of Chartered Accountants.

[26] The respondent's position regarding the accounting treatment of the advances received was first adopted by its finance department, with the approval of the accounting policy auditing committee, the company's upper management and the external accounting auditors from Toronto in consultation with their New York colleagues: *ibidem*, at pages 110 to 114. According to Mr. Paré, these experts were unanimous in stating that the respondent's position complied with standard SOP 81-1 and with GAAP: *ibidem*. In addition, the balance sheet drawn up in accordance with this standard provided a good picture of the respondent's financial situation on a

given date and reflected the extent of the work and operations of the financial statements' users—in short, the respondent's economic resources. In accordance with the accounting principles, [TRANSLATION] “the transactions and events are accounted for and presented in a manner that conveys their substance rather than necessarily their legal form”: *ibidem*, at pages 122 and 254. See also the cross-examination of the respondent's expert, Mr. Chlala, Appeal Book, Vol. 9, at pages 62 to 67.

[27] The fact that the respondent's balance sheet was GAAP-compliant in all respects is recognized and acknowledged by the appellant and its expert. Indeed, the appellant's expert, Mr. Thornton, confirmed this on cross-examination. He also admitted that the respondent had correctly exercised its judgment regarding the advances, seemed to have applied standard SOP 81-1 and had used paragraph 6.19 as a basis for its judgment; and that standard SOP 81-1 was an acceptable source: see Mr. Thornton's cross-examination, Appeal Book, Vol. 10, at pages 109 to 114. He also acknowledged that the advances had been allocated to the project for which they had been paid, not used to finance other projects: *ibidem*, at page 117.

[28] In reply to a question by the judge for clarification, the appellant's expert admitted that the amounts of the advances had to be deducted as liabilities in accordance with the billing in progress and, in a pre-delivery context, it was possible to have the advances reduced in accordance with the cost of the work without there being income to report at this stage: *ibidem*, at pages 182 and 183.

(d) Submissions of the parties

[29] The appellant is relying on the decision of this Court in *Oerlikon Aérospatiale Inc. v. Canada*, [1999] F.C.J. No. 496, and the Court of Québec's decision in *Bombardier c. Sous-ministre du Revenu du Québec*, 2010 QCCQ 3036 (Can LII), 2010 QCCQ 3036. The appellant submits that, first, the decision in *Oerlikon* is determinative in this case and, second, that this Court should arrive at the same conclusion as did the Court of Québec.

[30] With respect, I agree with the judge that the decision of this Court in *Oerlikon* has no bearing on the issue here. In *Oerlikon*, as pointed out by the judge at paragraph 26 of his reasons for decision, the issue was to determine the legal nature of an advance and whether the Act applied to advances on account or was limited in its application to advances in the nature of loans. It was not a matter of determining the amount of the advances for the purposes of calculating the taxable capital, as is the issue here. Moreover, as previously stated, the respondent does not dispute that the amounts received are advances. Instead, the respondent is arguing that the amount of these advances must be reduced by the cost of the work performed in order to determine the balance of this amount at the end of the fiscal year as required by paragraphs 181(3)(b) and 181.2(3)(c) of the Act.

[31] The Court of Québec's decision, which concerned precisely this same tax dispute but between the respondent and Revenu Québec, is contrary to the judge's decision at trial. The Court of Québec judge focused on the terms of the contract between the parties, under which the

respondent retains ownership of the aircraft until it is delivered to the purchaser and the advances received may be reimbursed to the purchaser in the event that the respondent fails to fulfill its obligations. Consequently, the advances remain potentially reimbursable advances, even if the costs of operations and of completing the work were drawn from them in the course of performing the contract. This decision is pending before the Court of Appeal of Québec following an appeal by the respondent and has not yet been heard.

[32] The appellant's position, with which the Court of Québec agreed, gives precedence to the legal reality over the commercial and accounting reality by not allowing the amount of the advances to be reduced by the cost of the work for the purposes of calculating the taxable capital under paragraph 181(3)(b). According to the respondent's expert, by designating the full amount of the advances as liabilities, the appellant is refusing to recognize that, on a commercial and economic level, the respondent used its inventory to perform the contract and sold that inventory, although from a legal standpoint ownership had not yet been transferred: see Mr. Chlala's cross-examination, Appeal Book, Vol. 9, at pages 40 to 43. In other words, the appellant's position does not reflect the [TRANSLATION] "economics of the situation" prevailing between the parties, which [TRANSLATION] "suggest that a continuous sale occurs as the work progresses, and revenue should be recognized accordingly": see the excerpt from the work by Messrs. Chlala, Ménard et al., quoted above in connection with the percentage-of-completion method.

[33] As this Court ruled through the decision penned by Justice Ryer in *Attorney General of Canada v. Ford Credit Canada Ltd.*, 2007 FCA 225, [2007] 4 C.T.C. 157, 2007 D.T.C. 5431,

affirming the decision of Chief Justice Bowman of the Tax Court of Canada in the same case, 2006 TCC 441, [2006] 5 C.T.C. 2300, 2006 D.T.C. 3424, and the similar conclusions reached by Justice Bowie in *PCL Construction Management Inc. v. R.*, [2001] 1 C.T.C. 2132, and Justice Sarchuk in *Royal Trust Co. v. R.*, [2001] 3 C.T.C. 2263, subsection 181(3) of the Act requires that the accounting characterization or definition of the terminology appearing on the balance sheet be used in order to determine a corporation's capital for its capital tax.

[34] In response to an argument similar to the one put forward by the appellant in this appeal, that is, that the ordinary legal sense of a component part of capital, if such a sense exists, must prevail over the accounting sense, Justice Ryer wrote the following at paragraphs 18 to 24:

[18] The Minister argued that Chief Justice Bowman was in error when he concluded that the existing jurisprudence and the plain meaning of subsection 181(3) mandate that the accounting characterization of terms in a balance sheet must be accepted in the determination of the capital of a corporation for LCT purposes. The Minister stated that most components of the capital of a corporation, for LCT purposes, originate in accounting principles and that if a component of capital derives its meaning primarily from GAAP, then the accounting meaning ascribed to that component must prevail. However, according to the Minister, where a component of the capital of a corporation has an ordinary legal meaning, that meaning is to be given precedence.

[19] With respect, I do not agree with the suggested dichotomy. The meaning to be accorded to the term capital stock, for the purposes of Part I.3 of the ITA, is to be discerned in light of the provisions of subsection 181(3). In my view, the language of subsection 181(3) does not contemplate a distinction between terms with ordinary legal meanings and terms with primarily accounting meanings.

[20] The proper interpretation of subsection 181(3) of the ITA must be determined in the context of its approximately sixteen year history, from mid-1989 to the beginning of 2006. In enacting the LCT as a deficit reduction measure, Parliament must have intended the tax to be temporary in nature. Presumably, Parliament did not envisage that federal deficits would occur each and every year. Against that background, it was open to Parliament either to enact

a comprehensive legislative scheme to impose the temporary new capital tax or to adopt a more simplified approach. In my view, in enacting subsection 181(3), Parliament basically chose to adopt a method of computing capital for the purpose of the temporary new tax that was well known to large corporations. The financial statements of large corporations are routinely prepared on an audited basis in accordance with GAAP, and therefore, adopting GAAP as the principal determinant of the capital tax base for most corporations ensured that the new and temporary tax would be relatively simple to implement and administer. However, a complete adoption of GAAP did not occur.

[21] When Parliament determined that deviations from GAAP were desirable, the necessary modifications were made by the enactment of specific legislative provisions. Two important components of capital, “long-term debt” and “reserves”, were given statutory meanings in subsection 181(1). In addition, paragraph 181(3)(a) provides that for the purposes specified in the opening portion of subsection 181(3), neither the equity nor the consolidation method of accounting is to be used. Moreover, if subsection 181(3) was not intended to be interpreted as providing that GAAP should be the principal determinant of the capital tax base for most corporations, Parliament could have so stated.

[22] Both parties to this appeal referred to the fact that since its enactment in 1989, Part I.3 of the ITA has undergone a number of amendments. In 1997, an amendment was made to subsection 181.2(3) to provide for the inclusion of deferred unrealized foreign exchange gains and losses in the computation of the capital of corporations other than financial institutions. In my view, this Parliamentary action in addressing a perceived deficiency in the GAAP treatment of deferred unrealized foreign exchange gains and losses in relation to LCT, supports the proposition that Parliament intended to defer to GAAP as the principal determinant of capital for the purposes of the LCT, except to the extent specifically otherwise provided in Part I.3 of the ITA.

[23] A similar view was expressed by the Department of Finance in a “comfort letter”, dated August 24, 1995, that was referred to in the Minister’s factum. The letter dealt with the changes to subsection 181.2(3) that were referred to above and a portion of it is apposite:

As you are no doubt aware, it is generally the Department’s policy to defer to Generally Accepted Accounting Principles (“GAAP”) in the calculation of capital for the purposes of LCT. However, the consideration of foreign exchange gains and losses in accordance with GAAP could lead to changes in a company’s LCT where there has been no change in the make-up of the company’s capital base. This is undesirable from a policy perspective, so a narrow exception to the application of GAAP is adopted.

[24] Subsection 181(3)(b)(ii) illustrates that Parliament intended to rely upon external standards in relation to the determination of LCT liability. That provision applies to banks and insurance corporations and specifies that the amounts reflected in the balance sheets of those corporations that have been accepted by their regulators are required to be used, without condition or qualification, for the purposes described in the opening portion of subsection 181(3).

[Emphasis added.]

[35] With respect, my view is that the determination of the issue in the case at bar is governed by this Court's decision in *Ford Credit Canada Ltd.*, above, and that the judge did not err in his interpretation and application of subsection 181(3) of the Act regarding the determination of a corporation's taxable capital for the purposes of capital tax under Part 1.3.

[36] The appellant submits that the amounts of the advances appearing in the supplementary notes on inventory are amounts that appear on the balance sheet and should have been accounted for in determining the taxable capital. However, the supplementary notes are not considered an element of the financial statements: see the *CICA Handbook – Accounting*, Section 1000, Financial Statement Concepts, Appeal Book, Volume 2, at page 425. They are useful only for the purpose of “clarification or further explanation of the items in financial statements”: *ibidem*. To use the respondent's words at paragraph 61 of its memorandum of fact and law, [TRANSLATION] “the amounts received shown in the note on [TRANSLATION] ‘Inventory’ are only presented as additional background information on the calculation method used to measure the value of the inventory in accordance with GAAP. To find otherwise would require the reader of the financial statements to question the measurement of the advances and the liabilities reported on the balance sheet, which would run counter to the purposes and bases of GAAP”. To accept the

submission by counsel for the appellant amounts to allowing the transaction's legal reality to prevail over its GAAP-required commercial reality and to eliminating the effects of the percentage-of-completion accounting method legitimately used by the respondent in keeping with GAAP.

[37] In any event, according to Mr. Chlala's report, unlike a loan from a financial institution, which is a financial liability that must be paid off by cash payments, for accounting purposes an advance from a client on a long-term contract is a non-financial liability that must be paid off by providing the services set out in the contract. The first creates a financial obligation, the second an obligation of performance or result. Thus, what will be recognized on the balance sheet, either in assets or liabilities depending on the scope of the work and the advances received, is the net amount or balance measured as a function of the cost of the work performed less the advances received from the client. The judge therefore did not err in taking the amounts appearing in liabilities on the balance sheet.

Respondent's cross-appeal

[38] Considering the conclusion at which I have arrived, it is not necessary to rule on the respondent's alternative argument, although on this issue of the cross-appeal I see no reason to depart from the conclusion of this Court in *Oerlikon Aérospatiale Inc.*, above.

Conclusion

[39] The evidence in the record shows that the accounting method used by the respondent and based on the U.S. SOP 81-1 standard was acceptable for long-term construction contracts of the nature of those it performs. The appellant admitted that the respondent's balance sheets for the years in issue are GAAP-compliant. In the circumstances, considering Parliament's intention for "[c]urrent year-end balances [to] be used" and to calculate the tax base "using the accounts of a corporation determined in accordance with generally-accepted accounting principles and presented on an unconsolidated basis" and given the interpretation made of the legislative provisions in *Attorney General of Canada v. Ford Credit Canada Ltd.*, above, I would dismiss the appeal and the cross appeal, both with costs.

"Gilles Létourneau"

J.A.

"I concur.

J.D. Denis Pelletier, J.A."

"I concur.

Robert M. Mainville, J.A."

Certified true translation
Sarah Burns

APPENDIX

Inclusions

Éléments à inclure

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 :

Services, etc., to be rendered

Services à rendre

(a) any amount received by the taxpayer in the year in the course of a business

a) les sommes reçues au cours de l'année par le contribuable dans le cours des activités d'une entreprise :

(i) that is on account of services not rendered or goods not delivered before the end of the year or that, for any other reason, may be regarded as not having been earned in the year or a previous year, or

(i) soit qui sont au titre de services non rendus ou de marchandises non livrées avant la fin de l'année ou qui, pour toute autre raison, peuvent être considérées comme n'ayant pas été gagnées durant cette année ou une année antérieure,

(ii) under an arrangement or understanding that it is repayable in whole or in part on the return or resale to the taxpayer of articles in or by means of which goods were delivered to a customer;

(ii) soit qui sont, en vertu d'un arrangement ou d'une entente, remboursables en totalité ou en partie lors du retour ou de la revente au contribuable d'articles dans lesquels ou au moyen desquels des marchandises ont été livrées à un client;

20.(1)(m) Reserve in respect of certain goods and services

20.(1)m) Provision relative à certaines marchandises et à certains services

(m) subject to subsection 20(6), where amounts described in paragraph 12(1)(a) have been included in

m) sous réserve du paragraphe (6), lorsque des sommes visées à l'alinéa 12(1)a) ont été incluses dans le calcul

computing the taxpayer's income from a business for the year or a previous year, a reasonable amount as a reserve in respect of

- (i) goods that it is reasonably anticipated will have to be delivered after the end of the year,
- (ii) services that it is reasonably anticipated will have to be rendered after the end of the year,
- (iii) periods for which rent or other amounts for the possession or use of land or chattels have been paid in advance, or
- (iv) repayments under arrangements or understandings of the class described in subparagraph 12(1)(a)(ii) that it is reasonably anticipated will have to be made after the end of the year on the return or resale to the taxpayer of articles other than bottles;

PART I.3

TAX ON LARGE CORPORATIONS

Definitions

181. (1) For the purposes of this Part,

“financial institution”

“financial institution”, in respect of a taxation year, means a corporation that at any time in the year is

(a) a bank or credit union,

du revenu tiré par un contribuable d'une entreprise, pour l'année ou une année antérieure, une somme raisonnable à titre de provision dans le cas :

- (i) de marchandises qui, selon ce qu'il est raisonnable de prévoir, devront être livrées après la fin de l'année,
- (ii) de services qui, selon ce qu'il est raisonnable de prévoir, devront être rendus après la fin de l'année,
- (iii) de périodes pour lesquelles le loyer ou d'autres sommes relatives à la possession ou à l'usage d'un fonds de terre ou de biens meubles, ont été payées à l'avance,
- (iv) de remboursements en vertu d'arrangements ou d'ententes de la catégorie visée au sous-alinéa 12(1)a)(ii), qui, selon ce qu'il est raisonnable de prévoir, devront être faits après la fin de l'année sur remise ou revente au contribuable d'articles autres que des bouteilles;

PARTIE I.3

IMPÔT DES GRANDES SOCIÉTÉS

Définitions

181. (1) Les définitions qui suivent s'appliquent à la présente partie.

« institution financière »

« institution financière » Société qui est, à un moment d'une année d'imposition, selon le cas :

a) une banque ou une caisse de crédit;

(b) an insurance corporation that carries on business in Canada,

b) une compagnie d'assurance qui exploite une entreprise au Canada;

(c) authorized under the laws of Canada or a province to carry on the business of offering its services as a trustee to the public,

c) une société autorisée par la législation fédérale ou provinciale à exploiter une entreprise d'offre au public de services de fiduciaire;

(d) authorized under the laws of Canada or a province to accept deposits from the public and carries on the business of lending money on the security of real estate or investing in mortgages or hypothecary claims on real estate,

d) une société autorisée par la législation fédérale ou provinciale à accepter du public des dépôts et qui exploite une entreprise soit de prêts d'argent garantis sur des biens immeubles, soit de placements dans des créances hypothécaires sur des biens immeubles;

(e) a registered securities dealer,

e) un courtier en valeurs mobilières inscrit;

(f) a mortgage investment corporation, or

f) une société de placement hypothécaire;

(g) a prescribed corporation;

g) une société visée par règlement.

“long-term debt” – “long-term debt” means

« passif à long terme » – « passif à long terme » Passif constitué :

(a) in the case of a bank, its subordinated indebtedness (within the meaning assigned by section 2 of the Bank Act) evidenced by obligations issued for a term of not less than 5 years,

a) de titres secondaires (au sens de l'article 2 de la Loi sur les banques) émis pour une durée d'au moins cinq ans, si l'émetteur est une banque;

(b) in the case of an insurance corporation, its subordinated indebtedness (within the meaning assigned by section 2 of the Insurance Companies Act) evidenced by obligations issued for a term of not less than 5 years, and

b) de titres secondaires (au sens du paragraphe 2(1) de la Loi sur les sociétés d'assurances) émis pour une durée d'au moins cinq ans, si l'émetteur est une compagnie d'assurance;

(c) in the case of any other corporation, its subordinated indebtedness (within the meaning that would be assigned by section 2 of the Bank Act if the definition of that expression in that section were applied with such modifications as the circumstances require) evidenced by obligations issued for a term of not less than 5 years,

but does not include, where the corporation is a prescribed federal Crown corporation for the purpose of section 27, any indebtedness evidenced by obligations issued to and held by Her Majesty in right of Canada;

“reserves” – “reserves”, in respect of a corporation for a taxation year, means the amount at the end of the year of all of the corporation’s reserves, provisions and allowances (other than allowances in respect of depreciation or depletion) and, for greater certainty, includes any provision in respect of deferred taxes.

Prescribed expressions

181.(2) For the purposes of this Part, the expressions “attributed surplus”, “Canadian assets”, “Canadian premiums”, “Canadian reserve liabilities”, “permanent establishment”, “total assets”, “total premiums” and “total reserve liabilities” have such meanings as may be prescribed.

Determining values and amounts

c) de titres secondaires (au sens de l’article 2 de la Loi sur les banques, compte tenu des adaptations nécessaires) émis pour une durée d’au moins cinq ans, si l’émetteur est une autre société.

Ne font pas partie du passif à long terme, lorsque la société est une société d’État prévue par règlement pour l’application de l’article 27, les titres de créance émis en faveur de Sa Majesté du chef du Canada et détenus par elle.

« réserves » – « réserves » Montant à la fin d’une année d’imposition constitué de l’ensemble des réserves et provisions d’une société, y compris les réserves pour impôts reportés. En sont exclus l’amortissement cumulé et les provisions pour épuisement.

Termes définis par règlement

181.(2) Pour l’application de la présente partie, les termes « actif canadien », « actif total », « établissement stable », « passif de réserve canadienne », « passif total de réserve », « primes canadiennes », « surplus attribué » et « total des primes » s’entendent au sens du règlement.

Calcul des valeurs et montants

181.(3) For the purposes of determining the carrying value of a corporation's assets or any other amount under this Part in respect of a corporation's capital, investment allowance, taxable capital or taxable capital employed in Canada for a taxation year or in respect of a partnership in which a corporation has an interest,

(a) the equity and consolidation methods of accounting shall not be used; and

(b) subject to paragraph 181(3)(a) and except as otherwise provided in this Part, the amounts reflected in the balance sheet

(i) presented to the shareholders of the corporation (in the case of a corporation that is neither an insurance corporation to which subparagraph 181(3)(b)(ii) applies nor a bank) or the members of the partnership, as the case may be, or, where such a balance sheet was not prepared in accordance with generally accepted accounting principles or no such balance sheet was prepared, the amounts that would be reflected if such a balance sheet had been prepared in accordance with generally accepted accounting principles, or
 (ii) accepted by the Superintendent of Financial Institutions, in the case of a bank or an insurance corporation that is required by law to report to the Superintendent, or the superintendent of insurance or other similar officer or authority of the province under whose laws the corporation is incorporated,

181.(3) Pour déterminer la valeur comptable d'un des éléments d'actif d'une société ou tout autre montant en vertu de la présente partie afférent au capital d'une société, à sa déduction pour placements, à son capital imposable et à son capital imposable utilisé au Canada pour une année d'imposition ou afférent à une société de personnes dans laquelle une société a une participation :

a) la consolidation et la méthode de comptabilisation à la valeur de consolidation ne peuvent être utilisées;

b) sous réserve de l'alinéa a) et sauf disposition contraire de la présente partie, les montants à utiliser sont les suivants :

(i) soit ceux qui figurent au bilan présenté aux actionnaires de la société — s'il s'agit d'une société qui n'est ni une compagnie d'assurance à laquelle le sous-alinéa (ii) s'applique, ni une banque — ou aux associés de la société de personnes, ou, si un tel bilan n'est pas dressé conformément aux principes comptables généralement reconnus ou si aucun bilan n'est dressé, ceux qui y figureraient si un tel bilan était dressé conformément à ces principes,
 (ii) soit ceux qui figurent au bilan accepté par le surintendant des institutions financières, s'il s'agit d'une banque ou d'une compagnie d'assurance tenue par la loi de faire rapport au surintendant, ou par le surintendant des assurances ou un autre agent ou autorité semblable de la province où elle est constituée, s'il s'agit d'une compagnie d'assurance

in the case of an insurance corporation that is required by law to report to that officer or authority,

tenue par la loi de faire rapport à cet agent ou à cette autorité.

shall be used.

Limitations respecting inclusions and deductions

181.(4) Unless a contrary intention is evident, no provision of this Part shall be read or construed to require the inclusion or to permit the deduction, in computing the amount of a corporation's capital, investment allowance, taxable capital or taxable capital employed in Canada for a taxation year, of any amount to the extent that that amount has been included or deducted, as the case may be, in computing the first-mentioned amount under, in accordance with or by reason of any other provision of this Part.

Restriction

181.(4) Sauf intention contraire évidente, aucune des dispositions de la présente partie n'a pour effet d'exiger l'inclusion ou de permettre la déduction d'une somme dans le calcul du capital d'une société, de sa déduction pour placements, de son capital imposable ou de son capital imposable utilisé au Canada pour une année d'imposition, dans la mesure où cette somme est incluse ou déduite, selon le cas, dans le calcul de ces montants en vertu, en conformité ou en application de toute autre disposition de la présente partie.

Tax payable

181.1 (1) Every corporation shall pay a tax under this Part for each taxation year equal to the amount obtained by multiplying the corporation's specified percentage for the taxation year by the amount, if any, by which

(a) its taxable capital employed in Canada for the year

exceeds

(b) its capital deduction for the year.

Impôt payable

181.1 (1) Toute société est tenue de payer, en vertu de la présente partie pour chaque année d'imposition, un impôt égal au produit du pourcentage déterminé qui lui est applicable pour l'année par l'excédent éventuel de son capital imposable utilisé au Canada pour l'année sur son abattement de capital pour l'année.

Specified percentage

181.1(1.1) For the purpose of

Pourcentage déterminé

181.1(1.1) Pour l'application du

subsection (1), the specified percentage of a corporation for a taxation year that ends after 2003 is the total of

(a) that proportion of 0.225% that the number of days in the taxation year that are before 2004 is of the number of days in the taxation year,

(b) that proportion of 0.200% that the number of days in the taxation year that are in 2004 is of the number of days in the taxation year, and

(c) that proportion of 0.175% that the number of days in the taxation year that are in 2005 is of the number of days in the taxation year.

Exceptions

181.1(1.2) Notwithstanding subsection (1.1), for the purposes of applying subsection 125(5.1) and the definitions “unused surtax credit” in subsections (6) and 190.1(5), the amount of tax in respect of a corporation under subsection (1) for a taxation year is to be determined as if the specified percentage of the corporation for the taxation year were 0.225%.

Short taxation years

181.1(2) Where a taxation year of a corporation is less than 51 weeks, the

paragraphe (1), le pourcentage déterminé applicable à une société pour une année d'imposition se terminant après 2003 correspond au total des produits suivants :

a) le produit de 0,225 % par le rapport entre le nombre de jours de l'année d'imposition qui sont antérieurs à 2004 et le nombre total de jours de l'année d'imposition;

b) le produit de 0,200 % par le rapport entre le nombre de jours de l'année d'imposition qui sont en 2004 et le nombre total de jours de l'année d'imposition;

c) le produit de 0,175 % par le rapport entre le nombre de jours de l'année d'imposition qui sont en 2005 et le nombre total de jours de l'année d'imposition.

Exceptions

181.1(1.2) Malgré le paragraphe (1.1), pour l'application du paragraphe 125(5.1) et de la définition de « crédit de surtaxe inutilisé » aux paragraphes (6) et 190.1(5), l'impôt relatif à une société en vertu du paragraphe (1) pour une année d'imposition est déterminé comme si le pourcentage déterminé qui lui est applicable pour l'année s'établissait à 0,225 %.

Année d'imposition de moins de 51 semaines

181.1(2) Dans le cas où l'année d'imposition d'une société compte

amount determined under subsection 181.1(1) for the year in respect of the corporation shall be reduced to that proportion of that amount that the number of days in the year is of 365.

moins de 51 semaines, le montant déterminé selon le paragraphe (1) pour l'année relativement à la société est réduit du produit de la multiplication de ce même montant par le rapport entre le nombre de jours de l'année et 365.

Where tax not payable

181.1(3) No tax is payable under this Part for a taxation year by a corporation

(a) that was a non-resident-owned investment corporation throughout the year;

(b) that was a bankrupt (within the meaning assigned by subsection 128(3)) at the end of the year;

(c) that was throughout the year exempt from tax under section 149 on all of its taxable income;

(d) that neither was resident in Canada nor carried on business through a permanent establishment in Canada at any time in the year;

(e) that was throughout the year a deposit insurance corporation (within the meaning assigned by subsection 137.1(5)) or a corporation deemed by subsection 137.1(5.1) to be a deposit insurance corporation; or

(f) that was throughout the year a corporation described in subsection 136(2) the principal business of which was marketing (including processing

Aucun impôt payable

181.1(3) Aucun impôt n'est payable en vertu de la présente partie pour une année d'imposition par une société qui, selon le cas :

a) est une société de placement appartenant à des non-résidents tout au long de l'année;

b) est un failli, au sens du paragraphe 128(3), à la fin de l'année;

c) est, tout au long de l'année, exonérée de l'impôt en application de l'article 149 sur la totalité de son revenu imposable;

d) ne réside pas au Canada et n'exploite pas d'entreprise par l'entremise d'un établissement stable au Canada à un moment de l'année;

e) est, tout au long de l'année, une compagnie d'assurance-dépôts, au sens du paragraphe 137.1(5), ou une filiale réputée être, en application du paragraphe 137.1(5.1), une compagnie d'assurance-dépôts;

f) est, tout au long de l'année, une société visée au paragraphe 136(2) dont l'entreprise principale consiste à assurer la commercialisation, y

incidental to or connected therewith) natural products belonging to or acquired from its members or customers.

compris le traitement accessoire ou rattaché à la commercialisation, de produits naturels acquis auprès de ses membres ou de ses clients, ou leur appartenant.

Deduction

181.1(4) There may be deducted from a corporation's tax otherwise payable under this Part for a taxation year an amount equal to the total of

(a) its Canadian surtax payable for the year, and

(b) such part as the corporation claims of its unused surtax credits for its 7 immediately preceding and 3 immediately following taxation years,

to the extent that that total does not exceed the amount by which

(c) the amount that would, but for this subsection, be its tax payable under this Part for the year

exceeds

(d) the total of all amounts each of which is the amount deducted under subsection 125.3(1) in computing the corporation's tax payable under Part I for a taxation year ending before 1992 in respect of its unused Part I.3 tax credit (within the meaning assigned by section 125.3) for the year.

Idem

Déduction

181.1(4) Est déductible de l'impôt payable par ailleurs par une société en vertu de la présente partie pour une année d'imposition, le total des montants suivants :

a) la surtaxe canadienne payable par la société pour l'année;

b) la partie, demandée en déduction par la société, de ses crédits de surtaxe inutilisés pour les sept années d'imposition précédentes et les trois années d'imposition suivantes.

Ce total est déductible dans la mesure où il ne dépasse pas l'excédent éventuel du montant visé à l'alinéa c) sur le total visé à l'alinéa d):

c) le montant qui, n'eût été le présent paragraphe, correspondrait à l'impôt payable par la société pour l'année en vertu de la présente partie;

d) le total des montants représentant chacun le montant déduit en application du paragraphe 125.3(1) dans le calcul de l'impôt payable par la société en vertu de la partie I pour une année d'imposition se terminant avant 1992, au titre de son crédit d'impôt de la partie I.3 inutilisé (au sens de l'article 125.3) pour l'année.

Idem

181.1(5) For the purposes of this subsection and subsections 181.1(4), 181.1(6) and 181.1(7),

(a) an amount may not be claimed under subsection 181.1(4) in computing a corporation's tax payable under this Part for a particular taxation year in respect of its unused surtax credit for another taxation year until its unused surtax credits, if any, for taxation years preceding the other year that may be claimed under this Part for the particular year have been claimed; and

(b) an amount in respect of a corporation's unused surtax credit for a taxation year may be claimed under subsection 181.1(4) in computing its tax payable under this Part for another taxation year only to the extent that it exceeds the total of all amounts each of which is an amount claimed in respect of that unused surtax credit in computing its tax payable under this Part or Part VI for a taxation year preceding that other year.

Definitions

181.1(6) For the purposes of this subsection and subsections 181.1(4), 181.1(5) and 181.1(7),

“Canadian surtax payable” –
“Canadian surtax payable” of a

181.1(5) Pour l'application du présent paragraphe et des paragraphes (4), (6) et (7):

a) nul montant n'est déductible en application du paragraphe (4) dans le calcul de l'impôt payable par une société en vertu de la présente partie pour une année d'imposition donnée au titre de son crédit de surtaxe inutilisé pour une autre année d'imposition tant que la société n'a pas déduit les crédits de surtaxe inutilisés pour les années d'imposition antérieures à cette autre année qu'elle peut déduire en application de la présente partie pour l'année donnée;

b) un montant au titre du crédit de surtaxe inutilisé d'une société pour une année d'imposition n'est déductible en application du paragraphe (4) dans le calcul de l'impôt payable par la société en vertu de la présente partie pour une autre année d'imposition que dans la mesure où le montant dépasse le total des montants représentant chacun un montant déduit au titre de ce crédit de surtaxe inutilisé dans le calcul de l'impôt payable par la société en vertu de la présente partie ou de la partie VI pour une année d'imposition antérieure à cette autre année.

Définitions

181.1(6) Les définitions qui suivent s'appliquent au présent paragraphe et aux paragraphes (4), (5) et (7).

« crédit de surtaxe inutilisé » – «
crédit de surtaxe inutilisé » S'agissant

corporation for a taxation year has the meaning assigned by subsection 125.3(4);

“unused surtax credit” – “unused surtax credit” for a taxation year ending after 1991

(a) of a corporation (other than a corporation that was throughout the year a financial institution, within the meaning assigned by section 190) means the amount, if any, by which

- (i) its Canadian surtax payable for the year exceeds the total of
- (ii) the amount that would, but for subsection 181.1(4), be its tax payable under this Part for the year, and
- (iii) the amount, if any, deducted under section 125.3 in computing the corporation’s tax payable under Part I for the year, and

(b) of a corporation that was throughout the year a financial institution (within the meaning assigned by section 190) means the lesser of

- (i) the amount, if any, by which
- (A) its Canadian surtax payable for the year exceeds the total of
- (B) the amount that would, but for subsection 181.1(4), be its tax payable under this Part for the year, and
- (C) the amount, if any, deducted under section 125.3 in computing the corporation’s tax payable under Part I for the year, and
- (ii) the amount, if any, by which its tax payable under Part I for the year exceeds the amount that would, but for subsection 181.1(4) and subsection

du crédit de surtaxe inutilisé pour une année d’imposition qui se termine après 1991, le montant déterminé comme suit :

a) dans le cas d’une société (sauf une société qui est, tout au long de l’année, une institution financière, au sens de l’article 190), l’excédent éventuel de sa surtaxe canadienne payable pour l’année sur le total des montants suivants :

- (i) le montant qui, sans le paragraphe (4), correspondrait à son impôt payable pour l’année en vertu de la présente partie,
- (ii) le montant déduit en application de l’article 125.3 dans le calcul de son impôt payable pour l’année en vertu de la partie I;

b) dans le cas d’une société qui est, tout au long de l’année, une institution financière, au sens de l’article 190, le moins élevé des montants suivants :

- (i) l’excédent éventuel de sa surtaxe canadienne payable pour l’année sur le total des montants suivants :
 - (A) le montant qui, sans le paragraphe (4), correspondrait à son impôt payable pour l’année en vertu de la présente partie,
 - (B) le montant déduit en application de l’article 125.3 dans le calcul de son impôt payable pour l’année en vertu de la partie I,
- (ii) l’excédent éventuel de son impôt payable pour l’année en vertu de la partie I sur le montant qui, sans les paragraphes (4) et 190.1(3), correspondrait au total de ses impôts payables pour l’année en vertu des parties I.3 et VI.

190.1(3), be the total of its taxes payable under Parts I.3 and VI for the year.

« surtaxe canadienne payable » –
« surtaxe canadienne payable »
S'entend au sens du paragraphe
125.3(4).

Acquisition of control

181.1(7) Where at any time control of a corporation has been acquired by a person or group of persons, no amount in respect of its unused surtax credit for a taxation year ending before that time is deductible by the corporation for a taxation year ending after that time and no amount in respect of its unused surtax credit for a taxation year ending after that time is deductible by the corporation for a taxation year ending before that time, except that

(a) the corporation's unused surtax credit for a particular taxation year that ended before that time is deductible by the corporation for a taxation year that ends after that time (in this paragraph referred to as the "subsequent year") to the extent of that proportion of the corporation's Canadian surtax payable for the particular year that

(i) the amount, if any, by which

(A) the total of all amounts each of which is

(I) its income under Part I for the particular year from a business that was carried on by the corporation throughout the subsequent year for profit or with a reasonable expectation of profit, or

Acquisition de contrôle

181.1(7) En cas d'acquisition du contrôle d'une société par une personne ou un groupe de personnes, aucun montant au titre du crédit de surtaxe inutilisé de la société pour une année d'imposition se terminant avant le moment de l'acquisition n'est déductible par la société pour une année d'imposition se terminant après ce moment et aucun montant au titre de son crédit de surtaxe inutilisé pour une année d'imposition se terminant après ce moment n'est déductible par la société pour une année d'imposition se terminant avant ce moment.

Toutefois :

a) le crédit de surtaxe inutilisé de la société pour une année d'imposition donnée qui s'est terminée avant le moment de l'acquisition est déductible par la société pour une année d'imposition qui se termine après ce moment (appelée année subséquente" au présent alinéa), jusqu'à concurrence du produit de sa surtaxe canadienne payable pour l'année donnée par le rapport entre :

(i) d'une part, l'excédent éventuel du total visé à la division (A) sur le total visé à la division (B):

(A) le total des montants représentant chacun :

(I) son revenu en vertu de la partie I pour l'année donnée provenant d'une entreprise qu'elle exploitait à profit ou

(II) where properties were sold, leased, rented or developed or services were rendered in the course of carrying on that business before that time, its income under Part I for the particular year from any other business all or substantially all of the income of which was derived from the sale, leasing, rental or development, as the case may be, of similar properties or the rendering of similar services exceeds

(B) the total of all amounts each of which is an amount deducted under paragraph 111(1)(a) or 111(1)(d) in computing its taxable income for the particular year in respect of a non-capital loss or a farm loss, as the case may be, for taxation year in respect of any business referred to in clause 181.1(7)(a)(i)(A)

is of the greater of

(ii) the amount determined under subparagraph 181.1(7)(a)(i), and
(iii) the corporation's taxable income for the particular year; and

(b) the corporation's unused surtax credit for a particular taxation year that ends after that time is deductible by the corporation for a taxation year that ended before that time (in this paragraph referred to as the "preceding year") to the extent of that proportion of the corporation's Canadian surtax payable for the particular year that

(i) the amount, if any, by which
(A) the total of all amounts each of which is

dans une attente raisonnable de profit tout au long de l'année subséquente,
(II) dans le cas où des biens sont vendus, loués ou mis en valeur ou des services, rendus dans le cadre de l'exploitation de l'entreprise visée à la subdivision (I) avant le moment de l'acquisition, son revenu en vertu de la partie I pour l'année donnée provenant d'une autre entreprise dont la totalité ou la presque totalité du revenu provient de la vente, de la location ou de la mise en valeur de biens semblables ou de la prestation de services semblables,

(B) le total des montants représentant chacun un montant déduit en application des alinéas 111(1)a) ou d) dans le calcul de son revenu imposable pour l'année donnée au titre d'une perte autre qu'une perte en capital ou d'une perte agricole pour une année d'imposition relativement à une entreprise visée à la division (A),
(ii) d'autre part, le plus élevé des montants suivants :

(A) l'excédent déterminé selon le sous-alinéa (i),

(B) le revenu imposable de la société pour l'année donnée;

b) le crédit de surtaxe inutilisé de la société pour une année d'imposition donnée qui se termine après le moment de l'acquisition est déductible par la société pour une année d'imposition qui s'est terminée avant ce moment (appelée « année précédente » au présent alinéa), jusqu'à concurrence du produit de sa surtaxe canadienne payable pour l'année donnée par le rapport entre :
(i) d'une part, l'excédent éventuel du total visé à la division (A) sur le total

(I) its income under Part I for the particular year from a business that was carried on by the corporation in the preceding year and throughout the particular year for profit or with a reasonable expectation of profit, or (II) where properties were sold, leased, rented or developed or services were rendered in the course of carrying on that business before that time, the corporation's income under Part I for the particular year from any other business all or substantially all of the income of which was derived from the sale, leasing, rental or development, as the case may be, of similar properties or the rendering of similar services exceeds

(B) the total of all amounts each of which is an amount deducted under paragraph 111(1)(a) or 111(1)(d) in computing the corporation's taxable income for the particular year in respect of a non-capital loss or a farm loss, as the case may be, for a taxation year in respect of any business referred to in clause 181.1(7)(b)(i)(A) is of the greater of

(ii) the amount determined under subparagraph 181.1(7)(b)(i), and

(iii) the corporation's taxable income for the particular year.

Previous Version

Taxable capital employed in Canada

181.2 (1) The taxable capital employed in Canada of a corporation

visé à la division (B):

(A) le total des montants représentant chacun :

(I) son revenu en vertu de la partie I pour l'année donnée provenant d'une entreprise qu'elle exploitait à profit ou dans une attente raisonnable de profit au cours de l'année précédente et tout au long de l'année donnée,

(II) dans le cas où des biens sont vendus, loués ou mis en valeur ou des services, rendus dans le cadre de l'exploitation de l'entreprise visée à la subdivision (I) avant le moment de l'acquisition, son revenu en vertu de la partie I pour l'année donnée provenant d'une autre entreprise dont la totalité ou la presque totalité du revenu provient de la vente, de la location ou de la mise en valeur de biens semblables ou de la prestation de services semblables,

(B) le total des montants représentant chacun un montant déduit en application des alinéas 111(1)a) ou d) dans le calcul de son revenu imposable pour l'année donnée au titre d'une perte autre qu'une perte en capital ou d'une perte agricole pour une année d'imposition relativement à une entreprise visée à la division (A), (ii) d'autre part, le plus élevé des montants suivants :

(A) l'excédent déterminé selon le sous-alinéa (i),

(B) le revenu imposable de la société pour l'année donnée.

Version précédente

Capital imposable utilisé au Canada

181.2 (1) Le capital imposable utilisé au Canada, pour une année

for a taxation year (other than a financial institution or a corporation that was throughout the year not resident in Canada) is the prescribed proportion of the corporation's taxable capital for the year.

d'imposition, d'une société, sauf une institution financière ou une société qui tout au long de l'année n'a pas résidé au Canada, correspond à la proportion prescrite du capital imposable de la société pour l'année.

Taxable capital

181.2(2) The taxable capital of a corporation (other than a financial institution) for a taxation year is the amount, if any, by which its capital for the year exceeds its investment allowance for the year.

Capital imposable

181.2(2) Le capital imposable d'une société, sauf une institution financière, pour une année d'imposition est égal à l'excédent éventuel de son capital pour l'année sur sa déduction pour placements pour l'année.

Capital

181.2(3) The capital of a corporation (other than a financial institution) for a taxation year is the amount, if any, by which the total of

Capital

181.2(3) Le capital d'une société, sauf une institution financière, pour une année d'imposition correspond à l'excédent éventuel du total des éléments suivants :

(a) the amount of its capital stock (or, in the case of a corporation incorporated without share capital, the amount of its members' contributions), retained earnings, contributed surplus and any other surpluses at the end of the year,

a) le capital-actions de la société (ou, si elle est constituée sans capital-actions, l'apport de ses membres), ses bénéfices non répartis, son surplus d'apport et tout autre surplus à la fin de l'année;

(b) the amount of its reserves for the year, except to the extent that they were deducted in computing its income for the year under Part I,

b) ses réserves pour l'année, sauf dans la mesure où elles sont déduites dans le calcul de son revenu pour l'année en vertu de la partie I;

(b.1) the amount of its deferred unrealized foreign exchange gains at the end of the year,

b.1) ses gains sur change non réalisés reportés à la fin de l'année;

(c) the amount of all loans and advances to the corporation at the end

c) les prêts et les avances qui lui ont

of the year,

(d) the amount of all indebtedness of the corporation at the end of the year represented by bonds, debentures, notes, mortgages, hypothecary claims, banker's acceptances or similar obligations,

(e) the amount of any dividends declared but not paid by the corporation before the end of the year,

(f) the amount of all other indebtedness (other than any indebtedness in respect of a lease) of the corporation at the end of the year that has been outstanding for more than 365 days before the end of the year, and

(g) where the corporation was a member of a partnership at the end of the year, that proportion of the amount, if any, by which

(i) the total of all amounts (other than amounts owing to the member or to other corporations that are members of the partnership) that would be determined under this paragraph and paragraphs 181.2(3)(b) to 181.2(3)(d) and 181.2(3)(f) in respect of the partnership at the end of its last fiscal period that ends at or before the end of the year (if paragraphs 181.2(3)(b) to 181.2(3)(d) and 181.2(3)(f) applied to partnerships in the same way that they apply to corporations) exceeds

(ii) the amount of the partnership's deferred unrealized foreign exchange losses at the end of that period that the member's share of the partnership's income or loss for that

été consentis à la fin de l'année;

d) ses dettes à la fin de l'année sous forme d'obligations, de créances hypothécaires, d'effets, d'acceptations bancaires ou de titres semblables;

e) les dividendes qu'elle a déclarés mais n'a pas versés avant la fin de l'année;

f) toutes ses autres dettes, sauf celles afférentes à un bail, à la fin de l'année qui sont impayées depuis plus de 365 jours avant la fin de l'année;

g) dans le cas où elle est un associé d'une société de personnes à la fin de l'année, le produit de la multiplication de l'excédent du total visé au sous-alinéa (i) sur le montant visé au sous-alinéa (ii) par le rapport entre la part qui lui revient du revenu ou de la perte de la société de personnes pour le dernier exercice de celle-ci se terminant à la fin de l'année ou antérieurement et le revenu ou la perte de la société de personnes pour cet exercice :

(i) le total des montants, sauf ceux dus à l'associé ou à d'autres sociétés qui sont des associés de la société de personnes, qui seraient déterminés selon le présent alinéa et les alinéas b) à d) et f) relativement à la société de personnes à la fin de l'exercice si les alinéas b) à d) et f) s'appliquaient aux sociétés de personnes de la même manière qu'ils s'appliquent aux

period is of the partnership's income or loss for that period exceeds the total of

sociétés,
(ii) les pertes sur change non réalisées reportées de la société de personnes à la fin de l'exercice,
sur le total des montants suivants :

(h) the amount of its deferred tax debit balance at the end of the year,

h) le solde de son report débiteur d'impôt à la fin de l'année;

(i) the amount of any deficit deducted in computing its shareholders' equity at the end of the year,

i) tout déficit déduit dans le calcul de l'avoir des actionnaires à la fin de l'année;

(j) any amount deducted under subsection 135(1) in computing its income under Part I for the year, to the extent that the amount can reasonably be regarded as being included in the amount determined under any of paragraphs 181.2(3)(a) to 181.2(3)(g) in respect of the corporation for the year, and

j) tout montant déduit en application du paragraphe 135(1) dans le calcul de son revenu pour l'année en vertu de la partie I, dans la mesure où il est raisonnable de considérer les déductions comme incluses dans l'un des montants calculés en application des alinéas a) à g) relativement à la société pour l'année;

(k) the amount of its deferred unrealized foreign exchange losses at the end of the year.

k) ses pertes sur change non réalisées reportées à la fin de l'année.

Investment allowance

Déduction pour placements

181.2(4) The investment allowance of a corporation (other than a financial institution) for a taxation year is the total of all amounts each of which is the carrying value at the end of the year of an asset of the corporation that is

181.2(4) La déduction pour placements d'une société, sauf une institution financière, pour une année d'imposition correspond au total des montants dont chacun représente la valeur comptable à la fin de l'année d'un élément d'actif de la société qui est, selon le cas :

(a) a share of another corporation,

a) une action d'une autre société;

(b) a loan or advance to another corporation (other than a financial institution),

b) un prêt ou une avance consenti à une autre société, sauf une institution financière;

- | | |
|---|---|
| <p>(c) a bond, debenture, note, mortgage, hypothecary claim or similar obligation of another corporation (other than a financial institution),</p> | <p>c) une obligation, un effet, une créance hypothécaire ou un titre semblable d'une autre société, sauf une institution financière;</p> |
| <p>(d) long-term debt of a financial institution,</p> | <p>d) une dette du passif à long terme d'une institution financière;</p> |
| <p>(d.1) a loan or advance to, or a bond, debenture, note, mortgage, hypothecary claim or similar obligation of, a partnership all of the members of which, throughout the year, were other corporations (other than financial institutions) that were not exempt from tax under this Part (otherwise than because of paragraph 181.1(3)(d)),</p> | <p>d.1) un prêt ou une avance consentis à une société de personnes dont l'ensemble des associés, tout au long de l'année, sont d'autres sociétés, sauf des institutions financières, qui ne sont pas exonérées de l'impôt en application de la présente partie, autrement qu'en vertu de l'alinéa 181.1(3)d), ou encore une obligation, un billet, une créance hypothécaire ou un titre semblable d'une telle société de personnes;</p> |
| <p>(e) an interest in a partnership, or</p> | <p>e) une participation dans une société de personnes;</p> |
| <p>(f) a dividend payable to the corporation at the end of the year on a share of the capital stock of another corporation,</p> | <p>f) un dividende payable à la société à la fin de l'année sur une action du capital-actions d'une autre société.</p> |
| <p>other than a share of the capital stock of, a dividend payable by, or indebtedness of, a corporation that is exempt from tax under this Part (otherwise than because of paragraph 181.1(3)(d)).</p> | <p>En sont exclues les actions du capital-actions et les dettes d'une société exonérée de l'impôt en application de la présente partie, autrement qu'en vertu de l'alinéa 181.1(3)d), ainsi que les dividendes payables par une telle société.</p> |

Value of interest in partnership

181.2(5) For the purposes of subsection 181.2(4), the carrying value, at the end of a taxation year, of

Valeur d'une participation dans une société de personnes

181.2(5) Pour l'application du paragraphe (4), la valeur comptable à la fin d'une année d'imposition de la

an interest of a corporation in a partnership shall be deemed to be an amount equal to that proportion of

participation d'une société dans une société de personnes est réputée correspondre au produit de la multiplication :

(a) the total of all amounts each of which is the carrying value of an asset of the partnership, at the end of its last fiscal period ending at or before the end of the year, described in any of paragraphs 181.2(4)(a) to 181.2(4)(d) and 181.2(4)(f), other than an asset that is a share of the capital stock of, a dividend payable by, or indebtedness of, a corporation that is exempt from tax under this Part (otherwise than because of paragraph 181.1(3)(d)),

a) du total des montants dont chacun représente la valeur comptable, à la fin du dernier exercice de la société de personnes se terminant au plus tard à la fin de l'année, d'un élément d'actif de la société de personnes visé à l'un des alinéas (4)a) à d) et f), sauf s'il s'agit de l'action du capital-actions ou de la dette d'une société exonérée de l'impôt en application de la présente partie, autrement qu'en vertu de l'alinéa 181.1(3)d), ou d'un dividende payable par une telle société,

that

par le rapport entre :

(b) the corporation's share of the partnership's income or loss for that period

b) d'une part, la part de la société sur le revenu ou la perte de la société de personnes pour cet exercice;

is of

(c) the partnership's income or loss for that period.

c) d'autre part, le revenu ou la perte de la société de personnes pour cet exercice.

Loan

Prêt

181.2(6) For the purpose of subsection 181.2(4), where a corporation made a particular loan to a trust that neither

181.2(6) Pour l'application du paragraphe (4), lorsqu'une société consent un prêt à une fiducie qui n'a ni consenti des prêts ou des avances à une personne qui n'est pas liée à la société ou contracté des prêts ou des avances auprès d'une telle personne, ni acquis auprès d'une telle personne, ou émis en faveur d'une telle personne, quelque obligation, billet, créance hypothécaire ou titre

(a) made any loans or advances to nor received any loans or advances from, nor

(b) acquired any bond, debenture, note, mortgage, hypothecary claim or similar obligation of nor issued any

bond, debenture, note, mortgage, hypothecary claim or similar obligation to

a person not related to the corporation, as part of a series of transactions in which the trust made a loan to another corporation (other than a financial institution) to which the corporation is related, the least of

(c) the amount of the particular loan,

(d) the amount of the loan from the trust to the other corporation, and

(e) the amount, if any, by which (i) the total of all amounts each of which is the amount of a loan from the trust to any corporation exceeds

(ii) the total of all amounts each of which is the amount of a loan (other than the particular loan) from any corporation to the trust

at any time shall be deemed to be the amount of a loan from the corporation to the other corporation at that time.

semblable, et que le prêt fait partie d'une série d'opérations dans le cadre desquelles la fiducie a consenti un prêt à une autre société, sauf une institution financière, à laquelle la société est liée, le moins élevé des montants suivants, à un moment donné, est réputé représenter le montant d'un prêt que la société a consenti à l'autre société à ce moment :

a) le montant du prêt que la société a consenti à la fiducie;

b) le montant du prêt que la fiducie a consenti à l'autre société;

c) l'excédent éventuel du total visé au sous-alinéa (i) sur le total visé au sous-alinéa (ii):

(i) le total des montants représentant chacun le montant d'un prêt que la fiducie a consenti à une société quelconque,

(ii) le total des montants représentant chacun le montant d'un prêt, sauf le prêt visé à l'alinéa a), qu'une société quelconque a consenti à la fiducie.

[Emphasis added.]

FEDERAL COURT OF APPEAL

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