Federal Court of Appeal | Cour d'appel fédérale

Date: 20240102

Docket: A-157-22

Citation: 2024 FCA 1

CORAM: **RENNIE J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

BETWEEN:

PROCON MINING AND TUNNELLING LTD.

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Vancouver, British Columbia, on December 11, 2023.

Judgment delivered at Ottawa, Ontario, on January 2, 2024.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: RENNIE J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] The appellant, Procon Mining & Tunnelling Ltd., was engaged in the business of providing contract mining and management services for all aspects of mine development and production, from start-up to closure. In 2012, the appellant subscribed for shares in two junior mining companies, in each case pursuant to a memorandum of understanding (MOU) entered

into by the appellant or an affiliate. Each of the mining companies had a mining project it hoped to develop.

[2] While each MOU contemplated that the appellant would be engaged to provide services in connection with the development and later operation of the relevant mine, each also contained several other terms relevant to the ongoing relationship between the junior mining company and the appellant and its affiliates.

[3] Neither project proceeded and, in 2013, the appellant sold the shares of both companies to a related corporation at a loss. The appellant deducted the resulting losses in computing its income for the 2013 taxation year. The Minister reassessed the appellant on the basis that the losses were capital losses not deductible in computing income. The Tax Court of Canada dismissed the appeal of that reassessment (2022 TCC 71 *per* Boyle J.) and the appellant now appeals that decision to us.

[4] The Tax Court's decision must be reviewed under the appellate standard of review established by *Housen v. Nikolaisen*, 2002 SCC 33. This means questions of law are reviewed on a correctness standard and questions of fact or mixed fact and law are reviewable for palpable and overriding error.

[5] The appellant submits that the Tax Court made three errors of law:

1. Because the shares did not themselves produce income and the Tax Court found they were held and used in the appellant's business, the appellant says they are

inventory, relying on *Canada Safeway Limited v. Canada*, 2008 FCA 24 (*Canada Safeway*).

2. Because the shares were "inextricably linked" to, "a necessary and integral part of", and "acquired in the course of" the appellant's services business, but not used in that business, the appellant says the loss was an income loss, citing *Morguard Corporation v. The Queen*, 2012 TCC 55, aff'd 2012 FCA 306, leave to appeal to SCC refused, 35183 (25 April 2013) (*Morguard Corporation*), *Glencore Canada Corporation v. The Queen*, 2021 TCC 63 (*Glencore Canada*), and *Johns-Manville Canada v. The Queen*, [1985] 2 S.C.R. 46, 21 D.L.R. (4th) 210 (*Johns-Manville*).

3. The Tax Court did not apply the test to determine whether the shares were acquired as an adventure in the nature of trade, and here the appellant had a secondary intention of selling the shares at a profit.

[6] I cannot agree and therefore would dismiss the appeal.

[7] Deciding whether a particular outlay or receipt is on income or capital account, or a particular property is capital property, is often difficult. In each case, that determination must be made with regard to the particular facts, having regard to various factors and all the surrounding circumstances: *Canada Safeway* at para. 61; *Hillsdale Shopping Centre Ltd. v. The Queen*, [1981] C.T.C. 322, 81 D.T.C. 5261 (FCA) at 327 (C.T.C.). It is necessarily a highly factually infused determination. Fact-finding is the purview of the Tax Court, not this Court on appeal.

[8] Before the Tax Court, the parties submitted a partial agreed statement of facts and a joint book of documents. Only Mr. Yurkowski, the founder, president, and chief executive officer of the appellant, testified.

[9] Over more than six pages of its reasons, the Tax Court summarized the evidence concerning the appellant and the share acquisitions. It found the shares "were acquired and held

…in connection with [the appellant's] business", "were not acquired for trading purposes", and "constituted an investment …in the equity of the [mining companies]… intentionally [made]…with a view to further strategically enhancing its future growth, and recoveries/cash flow generated from its business.": Reasons at paras. 1, 10. It said "[t]he evidence … overwhelmingly supports [those] findings": Reasons at para. 11.

[10] I agree.

[11] Although the appellant says the Tax Court erred in law, in effect it is asking us to review the evidence and make our own findings of fact, apply legal principles, and then come to our own conclusion. For example, the appellant says dividends were not expected to be paid on the shares, pointing to testimony from Mr. Yurkowski. Similarly, the appellant states that it contemplated the shares might increase in value in which case it might sell the shares, again pointing to Mr. Yurkowski's testimony.

[12] Referencing a particular statement made by a witness does not permit this Court to make the factual findings the appellant desires, particularly where the Tax Court expresses concerns about the credibility of the testimony, as it did here. It expressly questioned the completeness of the "description of the circumstances of the acquisition of the shares by the Appellant's [witness] in his testimony", requiring it "to look beyond [the appellant's] own description of [its] intention, motivation, reason or purpose for having done something, and to effectively test that against the other objective evidence": Reasons at para. 11.

[13] Here, neither the Tax Court nor the agreed statement of facts addressed the appellant's or the issuer's intentions concerning dividends on the shares following development of the mining project. Moreover, Mr. Yurkowski was equivocal regarding the appellant's plans for holding or disposing of the shares. During examination in chief, he described the appellant's goal as "forming long-term joint ventures" and the share acquisitions as "the first step to a long 20-, 30-year deal". The witness also testified that "[w]hether or not we ever sold the shares was immaterial" and when the appellant "bought equity in a company [it] was to keep it as long as [it] possibly could".

[14] Likewise, counsel and the courts must exercise care in considering the application of statements drawn from other cases. Read in light of the context in which they were made, statements that appear to mandate a particular characterization of an outlay or receipt, or acquisition or disposition, as being on income or capital account are not, in fact, unequivocal, but rather have a meaning that differs from that which the words on their face might suggest. Each case must be decided on the basis of its own facts and circumstances.

[15] The appellant says that once the Tax Court found that a sale of the shares was inevitable, it must have viewed a future sale at a profit as a motivating factor in the acquisition, consistent with the testimony of its witness. Again, I disagree.

[16] Although the Tax Court used the phrase "inevitable sale" at paragraph 10 of its reasons, the relevant sentence cannot be read in isolation. Read in the context of the statements that

immediately precede it, and the Tax Court's reasons in their entirety, it cannot be seen as a finding that the appellant established an intention to sell the shares at a profit.

[17] That the appellant may have "contemplated the possibility of resale of [the shares] is not, in itself, sufficient to conclude … the existence of an adventure in the nature of trade": *Canada Safeway* at paras. 61, 70. Rather, the prospect of resale must be an important consideration, or an operating motivation, for the acquisition: *Canada Safeway* at para. 61, see also paras. 46-59 where this Court discusses other relevant cases; *Crystal Glass Canada Ltd. v. The Queen*, [1989] 1 C.T.C. 330, 43 D.T.C. 5143 (FCA) at 330 (C.T.C.). As I have already explained, the evidence here supported more than one interpretation of the appellant's intention and I see no reason to interfere with the Tax Court's conclusions.

[18] Contrary to the appellant's submission, the Tax Court did turn its mind to whether the shares could have been acquired as an adventure in the nature of trade. It quoted a passage from *Canada Safeway* addressing the distinction between inventory and capital property in that context: Reasons at para. 17. However, in neither its notice of appeal, nor its submissions to the Tax Court, did the appellant posit that the share acquisitions were adventures in the nature of trade. The Tax Court said not taking that position was consistent with the agreed statement of facts: Reasons at para. 21. In other words, the facts did not support finding an adventure in the nature of trade.

[19] Finally, the appellant submits that *Morguard Corporation*, *Glencore Canada*, and *Johns-Manville* "demonstrate that losses incurred by disposing of property that is 'inextricably linked'

to the ongoing operation of the business are on income account": appellant's memorandum of fact and law at para. 86. Had the Tax Court applied those cases, says the appellant, it "would have held that the Appellant acquired and disposed of the Shares in the course of an undertaking" and that "the Losses were business losses": appellant's memorandum of fact and law at para. 106.

[20] I cannot agree with the appellant's characterization of the three cases it cites, nor their relevance to this appeal. First, *Morguard Corporation* and *Glencore Canada* concern negotiated break fees received after a failed acquisition, not dispositions of property. Moreover, they were decided based on their particular facts and circumstances, as all of these cases must be.

[21] As to *Johns-Manville*, the Tax Court considered it, but viewed it as inapplicable. I agree. It concerns property acquired for consumption in the business, the cost of which the Court there described as "not part of a plan for the assembly of assets": at 73. Here, the Tax Court found the shares were an investment made with a view to providing the appellant with long-term revenue and earnings, a finding amply supported by the evidence.

[22] As I have noted, although the appellant asserts errors of law, it asks us to reweigh the evidence and substitute our views for those of the Tax Court. We cannot interfere with the Tax Court's factual findings, and findings of mixed fact and law, absent a palpable and overriding error.

[23] I see no error that warrants our intervention and therefore I would dismiss the appeal with costs to the respondent.

"K.A. Siobhan Monaghan"
J.A.

“I agree
Donald Rennie”

“I agree
Anne L. Mactavish”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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