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Subsection 153(4.3) of the Act Is Not an Alternative to Judicial Review (2019) 27:8 Canadian Tax Highlights: Canadian Tax Foundation

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In *Bakorp Management Ltd.* (2019 FCA 195), a tax procedure case, the appellant appealed unsuccessfully to the FCA to overturn the TCC decision denying the appellant's request, pursuant to subsection 152(4.3), to require the minister to reduce non-capital loss applied in excess against its January 1992 year-end and to apply the excess non-capital loss against income of its March 1992 year-end. The appellant's March 1992 year-end was triggered by an amalgamation. The appellant's predecessor had been in litigation with the minister concerning the size of a non-capital loss that could be carried over from 1987. This dispute was not settled until April 10, 2010.

After finalization of the dispute, the appellant filed its predecessor's March 1992 return and at the same time requested that the minister reduce the excess loss that was utilized on the appellant's predecessor's January 2019 return. The minister refused to reduce the excess loss and assessed the appellant's March 1992 tax return, which was prepared on the basis that the minister would acquiesce to its request and that the excess loss from its January 1992 return would be available for its March 1992 return. At issue before the court was not whether there was a loss carried forward, but whether the minister could be required by the TCC to amend the appellant's January 1992 return allowing the excess loss to be applied to the appellant's March 1992 year-end through the consequential assessment provision of subsection 152(4.3).

Subsection 152(4.3) authorizes, or at the taxpayer's request requires, the minister to reassess outside the normal period after a successful appeal has altered a taxpayer's balance in a particular tax year, "but only to the extent that the reassessment can reasonably be considered to relate *to the change in the balance of the taxpayer* for the particular year" (*Sherway Centre Ltd.*, 2003 FCA 26). Given that the purpose of subsection 152(4.3) is to reassess tax, the appeal pursuant to subsection 152(4.3) did not make sense. Webb JA, in paragraph 29 of his decision, observed that

"Prior to this request being made, no taxes were payable in relation to the January 1992 taxation year. If the request would have been granted, the amount of taxes payable for that taxation year would not change, ie. no taxes would be payable for that year. This led to a question during the hearing of this appeal of whether this was a request to reassess the tax for that taxation year".

The appellant argued that subsection 152(4.3) should not be read as a part of the assessment regime set out in sections 165 and 169 and should not be subject to these provisions; therefore, the TCC had jurisdiction through subsection 152(4.3) to order the minister to reduce the excess loss of its January 1992 year-end. The FCA rejected that argument by citing that the TCC jurisdiction is set out in section 12 of the Tax Court Act, which allows the TCC to hear references and appeals under the Income Tax Act.

The jurisdiction of the TCC is limited to considering the correctness of assessments pursuant to section 171 and references pursuant to section 174; only the minister may apply to the TCC for the determination of a question. The FCA cited subsection 169(1), which provides that an appeal can be brought to the TCC only if a notice of objection has been served on an assessment. The FCA recognized that no objection could have been filed, given that that an assessment for January 1992 would have resulted in a nil assessment.

At paragraph 41, Webb JA notes that in this appeal there was no dispute that the non-capital losses as claimed for the January 1992 taxation year were valid non-capital losses and could be claimed in that year. The return as filed did not contain any errors with respect to the non-capital losses that were claimed. The dispute centered on the minster's refusal to make the adjustment as requested by the appellant on the January 1992 tax return. At paragraph 42 the FCA states the following:

"However, this disagreement between Bakorp and the Minister in relation to the application of subsection 152(4.3) of the Act in this case should have been resolved by Bakorp making an application to the Federal Court for judicial review of this decision of the Minister. The Tax Court does not have the jurisdiction to judicially review decisions of the Minister. The jurisdiction of the Tax Court is limited to references and appeals as provided in the Act. There is no provision in the Act that would permit the Tax Court to judicially review the decision of the Minister in this case. Having failed to seek judicial review of this decision before the Federal Court, Bakorp cannot effectively ask the Tax Court to interpret and indirectly apply this provision".

This case is a reminder to the practitioner to tread carefully when disputing a tax year that involves a prior loss year. In *Bakorp*, an objection to the appellant's January 1992 return was not filed and could not be filed because one cannot object to a nil assessment. However, where there is a dispute on the quantum of a loss that can be carried forward, a taxpayer can avail itself of a loss determination under subsection 152(1.1) and appeal the later year.