Federal Court of Appeal  Cour d'appel fédérale

Date: 20180920

Docket: A-20-17

Citation: 2018 FCA 166

CORAM: **DAWSON J.A.**
GLEASON J.A.
WOODS J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

594710 BRITISH COLUMBIA LTD.

Respondent

Heard at Vancouver, British Columbia, on May 17, 2018.

Judgment delivered at Ottawa, Ontario, on September 20, 2018.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: DAWSON J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

[1] This is an appeal by the Crown from a judgment of the Tax Court of Canada (*per* Rossiter C.J.) (2016 TCC 288) which vacated an assessment issued to the respondent, 594710 British Columbia Ltd. (Holdco).

[2] Holdco was assessed pursuant to the general anti-avoidance rule (the GAAR) in section 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) on the basis that it had engaged in abusive tax avoidance which frustrated section 160 of the Act. A total of $1,801,406 was assessed.

[3] Section 160 is designed to prohibit a person with a tax liability from avoiding tax collection measures by transferring property to a non-arm's length person without adequate consideration. If section 160 is applicable, the non-arm's length transferee becomes jointly and severally liable for the transferor's tax liability to the extent of the value of the property transferred.

[4] The Minister assessed Holdco under the GAAR as a non-arm's length transferee for joint and several liability of a tax liability owing by its former subsidiary, 671705 British Columbia Ltd. (Partnerco).

[5] Holdco appealed the section 160 assessment to the Tax Court on several grounds, one of which was to deny that Partnerco had a tax liability. In an appeal of a section 160 assessment, Holdco is entitled to challenge the assessment issued to Partnerco on any grounds that would have been open to Partnerco if it had appealed directly (*Gaucher v. Canada*, 2000 D.T.C. 6678, [2001] 1 C.T.C. 125 (F.C.A.)).

[6] A further complication in this case is that the Minister applied the GAAR twice – once in assessing Holdco and once in assessing Partnerco.

[7] The Tax Court vacated the assessment issued to Holdco, and this decision has been appealed to this Court.

[8] For the reasons below, I have concluded that the appeal should be allowed. The relevant statutory provisions are reproduced in an appendix to these reasons.

I. Summary of facts

A. *General*

[9] Most of the background facts are not in dispute and were well set out in the Tax Court decision. Below, I highlight the key facts for purposes of this appeal.

[10] Holdco is a member of the Onni Group, which is in the business of real estate development and is actively managed by members of the De Cotiis family. This appeal involves one of the real estate projects, a strata development called the Marquis Grande. The project was undertaken by a limited partnership created for this purpose, the Onni Halifax Development Limited Partnership (the partnership).

[11] The partnership was indirectly owned by four brothers of the De Cotiis family. They indirectly held 99.9 percent of the partnership equally by means of limited partnership interests. The remaining nominal interest was a general partnership interest held indirectly by one of the brothers.

[12] As the project was nearing completion in 2006 with only a few strata units remaining to be sold, the members of the partnership were facing the prospect of having to pay tax on almost $13 million of income. The brothers undertook to avoid this tax by entering into a series of transactions with Nuinsco Resources Limited (Nuinsco), an unrelated public corporation which had available tax losses and deductions.

[13] The arrangement involved Nuinsco becoming the sole limited partner just before the partnership's year end. This was designed to enable an allocation to Nuinsco of virtually all the partnership's income for tax purposes (herein referred to as taxable income) in accordance with the original partnership agreement. As a result, none of the partnership's taxable income was allocated to entities owned by the De Cotiis family.

[14] Although Nuinsco included in its income virtually all of the partnership's taxable income from the project, approximately $13 million, Nuinsco's sole economic gain was an amount equal to ten percent of the taxable income that was to be sheltered by Nuinsco's losses and deductions. Other than this amount, the profit from the development was passed on to corporations owned by the De Cotiis siblings.

[15] The steps in the arrangement are set out below, but it is first necessary to describe the initial ownership structure of the partnership and the capital invested by the original partners.

- The general partner was a corporation owned by one of the siblings.
- The limited partners were four corporations (together, Partnercos) which had equal partnership shares.

- The Partnercos were each owned by a holding corporation (together, Holdcos). Each of the Holdcos was wholly-owned by one of the De Cotiis siblings.
- Nominal capital was contributed to the partnership by the partners.

[16] The relevant fiscal year ends are:

The partnership	May 31
Partnercos	April 30
Holdcos	December 31
Nuinsco	December 31

B. *The arrangement*

[17] The key transactions that are relevant to this appeal are set out below.

May 25, 2006

- The partnership lent cash equally to the Partnercos in an aggregate amount of $8,474,040.
- Each of the Partnercos declared and paid a series of sequential stock dividends to their respective Holdcos for an aggregate amount of $8,474,040.
- Each of the Partnercos used the proceeds from the partnership loan to redeem the shares issued on the stock dividends. The aggregate amount received by the Holdcos was $8,474,040.

May 25, 2006 - May 29, 2006

- The following transactions were undertaken in respect of unsold strata units. The first two transactions were undertaken on May 25, 2006. The last transaction occurred on May 29, 2006.

(a) A corporation in the Onni Group loaned $3,051,400 to the partnership, taking the unsold strata units as security.

(b) The partnership entered into a management agreement with a corporate member of the Onni Group, in which this corporation undertook to provide services to the partnership relating to the sale of unsold strata units and remedial work.

(c) The partnership entered into a put agreement with another member of the Onni Group, in which the partnership acquired an option to sell the unsold strata units for an aggregate price of $3,051,400.

May 26, 2006

- Each of the Partnercos declared a stock dividend in the form of redeemable preferred shares to their respective Holdcos for an aggregate amount of $3,407,452.

May 29, 2006

- Nuinsco purchased all the shares of the Partnercos and the general partner for an aggregate consideration of $3,469,017.
- The partnership loaned its cash on hand, $4,443,957, to Nuinsco.

May 30, 2006

- Each of the Partnercos was wound up into Nuinsco. Consequently, Nuinsco assumed the debt owing by the Partnercos to the partnership ($8,474,040) and became the sole limited partner of the partnership. Nuinsco's indebtedness to the partnership at this time totalled $12,917,997.

May 31, 2006

- The partnership's taxable income in the amount of $12,136,180 was allocated to Nuinsco, as to 99.9 percent, and to the general partner, as to 0.1 percent.

June 1, 2006

- Each Partnerco was dissolved.
- The partnership distributed $12,041,997 to Nuinsco which was satisfied by set-off against the debt owing by Nuinsco to the partnership. This resulted in a reduction of the debt to $876,000.

June 14 - 16, 2006

- The partnership sold the remaining six strata units by transferring one unit to an arm's length purchaser and by exercising its option to sell the other five units to the Onni Group. As a result, Nuinsco reported an additional $862,683 of taxable income.

June 26, 2006

- The partnership distributed $863,683 to Nuinsco which was satisfied by set-off against the debt owing by Nuinsco to the partnership.

June 28, 2006

- The partnership was dissolved.

[18] The parties have agreed that the above transactions are a series of transactions for purposes of the GAAR, except for certain transactions that were undertaken by Nuinsco alone, such as partnership distributions after Nuinsco became the sole limited partner. However, the wind up and dissolution of the Partnercos were agreed to be part of the series.

C. *Partnerco's tax returns and assessment*

[19] Nuinsco's acquisition of the shares of Partnerco on May 29, 2006 resulted in Partnerco having a deemed year end. Accordingly, Partnerco filed a tax return for the period from May 1 to May 28, 2006. Income of nil was reported.

[20] Following the dissolution of Partnerco on June 1, 2006, Partnerco filed a tax return for the period May 29 to June 1, 2006. Income of nil was reported.

[21] The Minister accepted these returns and sent notifications that no tax was owing by notices dated December 21, 2006 and February 27, 2007. The parties had earlier agreed for the purpose of these proceedings that these were assessments, but they subsequently confirmed that this was not the case since no income was assessed.

[22] After Partnerco had been dissolved, the Minister applied to have it temporarily revived. Upon revival, the Minister assessed Partnerco pursuant to the GAAR for a period ending June 1, 2006. The assessment was issued on February 23, 2011 and added $3,246,694 to the income of Partnerco (approximately one-quarter of the partnership's taxable income).

D. *Holdco's tax return and assessments*

[23] Holdco filed a tax return for the period from January 1 to December 31, 2006, in which all of the stock dividends were included as income and an offsetting deduction was claimed

pursuant to subsection 112(1) of the Act. Holdco also reported a nil gain on the sale of the shares of Partnerco to Nuinsco.

[24] This return was assessed as filed.

[25] The Minister issued a further assessment to Holdco by notice dated July 11, 2013. Under this assessment, the GAAR was applied in order to impose liability under section 160 of the Act. The total amount assessed (including provincial tax) was $1,801,406.

II. Tax Court decision

[26] In the Tax Court, Holdco's appeal was allowed and the section 160 assessment was vacated. Set out below is a brief summary of the relevant findings of the Tax Court which led to this conclusion. Additional findings are provided in the analysis below.

[27] The Court considered whether the GAAR was properly applied to Partnerco in relation to the transactions. If so, Partnerco would have a tax liability based on approximately one-quarter of the taxable income of the partnership from the Marquis Grande. The Court concluded that the GAAR did not apply. It found that there was a tax benefit and an avoidance transaction, but that there was no abuse.

[28] The Court also considered whether the GAAR was properly applied to Holdco with respect to section 160. The Court concluded that the GAAR did not apply because there was no

tax benefit. However, the Court found that if there was a tax benefit there would be an avoidance transaction and an abuse.

[29] Finally, the Court considered whether the assessment issued to Partnerco was statute barred on the basis that it was issued after the expiry of the normal reassessment period for its taxation year ended May 28, 2006. The Court concluded that the assessment was valid and not out of time.

III. Issues to be determined

[30] The issues to be decided in this appeal are:

- Did the Tax Court err in concluding that the GAAR did not apply to Partnerco because it was not a misuse or abuse of the Act for Partnerco to avoid an income inclusion from its participation in the partnership?
- Did the Tax Court err in finding that the assessment issued to Partnerco was valid? This issue was discussed by the Tax Court in its statute-barred analysis.
- Did the Tax Court err in concluding that the GAAR did not apply to Holdco because no property was transferred from Partnerco to Holdco at less than fair market value and accordingly there was no tax benefit?
- Did the Tax Court err in concluding that there was a misuse or abuse of the Act by Holdco in avoiding the application of section 160 of the Act?

IV. Does the GAAR apply to Partnerco?

A. *Overview*

[31] The application of the GAAR to Partnerco will be considered first. As explained above, the Minister applied the GAAR to Holdco on the assumption that Partnerco had a tax liability. One of the grounds of Holdco's appeal to the Tax Court was that the GAAR should not have applied to Partnerco and therefore Holdco was not subject to section 160.

[32] In assessing Partnerco pursuant to the GAAR, the Minister added an amount to Partnerco's income as if it had retained its limited partnership interest and the transactions with Nuinsco were never carried out. As a result, approximately one-quarter of the partnership's taxable income, $3,246,694, was added to Partnerco's income.

[33] The GAAR assessment assumed that there was abusive tax avoidance because there is a discernable policy under the Act that prohibits arm's length persons from trading in tax attributes. This policy was said to be demonstrated by provisions dealing with loss trading in subsections 111(5), 66.7(10), 37(6.1), 127(9.1), 69(11), 83(2.1), 103(1) and 103(1.1) of the Act (Amended Reply at para. 22).

[34] The Crown has appealed the Tax Court's finding that abuse was not established. In this Court, the Crown relies on the assumptions above made for purposes of the assessment and augments these in two respects described below. The new submissions are permitted by virtue of subsection 152(9) of the Act.

[35] First, the Crown additionally relies on statutory provisions which it submits establish a policy against shifting income as opposed to trading in losses. The provisions of the Act are listed in a footnote in the Crown's memorandum, and no detailed submissions were made with respect to them.

[36] Second, the Crown submits that the series of transactions is abusive because it frustrates the income allocation provisions in subsection 96(1) of the Act.

[37] The discussion below commences with a brief description of the part of the decision of the Tax Court that addresses the application of the GAAR to Partnerco.

B. *Tax Court decision*

[38] The GAAR in section 245 of the Act has three elements – the existence of a tax benefit, an avoidance transaction, and an abuse. The Tax Court was required to consider all three.

[39] The Court also considered the reasonable tax consequences for Partnerco if the GAAR were to apply. It concluded that it was unreasonable for the Minister to assess Partnerco for a notional period of May 1 to June 1, 2006. The Minister should have assessed for the taxation year of May 29 to June 1, 2006. Neither party takes issue with this finding.

[40] The first two elements of the GAAR were determined to be easily satisfied. There was a tax benefit (i.e., the taxation of partnership income in the hands of Nuinsco) and an avoidance

transaction (i.e., all transactions in the series of transactions). The Court's focus was mainly on the third element – whether there was an abuse.

[41] One of the Court's key findings in the abuse analysis was that the series of transactions did not involve loss trading. The Court described the term "loss trading" as applicable to a transaction in which a loss company is transferred to an unrelated purchaser. In this case, a profitable company was transferred to an unrelated purchaser which had losses and this was described by the Court as "profit trading". Accordingly, in its analysis the Court focussed on whether there is a policy in the Act against profit trading.

[42] The analysis commenced with a preliminary finding, which the Court described as a "fatal shortcoming", that the Crown failed to fully analyse the relevant statutory provisions. It appears that a key shortcoming was the failure to analyze subsection 96(1) of the Act which was the provision relied on for the tax benefit.

[43] The Court then proceeded to consider the substantive issues, and concluded that there was no abusive tax avoidance. Below is a summary of the Court's findings that supported this conclusion.

- The provisions relied on by the Minister, subsections 111(5), 66.7(10), 69(11), 83(2.1), 103(1) and 103(1.1) of the Act, do not establish a general policy against profit trading (Reasons at paragraph 102).

- Subsections 103(1) and 103(1.1) of the Act target partnership agreements that are tax-motivated or unreasonable. In this case, there is no indication that the allocation scheme in the partnership agreement was chosen for tax purposes or

that it was unreasonable. Further, there is no indication that the sharing of income between Nuinsco and the general partner was unreasonable. There is possibly an abuse if subsection 103(1) is considered in tandem with subsection 96(1.01), but the Court declined to decide the point because the Crown had not put subsection 96(1.01) in issue (Reasons at paragraphs 97-101).

- Subsection 96(1), subsection 111(1) and section 66.7 of the Act were relied on to obtain the tax benefit, but these provisions do not evidence a policy against profit trading (Reasons at paragraph 114).

- In reference to subsection 96(1), the Crown did not provide a detailed analysis to establish the object, spirit or purpose of this provision.

- Based on the Court's own determination regarding subsection 96(1), the object, spirit or purpose of this provision is for a partner's income from a partnership to be determined in accordance with the partnership agreement. In addition, the allocation of income can be made at the end of the fiscal period based on membership in the partnership at that time, provided that this is specified in the partnership agreement (Reasons at paragraphs 106-108).

- The Court also commented that its conclusion that income may be allocated to persons who are partners at year end is consistent with *Mathew v. Canada*, 2005 SCC 55, [2005] 2 S.C.R. 643 (Reasons at para. 110).

C. *Analysis*

(1) Introduction

[44] The Crown submits that the Tax Court made three errors in its abuse analysis that warrant intervention:

(1) The Court failed to recognize that there is a general scheme in the Act against transferring losses and that a transfer of profits to a loss company is a distinction without a difference and equally abusive.

(2) The Court failed to determine that the partnership allocation provisions in sections 96 and 103 of the Act were misused and circumvented.

(3) The Court failed to have due regard to subsection 111(5) of the Act when the result of the transactions was, in effect, to transfer losses to an arm's length party.

[45] It is only necessary in these reasons to discuss the second of these issues since it is dispositive of this part of the appeal. I express no view on the two other alleged errors which deal with the policy in the Act concerning profit and loss trading. Accordingly, below I discuss whether the Court erred with respect to subsections 96(1) and 103(1).

(2) Proper approach to abuse

[46] The approach to be taken in determining abusive tax avoidance was most recently discussed by the Supreme Court of Canada in *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721, which repeated the guidance from the Supreme Court's prior jurisprudence that it is necessary to determine the object, spirit or purpose of the relevant provisions. This is a search for "the rationale that underlies the words that may not be captured by the bare meaning of the words themselves." The analysis is to be based on a textual, contextual and purposive interpretation of the statute, as it is in all questions of statutory interpretation (*Copthorne* at para. 68-70).

[47] The court must then determine whether an avoidance transaction "frustrates the identified purpose." This will be the case: "(1) where the transaction achieves an outcome the statutory provision was intended to prevent; (2) where the transaction defeats the underlying rationale of the provision; or (3) where the transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose. … At this stage, the Minister must clearly demonstrate that the transaction is an abuse of the Act, and the benefit of the doubt is given to the taxpayer" (*Copthorne* at para. 71-72).

(3) Applicable standard of review

[48] With respect to the applicable standard of review concerning abuse, the general principles have recently been reviewed by this Court. The question of the object, spirit or purpose of the relevant legislation is subject to a correctness review and the question of whether there is an abuse on the particular facts is subject to review based on the palpable and overriding standard (*Pomerleau v. Canada*, 2018 FCA 129 at para. 56).

(4) Object, spirit or purpose of subsection 96(1)

[49] I begin the abuse analysis by considering the object, spirit or purpose of subsection 96(1).

[50] Subsection 96(1) contains a series of rules providing for the calculation of the income and loss of members of a partnership for purposes of the Act. Relevant to this appeal is the allocation rule in paragraph 96(1)(*f*):

96. (1) … income … shall be computed as if …	**96.** (1) … revenu … est calculé comme si …

(*f*) the income of the partnership for a taxation year … were the income of the taxpayer … for the taxation year of the taxpayer in which the partnership's taxation year ends, to the extent of the taxpayer's share thereof;	*f*) le montant du revenu de la société de personnes, pour une année d'imposition, … constituait le revenu du contribuable … pour l'année d'imposition du contribuable au cours de laquelle l'année d'imposition de la société de personnes se termine, jusqu'à concurrence de la part du contribuable;
(Emphasis added)	(Non souligné dans l'original)

[51] It is useful to consider the legislative history of this provision.

[52] Subsection 96(1) of the Act was preceded by a remarkably similar provision in the *Income War Tax Act*, R.S.C. 1927, c. 97. Section 30 of that statute required the income of partners to include "the shares of the partners in the income of the partnership, whether withdrawn or not during the taxation year …".

[53] In the House of Commons debates prior to the introduction of section 30, the Minister of Finance commented that the intent was to impose tax on profits to which the partners are entitled:

> … If we are going to assess an individual who is in business upon his profits in that business, then we should assess a partnership, or a joint stock company upon its profits in its business. But we assess the partners individually upon their incomes, and therefore it is necessary to assess them not only upon the profits that are actually distributed, but upon the profits to which they are entitled. …
>
> (Emphasis added)
>
> (12th Parl., 7th Sess., Vol. 4 (2 August 1917) at p. 4083 (Hon. Thomas White))

[54] This view reflects the foundational principle of the Act that taxpayers are to be taxed on their own earnings, and not the earnings of someone else.

[55] This allocation scheme has been carried through to the present legislation and is reflected in subsection 96(1) of the Act. In a paper titled "The Law of Partnership and the Taxation of Partners" in *Partnership Taxation* (Mississauga, ON: Insight Press, 1989), Mr. Robert Couzin explains the interplay between the law of partnerships and taxation in a manner consistent with the Minister's comment above:

> Save where the Act otherwise provides, provincial (or foreign) law of partnership is applied under the Act. … This is relevant to characterize the arrangement … as well as to determine the consequences that flow from it. …
>
> Thus, the private law of partnership may be relevant in determining the amount and sharing of income, expenses or losses, treatment of new or retiring partners, etc. In each case, one must determine the legal consequences, and then examine how and to what extent they are changed by the Act. While the [Act] necessarily follows the private law, its approach is not entirely consistent with that law. For example, the reification of the "partnership interest" (intended to permit the introduction of capital gains taxation) leads to numerous complexities.
>
> (Article II at p. 1)

[56] I am not aware that Canadian courts have discussed the interplay between private law and taxation with respect to partnerships in any detail, but it was touched upon by Chief Justice Bowman (as he then was) of the Tax Court of Canada in *Penn West Petroleum Ltd. v. Canada*, 2007 TCC 190 at para. 33, [2007] 4 C.T.C. 2063:

> … [The partnership agreement] seeks to allocate what are purely notional proceeds of disposition arising as the result of a deeming provision of the [Act]. … [The agreement] seeks to provide that the deemed disposition that the [Act] dictates falls on the partnership can be shifted contractually to one of the partners even though as a civil matter nothing has changed. I have serious reservations as to whether this can be achieved as a matter of law. …

[57] The comments above reflect the proper approach to paragraph 96(1)(*f*) of the Act, but they do not reflect the object, spirit or purpose of the provision as required in a GAAR analysis. The purpose was expanded upon by the Supreme Court of Canada in *Mathew* at paragraphs 51-52:

> 51 The partnership rules under s. 96 are predicated on the requirement that partners in a partnership pursue a common interest in the business activities of the partnership, in a non-arm's length relationship. Although, on its face, s. 96(1) imposes no restriction on the flow of losses to its partners, except for the treatment of foreign partnerships under s. 96(8), it is implicit that the rules are applied when partners in a partnership carry on a business in common, in a non-arm's length relationship.
>
> 52 The purpose for the broad treatment of loss sharing between partners is to promote an organizational structure that allows partners to carry on a business in common, in a non-arm's length relationship.
>
> (Emphasis added)

[58] In the case at bar, the decision of the Tax Court concluded that, under paragraph 96(1)(*f*), income may be allocated to persons who are members of a partnership at year end so long as the partnership agreement provides for it. It is not clear from the decision whether this statement refers to income determined for private law purposes or income for tax purposes. If it refers to income for tax purposes, it fails to take into account the starting point for the allocation of taxable income – which is the allocation of profit for private law purposes.

[59] The Tax Court decision also fails to have due regard to the purpose of section 96 as stated in *Mathew*, above. As instructed by the Supreme Court, it is contrary to the object, spirit or purpose of subsection 96(1) to use that provision in order to allocate taxable income in a manner that does not assist the organizational structure of the partnership or the efficient conduct of the partnership business.

(5) Object, spirit or purpose of subsection 103(1)

[60] It is also necessary to determine the object, spirit or purpose of subsection 103(1) of the Act. This is an anti-avoidance provision which targets income-sharing agreements among partners that are made principally to reduce or postpone tax. In such a case, the income is to be shared based on what is reasonable in all the circumstances.

[61] Subsection 103(1) was enacted when the Act came into force in 1972. In a paper presented on partnerships in 1971 at the Annual Conference of the Canadian Tax Foundation, the purpose of subsection 103(1) was discussed by Mr. H. Purdy Crawford:

> One area where the use of a partnership in the past has permitted considerable flexibility has been in the ability to split incomes, to allocate between the partners profit-sharing interests on a different basis than capital interests and to adjust partnership interests from time to time either as a result of a renegotiation or as contemplated at the time of initial negotiation. It would appear that the draftsmen of the legislation recognized these possibilities as potential areas for tax avoidance. …
>
> ("Partnerships" in *Report on the Annual Conference of the Canadian Tax Foundation (1971)* (Toronto: Canadian Tax Foundation, 1972) 427, at p. 437)

[62] The object, spirit or purpose of subsection 103(1) is relatively clear – it is to counter tax avoidance arrangements in which partners agree to share income principally for tax reasons and the resulting allocation is unreasonable taking all the circumstances into account.

[63] The Tax Court decision determined that it is not within the object, spirit or purpose of subsection 103(1), by itself, to require a reallocation of income between current and former partners. In my view, this conclusion does not have due regard to the breadth of the language

used in the provision. Subsection 103(1) applies when partners agree to share income in a particular way. Since income from a partnership is allocated at the end of a fiscal period based on the income for that period, subsection 103(1) must potentially apply to all persons who are partners during the fiscal period of a partnership. Accordingly, depending on the circumstances it may be unreasonable for purposes of subsection 103(1) for a partnership agreement to allocate the entire income for a fiscal period to a current partner to the exclusion of a former partner.

(6) Application to the facts

(a) *General*

[64] At this stage, it must be considered whether the object, spirit or purpose of subsection 96(1) or 103(1) was frustrated. The Tax Court did not correctly identify the object, spirit or purpose of either provision, and this directly affected the Court's conclusion that there was no abuse. In the circumstances, this part of the analysis will be considered afresh.

[65] According to the Supreme Court's jurisprudence, abusive tax avoidance is found: "(1) where the transaction achieves an outcome the statutory provision was intended to prevent; (2) where the transaction defeats the underlying rationale of the provision; or (3) where the transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose" (*Copthorne* at para. 72).

[66] The abuse must be clear, and it must be established by the Crown. In my view, these requirements are satisfied with respect to both paragraph 96(1)(*f*) and subsection 103(1).

[67] In the analysis below, I have focussed on the avoidance transaction that is the acquisition of the shares of Partnerco by Nuinsco.

(b) *Was there an abuse of subsection 96(1)?*

[68] The question is whether the allocation of the partnership's income for tax purposes to Nuinsco, which became a partner one day before the end of the partnership's fiscal period, frustrates the object, spirit or purpose of paragraph 96(1)(*f*). There are no doubt many situations in which an allocation of taxable income and loss to persons who are partners at the fiscal year end is not abusive, but this is not one of them. In this case, the allocation frustrates the object, spirit or purpose of the provision as historically understood and as set out in *Mathew*, above. It does this by divorcing the economic consequences of the arrangement from the allocation of taxable income.

[69] Under the partnership agreement that was in effect throughout the series of transactions, allocations of income and loss (determined under generally accepted accounting principles) and taxable income and loss (determined under the Act) were to be made to persons who were partners at year end. Distributions could be made at any time in the discretion of the general partner.

[70] The allocation of taxable income to Nuinsco pursuant to the partnership agreement notionally complies with the text of subsection 96(1)(*f*) because it conforms with Nuinsco's entitlement to profit under private law. However, the allocation frustrates the purpose of this provision because Nuinsco's allocation, and its participation in the partnership in general, in no

way facilitates an "organizational structure that allows partners to carry on business in common" (*Mathew*, at para. 52). The allocation facilitates only one thing — avoidance of liability under the Act. This is starkly illustrated by considering the overall results of the series of transactions:

- From an economic perspective, the sole benefit to Nuinsco was receipt of an amount equal to 10 percent of the taxable income allocated to Nuinsco. This was in essence a deal fee for enabling the Onni Group to access Nuinsco's tax losses and deductions.

- Except for the amount of the "deal fee", the entire earnings of the partnership from the Marquis Grande development ended up in the hands of the Holdcos. Part of this, roughly two-thirds, was loaned by the partnership to the Partnercos which then distributed it to the Holdcos. The other one-third was received by the Holdcos from Nuinsco as consideration for the shares of the Partnercos. Nuinsco recouped this payment from the earnings of the partnership.

- Although the partnership made a distribution in the amount of $12,041,997 to Nuinsco once it became a partner, the distribution is misleading because the majority of the partnership's profit had already been distributed to the Holdcos prior to the sale to Nuinsco.

- From an operations perspective, the partnership conducted minimal business operations after Nuinsco acquired the Partnercos. At the time of the acquisition, the real estate development was nearing completion, with just a few strata units remaining to be sold. Two weeks after the acquisition, the partnership exercised an option that allowed it to sell the remaining strata units to the Onni Group at a fixed price. And two weeks after that, the partnership was dissolved.

- From the time of the acquisition of the Partnercos, Nuinsco had virtually no economic interest or risk in the real estate development. In carefully crafted arrangements, all economic interest and risk had been passed on to the Onni Group. The documents gave the appearance that Nuinsco had a potential further economic interest if it failed to exercise the option, but this right was illusory.

> From a practical standpoint, Nuinsco was going to exercise the option, and receive a pre-determined amount for the unsold strata units. It did not intend to leave itself vulnerable to risk by retaining a real economic interest, as evidenced partly by the fact that legal title to the real estate and ongoing operations had already been put in the hands of the Onni Group.

[71] The result of the series of transactions was that the De Cotiis family had shifted the entire taxable income from the development to an unrelated party which had virtually no economic interest or risk, except for a 10 percent "deal fee". I agree with the Crown that this defeats the object, spirit or purpose of subsection 96(1) and therefore there is an avoidance transaction that is abusive.

(c) *Was there an abuse of subsection 103(1)?*

[72] There is also a question as to whether the allocation of the partnership's taxable income to Nuinsco frustrates the object, spirit or purpose of subsection 103(1) of the Act.

[73] The Crown refers to the vacuity of the transactions as evidencing an intent to thwart subsection 103(1). It relies on this Court's decision in *XCO Investments Ltd. v. Canada*, 2007 FCA 53, 2007 D.T.C. 5146 in which subsection 103(1) was applied in similar circumstances.

[74] Holdco, on the other hand, suggests that subsection 103(1) cannot be invoked because the allocation formula was "rational, reasonable and normal" (*Signum Communications Inc. v. Canada*, 88 D.T.C. 6427, [1988] 2 C.T.C. 239 (F.C.T.D.); affirmed 91 D.T.C. 5360, [1991] 2 C.T.C. 31 (F.C.A.)).

[75] In my view, for the reasons discussed above under the subsection 96(1) analysis the relevant transactions, similar to the transactions in *XCO*, are the type of unreasonable arrangements to which subsection 103(1) is intended to apply. It may often be reasonable to allocate taxable income to persons who are partners at year end, but it was not reasonable in the transactions that took place here that are devoid of any material substance except for the "deal fee".

[76] I would also point out for clarification that the Minister may not have had to resort to the GAAR in this case because subsection 103(1) appears to apply on its own. The Crown suggests that the GAAR was necessary because Holdco relied on paragraphs 88(1)(*e.2*) and 87(2)(*e.1*) of the Act to avoid subsections 96(1.01) and 103(1). I have reservations that the section 87 and 88 provisions have this effect because they do not have general application to partnerships. They provide for a continuation of a certain corporations than are wound up but the continuity only applies in respect of a partnership interest.

[77] In any event, nothing turns on this in this appeal. Either subsection 103(1) applies on its own, or it applies as a result of the application of the GAAR. Not surprisingly, Holdco did not take the position that the GAAR should not apply because subsection 103(1) is applicable on its own.

[78] Finally, I wish to comment briefly about the relevance of subsection 96(1.01) of the Act, which was referred to in the reasons of the Tax Court and in the submissions of the Crown in this appeal. This provision, which was enacted in 2013 and is retroactive to 1995, provides that a

person who ceases to be a partner in a fiscal period is deemed to be a member of the partnership at the end of the period. Subsection 96(1.01) does not affect any of the analysis in these reasons. In particular, it is not necessary that Partnerco be an actual member of the partnership at the end of the fiscal period for the GAAR to be applied to either subsection 96(1) or 103(1).

(7) Conclusion

[79] In the result, I conclude that Partnerco was properly assessed to include a portion of the partnership's taxable income, and accordingly it has a tax liability for purposes of section 160. This conclusion is subject to the invalidity issue, discussed below.

V. Is the assessment of Partnerco invalid?

A. *Background*

[80] Holdco submits in the alternative that the GAAR assessment issued to Partnerco is invalid because the assessment was issued for a notional period (May 1 to June 1, 2006) that does not constitute a taxation year. Holdco submits that there were two taxation years in this period, May 1 to 28, 2006 and May 29 to June 1, 2006. Without a valid assessment, Partnerco does not have a tax liability for the stated period with the result that there was nothing to assess in the hands of Holdco under section 160 of the Act.

[81] The relevant background to the issue is set out below:

- Partnerco filed separate tax returns for two taxation years, May 1 to 28, 2006 and May 29 to June 1, 2006. Income of nil was reported in each return. The returns reflected the fact that Partnerco had a deemed year end on May 28, 2006 as a result of the sale of its shares to Nuinsco.

- The Minister issued notices in accordance with the returns that no tax was payable for either taxation year. The notices were issued on December 21, 2006 and February 27, 2007, respectively.

- The GAAR assessment was issued to Partnerco pursuant to a notice of assessment dated February 23, 2011 (the Partnerco assessment). It included the taxable income of the partnership that Partnerco had shifted to Nuinsco. This encompassed the taxable income related to the Marquis Grande development that was allocable by the partnership on its fiscal periods ending May 31, 2006 and June 28, 2006. The latter date is when the partnership was dissolved.

- At the time of the Partnerco assessment, the Minister was precluded from assessing the taxation year from May 1 to 28, 2006 due to the statute bar provisions in subsection 152(4) of the Act. The taxation year of May 29 to June 1, 2006 was still open for assessment at the time that the Partnerco assessment was issued.

- The notice of assessment stated that it was for a taxation year ending June 1, 2006. The notice did not clearly state the commencement date of the taxation year, but the parties indicated in their agreed statement of facts that the assessment was “in

relation to a taxation year commencing May 1, 2006 …" (Appeal Book, p. 1299 at para. 90). I accept that this is the commencement date.

- The assessing period of May 1 to June 1, 2006 ignored the deemed year end of May 28, 2006. The Tax Court determined that it was not a reasonable tax consequence for the Minister to ignore this year end when assessing Partnerco on the basis that it was unnecessary to do so. The Court also concluded that it would be a reasonable tax consequence to ignore the deemed year end in applying the GAAR to the Holdco assessment, because the deemed year end enabled Holdco to avoid the application of section 160. This is discussed below. (Reasons at para. 116-123.)

[82] The Tax Court concluded that the Partnerco assessment was valid and not statute barred. In particular, it determined that the assessment was an assessment of the taxation year ending June 1, 2006 and not an assessment of the taxation year ending May 28, 2006 (Reasons at para. 45-47).

B. *Analysis*

[83] The parties provided brief submissions on this issue at the hearing. However, both took the opportunity to greatly expand on their submissions after the hearing in response to a direction by the Court requesting that counsel address an apparent factual error in the agreed facts to the effect that the Minister had issued initial assessments instead of notices that no tax was owing.

The submissions inappropriately addressed the invalidity issue at large, even though this was not requested by the Court.

[84] Holdco submitted that the Minister had no authority to ignore the deemed year end when assessing Partnerco. Consequently, the Partnerco assessment is invalid because it encompasses two taxation years, May 1 to 28, 2006 and May 29 to June 1, 2006, which contravenes the statute bar provisions which contemplate one assessment for each taxation year.

[85] There is no error in the Tax Court's conclusion that the Minister unreasonably assessed Partnerco based on a notional period of May 1 to June 1, 2006. However, this does not mean that the Partnerco assessment is invalid.

[86] Generally, mistakes in assessments and in notices of assessment may be corrected by way of reassessment. A taxpayer is required to file a notice of objection to preserve its appeal rights and the original assessment is valid until it has been replaced. (See Colin Campbell, *Administration of Income Tax 2018* (Toronto: Thomson Reuters, 2018) at p. 406-409.)

[87] In *Lornport Investments Ltd. v. Canada*, [1992] 2 F.C. 293, 92 D.T.C. 6231, this Court considered whether a statute barred assessment is voidable and not void due to the general curative provision in subsection 152(8) of the Act. This provision reads:

152. (8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or	**152**. (8) Sous réserve des modifications qui peuvent y être apportées ou de son annulation lors d'une opposition ou d'un appel fait en vertu de la présente partie et sous réserve d'une nouvelle cotisation, une

omission in the assessment or in any proceeding under this Act relating thereto.	cotisation est réputée être valide et exécutoire malgré toute erreur, tout vice de forme ou toute omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.

[88] In concluding that subsection 152(8) does not apply to statute barred assessments, the Court in *Lornport* commented as follows:

> … It seems to me that [subsection 152(8)] is not addressed to a situation where an assessment is issued out of time but rather to a situation where an assessment is issued in time but contains an "error, defect or omission" or that such is contained in any proceeding under the Act relating to it.
>
> (D.T.C. at p. 6233)

[89] Just prior to *Lornport*, this Court also determined that an out of time assessment is not void if the Minister alleges misrepresentation or fraud. In *Canada v. Canadian Marconi Company*, [1992] 1 F.C.R. 655 at p. 661, 91 D.T.C. 5626 at p. 5629 (F.C.A.), the Court commented:

> Where the Minister alleges, expressly or implicitly, misrepresentation or fraud, there is nothing offensive in putting a taxpayer on notice that he must object to an out-of-time reassessment. It is, with respect, quite otherwise absent an allegation of fraud or misrepresentation. An obvious policy consideration nourishes the distinction in treatment.

[90] On the facts of this case, there is no good reason, based either on policy or the language of the statute, for the Partnerco assessment to be invalid or void.

[91] In Holdco's subsequent submissions, it suggests that the Minister is attempting to create a taxation year to indirectly assess what cannot be assessed directly.

[92] I disagree with this submission. Holdco did not explain how the Minister is inappropriately trying to assess what cannot be assessed directly. It is true that the Minister was precluded from assessing the period from May 1 to 28, 2006, but the Minister has never alleged that there was any income in this period which potentially could give rise to an assessment. The assessing action by the Minister did not change the substance of the notification previously issued that there was no tax payable for the period of May 1 to 28, 2006.

[93] Holdco suggested at the hearing that the assessment encompassing two taxation years should be void because it creates problems with the statute bar provisions which contemplate an assessment for one taxation year only. Holdco submits that the interests of predictability, fairness and certainty are at stake.

[94] I do not agree that interests of predictability, fairness and certainty are at stake on the facts of this case. As mentioned, the Minister did not purport to include income for the statute barred period of May 1 to 28, 2006, and the period for which income was included, May 29 to June 1, 2006, was not statute barred.

[95] The situation is one in which the mistake should be corrected by a reassessment rather than by finding the assessment to be void. An appeal of the Partnerco assessment was not before the Tax Court or this Court and therefore the assessment cannot be corrected by the Court ordering a reassessment. That does not matter. As mentioned earlier, Holdco does not have any greater rights regarding the Partnerco assessment than Partnerco would have had if it had appealed the assessment directly.

[96] In my view, the Tax Court made no error in concluding that the Partnerco assessment was valid.

VI. Does the GAAR apply to Holdco?

A. *Overview*

[97] Holdco was issued an assessment under which joint and several liability was imposed for Partnerco's tax liability. This assessment was also issued pursuant to the GAAR on the basis that Nuinsco's acquisition of Partnerco, which created a deemed year end for Partnerco, frustrated the application of section 160 of the Act.

[98] The general purpose of section 160 as a collection tool is well known. In this particular case, section 160 would apply to Holdco if Partnerco transferred property to it for less than fair market value consideration and if in the same taxation year Partnerco had a tax liability.

[99] The Minister assumed that the series of transactions circumvented section 160 by causing a deemed year end in Partnerco at a point which would enable Holdco to avoid the application of the provision. This was accomplished by having a year end arise after a transfer of property but before the tax liability was incurred.

B. *Tax Court decision*

[100] The Tax Court considered the application of the GAAR to Holdco in accordance with GAAR's three elements – a tax benefit, an avoidance transaction and an abuse.

[101] As for the first element, the Court concluded that there was no tax benefit because any transfers of property from Partnerco to Holdco were for fair market value consideration. The Court focussed on two transfers: (1) the redemption of Partnerco's shares that were issued by way of stock dividends; and (2) the loan from the partnership to Nuinsco together with the payment by Nuinsco for the acquisition of the shares of Partnerco. According to the Tax Court's analysis these transfers were for fair market value consideration and there was no tax benefit.

[102] Notwithstanding that this was dispositive of the GAAR issue, the Court also made findings with respect to the two other GAAR elements.

[103] As for an avoidance transaction, the Court concluded that the sale of the shares of Partnerco to Nuinsco was an avoidance transaction.

[104] As for an abuse, the Court concluded that section 160 would have been abused if there had been a tax benefit. The Court considered the object, spirit or purpose of section 160 at paragraph 167 of its reasons:

> … I find that the [Crown] has sufficiently demonstrated the existence of an underlying policy against allowing those who incur liability for income tax from reducing, through transfers to non-arm's length parties at a time where the transferor is so liable or reasonably likely to anticipate incurring such liability, the pool of assets with which they may satisfy that tax debt.

[105] As for whether the transactions frustrated this purpose, the Court commented at paragraph 168:

> … the manner in which the series of transactions operated so as to allow for the transfer of cash from [partnership] indirectly to [Holdco] while footing Nuinsco

or Partnerco itself with the tax liability due to the operation of the deemed year end rules was abusive of section 160.

C. *Analysis*

(1) Introduction

[106] Both parties submit that the Tax Court made errors in the GAAR analysis. The Crown submits that the Court erred in failing to find a tax benefit and Holdco submits that the Tax Court erred with respect to abuse. The Crown's submissions will be considered first.

(2) Was there a tax benefit?

[107] The Crown submits that the Tax Court erred in concluding that there was no tax benefit because there were no transfers of property for less than fair market value. According to the Crown, there were two transfers without any consideration – the redemption of preferred shares of Partnerco held by Holdco and a loan to Nuinsco in combination with the payment by Nuinsco for the balance of the Partnerco shares. For purposes of this appeal, it is necessary to consider only the first transfer because the amount of this transfer exceeds the liability that was assessed under section 160.

[108] Whether the redemption of shares is a transfer of property without consideration raises a question of mixed fact and law for which the palpable and overriding standard of review applies (*Housen v. Nikolaisen*, 2002 SCC 33 at para. 36, [2002] 2 S.C.R. 235; *Copthorne* at para. 34).

[109] A tax benefit, as that term is defined in subsection 245(1) of the Act, includes the "avoidance … of [an] amount payable under this Act …". This would include the avoidance of a liability under section 160 of the Act.

[110] One of the requirements of section 160 is that property has been transferred for less than fair market value consideration (subparagraph 160(1)(*e*)(i)). For this purpose a transfer includes a transfer "indirectly, by means of a trust or by any other means whatever, …".

[111] Although the Crown describes the relevant transfer of property as the redemption of shares, the focus of its submissions is on the overall effect of the combination of the issuance of stock dividends followed by the immediate redemption of the shares just issued (Crown's memorandum, at para. 91).

[112] In my view, the Tax Court erred by failing to consider this combination. The stock dividends and the redemption together resulted in a transfer of cash "indirectly … by any means whatever" from Partnerco to Holdco without consideration. It was an extricable error of law for the Court to fail to consider this language in this part of its analysis.

[113] The two steps together resulted in the equivalent of a cash dividend. In *Algoa Trust v. Canada* (February 4, 1998, docket A-201-93, unreported), this Court upheld the decision of the Tax Court (*Algoa Trust v. Canada*, 93 D.T.C. 405, [1993] 1 C.T.C. 2294) which concluded that a cash dividend is a transfer of property without consideration for purposes of section 160.

[114] According to the reasons of the Tax Court in *Algoa Trust*, a "shareholder gives consideration for the shares and not for what the shares may bring. … When the shareholder receives a dividend it is not as a result of any consideration he or she gave the corporation and which the corporation is obliged to pay for investing …" (D.T.C. at p. 411). According to the record of the Federal Court of Appeal, the oral reasons confirming the Tax Court's decision briefly stated that counsel "has not been able to convince us that Judge Rip made any error in deciding as he did."

[115] Although the *Algoa Trust* decision deals with a cash dividend, the combination in this case of stock dividends followed by a redemption has the same effect and similarly results in a transfer of property without consideration.

[116] In my view the Tax Court erred in failing to conclude that there was a "tax benefit" as defined in subsection 245(1) of the Act.

(3) Was there an abuse?

[117] As explained above, the Tax Court concluded that there would be abusive tax avoidance if there were a tax benefit.

[118] The legal principles that are applicable in determining abuse and the relevant standard of review are discussed in the Partnerco analysis above.

[119] It is first necessary to determine the object, spirit or purpose of section 160 by conducting a textual, contextual and purposive interpretation of the Act.

[120] By its terms, the purpose of section 160 is to impose joint and several liability where a transfer of property occurs in the same taxation year that a tax liability arises or a later taxation year.

[121] The Crown submits that the object, spirit or purpose of section 160 is to include a tax liability that has not yet arisen but is reasonably likely to be incurred. It is not necessary in this appeal to consider whether section 160 has this expanded purpose and I express no view on it.

[122] The next question is whether the object, spirit or purpose was frustrated by an avoidance transaction. As described in the Partnerco abuse analysis, this will be the case where "(1) where the transaction achieves an outcome the statutory provision was intended to prevent; (2) where the transaction defeats the underlying rationale of the provision; or (3) where the transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose. … At this stage, the Minister must clearly demonstrate that the transaction is an abuse of the Act, and the benefit of the doubt is given to the taxpayer" (*Copthorne* at para. 72).

[123] In this case, section 160 was circumvented by the acquisition of control of Partnerco which resulted in a deemed year end on May 28, 2006. The deemed year end defeats section 160 because the transfer of property (i.e., stock dividends/redemption) occurred in a taxation year prior to when the tax liability arose. As discussed above, the acquisition of control of Partnerco

arose as part of a series of transactions that was devoid of any purpose or effect except to obtain a tax benefit, or in this case two tax benefits – the avoidance of tax by Partnerco and the avoidance of liability under section 160 by Holdco.

[124] Holdco submits that the Tax Court's abuse analysis is contrary to the principle set out by this Court in *Canada v. Landrus*, 2009 FCA 113 at para. 47, 2009 D.T.C. 5085:

> … [W]here it can be shown that an anti-avoidance provision has been carefully crafted to include some situations and exclude others, it is reasonable to infer that Parliament chose to limit their scope accordingly.

[125] With respect, this excerpt from *Landrus* only tells part of the story. In another part of the reasons in *Landrus*, the Court makes it clear that abuse may be established by the vacuity of transactions. At paragraph 56, the Court states:

> I accept that the transactions in issue would be arguably abusive if they had given rise to the tax benefit in circumstances where the legal rights and obligations of the respondent were otherwise wholly unaffected. …

[126] The *Landrus* decision supports the conclusion that the acquisition of control of Partnerco is abusive of section 160. There is no error in the Tax Court's conclusion on abuse.

(4) Conclusion

[127] For the reasons above, I conclude that the Tax Court erred with respect to its conclusion that the GAAR did not apply to Holdco.

VII. Disposition

[128] I would allow the appeal, set aside the decision of the Tax Court, and giving the judgment which the Tax Court ought to have given I would dismiss Holdco's appeal to the Tax Court of Canada.

[129] The issue of costs is reserved. Holdco has requested to make written submissions and I would therefore direct that the Crown file written submissions (maximum 5 pages) within 10 days of the date of this decision. Holdco may file a written reply within a further 10 days (maximum 5 pages) and the Crown may file a brief response (maximum 2 pages) within a further 5 days.

"Judith M. Woods"
J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Mary J. L. Gleason J.A."

APPENDIX

***Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)**	***Loi de l'impôt sur le revenu*, L.R.C. (1985), ch. 1 (5e suppl.)**
87. (2) Where there has been an amalgamation of two or more corporations after 1971 the following rules apply:	**87.** (2) Lorsqu'il y a eu fusion de plusieurs sociétés après 1971, les règles suivantes s'appliquent :
…	[…]
(*e*.1) where a partnership interest that is capital property has been acquired from a predecessor corporation to which the new corporation was related, for the purposes of this Act, the cost of that partnership interest to the new corporation shall be deemed to be the amount that was the cost of that interest to the predecessor corporation and, in respect of that partnership interest, the new corporation shall be deemed to be the same corporation as and a continuation of the predecessor corporation;	*e*.1) dans le cas où une participation dans une société de personnes qui est une immobilisation a été acquise auprès d'une société remplacée à laquelle la nouvelle société était liée, le coût de cette participation pour la nouvelle société est réputé, pour l'application de la présente loi, être son coût pour la société remplacée et, en ce qui concerne cette participation, la nouvelle société est réputée être la même société que la société remplacée et en être la continuation;
88. (1) Where a taxable Canadian corporation (in this subsection referred to as the "subsidiary") has been wound up after May 6, 1974 and not less than 90% of the issued shares of each class of the capital stock of the subsidiary were, immediately before the winding-up, owned by another taxable Canadian corporation (in this subsection referred to as the "parent") and all of the shares of the subsidiary that were not owned by the parent immediately before the winding-up were owned at that time by persons with whom the parent was dealing at arm's length, notwithstanding any other provision of this Act other than subsection 69(11), the following rules	**88.** (1) Lorsqu'une société canadienne imposable (appelée « filiale » au présent paragraphe) a été liquidée après le 6 mai 1974, qu'au moins 90 % des actions émises de chaque catégorie de son capital-actions appartenaient, immédiatement avant la liquidation, à une autre société canadienne imposable (appelée « société mère » au présent paragraphe) et que toutes les actions de la filiale qui n'appartenaient pas à la société mère immédiatement avant la liquidation appartenaient alors à des personnes avec lesquelles la société mère n'avait pas de lien de dépendance, les règles suivantes s'appliquent malgré les autres

apply:

…

(*e*.2) paragraphs 87(2)(*c*), (*d*.1), (*e*.1), (*e*.3), (*e*.42), (*g*) to (*l*), (*l*.21) to (*u*), (*x*), (*z*.1), (*z*.2), (*aa*), (*cc*), (*ll*), (*nn*), (*pp*), (*rr*) and (*tt*) to (*ww*), subsection 87(6) and, subject to section 78, subsection 87(7) apply to the winding-up …

96. (1) Where a taxpayer is a member of a partnership, the taxpayer's income, non-capital loss, net capital loss, restricted farm loss and farm loss, if any, for a taxation year, or the taxpayer's taxable income earned in Canada for a taxation year, as the case may be, shall be computed as if

(*a*) the partnership were a separate person resident in Canada;

(*b*) the taxation year of the partnership were its fiscal period;

(*c*) each partnership activity (including the ownership of property) were carried on by the partnership as a separate person, and a computation were made of the amount of

(i) each taxable capital gain and allowable capital loss of the partnership from the disposition of property, and

(ii) each income and loss of the partnership from each other source or from sources in a

dispositions de la présente loi, exception faite du paragraphe 69(11):

[…]

e.2) les alinéas 87(2)*c*), *d*.1), *e*.1), *e*.3), *e*.42), *g*) à *l*), *l*.21) à *u*), *x*), *z*.1), *z*.2), *aa*), *cc*), *ll*), *nn*), *pp*), *rr*) et *tt*) à *ww*), le paragraphe 87(6) et, sous réserve de l'article 78, le paragraphe 87(7) s'appliquent à la liquidation, […]:

96. (1) Lorsqu'un contribuable est un associé d'une société de personnes, son revenu, le montant de sa perte autre qu'une perte en capital, de sa perte en capital nette, de sa perte agricole restreinte et de sa perte agricole, pour une année d'imposition, ou son revenu imposable gagné au Canada pour une année d'imposition, selon le cas, est calculé comme si :

a) la société de personnes était une personne distincte résidant au Canada;

b) l'année d'imposition de la société de personnes correspondait à son exercice;

c) chaque activité de la société de personnes (y compris une activité relative à la propriété de biens) était exercée par celle-ci en tant que personne distincte, et comme si était établi le montant :

(i) de chaque gain en capital imposable et de chaque perte en capital déductible de la société de personnes, découlant de la disposition de biens,

(ii) de chaque revenu et perte de la société de personnes afférents à chacune des autres

particular place,

for each taxation year of the partnership;

(*d*) each income or loss of the partnership for a taxation year were computed as if

(i) this Act were read without reference to sections 34.1 and 34.2, subsection 59(1), paragraph 59(3.2)(*c*.1) and subsections 66.1(1), 66.2(1) and 66.4(1), and

(ii) no deduction were permitted under any of section 29 of the *Income Tax Application Rules*, subsection 65(1) and sections 66, 66.1, 66.2, 66.21 and 66.4;

(*e*) each gain of the partnership from the disposition of land used in a farming business of the partnership were computed as if this Act were read without reference to paragraph 53(1)(i);

(*e*.1) the amount, if any, by which

(i) the total of all amounts determined under paragraphs 37(1)(a) to 37(1)(c.1) in respect of the partnership at the end of the taxation year

sources ou à des sources situées dans un endroit donné,

pour chaque année d'imposition de la société de personnes;

d) chaque revenu ou perte de la société de personnes pour une année d'imposition était calculé comme si :

(i) d'une part, il n'était pas tenu compte des articles 34.1 et 34.2, du paragraphe 59(1), de l'alinéa 59(3.2)*c*.1) ni des paragraphes 66.1(1), 66.2(1) et 66.4(1),

(ii) d'autre part, aucune déduction n'était permise par le paragraphe 65(1) et les articles 66, 66.1, 66.2, 66.21 et 66.4 ni par l'article 29 des *Règles concernant l'application de l'impôt sur le revenu*;

e) chaque gain de la société de personnes résultant de la disposition de fonds de terre utilisés dans une entreprise agricole de la société de personnes était calculé compte non tenu de l'alinéa 53(1)i);

e.1) était déduit, en application du paragraphe 37(1), par la société de personnes dans le calcul de son revenu pour l'année l'excédent éventuel du total visé au sous-alinéa (i) sur le total visé au sous-alinéa (ii):

(i) le total des montants déterminés aux alinéas 37(1)a) à c.1) quant à la société de personnes à la fin d'une année d'imposition

exceeds

(ii) the total of all amounts determined under paragraphs 37(1)(*d*) to 37(1)(*g*) in respect of the partnership at the end of the year

(ii) le total des montants déterminés aux alinéas 37(1)*d*) à *g*) quant à la société de personnes à la fin de l'année;

were deducted under subsection 37(1) by the partnership in computing its income for the year;

(*f*) the amount of the income of the partnership for a taxation year from any source or from sources in a particular place were the income of the taxpayer from that source or from sources in that particular place, as the case may be, for the taxation year of the taxpayer in which the partnership's taxation year ends, to the extent of the taxpayer's share thereof; and

f) le montant du revenu de la société de personnes, pour une année d'imposition, tiré d'une source quelconque ou de sources situées dans un endroit donné, constituait le revenu du contribuable tiré de cette source ou de sources situées dans cet endroit donné, selon le cas, pour l'année d'imposition du contribuable au cours de laquelle l'année d'imposition de la société de personnes se termine, jusqu'à concurrence de la part du contribuable;

(*g*) the amount, if any, by which

g) la perte du contribuable — à concurrence de la part dont il est tenu — résultant d'une source ou de sources situées dans un endroit donné, pour l'année d'imposition du contribuable au cours de laquelle l'année d'imposition de la société de personnes se termine, équivalait à l'excédent éventuel :

(i) the loss of the partnership for a taxation year from any source or sources in a particular place,

(i) de la perte de la société de personnes, pour une année d'imposition, résultant de cette source ou de ces sources,

exceeds

sur :

(ii) in the case of a specified member (within the meaning of

(ii) dans le cas d'un associé déterminé (au sens de la

the definition **specified member** in subsection 248(1) if that definition were read without reference to paragraph (*b*) thereof) of the partnership in the year, the amount, if any, deducted by the partnership by virtue of section 37 in calculating its income for the taxation year from that source or sources in the particular place, as the case may be, and

(iii) in any other case, nil

were the loss of the taxpayer from that source or from sources in that particular place, as the case may be, for the taxation year of the taxpayer in which the partnership's taxation year ends, to the extent of the taxpayer's share thereof.

définition **d'associé déterminé** figurant au paragraphe 248(1), mais compte non tenu de l'alinéa *b*) de celle-ci) de la société de personnes au cours de l'année, le montant déduit par la société de personnes en application de l'article 37 dans le calcul de son revenu pour l'année d'imposition provenant de cette source ou de ces sources,

(iii) dans les autres cas, zéro.

96. (1.01) If, at any time in a fiscal period of a partnership, a taxpayer ceases to be a member of the partnership

(*a*) for the purposes of subsection (1), sections 34.1, 34.2, 101, 103 and 249.1 and notwithstanding paragraph 98.1(1)(*d*), the taxpayer is deemed to be a member of the partnership at the end of the fiscal period; and

…

96. (1.01) Les règles ci-après s'appliquent dans le cas où un contribuable cesse d'être un associé d'une société de personnes au cours d'un exercice de celle-ci :

a) pour l'application du paragraphe (1), des articles 34.1, 34.2, 101, 103 et 249.1 et malgré l'alinéa 98.1(1)*d*), le contribuable est réputé être un associé de la société de personnes à la fin de l'exercice;

[…]

103. (1) Where the members of a partnership have agreed to share, in a specified proportion, any income or loss of the partnership from any source or from sources in a particular place, as the case may be, or any other amount in respect of any activity of the partnership that is relevant to the

103. (1) Lorsque les associés d'une société de personnes sont convenus de partager en proportions déterminées tout revenu ou perte de la société de personnes provenant d'une source donnée ou de sources situées dans un endroit déterminé ou tout autre montant qui se rapporte à une activité

computation of the income or taxable income of any of the members thereof, and the principal reason for the agreement may reasonably be considered to be the reduction or postponement of the tax that might otherwise have been or become payable under this Act, the share of each member of the partnership in the income or loss, as the case may be, or in that other amount, is the amount that is reasonable having regard to all the circumstances including the proportions in which the members have agreed to share profits and losses of the partnership from other sources or from sources in other places.

quelconque de la société de personnes et qui doit entrer en ligne de compte dans le calcul du revenu ou du revenu imposable de tout associé de cette société de personnes et lorsqu'il est raisonnable de considérer que cette convention a pour objet principal de réduire les impôts ou de différer le paiement des impôts qui auraient pu être ou devenir payables par ailleurs en vertu de la présente loi, la part du revenu ou de la perte, selon le cas, ou de l'autre montant, revenant à chaque associé de la société de personnes est le montant qui est raisonnable, compte tenu des circonstances, y compris les proportions dans lesquelles les associés sont convenus de partager les profits et les pertes de la société de personnes provenant d'autres sources ou de sources situées à d'autres endroits.

152. (3.1) For the purposes of subsections (4), (4.01), (4.2), (4.3), (5) and (9), the normal reassessment period for a taxpayer in respect of a taxation year is

152. (3.1) Pour l'application des paragraphes (4), (4.01), (4.2), (4.3), (5) et (9), la période normale de nouvelle cotisation applicable à un contribuable pour une année d'imposition s'étend sur les périodes suivantes :

(*a*) if at the end of the year the taxpayer is a mutual fund trust or a corporation other than a Canadian-controlled private corporation, the period that ends four years after the earlier of the day of sending of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of sending of an original notification that no tax is payable by the taxpayer for the year; and

a) quatre ans suivant soit la date d'envoi d'un avis de première cotisation en vertu de la présente partie le concernant pour l'année, soit, si elle est antérieure, la date d'envoi d'une première notification portant qu'aucun impôt n'est payable par lui pour l'année, si, à la fin de l'année, le contribuable est une fiducie de fonds commun de placement ou une société autre qu'une société privée sous contrôle canadien;

(*b*) in any other case, the period that ends three years after the

b) trois ans suivant celle de ces dates qui est antérieure à l'autre,

earlier of the day of sending of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of sending of an original notification that no tax is payable by the taxpayer for the year.

dans les autres cas.

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

152. (4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :

…

[…]

245. (1) In this section,

245. (1) Les définitions qui suivent s'appliquent au présent article.

"tax benefit" means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty;

« attribut fiscal » S'agissant des attributs fiscaux d'une personne, revenu, revenu imposable ou revenu imposable gagné au Canada de cette personne, impôt ou autre montant payable par cette personne, ou montant qui lui est remboursable, en application de la présente loi, ainsi que tout montant à prendre en compte pour calculer, en application de la présente loi, le revenu, le revenu imposable, le revenu imposable gagné au Canada de cette personne ou l'impôt ou l'autre montant payable par cette personne ou le montant qui lui est

remboursable.

"tax consequences" to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount that is relevant for the purposes of computing that amount;

« avantage fiscal » Réduction, évitement ou report d'impôt ou d'un autre montant exigible en application de la présente loi ou augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi. Y sont assimilés la réduction, l'évitement ou le report d'impôt ou d'un autre montant qui serait exigible en application de la présente loi en l'absence d'un traité fiscal ainsi que l'augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi qui découle d'un traité fiscal.

"transaction" includes an arrangement or event.

« operation » Sont assimilés à une opération une convention, un mécanisme ou un événement.

(2) Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

(2) En cas d'opération d'évitement, les attributs fiscaux d'une personne doivent être déterminés de façon raisonnable dans les circonstances de façon à supprimer un avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, de cette opération ou d'une série d'opérations dont cette opération fait partie.

(3) An avoidance transaction means any transaction

(3) L'opération d'évitement s'entend :

(*a*) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or

a) soit de l'opération dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que l'opération est principalement effectuée pour des objets véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un

objet véritable;

(*b*) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit.

b) soit de l'opération qui fait partie d'une série d'opérations dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que l'opération est principalement effectuée pour des objets véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un objet véritable.

(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

(4) Le paragraphe (2) ne s'applique qu'à l'opération dont il est raisonnable de considérer, selon le cas :

(*a*) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of

a) qu'elle entraînerait, directement ou indirectement, s'il n'était pas tenu compte du présent article, un abus dans l'application des dispositions d'un ou de plusieurs des textes suivants :

(i) this Act,

(i) la présente loi,

(ii) the *Income Tax Regulations*,

(ii) le *Règlement de l'impôt sur le revenu*,

(iii) the *Income Tax Application Rules*,

(iii) les *Règles concernant l'application de l'impôt sur le revenu*,

(iv) a tax treaty, or

(iv) un traité fiscal,

(v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or

(v) tout autre texte législatif qui est utile soit pour le calcul d'un impôt ou de toute autre somme exigible ou remboursable sous le régime de la présente loi, soit pour la détermination de toute somme à prendre en compte dans ce calcul;

(*b*) would result directly or indirectly in an abuse having

b) qu'elle entraînerait, directement ou indirectement, un abus dans

regard to those provisions, other than this section, read as a whole.

l’application de ces dispositions compte non tenu du présent article lues dans leur ensemble.

(5) Without restricting the generality of subsection (2), and notwithstanding any other enactment,

(5) Sans préjudice de la portée générale du paragraphe (2) et malgré tout autre texte législatif, dans le cadre de la détermination des attributs fiscaux d’une personne de façon raisonnable dans les circonstances de façon à supprimer l’avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, d’une opération d’évitement :

(*a*) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part,

a) toute déduction, exemption ou exclusion dans le calcul de tout ou partie du revenu, du revenu imposable, du revenu imposable gagné au Canada ou de l’impôt payable peut être en totalité ou en partie admise ou refusée;

(*b*) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person,

b) tout ou partie de cette déduction, exemption ou exclusion ainsi que tout ou partie d’un revenu, d’une perte ou d’un autre montant peuvent être attribués à une personne;

(*c*) the nature of any payment or other amount may be recharacterized, and

c) la nature d’un paiement ou d’un autre montant peut être qualifiée autrement;

(*d*) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,

d) les effets fiscaux qui découleraient par ailleurs de l’application des autres dispositions de la présente loi peuvent ne pas être pris en compte.

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-20-17
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. CHIEF JUSTICE E.P. ROSSITER DATED DECEMBER 15, 2016, NO. 2013-4033(IT)G	
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. 594710 BRITISH COLUMBIA LTD.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 17, 2018
REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRED IN BY:	DAWSON J.A. GLEASON J.A.
DATED:	SEPTEMBER 20, 2018

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