Docket: 2002-2695(IT)G

BETWEEN:

INCO LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Determination of a question pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)*, heard on September 25, 2003, at Toronto, Ontario,

By: The Honourable Justice A.A. Sarchuk

Appearances:

Counsel for the Appellant:	Al Meghji and Gerald Grenon
Counsel for the Respondent:	Luther P. Chambers

ORDER

Upon application by the Appellant pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)* for the determination of a question;

And upon hearing counsel for the parties;

It is ordered that for the reasons attached, the Minister did not determine the losses of 321821 B.C. Ltd. as referred to in the July 4, 1997 letter such that the non-capital losses realized by 321821 in its 1999 taxation year are available to be applied by the Appellant in its 2000 taxation year by virtue of paragraph 88(1.1)(*c*) and 111(1)(*a*) of the *Income Tax Act*.

Costs will be at the discretion of the trial judge.

Signed at Ottawa, Canada, this 31st day of May, 2004.

"A.A. Sarchuk"

Sarchuk J.

Citation: 2004TCC373
Date: 20040531
Docket: 2002-2695(IT)G

BETWEEN:

INCO LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Sarchuk J.

[1] Before the Court is an application for the determination of a question of law pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)*. The question in issue is:

> …whether the Minister determined the losses of 321821 B.C. Ltd. ("321821") referred to in the July 4, 1997 letter, such that the non-capital losses realized by 321821 in its 1996 taxation year are available to be applied by the Appellant in its 2000 taxation year by virtue of paragraphs 88(1.1)(*c*) and 111(1)(*a*) of the *Income Tax Act*.

[2] The following allegations of fact are not disputed:

(a) On August 21, 1996, the Appellant acquired all the issued and outstanding shares of 321821 B.C. Ltd. ("321821", formerly Diamond Field Resources Inc.) a British Columbia corporation.

(b) Immediately following its acquisition of the 321821 shares the Appellant resolved, by resolution dated August 21, 1996, to wind-up 321821 and commenced the winding-up of 321821 into the Appellant. The winding-up was completed by dissolution of 321821 on December 11, 2001.

(c) By virtue of the winding-up of 321821, any non-capital losses of 321821 for its taxation years ending June 30, 1996 and August 21, 1996 would be

deemed by paragraph 88(1.1)(*c*) of the *Act* to be the non-capital losses of the Appellant for its taxation year ending December 31, 1996. Accordingly, any such non-capital losses would be available to the Appellant to deduct in computing its taxable income for taxation years ending after December 31, 1996.

(d) By two separate letters dated May 23, 1997 to the Vancouver Tax Services Office, 321821 requested that the Minister of National Revenue (the "Minister") determine its non-capital losses for its taxation years ending June 30, 1996 and August 21, 1996, respectively.

(e) The Surrey Taxation Centre responded to 321821 by letter dated July 4, 1997, the reference line of which stated "Re: Your request dated May 23, 1997" (the "Letter") and the body of which stated:

> "We are replying to your letter requesting the non-capital losses available to the corporation for application against taxable income in future years. We are pleased to offer the following information for your records:

Origin Year	Amount Available	Balance Forward
1993	$144,137.00	$144,137.00
1994	2,450,430.00	2,594,567.00
1996 (30/06)	65,684,989.00	68,279,556.00
1996 (21/08)	131,933,429.00	200,212,985.00

> We trust this information will help you."

[3] The amount of losses stated to be available in the Letter is identical to the losses reported in the tax returns of 321821 for its taxation years ending June 30, 1996 and August 21, 1996.

Statutory Provisions:

[4] The following is the relevant legislation in the *Income Tax Act*:

152(1.1) Where the Minister ascertains the amount of a taxpayer's non-capital loss, net capital loss, restricted farm loss, farm loss or limited partnership loss for a taxation year and the taxpayer has not reported that amount as such a loss in the taxpayer's return of income for that year, the Minister shall, at the request of the taxpayer, determine, with all due dispatch, the amount of the

loss and shall send a notice of determination to the person by whom the return was filed.

152(1.2) Paragraphs 56(1)(*l*) and 60(*o*), this Division and Division J, as they relate to an assessment or a reassessment and to assessing or reassessing tax, apply, with such modifications as the circumstances require, to a determination or redetermination of an amount under this Division or an amount deemed under subsection 122.61 or 126.1 to be an overpayment on account of a taxpayer's liability under this Part, except that subsection (1) and (2) do not apply to determinations made under subsection (1.1) and (1.11) and, for greater certainty, an original determination of a taxpayer's non-capital loss, net capital loss, restricted farm loss or limited partnership loss for a taxation year may be made by the Minister only at the request of the taxpayer.

152(1.3) For greater certainty, where the Minister makes a determination of the amount of a taxpayer's non-capital loss, net capital loss, restricted farm loss, farm loss or limited partnership loss for a taxation year or makes a determination under subsection (1.11) with respect to a taxpayer, the determination is (subject to the taxpayer's rights of objection and appeal in respect of the determination and to any redetermination by the Minister) binding on both the Minister and the taxpayer for the purpose of calculating the income, taxable income or taxable income earned in Canada of, tax or other amount payable by, or amount refundable to, the taxpayer, as the case may be, for any taxation year.

152(4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if … [1]

Appellant's position

[5] In brief, the Appellant contends that the Respondent's position is based upon two erroneous premises:

(a) that the losses may be determined by the Minister only under subsection 152(1.1) of the *Act*; and

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[1] In the 1997 version of the *Act*, subsection 152(4) read differently. However, pursuant to amendment S.C. 1998, c. 19, subsection 181(4), i.e. this version was made applicable after April 27, 1989.

(b) that since subsection 152(1.1) operates only where the Minister has ascertained a taxpayer's losses in amounts different than the amounts reported by the taxpayer, no purported determination issued by the Minister can technically be a "determination" at law unless the Minister has ascertained the taxpayer's losses to be different than those reported by the taxpayer.

The Appellant further says the basis for the Respondent's position is wrong and that:

(a) the losses also may be determined by the Minister under subsections 152(1.2) and (4) of the *Act*, provided the taxpayer has requested that its losses be determined; and

(b) subsections 152(1.2) and (4) provide for determinations of loss where the Minister has not ascertained the taxpayer's losses and amounts different than the amounts reported by the taxpayer, if the taxpayer has requested the determination of loss. There is no dispute that the Appellant had requested that its losses be determined by the Minister.

[6] The Appellant submits that there are two branches to the scheme created by the *Act* governing determinations of loss by the Minister. Subsection 152(1.1) is the first branch. Determinations of loss under this branch are "mandatory" because subsection 152(1.1) requires the Minister, at the request of the taxpayer, to determine the taxpayer's loss where, *inter alia*, he ascertains the quantum of that loss to be different from the quantum reported by the taxpayer in its return. However, according to the Appellant, subsections 152(1.2) and (4) form a second branch, referred to by counsel as "authorized determinations" which unambiguously permits but does not require the Minister to issue a determination regardless of whether the amount reported by the taxpayer is different than the amount ascertained by the Minister. This is so, the Appellant says, because the words "this Division" in subsection 152(1.2) refer to Division 1 of the *Act*, "Returns, Assessments, Payment and Appeals". As subsection 152(4) is also in Division 1, the effect of subsection 152(1.2) is to make subsection 152(4) also apply to determinations and redeterminations of loss.[2] Thus, as subsection 152(4)

[2] When modified subsection 152(4) would read as follows:

gives the Minister discretionary power to make assessments, it similarly gives the Minister, subject to modifications, the discretionary power to make a loss determination subject only to the proviso in subsection 152(1.2) that an original determination of loss may be made only at the taxpayer's request.

[7] In response to the Respondent's submission that all determinations of loss must be made under the authority of subsection 152(1.1), counsel argued that if original determinations can only be made under the authority of that subsection, the stipulation in paragraph 152(1.2) that original determinations of a taxpayer's loss may only be made at the taxpayer's request would be redundant. This redundancy would offend the principle that all words in a statute must be given meaning.[3] More specifically, the redundancy arises because the text of subsection 152(1.1) already provides that a determination of loss under that subsection will only be made "at the request of the taxpayer". Accordingly, if that subsection were the only authority pursuant to which original determinations could be made, as argued by the Respondent, there would be no need to add an additional stipulation in subsection 152(1.2) that original determinations can only be made at the request of the taxpayer. Counsel further argued that the redundancy was made even more clear by the reorganization of subsection 152(1.2) of the *Act* in 1998. Prior to the reorganization, the stipulation that an original determination could be made only at the request of the taxpayer appeared in the body of the text of subsection 152(1.2). The 1998 version sets out that an original determination can only be made at the request of the taxpayer into an individual subparagraph. Therefore, counsel argued, paragraph 152(1.2)(*b*) (the 1998 version) serves no purpose other than providing a specific rule that an "original determination" may be made only at the taxpayer's request. Furthermore, since subsection 152(1.1) already stipulates that a determination will not be issued without a taxpayer's request, the whole of paragraph 152(1.2)(*b*) would be unnecessary and redundant if an "original determination" could only be made under subsection 152(1.1).

> The Minister **may** at any time make a ***determination, redetermination or additional determination*** … except that a ***determination, redetermination or additional determination*** may be made after the taxpayer's normal ***redetermination*** period in respect of the year only if …

[3] *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160 at 182; *Re: Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27.

[8] Counsel argued that a conclusion that subsections 152(1.2) and (4) do not authorize determinations of loss at the request of the taxpayer, would lead to the following inappropriate results:

(a) no determination of loss could ever be made where the Minister concluded that losses were equal to the amount the taxpayer reported even if both parties wished to have the losses determined; and

(b) the time period for redetermination would never be commenced and certainty of the amount of losses would never be achieved. Furthermore, although the parties might have agreed regarding the amount of losses originally, either party could take the position at some future time that the losses were other than originally agreed;

and contends that it should not be assumed that Parliament would have intended an absurd result which would frustrate the object of promoting certainty that was at the root of the introduction of the loss determination rules.

Respondent's Position

[9] Counsel for the Respondent asserts that the issue before the Court can only be answered negatively in that neither subsection 152(1.2) nor subsection 152(4) of the *Act* empowered the Minister to issue a notice of loss determination as this term is understood in section 152 of the *Act*. More specifically, subsection 152(1.1) is the only provision empowering the Minister to issue a determination of loss. This subsection contemplates a procedure involving sequential steps that must be taken in order for there to be a valid loss determination. These steps are:

(a) the Minister ascertains the amount of a taxpayer's non-capital loss for a taxation year in an amount that differs from the one reported in the taxpayer's income tax return;

(b) the taxpayer requests that the Minister determine the amount of the loss; and

(c) the Minister thereupon determines the amount of the loss and sends a Notice of Loss Determination to the taxpayer. This determination is binding on the taxpayer and the Minister.

According to the Respondent, the Appellant's position that subsections 152(1.2) and (4) empower the Minister to issue a binding notice of loss determination is untenable. Counsel argued that:

> … On their plain reading, neither of these subsections empower the Minister to make a loss determination, that is to say, to effect a fixation of losses which is binding on both the Minister and the taxpayer. Furthermore, subsection 152(1.2) clearly provides that a determination or redetermination of an amount, such as a non-capital loss, must precede the application of the provisions of "this Division" i.e. Division I, of which subsections 152(1.3) and 152(4) are part, because those provisions are to be applied to a loss determination. Therefore, because subsection 152(1.3) makes a loss determination binding on the Minister and a taxpayer, the limitations of subsection 152(4) pertaining to the making of reassessments are made applicable to loss determinations already made. In other words, subsection 152(4) imposes procedural constraints on the Minister; it does not empower the Minister to make a loss determination of a binding nature. The power to do so resides solely in subsection 152(1.1).
>
> In other words, subsections 152(1.2) and (1.3) are rules which apply where the Minister has made a determination of a taxpayer's non-capital loss pursuant to subsection 152(1.1).

[10] Counsel acknowledged that the plain meaning rule of statutory interpretation applies only where the words employed in a statute are clear and that if they permit two interpretations, a purposive analysis of them is required. He contends that if there is any debate on the "plain meaning" of the subsections in issue, the Respondent's position is affirmed by examining the legislative history of these sections. A detailed review of the amendments to subsections 152(1.1) and (1.2) was conducted to demonstrate that it was never Parliament's intent that there be any provision in the *Act* other than subsection 152(1.1) granting the Minister the authority to make a determination of loss. Furthermore, it was argued, all the amendments to subsections 152(1.2) and (1.3) indicate that these subsections were meant to be companion pieces to the legislation applicable to loss determinations under subsection 152(1.1). They are procedural in nature and were not meant to confer "new determination powers on the Minister". Based on this analysis, it was submitted that the only logical conclusion was that subsection 152(1.2) was not enacted because of an intent to create an independent or secondary Ministerial power to make loss determinations.

Conclusion

[11] The primary basis for the Appellant's position is that the *Act* contemplates two separate and fundamentally different methods by virtue of which the Minister may determine a taxpayer's loss in a binding fashion. The first method compels the Minister to make what the Appellant described as "mandatory determinations" pursuant to subsection 152(1.1) while the second authorized the Minister to make the determinations without being compelled to do so. These the Appellant described as "authorized determinations" which may be made pursuant to the provisions of subsections 152(1.2) and (4). These two subsections, it was argued, establish the circumstances where the Minister is not required to determine a taxpayer's losses but may do so, subject only to the taxpayer having requested a determination.

[12] Division I of Part I of the *Act* contains the primary statutory scheme governing tax returns, assessments, payments and administrative appeals under the *Act*. Rather than specifying a separate regime for determinations of loss, the *Act* adopts the scheme established in Division I in respect of assessments and reassessments and applies those rules to determinations of loss, subject to modifications provided. Section 152 provides the basic procedures for assessments and reassessments as well as the determination and redetermination of losses. Subsection 152(1) requires the Minister to examine a return and assess tax for the taxation year, interest and penalties, if any, payable. Subsection 152(1.1) for its part provides that where the Minister ascertains the amount of the taxpayer's non-capital loss for a taxation year and the taxpayer has not reported that amount as such a loss in his return of income for that year, the Minister shall, at the request of the taxpayer, determine the amount of the loss and shall send a notice of determination to the person by whom the return was filed, while subsection 152(1.2) provides that subject to three exceptions, the provisions of Division I (i.e. sections 152 to 168) regarding assessments and reassessments apply, with such modification as the circumstances require, to determinations and redeterminations. More specifically, by operation of subsection 152(1.2), subsection 152(1) (the requirement that the Minister examine the taxpayer's return and determine the amount of any refund or tax owing) and 152(2) (the requirement that the Minister send a notice of assessment) do not apply to determinations made under subsections 152(1.1) (loss determination) and 152(1.11) (determinations pursuant to subsection 245(2)). As contrasted to an assessment, subsection 152(1.2) also confirms that an original determination of a taxpayer's various stipulated losses may only be made by the Minister upon a request for such a determination by the taxpayer.

[13] It is common ground that as a general rule it is necessary to interpret clear and unequivocal words in a statute according to their ordinary, everyday meaning,

i.e. the plain meaning approach, unless the words are specifically assigned different definitions. This does not necessarily mean, however, that the language of the relevant sections must be interpreted independently of the context, and legislative purpose is part of that context. I am of the view that the language used by the legislators in subsections 152(1.1), (1.2), (1.3) and 152(4) of the *Act* does not lead to the conclusion sought by the Appellant. The words and phrases used in these subsections, interpreted in the context of the relevant statutory provisions lead to no conclusion other than that neither subsection 152(1.2) nor subsection 152(4) of the *Act* or any combination of the two empowers the Minister to issue a notice of loss determination as this term is understood in section 152 of the *Act*. On the other hand, subsection 152(1.1) of the *Act* clearly contemplates and establishes a procedure involving sequential steps or events that must take place in order for there to be a valid loss determination. These steps are: (a) the Minister ascertains the amount of a taxpayer's non-capital loss for a taxation year in an amount that differs from the one reported in the taxpayer's income tax return; (b) the taxpayer requests that the Minister determine the amount of the loss; (c) the Minister thereupon determines the amount of the loss and issues a notice of loss determination to the taxpayer. On the other hand, nothing in the language found in subsection 152(1.2) clearly contemplates a similar or parallel conclusion. It is also reasonable to conclude that since subsections 152(1.1) and (1.2) were enacted and amended together indicates a legislative intent that subsection 152(1.2) be no more than a procedural companion piece to subsection 152(1.1) and that it was not intended to create an independent or secondary Ministerial power to make loss determinations.

[14] The Appellant's position is that if original determinations were only authorized under subsection 152(1.1), subsection 152(1.2) would specifically refer to subsection 152(1.1). Counsel further argued that if Parliament had in fact intended that subsection 152(1.1) be the sole provision authorizing original determinations of losses, that fact could readily have been dealt with in subsection 152(1.2) by changing the words "an original determination (of losses) may be made by the Minister only at the request of the taxpayer" to "an original determination (of losses) may be made only under subsection 152(1.1)". With respect to this submission, I am inclined to accept the riposte of counsel for the Respondent to the effect that if the Appellant's suggestion was correct, the question arises why Parliament saw fit to enact subsection 152(1.1) (in which it subjected loss determinations to stringent requirements) at all since subsection 152(1.2) would have itself sufficed.

[15] Counsel for the Appellant also argued that the Minister's position would create a situation where the time period for redetermination would never be commenced and certainty of the amount of losses would never be achieved. Furthermore, even though the parties originally agreed regarding the amount of losses, either party would be able to take the position at some time in the future that the losses were other than as originally agreed. That may be so but that situation must clearly have been contemplated and considered by the legislators, otherwise there would have been no point in framing the provisions in such a manner as to leave the decision to seek a determination and more importantly, the timing of it in the hands of the taxpayer.

[16] Counsel for both parties made reference, both oblique and direct, to the legislative intent underlying the provisions in issue. The application of the purposive approach in the face of clear and unambiguous legislative language has been considered in a number of cases. In particular, McLachlin J. stated in *Shell Canada v. The Queen*:[4]

> 40 Second, it is well established in this Court's tax jurisprudence that a searching inquiry for either the "economic realities" of a particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the *Act* to a taxpayer's transaction. Where the provision at issue is clear and unambiguous, its terms must simply be applied: *Continental Bank*, *supra*, at para. 51, per Bastarache, J.; *Tennant*, *supra*, at para. 16, per Iacobucci, J.; *Canada v. Antosko* [94 DTC 6314], [1994] 2 S.C.R. 312, at pp. 326-27 and 330, per Iacobucci, J.; *Friesen v. Canada* [95 DTC 5551], [1995] 3 S.C.R. 103, at para. 11, per Major, J; *Alberta (Treasury Branches) v. M.N.R.*, [1996] 1 S.C.R. 963, at para. 15, per Cory, J.
>
> 43 … The *Act* is a complex statute through which Parliament seeks to balance a myriad of principles. This Court has consistently held that courts must therefore be cautious before finding within the clear provisions of the *Act* an unexpressed legislative intention: *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147, at para. 41, per Iacobucci, J.; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 112, per Iacobucci, J.; *Antosko*, *supra*, at p. 328, per Iacobucci, J. Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the *Act*.
>
> 45 …The courts' role is to interpret and apply the *Act* as it was adopted by Parliament. *Obiter* statements in earlier cases that might be said to support a

[4] 99 DTC 5669 (S.C.C.) at 5676-77.

> broader and less certain interpretative principle have therefore been overtaken by our developing tax jurisprudence. ..

It is common ground that the purpose rule is not a substitute for the plain meaning rule but is generally only used for statutory language that is ambiguous or obscure and a Court needs assistance in determining legislative intention. It has also been observed that the plain meaning approach of itself is not a total rejection of purposive interpretation but is simply a recognition that object and purpose can play only a limited role in the interpretation of a statute that is as precise and detailed as the *Act*.

[17] In my view, the language of the sections in issue is not ambiguous and must be interpreted according to its plain meaning. Furthermore, this approach does not produce absurd results as argued on behalf of the Appellant. In this context, it is important to note the genesis of the sections of the *Act* in issue. There is no dispute that an assessment includes a "nil" assessment and that a taxpayer has no right of appeal from such an assessment since no tax is payable. This applies even in circumstances where such an assessment does not change the substance of the assessment but rather merely carried back and applied tax credits from subsequent years with the result the taxes payable are reduced to nil. Since the Courts had ruled that there was no right of appeal from a nil assessment, it became apparent that substantial problems arose with respect to the Minister's calculation of the losses of a taxpayer. If such a determination resulted in a nil assessment, there was no basis upon which the taxpayer could appeal that decision. The enactment of the statutory provisions in issue in this appeal was clearly intended to deal with this scenario and provide a process which would enable the taxpayer to appeal from a determination by the Minister of its losses notwithstanding that such a determination resulted in a nil assessment. The system is fairly straightforward. The Minister, at the request of the taxpayer, is required to ascertain the taxpayer's losses to be different from those reported in a taxpayer's income tax return at which time if the taxpayer disagrees with the calculation of the losses reported, he has two alternatives. The taxpayer may request that the Minister determine the amount of the loss immediately, and the Minister is bound to do so, or the taxpayer may prefer to raise the matter in another taxation year in which the losses are claimed. This legislative scheme does not, as counsel for the Appellant argued, create a situation where the time period for determination would never be commenced and certainty of the amount would never be achieved.

[18] For the foregoing reasons, I have concluded that the Minister did not determine the losses of 321821 B.C. Ltd. as referred to in the July 4, 1997 letter

such that the non-capital losses realized by 321821 in its 1999 taxation year are available to be applied by the Appellant in its 2000 taxation year by virtue of paragraph 88(1.1)(*c*) and 111(1)(*a*) of the *Income Tax Act*.

Signed at Ottawa, Canada, this 31st day of May, 2004.

"A.A. Sarchuk"

Sarchuk J.

CITATION:	2004TCC373
COURT FILE NO.:	2002-2695(IT)G
STYLE OF CAUSE:	Inco Limited and Her Majesty the Queen
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 25, 2003
REASONS FOR ORDER BY:	The Honourable Justice A.A. Sarchuk
DATE OF ORDER:	May 31, 2004

APPEARANCES:

Counsel for the Appellant:	Al Meghji and Gerald Grenon
Counsel for the Respondent:	Luther P. Chambers

COUNSEL OF RECORD:

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