Federal Court of Appeal  Cour d'appel fédérale

Date: 20181115

Docket: A-243-17

Citation: 2018 FCA 209

[ENGLISH TRANSLATION]

CORAM: **NOËL C.J.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

2763478 CANADA INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on October 4, 2018.

Judgment delivered at Ottawa, Ontario, on November 15, 2018.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal by 2763478 Canada Inc. (the appellant) from a decision rendered by Justice Paris of the Tax Court of Canada (TCC judge) confirming the reassessment by the Minister of National Revenue (the Minister) pursuant to the general anti-avoidance rule (GAAR)

provided for in section 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA). This assessment disallowed a capital loss of $6,423,650 claimed by the appellant in the computation of its income for the 2005 taxation year.

[2] The TCC judge ruled that the GAAR applied to the tax plan the appellant had put in place, because the capital loss claimed was a paper loss and was the result of an avoidance transaction. The TCC judge also rejected the appellant's alternative argument that an excessive adjustment would result from the disallowed loss, since it would likely lead to double taxation.

[3] In support of its appeal, the appellant alleges that none of the conditions precedent for the application of the GAAR was established before the TCC judge such that he was required to vacate the assessment issued against it. In the alternative, the appellant claims that the disallowance of the loss claimed does not result in a reasonable adjustment for the purposes of subsections 245(2) and (5) given that it will lead to an eventual double taxation of the same capital gain.

[4] For the following reasons, I am of the view that the appeal cannot succeed.

[5] The legislative provisions referred to in the following analysis are set out in the appendix to these reasons.

FACTS

[6] During the relevant period, the appellant was used as an investment vehicle by its sole shareholder, Richard Jobin (Mr. Jobin). At the relevant time, Mr. Jobin was also the sole shareholder and director of Le Groupe AST 1993 Inc. (Groupe AST). Groupe AST operated a business that offered occupational health and safety services from 1989 and that had particularly rapid growth in the late 1990's.

[7] In the fall of 2002, Automatic Data Processing (ADP), an unrelated corporation, expressed a "firm" intention to acquire Groupe AST. The acquisition did not occur until three years later, on January 17, 2005, with the sale of shares in Groupe AST to a corporation created by ADP for this purpose. In preparation for this sale, the following plan was put in place.

[8] First, on January 4, 2005, Mr. Jobin transferred to the appellant, by rollover pursuant to subsection 85(1) of the ITA, the 11,143,607 common shares he held in Groupe AST. At that time, these shares had an adjusted cost base (ACB) of $341,413 and a fair market value (FMV) of $11,143,600. The elected amount was set at $341,413, an amount equal to the promissory note issued in exchange for the shares in Groupe AST. Additionally, 10,802,195 Class E preferred shares with a redemption price of $1 each were issued to Mr. Jobin in exchange for shares in Groupe AST. Because the elected amount reflected the ACB of the transferred shares, the rollover did not give rise to any tax consequence for Mr. Jobin.

[9] On January 6, 2005, Groupe AST added $2,600,000 to the paid-up capital of the common shares held by the appellant. This triggered the application of subsection 55(2) pursuant to which the appellant was deemed to have realized a capital gain of $2,600,000.

[10] On January 14, 2005, the appellant transferred to 9144-4075 Québec Inc. (9144), a company incorporated 6 months earlier, the sole shareholder of which was Mr. Jobin, all the shares it held in Groupe AST (and other related companies) for $12,847,200, a price equal to their FMV. As consideration, the appellant received 9,999,900 Class A shares issued by 9144. The appellant thereby realized a capital gain of $9,875,137 and a total capital gain of $12,475,137 for its 2005 taxation year, considering the deemed gain of $2,600,000 resulting from the application of subsection 55(2).

[11] The arm's length sale was concluded a few days later, on January 17, 2005, when a subsidiary of ADP—6295231 Canada Inc.—acquired the shares held by 9144 in Groupe AST (and certain related companies) for $12,847,200. As this amount was equal to the ACB of the shares sold, 9144 did not realize a capital gain as a result of this sale.

[12] In October 2005, Mr. Jobin continued reorganizing his assets with the goal of implementing an estate freeze and allowing his son, Maxime Jobin, to join him as shareholder of 9144 and partake in the future growth of this company. The expected growth was to come from investments made and managed by Mr. Jobin and his son, using the funds received as a result of the sale of the shares of Groupe AST.

[13] To this end, 9144 declared a stock dividend on the Class A shares held by the appellant by issuing 13,000 Class B shares redeemable for $13,000,000, or $1,000 per share. As the redemption price of the Class B shares exceeded the value of the capital stock of 9144 and since this category of shares had precedence over all other categories of shares, the stock dividend had the effect of transferring the value of the Class A shares to Class B shares. Because the ACB of the shares of these two classes remained otherwise unchanged, the Class A shares then reflected an unrealized loss of $12,847,299, and the Class B shares reflected an unrealized gain of a similar magnitude.

[14] The unrealized loss reflected by the Class A shares was realized the following day, when they were sold for $1 (their FMV) to 9149-2736 Québec Inc. (9149), a company that was incorporated in November 2004 and whose sole shareholder was Maxime Jobin. 9144 and 9149 not being “affiliated persons” within the meaning of section 251.1, the stop-loss rule provided for in subparagraph 40(2)(*g*)(ii) and subsection 40(3.4) was not triggered, thereby leaving the capital loss of $12,847,300 unchanged.

[15] The appellant was therefore able to deduct this loss in computing its taxable capital gains for the taxation year in issue, thereby reducing them to nil.

[16] Relying on the GAAR, the Minister conceded that this result was in compliance with the text of the relevant provisions of the ITA that were relied upon in order to obtain it. She submits, however, that it contrary to their object, spirit and purpose (*Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63 [*Copthorne*], at paragraph 70).

TAX COURT OF CANADA DECISION

[17] The TCC judge held that the GAAR was applicable and went on to disallow the deduction of the capital loss. In reaching this conclusion, the TCC judge applied the three-part test which must be met before the GAAR can apply.

[18] As for the first, the only issue to be determined was the extent of the tax benefit given the appellant's concession that a tax benefit had been achieved. In this respect, the TCC judge found that the amount of the tax benefit was equal to the reduction of tax that would have been payable in the absence of the loss, namely $6,423,650 (Reasons, paragraph 46).

[19] Second, the TCC judge found that the tax benefit resulted from a series of transactions, including one that had no *bona fide* purpose. He noted that according to Mr. Jobin, each step of the plan was essential to the implementation of the estate freeze (Reasons, paragraph 48). However, he concluded that [TRANSLATION] ". . . the estate freeze could also have been implemented if the appellant had received the Class B shares in 9144 directly in exchange for the shares transferred to 9144 and if the Class A shares had been issued directly to 9149" (Reasons, paragraph 49).

[20] Third, citing the case law of this Court, in particular *Triad Gestco Ltd. v. Canada*, 2012 FCA 258 [*Triad Gestco*] and *1207192 Ontario Ltd. v. Canada*, 2012 FCA 259 [*1207192*], the TCC judge concluded that the tax benefit obtained as a result of the series of transactions

frustrated the rationale of paragraphs 38(*b*), 39(1)(*b*) and 40(1)(*b*) of the ITA (Reasons, paragraphs 53 to 56). There was therefore an abuse of these provisions.

[21] Lastly, the TCC judge rejected the appellant's alternative argument that the disallowance of the loss would result in double taxation due to the fact that the Class E preferred shares, currently held by Mr. Jobin, reflected an unrealized gain that corresponds in part to the disallowed loss. Indeed, as was the case in *Triad Gestco*, no credible scenario for the sale of these shares was presented (Reasons, paragraph 59).

ERRORS ALLEGED BY THE APPELLANT

[22] In support of the argument that the GAAR does not apply, the appellant submits first that the capital loss it incurred does not give rise to [TRANSLATION] "a true tax benefit" (Appellant's Memorandum, paragraph 38). Even if a tax benefit was obtained, it must be reduced by the amount of the unrealized gain reflected by the appellant's Class E shares, currently held by Mr. Jobin (Appellant's Memorandum, paragraphs 42 and 43).

[23] Second, the appellant submits that the claimed loss does not result from a series of transactions and that, in any event, all the steps in the alleged series had a *bona fide* purpose. Dealing with the series of transactions, the appellant submits that the primary purpose behind the incorporation of 9144 was to allow for the growth of the amounts obtained from the sale of the shares in Groupe AST to take place in a new entity which would use them as investment funds (Appellant's Memorandum, paragraphs 48 and 59). The decision to use 9144 for estate freeze purposes was made later (Appellant's Memorandum, paragraph 46). Given this belated decision,

the exchange of shares between the appellant and 9144 in January 2005 could not have formed part of the series of transactions (Appellant's Memorandum, paragraphs 50 and 51). According to the appellant, the TCC judge made a palpable and overriding error in holding otherwise.

[24] Otherwise, the appellant submits that each of the transactions had a *bona fide* purpose. It submits that the exchange of shares was a judicious choice that made it possible to sell shares in Groupe AST through 9144 (Appellant's Memorandum, paragraphs 59 and 62). In turn, the declaration of the stock dividend was made in order to ensure that the increased value of 9144 following the freeze was reflected in the Class A shares. As with any estate freeze, the increase in value of the common shares was transferred to the preferred shares in order for the common shares to have a nominal value after the freeze. Lastly, the third transaction had to take place in order to allow Maxime Jobin to participate in the future growth of 9144 (Appellant's Memorandum, paragraphs 66 and 68).

[25] The appellant adds that, in any event, the plan which was implemented did not give rise to an abuse. It submits that the object, spirit and purpose of the provisions relied upon is no broader than what their wording reveals (Appellant's Memorandum, paragraph 92). Recognizing that this Court has already pronounced on the rationale behind paragraphs 38(*b*), 39(1)(*b*) and 40(1)(*b*) of the ITA, the appellant nonetheless challenges this rationale. In this respect, it notes that the concept of "paper loss" is nowhere mentioned in the ITA (Appellant's Memorandum, paragraph 95). The appellant adds that Parliament's intent is not to automatically disallow any loss that is not a true "economic loss" (Appellant's Memorandum, paragraph 96). According to

the appellant, the capital cost allowance system best illustrates this point (Appellant's Memorandum, paragraph 97).

[26] Even if the Court adheres to the approach set out in *Triad Gestco*, the appellant submits that the overall effect of the transactions is not contrary to the rationale behind paragraphs 38(*b*), 39(1)(*b*) and 40(1)(*b*). Distinguishing the present case from those in which the GAAR applied to disallow paper losses, the appellant submits that the main objectives pursued were the sale of the shares in Groupe AST, the estate freeze and the addition of Maxime Jobin as a shareholder of 9144 (Appellant's Memorandum, paragraphs 102, 111, 115, 116, 118, 126 and 127). As none of these objectives is contrary to the rationale underlying any of the provisions relied upon, the appellant submits there was no abuse

[27] In the alternative, the appellant contends that the TCC judge erred in failing to consider the eventual double taxation which it alleges. Specifically, it submits that the TCC judge committed a palpable and overriding error in concluding that no credible double taxation scenario had been presented. Contrary to the situation in *Triad Gestco*, Mr. Jobin will, upon his death, be deemed to have disposed of the Class E shares of the capital stock of the appellant, which reflect the unrealized gain. It follows that this gain will be realized, and that the TCC judge had to consider this eventual gain (Appellant's Memorandum, paragraphs 132 to 141).

[28] Finally, although the appellant notes that the Class B shares of the capital stock of 9144 also reflect an unrealized capital gain commensurate with the loss that was disallowed (Appellant's Memorandum, paragraphs 16, 38, 100 and 138), the appellant does not ask that its

tax consequences be adjusted in order to take into account this unrealized gain. I note in this respect that the appellant has presented no scenario which could lead to the realization of this gain (Compare *Triad Gestco*, paragraphs 58 and 59).

CROWN'S POSITION

[29] In support of her plea that the appeal be dismissed, the Crown essentially adopts the reasons given by the TCC judge as her own. She adds that there was, beyond the alternative transaction identified by the TCC judge, another way to implement the estate freeze without engineering the claimed loss. It submits that the devaluation of the Class A shares before their sale to 9144 can only be explained by a desire to generate a tax loss (Crown's Memorandum, paragraphs 60 to 62).

ANALYSIS

[30] In order to apply the GAAR, the TCC judge had to answer the following three questions in the affirmative: Was there a tax benefit? Was one of the transactions in the series of transactions that resulted in the tax benefit an avoidance transaction? Does the result achieved frustrate the object, spirit and purpose of paragraphs 38(*b*), 39(1)(*b*) and 40(1)(*b*) or, in other words, their reason for being?

- *Standard of review*

[31] The TCC judge's conclusion that there was a tax benefit and that this benefit was the result of an avoidance transaction is based on a finding of fact with the result that it cannot be

overturned in the absence of a palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*], at paragraph 10; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 [*Trustco*], at paragraph 19). As for the alleged abuse, the question to be examined is one of mixed fact and law since it turns on the application of the relevant provisions to the transactions in issue. As such, the abuse finding is also subject to the palpable and overriding error standard. However, the interpretation of the statutory provisions, which must take place before the issue of abuse can be addressed, gives rise to an extricable question of law to be reviewed on a standard of correctness (*Pierre Pomerleau v. The Queen*, 2018 FCA 129 at paragraph 56, citing *Trustco* at paragraph 44 and *Housen* at paragraphs 8 to 37).

- *Tax benefit*

[32] Pursuant to subsection 245(1) of the ITA, a tax benefit is established when, among other things, there is a "reduction" or "avoidance" of tax. The appellant recognized that it declared a capital loss following the sale of Class A shares. This allowed for the deduction of an allowable capital loss of $6,423,650 in the computation of its income, thereby reducing the tax otherwise payable for the year in issue. Based on the plain wording of subsection 245(1), this reduction constitutes a tax benefit.

[33] The appellant submits, however, that the tax benefit so established should be reduced by the unrealized gain reflected in the Class E shares held by Mr. Jobin.

[34] This argument cannot succeed for two reasons. First, it does not take into consideration the fact that unrealized capital gains, like unrealized losses, are not amounts that can be taken into account in computing a "tax benefit" as this term is defined in subsection 245(1). I also note that this unrealized gain is reflected in shares held by Mr. Jobin, a taxpayer who is distinct from the appellant and who is not targeted by the assessment under appeal. I will return to this question at the end of my reasons when I address the appellant's alternative argument.

[35] I therefore conclude that the TCC judge did not err in finding that there was a tax benefit commensurate with the reduction of tax resulting from the claimed loss.

- *Avoidance transaction*

[36] Determining the existence of an avoidance transaction is a two-step process (*Copthorne*, at paragraph 40). First, the tax benefit must result from a transaction or series of transactions. Second, the purpose of the transaction or each transaction within the series of transactions must be identified to determine whether any one of them constitutes an avoidance transaction. If it is found that any transaction within the series was not undertaken primarily for a *bona fide – i.e.*: non-tax – purpose, the series will be treated as an avoidance transaction.

[37] According to the Minister, the three transactions to consider are the exchange of shares that took place on January 14, 2005, between the appellant and 9144; the declaration of a stock dividend by 9144 on October 28, 2005; and the sale of Class A shares by the appellant to 9149 the following day. These transactions constitute a series to the extent that they are related to each

other (*Copthorne*, at paragraph 44). The TCC judge concluded that the three transactions were related and that they constitute the series that produced the tax benefit.

[38] The appellant does not challenge the finding that the creation of the capital loss resulted from the three transactions which it undertook. However, it submits that these transactions do not constitute a series because the first is not related to the other two (Appellant's Memorandum, paragraphs 46 and 50).

[39] In this respect, the appellant submits that the decision to give effect to the estate freeze was only reached after the share exchange, with the result that this transaction did not form part of the series of transactions. I note in this regard that the Supreme Court of Canada has held that it is not necessary for each step in the series to have been determined in advance; it is sufficient that the transactions be completed "because of" or "in relation to" the series (*Trustco*, at paragraph 26). Mr. Jobin recognized that an estate freeze was contemplated as early as 2004 (Testimony of Mr. Jobin, Appeal Book, Vol. 4, Tab H, pages 1006 and 1007; Appellant's Memorandum, paragraph 59b)).

[40] Nevertheless, the appellant submits that the length of time between the first and second transaction is sufficient to establish that the two were unrelated. I agree that the length of time separating transactions may show that they are unrelated (*Copthorne*, at paragraph 47). However, the mere fact that time has passed before an already contemplated series is completed does not establish that the transactions are not related.

[41] At the hearing, counsel for the appellant argued that the decision to implement the estate freeze could not have been made on January 14, 2005, because the sale price of the shares of Groupe AST held by 9144 was subject to adjustments for [TRANSLATION] "contingencies". Suffice it to say that, according to the evidence, these adjustments could be made within a period of at least five years starting January 14, 2005 ("Escrow Agreement" clause 6(b), Appeal Book, vol. 2, page 515), and Mr. Jobin's testimony does not show that he was better informed about any potential contingencies in October 2005 when the second and third transactions took place than he was on January 14, 2005 when the first took place (Testimony of Mr. Jobin, Appeal Book, vol. 4, tab H, pages 43 and 58).

[42] Given that the question whether a transaction is part of a series is one of fact, it was open to the TCC judge to find that the first transaction was linked to the other two transactions and therefore formed part of the series.

[43] The TCC judge next considered whether any of the transactions comprised within the series could be labelled as an avoidance transaction. He first noted that, according to the appellant, the purpose of the series and each of the transactions within it was the estate freeze, insisting that if one of the three transactions had been missing, the freeze could not have been achieved. After indicating that the burden of establishing this assertion rested with the appellant, he found that the issuance of the Class A shares by 9144 in exchange for the shares received from the appellant was not necessary in order to accomplish the estate freeze. The freeze could equally have been achieved if the appellant had received the Class B shares of 9144's capital

stock directly in exchange for the Groupe AST shares and if the Class A shares had been issued directly to 9149 (Reasons, paragraphs 47 to 49).

[44] The appellant challenges this conclusion. It reiterates that the decision to operate the estate freeze was only reached after the issuance of the Class A shares and that the main purpose for this issuance was to keep the investment funds in 9144 where they could be used for the benefit of both the father and the son. The Class A shares were therefore issued primarily for a *bona fide* purpose.

[45] This argument was also considered by the TCC judge, who found that the funds could have been kept in 9144 if the appellant had received the Class B shares directly rather than the Class A shares (Reasons, paragraph 50). Having so found, he held that the appellant had failed to establish that the issuance of the Class A shares by 9144 was mainly motivated by a *bona fide* purpose (Reasons, paragraphs 49 and 51).

[46] This finding seems unassailable. The motivation behind a transaction is ascertained on the basis of objective factors (*Trustco*, at paragraph 29). Given the tax benefit that was obtained, it is not sufficient for the appellant to assert that the main purpose was not tax related, as this goes to the subjective nature of the transaction. After weighing the evidence, the TCC judge did not accept that the tax benefit obtained was merely incidental. The evidence supports this conclusion.

[47] Leaving aside the first transaction, the Crown argues that the second and third transactions are also avoidance transactions. Specifically, the devaluation of the Class A shares was not necessary in order to accomplish the estate freeze. According to the Crown, the appellant could have exchanged the Class A shares for preferred shares on a tax-exempt basis, using the mechanism provided for in subsection 85(1) or 86(1) of the ITA, which would have allowed 9149 to acquire the Class A shares at a low cost— *i.e.*: $1—and therefore to benefit from their future growth. Although this argument was clearly raised by the Crown in its memorandum, counsel for the appellant provided no response during the course of the hearing.

[48] The Crown's argument seems sound to me. If the purpose sought was to freeze the value of the Class A shares which it held and to ensure that Maxime Jobin could partake in 9144's future growth, the appellant could simply have invoked subsection 85(1) or 86(1) and disposed of its Class A shares to 9144 for an amount equal to their ACB, in exchange for preferred shares with a redemption value equal to the value of the Class A shares. This would have enabled the appellant to freeze the value of the Class A shares without any tax becoming exigible. Moreover, any common share issued immediately after the freeze would have had a nominal FMV, thereby allowing 9149 to acquire them at that price and to benefit from any future growth.

[49] In short, none of the transactions which form part of the series was shown to have a *bona fide* purpose.

- *Abuse*

[50] The abuse analysis is carried out in two steps. The first involves determining the object, spirit and purpose of the provisions relied upon to obtain the tax benefit (*Copthorne*, at paragraph 69). The object, spirit and purpose of a given provision is analogous to its rationale (*Copthorne*, at paragraph 70). The second step involves determining whether this rationale has been frustrated by the tax benefit achieved (*Copthorne*, at paragraph 71). In this exercise, the Crown bears the burden of establishing that the provisions in issue, when construed with a focus on their object, spirit and purpose have a broader reach than that revealed by a traditional statutory interpretation (*ibidem*).

(1) The object, spirit and purpose of the relevant provisions

[51] This Court has already considered the object, spirit and purpose of paragraphs 38(*b*), 39(1)(*b*) and 40(1)(*b*) (*Triad Gestco* and *1207192*). The appellant nevertheless invites us to reconsider the meaning and effect previously given to these provisions.

[52] As in these other cases, it is not disputed that the loss resulting from the transfer of value between the Class A and Class B shares and the disposition of the Class A shares the following day was a pure paper loss, in that no economic loss was sustained. Indeed, the appellant was neither richer nor poorer following this transfer. The only change that took place is that rather than holding Class A shares, which had a FMV of about $13,000,000, the appellant held Class B shares with the same FMV.

[53] In *Triad Gestco*, this Court distinguished a “paper loss” from an “economic ” or “true” loss and held that, given the object, spirit and purpose of paragraphs 38(*b*), 39(1)(*b*) and 40(1)(*b*), a paper loss does not give rise to an allowable capital loss (*Triad Gestco*, at paragraphs 39 and 51). The Court drew this distinction after considering the operation of the statutory scheme implemented in 1972 to tax capital gains (*Triad Gestco*, at paragraphs 27 to 36) and the objective that was being pursued (*Ibidem*, at paragraph 42). It was noted that before 1972, increases in the value of capital assets were not taxed. It was following the recommendations of the Carter Commission, which found that increases in the value of capital assets gave rise to a form of enrichment, that the legislative framework aimed at taxing capital gains was implemented (*Carter Commission Report*, 1966, at pages 42 to 44, and *Triad Gestco*, at paragraph 42).

[54] Paragraph 3(*b*) of the ITA is at the root of the regime. It recognizes capital gains as a source of income and makes increases in the value of capital property taxable for the year in which it is realized through the disposition of the property holding the gain. Conversely, a capital loss is recognized when it is realized in the same fashion. Unrealized increases in the value of capital property are not taxable, but it is important to keep in mind the deemed disposition upon death (paragraph 70(5)(*a*)), which effectively makes all increases in the value of capital property held by a taxpayer taxable at that time.

[55] Sections 39 and 40 provide the method for calculating the gain or loss. A loss is incurred when property is disposed of for “proceeds of disposition” that are lower than its “adjusted cost base”. The “adjusted cost base” is the purchase price of a capital property adjusted in accordance

with section 53, and the "proceeds of disposition" is the price for which the property is sold or is otherwise compensated for, as provided in section 54. The difference between the adjusted cost base and the proceeds of disposition of a given property provides a measure of its change in value, and the corresponding increase or decrease in the owner's economic power (*Triad Gestco*, paragraphs 42 and 50).

[56] The appellant points out that the phrases "paper loss" and "economic" or "true" loss appear nowhere in the ITA (Appellant's Memorandum, paragraphs 95 and 96). That is so, but as the Supreme Court explained in *Copthorne* (paragraph 70), a construction focussed on the object, spirit and purpose of a provision may give it a broader meaning than a construction which focuses on the words (to the same effect, see *Triad Gestco*, at paragraph 51). When one considers the object, spirit and purpose of the capital gains regime, it seems clear that allowing a paper loss to offset a true gain would frustrate its reason for being.

[57] The appellant emphasizes that the ITA sometimes recognizes losses that are not actual or true losses. Relying on these instances, it argues that the existence of a true loss cannot be required by the object, spirit and purpose of the relevant provisions (Appellant's Memorandum, paragraph 96).

[58] The exceptions to which the appellant alludes to have already been considered by this Court (*Triad Gestco*, at paragraphs 43 to 50). The only exception which merits attention is the one pertaining to the capital cost allowance system on which the appellant places particular reliance (Appellant's Memorandum, paragraph 97).

[59] The capital cost of prescribed capital property that is used to earn income can give rise to an annual deduction commonly known as “depreciation”. The phrase “depreciable property” is defined in subsection 13(21), which refers to paragraph 20(1)(*a*). Paragraph 20(1)(*a*) allows for an annual deduction which accounts for depreciation computed at a rate prescribed by the *Income Tax Regulations*, C.R.C., c. 945. The appellant insists on the fact that this rate of depreciation is based on a percentage which does not necessarily track the true decrease in value of the property being depreciated.

[60] That is so, but there are additional rules governing depreciation, the effect of which is to correct any such discrepancy. By operation of these rules, specifically subsections 13(1) and 20(16), any depreciation that is either excessive or insufficient by reason of these approximate percentages is eventually recaptured or deducted as a terminal loss based on the true value of the property— *i.e.*: its fair market value. In the end, it is the true value of the property comprised in a depreciable category that is taken into account in the computation of income (*Water’s Edge Village Estates (Phase II) Ltd. v. Canada*, 2002 FCA 291, [2003] 2 F.C. 25, paragraph 45). Properly understood, the capital cost allowance system, rather than supporting the position of the appellant, undermines it.

[61] None of the appellant’s arguments brings me to reconsider the conclusion reached in *Triad Gestco* according to which a paper loss cannot give rise to an allowable capital loss given the object, spirit and purpose of the provisions in issue including based on the above reasons, paragraph 3(b).

(2) Abuse of the provisions

[62] Having correctly identified the object, spirit and purpose of the provisions in issue, the TCC judge held that the deduction of the claimed loss would frustrate their rationale and result in an abuse of these provisions. I can detect no palpable and overriding error in this regard.

- *Alternative argument*

[63] If the GAAR is applicable, the appellant nevertheless submits that disallowing the loss claimed was not "reasonable in the circumstances in order to deny the tax benefit" that it obtained as these words are used in subsections 245(2) and (5). In its view, the TCC judge had to take into account the capital gains that Mr. Jobin will realize upon his death when he will be deemed to have disposed of the Class E shares that he still holds. The appellant specifies that the gain which these shares reflect, given their high redemption price and their nominal FMV, is [TRANSLATION] "up to a certain point" the same as that realized following the transfer of the Groupe AST shares to 9144 (Appellant's Memorandum, paragraphs 42 and 140). In short, the appellant is asking the Court to reduce the tax benefit it obtained now on account of a gain which might be realized later.

[64] The appellant's argument faces several obstacles. Assuming that an unrealized capital gain could be taken into account in determining the tax consequences resulting from a GAAR assessment, the future gain would still have to be certain to occur and the amount thereof would have to be quantifiable.

[65] In the present case, although it is certain that Mr. Jobin will be deemed to dispose of the property that he owns at the time of his death, nothing excludes the possibility that he could divest himself of his Class E shares in a tax-efficient way before then or that he could find a way to minimize the unrealized gain on these shares during his lifetime.

[66] I also note that, as matters stand, the high FMV of the Class E shares, giving rise to the alleged gain, is based on the appellant's ability to redeem them for the stated redemption price – *i.e.*: $10,802,195. Although the capacity of the appellant to redeem the shares at this price existed in 2005, the moneys generated by the sale of Groupe AST have since been exposed to risk through their use as investment funds by 9144, and there is no evidence on record establishing that the ability to redeem the shares still exists and no way of predicting that it will still exist at the time of Mr. Jobin's death (Testimony of Mr. Jobin, Appeal Book, vol. 4, tab H, pages 52 to 55).

[67] Therefore, not only is it impossible to assert that the unrealized gain will be realized, but it is also impossible to determine what the gain would be if it should be realized.

[68] Finally, even if the appellant could overcome these difficulties, I note that it is the disposition of the shares held by Mr. Jobin which would give rise to the double taxation. It follows that it is the tax consequences to Mr. Jobin which would have to be adjusted in order to eliminate this double taxation and not the tax consequences to the appellant. I note in that respect that Mr. Jobin could have invoked subsections 245(5) and (6) for this purpose, subject to making

the requested adjustment within 180 days after the day of sending of the notice of assessment issued against the appellant.

[69] I therefore conclude that the TCC judge did not err in rejecting the appellant's alternative argument.

[70] I would dismiss the appeal with costs.

"Marc Noël"
Chief Justice

"I agree
Richard Boivin J.A."

"I agree
Yves de Montigny J.A."

ANNEX

***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.)**
DIVISION B	**SECTION B**
Computation of Income	**Calcul du revenu**
Basic Rules	**Règles fondamentales**
Income for taxation year	**Revenu pour l'année d'imposition**
3 The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:	**3** Pour déterminer le revenu d'un contribuable pour une année d'imposition, pour l'application de la présente partie, les calculs suivants sont à effectuer :
(a) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,	**a)** le calcul du total des sommes qui constituent chacune le revenu du contribuable pour l'année (autre qu'un gain en capital imposable résultant de la disposition d'un bien) dont la source se situe au Canada ou à l'étranger, y compris, sans que soit limitée la portée générale de ce qui précède, le revenu tiré de chaque charge, emploi, entreprise et bien;
(b) determine the amount, if any, by which	**b)** le calcul de l'excédent éventuel du montant visé au sous-alinéa (i) sur le montant visé au sous-alinéa (ii):
(i) the total of	**(i)** le total des montants suivants :
(A) all of the taxpayer's taxable capital gains for the year from dispositions of property other than listed personal property, and	**(A)** ses gains en capital imposables pour l'année tirés de la disposition de biens, autres que des biens meubles déterminés,
(B) the taxpayer's taxable net gain for the year from dispositions of listed personal property,	**(B)** son gain net imposable pour l'année tiré de la disposition de biens meubles déterminés,
exceeds	
(ii) the amount, if any, by which the taxpayer's allowable capital losses for the year from dispositions of property other than listed personal property exceed the taxpayer's	**(ii)** l'excédent éventuel de ses pertes en capital déductibles pour l'année, résultant de la disposition de biens autres que des biens meubles déterminés sur les pertes déductibles

allowable business investment losses for the year,

…

Recaptured depreciation

13(21) In this section,

total depreciation allowed to a taxpayer before any time for property of a prescribed class means the total of all amounts each of which is an amount deducted by the taxpayer under paragraph 20(1)(a) in respect of property of that class or an amount deducted under subsection 20(16), or that would have been so deducted but for subsection 20(16.1), in computing the taxpayer's income for taxation years ending before that time; (*amortissement total*)

Deductions permitted in computing income from business or property

20 (1) Notwithstanding paragraphs 18(1)(a), 18(1)(b) and 18(1)(h), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto

(a) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

au titre d'un placement d'entreprise pour l'année, subies par le contribuable;

[…]

Récupération de l'amortissement

13(21) Les définitions qui suivent s'appliquent au présent article.

amortissement total S'agissant de l'amortissement total accordé à un contribuable avant un moment donné pour les biens d'une catégorie prescrite, le total des montants dont chacun représente une déduction pour amortissement prise par le contribuable par application de l'alinéa 20(1)a) pour les biens de cette catégorie ou un montant déduit en application du paragraphe 20(16) — ou qui serait ainsi déduit sans le paragraphe 20(16.1) — dans le calcul du revenu du contribuable pour les années d'imposition se terminant avant ce moment. (*total depreciation*)

Déductions admises dans le calcul du revenu tiré d'une entreprise ou d'un bien

20 (1) Malgré les alinéas 18(1)a), b) et h), sont déductibles dans le calcul du revenu tiré par un contribuable d'une entreprise ou d'un bien pour une année d'imposition celles des sommes suivantes qui se rapportent entièrement à cette source de revenus ou la partie des sommes suivantes qu'il est raisonnable de considérer comme s'y rapportant :

a) la partie du coût en capital des biens supporté par le contribuable ou le montant au titre de ce coût ainsi supporté que le règlement autorise;

SUBDIVISION C	**SOUS-SECTION C**
Taxable capital gain and allowable capital loss	**Gains en capital imposables et pertes en capital déductibles**
38 For the purposes of this Act,	**38** Pour l'application de la présente loi :
(b) a taxpayer's allowable capital loss for a taxation year from the disposition of any property is 1/2 of the taxpayer's capital loss for the year from the disposition of that property;	**b)** la perte en capital déductible d'un contribuable, pour une année d'imposition, résultant de la disposition d'un bien est égale à la moitié de la perte en capital que le contribuable a subie, pour l'année, à la disposition du bien;
39 (1) For the purposes of this Act,	**39 (1)** Pour l'application de la présente loi :
(b) a taxpayer's capital loss for a taxation year from the disposition of any property is the taxpayer's loss for the year determined under this subdivision (to the extent of the amount thereof that would not, if section 3 were read in the manner described in paragraph (a) of this subsection and without reference to the expression "or the taxpayer's allowable business investment loss for the year" in paragraph 3(d), be deductible in computing the taxpayer's income for the year or any other taxation year) from the disposition of any property of the taxpayer other than	**b)** une perte en capital subie par un contribuable, pour une année d'imposition, du fait de la disposition d'un bien quelconque est la perte qu'il a subie au cours de l'année, déterminée conformément à la présente sous-section (jusqu'à concurrence du montant de cette perte qui ne serait pas déductible, si l'article 3 était lu de la manière indiquée à l'alinéa a) du présent paragraphe et compte non tenu du passage « et des pertes déductibles au titre d'un placement d'entreprise subies par le contribuable pour l'année » à l'alinéa 3d), dans le calcul de son revenu pour l'année ou pour toute autre année d'imposition) du fait de la disposition d'un bien quelconque de ce contribuable, à l'exception :
(i) depreciable property, or	**(i)** d'un bien amortissable,
(ii) property described in any of subparagraphs 39(1)(a)(ii) to (iii) and (v)	**(ii)** d'un bien visé à l'un des sous-alinéas a)(ii) à (iii) et (v)
40 (1) Except as otherwise expressly provided in this Part	**40 (1)** Sauf indication contraire expresse de la présente partie :
(b) a taxpayer's loss for a taxation year from the disposition of any	**b)** la perte d'un contribuable résultant, pour une année

property is,

(i) if the property was disposed of in the year, the amount, if any, by which the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition, exceeds the taxpayer's proceeds of disposition of the property, and

(ii) in any other case, nil.

d'imposition, de la disposition d'un bien est :

(i) en cas de disposition du bien au cours de l'année, l'excédent éventuel du total du prix de base rajusté du bien, pour le contribuable, immédiatement avant la disposition, et des dépenses dans la mesure où celles-ci ont été engagées ou effectuées par lui en vue de réaliser la disposition sur le produit de disposition du bien qu'il en a tiré,

(ii) dans les autres cas, nulle.

PART XVI

Tax avoidance

Definitions

245 (1) In this section,

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; (*attribut fiscal*)

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

PARTIE XVI

Évitement fiscal

Définitions

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

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*)

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,

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; (*avantage fiscal*)

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. (*tax benefit*)

General anti-avoidance provision

(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.

Disposition générale anti-évitement

(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.

Avoidance transaction

(3) An avoidance transaction means any transaction

Opération d'évitement

(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.

Application of subsection (2)

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

(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

(i) this Act,

(ii) the Income Tax Regulations,

(iii) the Income Tax Application Rules,

(iv) a tax treaty, or

(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

(b) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

Determination of tax consequences

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

Application du par. (2)

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

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) la présente loi,

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

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

(iv) un traité fiscal

(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) qu'elle entraînerait, directement ou indirectement, un abus dans l'application de ces dispositions compte non tenu du présent article lues dans leur ensemble.

Attributs fiscaux à déterminer

(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,

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

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

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

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

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

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.

Request for adjustments

(6) Where with respect to a transaction

(a) a notice of assessment, reassessment or additional assessment involving the application of subsection 245(2) with respect to the transaction has been sent to a person, or

(b) a notice of determination pursuant to subsection 152(1.11) has been sent to a person with respect to the transaction,

any person (other than a person referred to in paragraph (a) or (b)) shall be entitled, within 180 days after the day of sending of the notice,

Demande en vue de déterminer les attributs fiscaux

(6) Dans les 180 jours suivant l'envoi à une personne d'un avis de cotisation, de nouvelle cotisation ou de cotisation supplémentaire qui tient compte du paragraphe (2) en ce qui concerne une opération, ou d'un avis concernant un montant déterminé en application du paragraphe 152(1.11) en ce qui concerne une opération, toute personne autre qu'une personne à laquelle un de ces avis a été envoyé a le droit de demander par écrit au ministre d'établir à son égard une cotisation, une nouvelle cotisation ou une cotisation supplémentaire en application du paragraphe (2) ou de déterminer un montant en application

to request in writing that the Minister make an assessment, reassessment or additional assessment applying subsection (2) or make a determination applying subsection 152(1.11) with respect to that transaction.

du paragraphe 152(1.11) en ce qui concerne l'opération.

FEDERAL COURT OF APPEAL

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