Federal Court of Appeal  Cour d'appel fédérale

Date: 20121015

Docket: A-286-11

Citation: 2012 FCA 258

CORAM: **NOËL J.A.**
SHARLOW J.A.
MAINVILLE J.A.

BETWEEN:

TRIAD GESTCO LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on September 25, 2012.

Judgment delivered at Ottawa, Ontario, on October 15, 2012.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: SHARLOW J.A.
MAINVILLE J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20121015

Docket: A-286-11

Citation: 2012 FCA 258

CORAM: **NOËL J.A.**
SHARLOW J.A.
MAINVILLE J.A.

BETWEEN:

TRIAD GESTCO LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal by Triad Gestco Ltd. (the appellant) from a decision rendered by Justice Favreau of the Tax Court of Canada (the Tax Court judge) dismissing its appeal from reassessments in respect to its 2001 and 2002 taxation years. In issuing these reassessments, the Minister of National Revenue (the Minister) relied on the general anti-avoidance rule (GAAR) set out in section 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) to disallow the deduction of a capital loss claimed by the appellant.

[2] This appeal raises questions which are common to the appeal in a companion case (*1207192 Ontario Ltd. v. The Queen*, 2011 TCC 283 (*1207192 Ontario Limited*)) which was heard together with the present appeal and which decision is also being released today. The common issue is whether the deduction of a capital loss which arises from the implementation of a planning technique known in the tax community as a "value shift" results in a misuse or abuse of the provisions relied upon within the meaning of subsection 245(4). Both Tax Court judges answered this question in the affirmative and denied the claimed loss but for partly diverging reasons.

[3] For the reasons that follow, I am of the view that the Tax Court judge came to the correct conclusion, but I come to that result for reasons that more closely resemble those given by Justice Paris in the companion appeal.

CONTEXT AND FACTS

[4] The provisions of the Act that are relevant to the analysis appear in the annex to this decision. The facts are fully set out in the decision under appeal and need not be repeated. It suffices for present purposes to set out the following brief summary.

[5] During its 2001 taxation year (which ends August 31) the appellant realized a capital gain in the amount of $7,799,545 further to the disposition of a commercial building in an arm's length sale for a selling price of $32,650,000.

[6] Subsequently, the following transactions were entered in at the instigation of Peter Cohen, the appellant's majority shareholder:

- the incorporation on July 25, 2002 of Rcongold Systems Inc. (Rcongold) whose sole director was Peter Cohen;

- the settlement on August 20, 2002 of the Peter Cohen Trust for the benefit of Peter Cohen by a person not related to him;

- the subscription by the appellant on August 27, 2002 for 8,000 common shares of Rcongold for a consideration of $8,000,000;

- the declaration of a stock dividend by Rcongold on August 28, 2002 of $1 payable to the appellant as the shareholder holding all common shares issued or outstanding by the issuance of 80,000 preferred shares with a redemption price of $100 each; and

- the sale by the appellant to the Peter Cohen Trust on August 29, 2002 of the 8,000 common shares which it held in Rcongold for the amount of $65 thereby resulting in a capital loss of $7,999,935.

[7] In filing its tax return for the 2002 taxation year, the appellant claimed an allowable capital loss of $3,932,998 which resulted in a net capital loss of $143,063 that the appellant applied to reduce its tax liability for its 2001 taxation year.

[8] By reassessments issued on March 8, 2006, these losses were denied by the Minister on the basis that no economic loss was incurred and the GAAR applied to deny the tax benefit claimed by the appellant, i.e. the capital loss and the carry over to the preceding year.

DECISION OF THE TAX COURT JUDGE

[9] It was conceded before the Tax Court judge that the transactions in issue gave rise to a tax benefit within the meaning of subsection 245(1). At issue was whether the transactions which led to the claimed loss were "avoidance transactions" within the meaning of subsection 245(3) and whether there was a misuse or abuse of the provisions relied upon to achieve the tax benefit.

[10] The Tax Court judge held that the transactions in issue were "avoidance transactions" (reasons, paras. 70 to 83) and that the result achieved defeats the underlying rationale of the provisions relied upon (reasons, paras. 84 to 102). This last conclusion is the only one being challenged on appeal.

[11] In coming to this conclusion, the Tax Court judge reviewed the history of the legislation beginning with the introduction of the capital gains system back in 1972. He also considered specific anti-avoidance provisions relating to capital losses, namely former subsection 55(1), paragraph 40(2)(*g*) and section 54 (reasons, paras. 85 to 94).

[12] According to the Tax Court judge, the repeal of former subsection 55(1) in 1988 upon the introduction of the GAAR "did not signal a policy shift" but "confirmed the continued intention of Parliament" that capital losses not be deducted where the loss is created artificially (reasons, para. 89). He relied in particular on the Technical Notes issued in conjunction with the enactment of the GAAR back in 1988 which state that "Because the scope of the [GAAR] is broad enough to cover the transactions to which subsection 55(1) was intended to apply, that subsection is no longer necessary" (reasons, para. 88).

[13] The Tax Court judge further held that a reading of the relevant provisions show that there is an overarching policy preventing the deduction of artificial capital losses realized "within the same economic unit", and that this policy was being abused by the appellant (reasons, para. 98). According to the Tax Court judge, the amendment of section 251.1 in 2005 which brought trusts

within the definition of "affiliated persons" is a clear indication that the result achieved by the appellant was contrary to the object, spirit and purpose of the Act (reasons, para. 97).

[14] The essence of the Tax Court judge's reasoning for dismissing the appeal is captured by the following paragraph (reasons, para. 100):

> The transactions undertaken by the appellant amount to abusive tax avoidance because they defeat the underlying rationale of the capital loss provisions in the Act. Through the manipulation of the fiscal "amount" of the Rcongold common shares, the appellant created artificially devalued property that was transferred to a person within the same economic unit to create an artificial capital loss without incurring any real economic loss. On August 27, 2002, the appellant owned shares of Rcongold which had a fair market value of $8 million (the common shares). On August 28, 2002, the appellant continued to own shares of Rcongold which had a fair market value of $8 million (the Class "E" shares) and after the disposition of the common shares of Rcongold to the [Peter Cohen Trust], the appellant continued to own shares in Rcongold having a fair market value of $8 million.

POSITION OF THE PARTIES ON APPEAL

- *The appellant*

[15] The appellant argues that the relevant provisions of the Act operate in a purely mechanical fashion (appellant's memorandum, paras. 19 and 31). It submits that upon the application of sections 3, 38, 39 and 40 of the Act, there can be no doubt that the capital loss is deductible. The requirement that this loss be a "true" or "real" economic loss is nowhere to be found in the Act and cannot be inferred from the statutory context especially in light of the fact that the Act itself produces results that can be labeled as "artificial" but which are nevertheless given effect to (appellant's memorandum, para. 32). For example, the appellant points to the rules governing flow-through shares in section 66.3 of the Act.

[16] The appellant also contends that the Tax Court judge did not follow the proper interpretative approach under section 245 of the Act as established in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 (*Canada Trustco*) and *Lipson v. Canada*, 2009 SCC 1. *Canada Trustco* clearly stands for the proposition that any overarching policy must be rooted in specific provisions of the Act. It contends that it is not possible to find such an overarching policy in the provisions referred to by the Tax Court judge.

[17] Specifically, the appellant contends that it was not possible to ground an overarching policy against "artificial capital loss" on former subsection 55(1), as it was repealed. It submits that it would be incongruous if Parliament had sought to retain this concept while repealing the provision providing for it (appellant's memorandum, paras. 37 and 38). With regard to the Technical Notes which were central to the analysis of the Tax Court judge, the appellant submits that the fact that they were drafted a decade before the transactions in issue took place and that the relevant provisions have since been the subject of numerous amendments, diminishes their relevance.

[18] The appellant further contends that the Tax Court judge erred in holding that the Act embodies a general policy against the deduction of capital losses on dispositions within an "economic unit". The appellant points out that neither the stop loss rules in subparagraph 40(2)(*g*)(i) or subsection 40(3.4) refer to that concept. Rather, they refer to the term "affiliated persons" as defined in section 251.1 to suspend, but not deny, capital losses realized between affiliated persons (appellant's memorandum, paras. 48 and 49).

[19] Furthermore, the definition of "affiliated persons" as introduced in 1985 does not to this day apply to siblings, or to parents, or their children. According to the appellant, the reasoning of the Tax Court judge if it goes unchecked would result in the suspension of capital losses realized between siblings and between parent and child even though they were deliberately excluded from the definition of "affiliated persons" (appellant's memorandum, paras. 50 to 54).

[20] The appellant also takes issue with the Tax Court judge's reliance on the 2005 amendment to the definition of "affiliated persons" at section 251.1 of the Act. It contends that the fact that trusts were added to the definition in 2005 shows that Parliament had made a deliberate policy decision not to include trusts in the definition before hand. Had Parliament rather sought to correct or revise a statutory misstatement, it would have made the 2005 retroactive (appellant's memorandum, paras. 56 and 57).

[21] Finally, the appellant relies on the decision of the Tax Court in the companion's case in which Justice Paris "respectfully disagreed" with the conclusion reached by the Tax Court judge based on the notion of "economic unit".

- *The respondent*

[22] The respondent for her part supports the conclusion reached by the Tax Court judge relying essentially on the reasons that he gave. She rejects the contention that the computation of capital losses (or gains) under the Act gives rise to a purely mechanical exercise. According to the respondent, the question whether a loss has in fact occurred is central to the computation of capital losses under the Act (respondent's memorandum, para. 31).

[23] The respondent also relies on former subsection 55(1) of the Act and the case law which interpreted it in a way that disallowed the deduction of losses that were considered to have been artificially or unduly created by the taxpayer. She points to the 1988 Technical Notes for the proposition that the repeal of subsection 55(1) was simply a reflection of the fact that it was no longer necessary, as the new section 245 of the Act was broad enough to cover the transactions contemplated by former subsection 55(1). The respondent squarely challenges the appellant's argument that the repeal of subsection 55(1) signaled a change in legislative intent against artificial capital losses (respondent's memorandum, paras. 43 to 46).

[24] The respondent further submits that the Tax Court judge properly referred to the stop-loss rules – although she recognizes that the applicable provision was subsection 40(3.4) rather than subparagraph 40(2)(*g*)(i) – as evidencing an overarching policy to deny losses where the economic interest in property disposed of is not truly relinquished.

[25] Finally, the respondent points to the decision of the Supreme Court in *Mathew v. Canada*, 2005 SCC 55, which confirmed the abusive nature of a transaction by reference to its artificial nature. The concept of artificiality as discussed in *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63 (*Copthorne Holdings*), is also relied upon.

ANALYSIS AND DECISION

- *Statutory context*

[26] Before embarking on the analysis, it is useful to briefly review the provisions of the Act which deal with treatment of capital losses.

[27] Capital gains and losses are the subject of a lengthy and complex statutory scheme. The original version of these provisions came into effect in 1972. Before that time, capital gains were not subject to tax and capital losses were not recognized for income tax purposes.

[28] It has always been the case that capital gains are taxed at a lower rate than income. That result is achieved by means of a statutory inclusion rate. The taxable portion of a capital gain (or the deductible portion of a capital loss) is determined by multiplying the inclusion rate by the amount of the capital gain (or capital loss). The inclusion rate for the period relevant to this appeal was 50%. Thus, a taxpayer who realized a $100 capital gain during that period would include only $50 in income, and a taxpayer who suffered a $100 capital loss during that period would be entitled to tax relief for only $50.

[29] The determination for income tax purposes of the capital gain or loss on the disposition of property is dictated by the interaction of numerous specific provisions in Part I, Division B, Subdivision c of the Act. Many of those provisions are definitions that include or consist of a mathematical formula, which can be difficult to follow. Fortunately, there is in this case no dispute as to the computation of the capital loss in issue. Therefore, the application of the Act to the facts can be sufficiently understood by reference to only a few general provisions.

[30] Generally, a capital loss arises for income tax purposes when capital property is sold for "proceeds of disposition" that are less than the "adjusted cost base" of the property sold (paragraphs 39(1)(*b*) and 40(1)(*b*) of the Act).

[31] The terms "proceeds of disposition" and "adjusted cost base" are defined in section 54 of the Act. The definitions are long and complex, but for the purposes of this appeal only the most general part of each definition is relevant. As mentioned above, the capital losses in issue in this appeal arose from the sale of corporate shares. The "proceeds of disposition" of those sales should be understood to mean the sale price of the shares as determined under the contract of sale, and the "adjusted cost base" of the shares should be understood to mean the amount originally laid out by the corporate taxpayer to acquire the shares that were sold. Section 53 of the Act lists a large number of potential positive and negative adjustments to that original cost that must be made in determining "adjusted cost base", but the record in this case does not indicate that any such adjustments are required.

[32] A capital loss is not, *per* se, deductible in computing income. Rather, paragraph 38(*b*) provides that ½ of capital losses realized in a particular taxation year (referred to as the "allowable capital loss") may be applied to offset taxable capital gains (generally, ½ of capital gains) realized in the same year, or in a subsequent taxation year or any of the previous three taxation years (see paragraph 111(1)(*b*) and the definition of "net capital loss" in subsection 111(8)).

[33] Numerous specific anti-avoidance provisions in the Act preclude a taxpayer from claiming tax relief for a capital loss. They are referred to colloquially as "stop-loss rules". Generally, a stop-loss rule deems a particular loss to be nil. For example, subparagraph 40(2)(*g*)(iii) of the Act provides that with certain exceptions, a loss from the disposition of personal use property is deemed to be nil.

[34] Some stop-loss rules are paired with relieving provisions that, in effect, result only in the suspension of a capital loss arising on a particular disposition of property. For example, subsection 40(3.4) of the Act provides (among other things) that a corporation's loss on the disposition of capital property is deemed to be nil if the corporation or an affiliated person acquires the same or an identical property within 30 days before or after the disposition, and at the end of that period the corporation or an affiliated person owns the substituted property. However, the same provision specifies that the loss may be recognized by the corporation later if, for example, the property ceases to be owned by the corporation or an affiliated person.

[35] Similarly, subparagraph 40(2)(*g*)(i) of the Act deems a capital loss to be nil if it meets the statutory definition of "superficial loss" (generally, a loss arising on the disposition of property where the same taxpayer or an affiliated person acquires the same or an identical property – the "substituted property" – within 30 days and the taxpayer or an affiliated person owns the substituted property at the end of the 30-day period). Subject to certain conditions, paragraph 53(1)(*f*) of the Act may apply to add the amount of the disallowed loss to the adjusted cost base of the substituted property. The result would be that the previously disallowed loss is recognized in the computation of any gain or loss on the disposition of the substituted property. This could be a deferral of a capital loss, or it could be a transfer of a capital loss from the original transferor of the property to the affiliated person who acquired it.

[36] Of significance for our purpose is the amendment to the definition of "affiliated persons" in 2005 to include trusts. This amendment, had it been applicable when the transactions in issue took place, would have resulted in the suspension of the capital loss claimed by the appellant. It is useful

to point out that the definition of "affiliated persons" to this date does not operate to suspend losses resulting from transactions between parent and child or between siblings. It follows that subject to the application of the GAAR, the loss resulting from a value shift could still be claimed if triggered by a sale between such persons.

- *The GAAR analysis*

[37] As noted, the appellant conceded before the Tax Court judge that the claimed loss results in a "tax benefit" within the meaning of subsection 245(1). Before us, the appellant does not challenge the Tax Court judge's conclusion that the transactions, including the payment of the stock dividend, the creation of the Peter Cohen Trust and the sale of the common shares to this trust, were "avoidance transactions" within the meaning of subsection 245(3).

[38] The remaining issue is whether the avoidance transactions give rise to misuse or abuse. This in turn depends on whether the transactions, if given effect to, would defeat the underlying rationale of the provisions relied upon to obtain the tax benefit (i.e. subparagraph 3(*b*)(ii), paragraph 38(*b*), paragraph 39(1)(*b*), subparagraph 40(1)(*b*)(ii) and section 54). The burden of establishing the existence of this underlying rationale rests on the respondent.

[39] It is common ground that the loss generated by the appellant as a result of the value shift is a loss on paper only in the sense that no economic loss was suffered (the term "paper loss" is used in that sense throughout these reasons). All that happened is that the high inherent value of the common shares was moved to the preferred shares – because they are paid in priority – with the result that the common shares were left with a nominal value and a high cost, thereby allowing for

the loss to be realized on the disposition of these shares to the Peter Cohen Trust. The appellant was neither richer nor poorer after this disposition.

[40] According to the appellant, the loss should be given effect to despite the fact that no economic loss was suffered. It maintains that the application of the provisions of the Act on which it relied to trigger this loss gives rise to a mechanical exercise and that their effect, when so applied, is to recognize the claimed loss despite the fact that no economic loss was suffered and no dollars were lost.

[41] The result proposed by the appellant is fundamentally counter-intuitive as the capital gain system is generally understood to apply to real gains and real losses. In this regard, the comment of the House of Lords in *WT Ramsay Ltd. v. Inland Revenue Commissioners*, [1981] 1 All ER 865, although it was made by reference to capital gain under UK Law, is entirely apposite (p. 873):

> The capital gains tax was created to operate in the real world, not that of make-believe. As I said in *Aberdeen Construction Ltd. v. Inland Revenue Comrs*, [1978] 1 All ER 962 at 996, [1978] AC 885 at 893, [1978] STC 127 at 131, it is a tax on gains (or, I might have added, gains less losses), it is not a tax on arithmetical differences.

[42] In Canada, the capital gain system has been understood, since a time that pre-dates its creation, to be aimed at taxing increases in "economic power" (*Carter Commission Report, 1966*, p. 325) and "economic power" is unaffected by paper losses.

[43] Nevertheless, the appellant submits that the matter is not so simple. It points to the fact that the Act does contemplate, in some instances, that tax be paid on capital gains when no economic gain is realized and losses be allowed when no economic loss is incurred.

[44] The most apt illustration is subsection 45(1) of the Act – under Subdivision c "Taxable Capital Gains and Allowable Capital Losses" – which provides that when property is acquired for the purpose of earning income, and begins to be used for some other purpose (or vice versa), it is deemed to be disposed of at that time for an amount equal to its fair market value, and to be reacquired at a cost equal to that amount. Subsection 13(2) of the Act operates much the same way with respect to depreciable property. The effect of these provisions is that paper gains or losses may be made or incurred, and when that happens, they are treated to as though they are real.

[45] The appellant also points to the flow-through share regime which permits corporations to renounce "Canadian exploration expense" for the benefit of the holders of the flow-through shares. The cost to a shareholder of a flow-through share is deemed to be nil by virtue of subsection 66.3(3) of the Act. On a sale of the flow-through share, the deemed cost is picked up by the definition of "adjusted cost base" in section 54 to arrive at the relevant gain or loss. This again can lead to a capital gain being imposed when no economic gain has been realized.

[46] In weighing the impact of provisions such as subsection 45(1) and section 66.1 – there are other similar provisions – it is important to understand that they are policy oriented and that the treatment which they provide is dictated solely by the policy objective which they seek to achieve.

[47] The change of use provisions are intended to facilitate the transition when a taxpayer ceases to use property for one purpose and begins to use it for another. They do so by deeming a disposition and an immediate reacquisition at a price that is tracked until the asset is actually disposed of. In the meantime, this provides flexibility from a taxpayer perspective while insuring the integrity of the tax system.

[48] Flow-through shares are intended to encourage oil and mineral exploration. The cost of these shares is fully deducted in computing income while the shares get capital gain treatment when they are sold. This is a highly advantageous treatment which explains why the adjusted cost base of these shares is set at 0.

[49] While these provisions are of interest, I do not believe that they detract from the underlying policy preventing the deduction of paper losses if indeed such a policy can be gleaned from the provisions relied upon by the appellant to obtain the tax benefit.

[50] Addressing this question, Justice Paris in the companion case conducted a textual, contextual and purposive analysis of the provisions relied upon by the appellant in order to obtain the tax benefit (*1207192 Ontario Limited*, paras. 63 to 68 and 84 to 93). He properly identified each of the relevant provisions and their reason for being. I agree with his conclusion that these provisions, in particular paragraph 38(*b*), provide relief as an offset against capital gain where a taxpayer has suffered an economic loss on the disposition of property. I also agree with his further conclusion that offsetting a capital gain with the paper loss that was claimed results in an abuse and

a misuse of the relevant provisions, specifically paragraphs 38(*b*), 39(1)(*b*) and 40(1)(*b*) (*1207192 Ontario Limited*, paras. 92 and 93).

[51] The appellant correctly points out that the words "economic loss" on which Justice Paris relied in identifying the underlying rationale do not appear in any of the relevant provisions. However, there is no objection at this stage of the analysis to departing from the bare meaning of the words provided that the reading proposed is supported by a textual, contextual and purposive reading of the relevant provisions (*Copthorne Holdings*, para. 70). Given their purpose – i.e. to tax the net realized increase in the value of capital assets – it is not possible, in my view, to read the relevant provisions otherwise.

- *Former subsection 55(1)*

[52] There was a lengthy debate before us about whether subsection 55(1) can be relied upon to establish an overarching policy aimed at defeating "artificial transactions" despite its removal. As noted earlier the removal of this provision was accompanied by the publication of Technical Notes indicating that subsection 55(1) was abrogated because the void created by the removal of that provision was filled by the implementation of the GAAR.

[53] For the reasons already given, it is not necessary to rely on former subsection 55(1) to decipher the existence of a policy which prevents the deduction of the loss claimed in this case. That said, former subsection 55(1) forms part of the legislative history and as it is clear that the paper loss that was claimed in this case would have "artificially" or "unduly" reduced the appellant's tax liability under that provision, the fact that Department of Finance officials believed that the GAAR

would fill the void is consistent with the continued existence of the overarching policy that I have identified.

- *Alternative conclusion*

[54] I now turn to the Tax Court judge's conclusion in the present case that the transactions in issue also defeat the object, spirit and purpose of the anti-avoidance rules in subparagraph 40(2)(*g*)(i). In his view, this provision reveals the existence of a policy against the deduction of capital losses on dispositions "within an economic unit". Furthermore, the amendment brought to the definition of "affiliated persons" in 2005 to include trusts is "a clear indication that the results achieved by the appellant were contrary to the object, spirit and purpose of the Act when read as a whole" (reasons, para. 97).

[55] Justice Paris disagreed with the conclusion reached by the Tax Court judge in this regard (*1207192 Ontario Limited*, paras. 73 to 83).

[56] I agree with Justice Paris that a reading of the relevant provisions does not support the existence of the policy identified by the Tax Court judge essentially for the reasons that he gave. When Parliament introduced the notion of "affiliated persons" back in 1995, it had to be aware that trusts could be used to counter the operation of subparagraph 40(2)(*g*)(i) and subsection 40(3.4). It is therefore reasonable to infer that a deliberate choice was made not to bring trusts within the definition. The fact that Parliament decided to alter this policy by including trusts on a prospective basis in 2005 cannot be relied on to infer that a policy to that effect was in place before the amendment (compare *Water's Edge Water's Edge Village Estates (Phase II) Ltd. v. Canada*, 2002

FCA 291, [2003] 2 F.C. 25, para. 47, where in contrast an amendment was held to be relevant because it had been enacted in order to close a blatant loophole).

- *Novel argument*

[57] The appellant argued for the first time during the course of the hearing of the appeal that the disallowance of the claimed loss gives rise to a form of unfairness given that it remains the holder of the preferred shares. It points out that since these shares have tax characteristics which inversely mirror those of the common shares – i.e. a correspondingly high value and low cost – their disposition would trigger a gain tantamount to the loss claimed.

[58] I need only observe that many years have passed since the loss was claimed, and there is no suggestion that the preferred shares have been sold. This is not surprising since the purpose of the transactions was to avoid paying taxes on the gain resulting from the sale of the commercial building back in 2001. I note in this respect that contrary to individuals, a corporation can maintain ownership of capital assets without any time limitation.

[59] That said, had the appellant been able to put forth a credible scenario indicating that the preferred shares were to be sold, thereby reducing the extent of the tax benefit obtained, it would have been open to it to request that the tax consequences resulting from the application of the GAAR be adjusted pursuant to subsection 245(5). No such request was made.

[60] I would dismiss the appeal with costs.

"Marc Noël"

J.A.

"I agree.
K. Sharlow J.A."

"I agree
Robert M. Mainville J.A."

ANNEX

Income Tax Act, R.S.C. 1985, c. 1 (5th supp.) (the Act)

- Paragraph 3(*b*)(ii) of the Act :

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 :
…	[…]
(*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):
…	[…]
(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 allowable business investment losses for the year,	(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 au titre d'un placement d'entreprise pour l'année, subies par le contribuable;
…	[…]

- Section 38 of the Act:

38. Taxable capital gain and allowable capital loss -- For the purposes of this Act,	**38.** Sens de gain en capital imposable et de perte en capital déductible -- Pour l'application de la présente loi :
(*a*) [taxable capital gain—general] -- subject to paragraphs (a.1) to (a.3), a taxpayer's taxable capital gain for a taxation year from the disposition of any property is $^1/_2$ of the taxpayer's capital gain for the year from the disposition of the property;	*a*) [Gain en capital imposable—général] -- sous réserve des alinéas a.1) à a.3), le gain en capital imposable d'un contribuable pour une année d'imposition, tiré de la disposition d'un bien, est égal à la moitié du gain en capital qu'il a réalisé pour l'année à la disposition du bien;
…	[…]
(*b*) [allowable capital loss] -- 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; and	*b*) [Perte en capital déductible] -- 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;
…	[…]

- Paragraph 39(1)(*b*) of the Act:

39. (1) Meaning of capital gain and capital loss [and business investment loss] -- For the purposes of this Act,	**39.** (1) Sens de gain en capital et de perte en capital [et des pertes au titre d'un placement d'entreprise] -- Pour l'application de la présente loi :
…	[…]
(*b*) a taxpayer's capital loss for a taxation year from the disposition of any property is	*b*) une perte en capital subie par un contribuable, pour une année

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

(i) depreciable property , or

(ii) property described in any of subparagraphs (a)(i),

(ii) to (iii) and (v); and

…

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) d'un bien amortissable,

(ii) d'un bien visé à l'un des sous-alinéas a)(i), (ii) à (iii) et (v);

[…]

-Subsection 40(*b*) of the Act:

40. (1) General rules [gain and loss calculation] -- Except as otherwise expressly provided in this Part

…

(*b*) a taxpayer's loss for a taxation year from the

40. (1) Règles générales [calcul du gain et de la perte] -- Sauf indication contraire expresse de la présente partie :

[…]

b) la perte d'un contribuable résultant, pour une année d'imposition, de la disposition d'un

disposition of any property is,	bien est :
(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	(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) in any other case, nil.	(ii) dans les autres cas, nulle
…	[…]

- Former 55(1) of the Act was repealed upon the enactment of section 245 of the Act. Prior to the repeal, it provided as follows:

55. (1) For the purposes of this subdivision, where the result of one or more sales, exchanges, declarations of trust, or other transactions of any kind whatever is that a taxpayer has disposed of property under circumstances such that he may reasonably be considered to have artificially or unduly	**55.** (1) Aux fins de la présente sous-section, lorsque les circonstances dans lesquelles ont été effectuées une ou plusieurs opérations de vente ou d'échange, ou autres transactions de quelque nature que ce soit, permettent de croire raisonnablement que le contribuable a disposé d'un bien de façon à artificiellement ou indûment

(*a*) reduced the amount of his gain from the disposition,

(*b*) created a loss from the disposition, or

(*c*) increased the amount of his loss from the disposition,

the taxpayer's gain or loss, as the case may be, from the disposition of the property shall be computed as if such reduction, creation or increase, as the case may be, had not occurred.

(*a*) réduire le montant de son gain résultant de la disposition,

(*b*) occasionner une perte résultant de la disposition, ou

(*c*) augmenter le montant de sa perte résultant de la disposition,

le gain ou la perte du contribuable, selon le cas, résultant de la disposition du bien, est calculée comme si une telle réduction, perte ou augmentation, selon le cas, ne s'était pas produite.

- Section 245 of the Act:

Definitions

245. (1) In this section,

"tax benefit"
« avantage 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 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;

"tax consequences"
« attribut fiscal »

Définitions

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

« attribut fiscal »
"tax consequences"

« 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

"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;

"transaction"
« opération »

"transaction" includes an arrangement or event.

(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.

(3) An avoidance transaction means any transaction

(*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

(*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

est remboursable.

« avantage fiscal »
"tax benefit"

« 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.

« opération »
"transaction"

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

(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) L'opération d'évitement s'entend :

a) soit de l'opération dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est

arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

(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.

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

(*a*) any deduction, exemption or

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) 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) 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

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.

…

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.

(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) 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.

[…]

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-286-11

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE FAVREAU OF THE TAX COURT OF CANADA DATED JULY 12, 2011, NO. 2008-1667(IT)G.

STYLE OF CAUSE:	TRIAD GESTCO LTD. and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 25, 2012
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	SHARLOW J.A. MAINVILLE J.A.
DATED:	October 15, 2012

APPEARANCES:

Guy Du Pont, Ad.E. Michael N. Kandev Olivier Fournier	FOR THE APPELLANT
Justine Malone Marie-Andrée Legault	FOR THE RESPONDENT

SOLICITORS OF RECORD:

DAVIES WARD PHILLIPS & VINEBERG LLP Montréal, Quebec	FOR THE APPELLANT
MYLES J. KIRVAN Deputy Attorney General of Canada	FOR THE RESPONDENT