

**A- 160-22
(2020-208(IT)G)**

**FEDERAL COURT OF APPEAL
(on appeal from the Tax Court of Canada)**

BETWEEN:

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
F I L E D	05-AUG-2022 Robert M'vondo
SASKATOON, SK -1-	

POTASH CORPORATION OF SASKATCHEWAN INC.

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

**NOTICE OF APPEAL
(Pursuant to subsection 27(1.1) of the *Federal Courts Act*)**

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Counsel for the Appellant

Counsel for the Respondent

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Potash Corporation of Saskatchewan Inc. (the "**Appellant**"). The relief claimed by the Appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the Appellant. The Appellant requests that this appeal be heard either in Saskatoon, Calgary or Regina.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the Appellant's solicitor, or, if the Appellant is self-represented, on the Appellant, **WITHIN 10 DAYS** after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE ON YOU.

AOUT
AUG 5 2022

Saskatoon, this ___ day of August, 2022

Issued by: **ORIGINAL SIGNED BY**
ROBERT M'VONDO
(Registry Officer) **REGISTRY OFFICER**

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NOTICE IS HEREBY GIVEN TO:

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Counsel for the Respondent

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the judgment of the Tax Court of Canada dated July 7, 2022, docket 2020-208(IT)G, dismissing the Appellant's appeal against notices of reassessment issued by the Minister of National Revenue for the 1999 to 2002 taxation years whereby the deduction of a tax paid to the Saskatchewan Crown was refused (the "**Reassessments**").

THE APPELLANT ASKS THAT THIS COURT:

ALLOW this Appeal;

SET ASIDE the Tax Court's decision;

RENDER the judgment that the Tax Court ought to have rendered, to:

ALLOW the Appellant's appeal against the Reassessments; and

REFER the Reassessments back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to deduct, in computing its income for the 1999, 2000, 2001 and 2002 taxation years (the "**Taxation Years**"), the following respective amounts paid or accrued to the Saskatchewan Crown: \$14,643,226, \$16,454,834, \$14,673,344 and \$13,655,538.

AWARD costs to the Appellant in this Court and in the Tax Court below, on such scale as may be deemed just; and

GRANT such further and other order as this Court may deem just in the circumstances.

THE GROUNDS FOR APPEAL are as follows:

1. Producing potash means extracting potash from the ground and processing same at mine facilities.
2. The Appellant produces potash from its Saskatchewan mine facilities and sells potash.
3. The Base Payment is a tax imposed on Saskatchewan potash producers as provided for in the *Mineral Taxation Act, 1983* (Saskatchewan)¹ (the "**Base Payment**") and computed

¹ SS 1983-84, c M-17.1.

in accordance with section 5 of the Third Schedule of the *Mineral Taxation Act, 1983* and *The Potash Production Tax Regulations*.² Essentially, the Base Payment is obtained by multiplying the “quantity of potash sold or otherwise disposed” by a tax rate.

4. The Appellant is liable for the Base Payment in respect of the potash that it sells or otherwise disposes of.
5. The Tax Court held that both paragraphs 18(1)(a) and (m) of the *Income Tax Act*³ (the “ITA”) preclude the deduction of the Base Payment paid or accrued by the Appellant during the Taxation Years.

Paragraph 18(1)(a) of the ITA Does Not Preclude the Deduction

6. The Tax Court held that paragraph 18(1)(a) applies because the Base Payment is a tax on income or profit,⁴ and alternatively, because it is incurred after the income-earning event, that is, after the sale or other disposition of potash.⁵
7. This analysis is, with respect, wrong in law:
 - a. The Base Payment is not a function of a tax rate applied to some measure of income or profits. It is payable regardless of profitability.
 - b. Paragraph 18(1)(a), which contains no limitation as to time,⁶ does not require a causal connection between a particular expenditure and a particular income, or that the income be generated in the same year in which the expenditure is made.⁷
8. Rather, paragraph 18(1)(a) requires that an expense be made or incurred in the ordinary course of business with the intention that the business could generate taxable income.⁸ The Base Payment is such an expense.

² RRS, c M-17.1 Reg 6.

³ RSC, 1985, c 1 (5th Supp), as it applied during the Taxation Years.

⁴ Tax Court's judgment, at paras 69 to 72.

⁵ *Ibid* at para 73.

⁶ *Premium Iron Ores Ltd. v MNR*, [1966] SCR 685, at p 721-722.

⁷ *Mattabi Mines Ltd. v Ontario (Minister of Revenue)*, [1988] 2 SCR 175 at p 189.

⁸ *Id.* and *Premium Iron Ores Ltd. v MNR*, [1966] SCR 685, at p 721-722.

Paragraph 18(1)(m) of the ITA Does Not Preclude the Deduction

9. The Tax Court acknowledged that “production” and “sale or other disposition” are separate events and that the Base Payment only arises after the “sale or other disposition” of potash.⁹
10. It nevertheless concluded that the Base Payment is a payment “in relation to [...] production” within the meaning of paragraph 18(1)(m), on the basis that “sale or other disposition of potash is an activity that relates to the production of that potash.”¹⁰
11. This analysis is, with respect, equally flawed.
12. Paragraph 18(1)(m) commands the determination of whether a tax paid or payable to a province is in relation to the production of a mineral, not whether an activity is in relation to said production.
13. Given that the Appellant produces potash, all of its activities can be said to be in relation to production. If paragraph 18(1)(m) applied as the Tax Court ruled, all taxes paid by the Appellant would be within the scope of paragraph 18(1)(m), an unwarranted result that would be incoherent with the Respondent’s treatment of the Appellant’s other taxes.
14. In *Canada v Cogema Resources Inc.*,¹¹ this Court endorsed the conclusion that a tax cannot be considered to be “in relation to the production of minerals” when mere production is insufficient to trigger the tax. In fact, this Court agreed that when minerals must be sold for a tax to be levied, that tax is in relation to the sale of minerals.¹²
15. For the Base Payment to be levied, potash must be sold or otherwise disposed of. Accordingly, the Base Payment is a tax in relation to the sale or other disposition of potash and its deduction is not precluded by paragraph 18(1)(m).

⁹ Tax Court’s judgment, at paras 78, 83 and 86.

¹⁰ *Ibid* at para 86.

¹¹ 2005 FCA 316, upholding 2004 TCC 750.

¹² *Ibid* at para 2.

Conclusion

16. The Tax Court's decision falters on its own logic. A tax cannot be both a tax on profit and a tax on production. Furthermore, the Tax Court's decision cannot stand because the Base Payment is an expense made to earn income, the deduction of which is not precluded by paragraphs 18(1)(a) or (m) of the ITA.

DATED IN MONTRÉAL , this 1st day of August, 2022

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Counsel for the Appellant

Schedule Tax Court of Canada judgement (2022 TCC 75), dated July 7, 2022, docket 2020-208(IT)G

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the 5th

day of August A.D. 20 22

Dated this 5th day of August 2022

Robert M'Vondo
REGISTRY OFFICER
AGENT DU GREFFE