Federal Court of Appeal

Cour d'appel fédérale

Date: 20140423

Dockets: A-327-13
A-328-13

Citation: 2014 FCA 103

CORAM: BLAIS C.J.
SHARLOW J.A.
STRATAS J.A.

Docket: A-327-13

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LEHIGH CEMENT LIMITED

Respondent

Docket: A-328-13

AND BETWEEN:

HER MAJESTY THE QUEEN

and

CBR ALBERTA LIMITED

Respondent

Heard at Vancouver, British Columbia, on April 8, 2014.

Judgment delivered at Ottawa, Ontario, on April 23, 2014.

REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	BLAIS C.J. SHARLOW J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] In these consolidated appeals, the Crown appeals from the judgment dated May 29, 2013 of the Tax Court of Canada (*per* Justice Paris): 2013 TCC 176.

[2] As will be described, Lehigh Cement Limited ("Lehigh") and CBR Alberta Limited ("CBR Alberta") (collectively the "taxpayers") acquired shares of a non-resident corporation as part of a wider, complex restructuring consisting of many steps. In their returns for the 1996 and 1997 taxation years, the taxpayers claimed a deduction offsetting the amount of the dividends received from the non-resident corporation, relying upon paragraph 113(1)(*a*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The Minister reassessed, disallowing the deductions.

[3] In disallowing the deductions, the Minister applied paragraph 95(6)(*b*) of the *Income Tax Act*, an anti-avoidance provision. In her view, that anti-avoidance provision applied because (paraphrasing the language of paragraph 95(6)(*b*)) the taxpayers had acquired shares of the non-resident corporation for the principal purpose of avoiding the payment of tax that would otherwise be payable under the Act.

[4] In the Tax Court, the parties debated the principal purpose of the taxpayers' acquisition of shares of the non-resident corporation. They also debated whether paragraph 95(6)(*b*) should be interpreted broadly as the Crown contended, or narrowly as the taxpayers contended.

[5] The Tax Court allowed the taxpayers' appeals from the reassessments. While it agreed with the Crown concerning the breadth of paragraph 96(5)(*b*), it found that the paragraph did not apply to the taxpayers in these circumstances because there was no tax that would have otherwise been payable. The Minister appeals.

[6] For the reasons set out below, I agree in result with the Tax Court but for different reasons. I would dismiss the appeal.

A. The basic facts

(1) The taxpayers

[7] The taxpayers, Lehigh, a cement and building products manufacturer in Canada, and its wholly owned subsidiary, CBR Alberta, were Canadian companies. They belonged to a corporate group known as the CBR Group. The CBR Group operated in Europe, North America and Asia. The parent of the CBR Group was a Belgian company, CBR SA.

(2) The event giving rise to the issue in this case

[8] In 1991, Lehigh's U.S.-incorporated sister company, CBR Cement Corporation ("CBR US") began to incur operating losses. By the end of 1994, its book losses totalled US$94.8 million. Its activities in the U.S. were financed by debt and equity including:

(1) amounts borrowed from CBR SA and CBR Asset Management Luxembourg ("CBR AM") (which was wholly owned by CBR SA), and (2) capital contributions from its parent U.S. company CBR Investment Corporation of America ("CBR ICA"), raised by it from the sale of preferred shares to Lehigh in 1991. CBR Group decided to refinance the intercompany debt and equity.

(3) The refinancing transactions

[9] The relevant refinancing transactions took place in 1995. I adopt the Tax Court's description of them (at paragraphs 27 to 30):

> [27] In 1995, the CBR Group decided to refinance the inter-company debt and equity of CBR US set out above with US$100 million borrowed by [Lehigh] to be invested in a U.S. LLC and loaned by the LLC to CBR US.
>
> [28] The refinancing was carried out in two parts. The CBR SA and CBR AM loans were replaced in a series of transactions carried out in mid-1995. The preferred shares in CBR ICA held by [Lehigh] were redeemed as part of another series of transactions carried out in December 1995.
>
> [29] The first series of transactions took place as follows:
>
> In March 1995, CBR Alberta was incorporated to act as the second requisite member in the LLC.
>
> On June 27, 1995 the appellants set up a Delaware limited liability company under the name CBR Developments NAM LLC (NAM LLC). It was structured as a foreign affiliate of the appellants with [Lehigh] holding a 99% interest and CBR Alberta holding a 1% interest.
>
> On July 10, 1995:
>
> - [Lehigh] borrowed US$60 million from Citibank Canada Inc. at an annual interest rate of 6.7% in exchange for a promissory note.

- Citibank sold the right to receive future interest payments under the note to Brussels Bank Lambert (BBL) and sold the right to receive the principal to CBR International Services SA (CBR IS), a Belgian company ultimately owned by CBR SA. CBR IS acted as the treasury centre for the CBR Group. It obtained the capital required for the purchase through an increase in capital from CBR SA.

- [Lehigh] used part of the borrowed funds to subscribe for preferred shares in CBR Alberta, bringing the total capital invested by [Lehigh] in CBR Alberta to US$600,000.

- [Lehigh] contributed US$59.4 million (i.e. the remainder of the borrowed funds) to NAM LLC, and CBR Alberta contributed US$600,000.

- NAM LLC lent US$60 million to CBR US at an annual interest rate of 8.25%.

- CBR US used these funds to pay off the CBR SA and CBR AM loans.

[30] The second series of transactions took place as follows:

On December 22, 1995, [Lehigh] borrowed US$40 million from BBL at an annual interest rate of 6.84%, or at a fluctuating rate depending on the circumstances;

On December 27, 1995, [Lehigh] subscribed for preferred shares of CBR Alberta for US$400,000;

[Lehigh] and CBR Alberta made additional capital contributions of US$39.6 million and US$400,000, respectively, to NAM LLC;

On or before December 31, 1995, NAM LLC loaned an additional US$40 million to CBR US at an annual interest rate of 8.25%;

CBR US paid a dividend of US$40 million to CBR ICA;

CBR ICA used the proceeds of the dividend to redeem the preferred shares held by [Lehigh];

As of December 31, 1995, [Lehigh] and CBR Alberta had made total contributions of capital to NAM LLC of US$99 million and US$1 million, respectively.

[10] The parties take no issue with the Tax Court's analysis of the anticipated tax results. The Tax Court described them as follows (at paragraphs 31 to 35):

> [31] The refinancing was expected to produce tax savings of US$1.92 million per year in Canada for [Lehigh] and US$1.19 million per year for CBR SA in Belgium.
>
> [32] For the appellants, the tax savings were expected to result from the deduction for interest paid on the money borrowed by [Lehigh] to purchase the shares of NAM LLC and from the fact that the dividends received by the appellants from NAM LLC would be tax exempt.
>
> [33] For CBR SA, the tax savings were expected to originate from an exemption under Belgian tax law on dividends to be received from CBR IS.
>
> [34] CBR US was not expected to have any net income until 1997. Therefore, while it was not expected that CBR US would obtain a tax benefit in the years 1995 to 1997 for the interest it paid to NAM LLC, it was anticipated that its interest expense would increase its net operating losses to be carried forward for U.S. federal tax purposes.
>
> [35] In addition to the tax benefits already mentioned, the refinancing also addressed other tax concerns raised by the financial services division of the CBR Group. It was noted that proposed changes to Canadian tax law regarding interest deductibility put the interest deduction on the money borrowed by [Lehigh] to purchase the preferred shares in CBR ICA at risk, since CBR ICA had not paid dividends to [Lehigh] on those shares. It was also felt that potential changes to the U.S.-Luxembourg tax treaty might increase the tax cost of the existing financing. Finally, the U.S. withholding tax on interest payments from CBR US to CBR SA was not fully tax credited in Belgium.

[11] During the period 1995-1997, CBR US paid over US$15 million to NAM LLC, which paid these amounts to the taxpayers in the form of dividends in the 1996 and 1997 taxation years.

[12] In calculating their taxable income for those years, the taxpayers claimed a deduction offsetting the amount of the dividends included in income, relying upon paragraph 113(1)(*a*) of the Act and NAM LLC's status as a foreign affiliate of both companies.

[13] In response, as will be seen, the Minister reassessed the taxpayers on the basis that their acquisition of shares in the non-resident corporation NAM LLC was for the principal purpose of avoiding Canadian tax. Therefore, according to the Minister, the anti-avoidance provision, paragraph 95(6)(*b*), applied. The Minister disallowed the taxpayers' deductions.

[14] To appreciate the Minister's position and to understand what paragraph 95(6)(*b*) does, I shall review the legislative regime associated with paragraph 95(6)(*b*).

(4) The legislative regime

[15] Paragraph 95(6)(*b*) appears in subdivision i of Division B of Part I of the Act. The subject-matter is the taxation of income from non-resident corporations.

[16] Parliament has chosen to make the taxation of income received by a Canadian taxpayer from a non-resident corporation depend upon the type of income and the ownership status of the non-resident corporation. To take the particular issue in this case as an example, both the type of income and the ownership status of the non-resident corporation come into play:

- *Type of income*. For the purposes of this case, all that need be said is that under subsection 90(1) of the Act, dividends received by a Canadian taxpayer from a non-resident corporation must be included in income when received by the taxpayer. However, under paragraph 113(1)(*a*) of the Act, dividends paid by certain non-resident corporations from exempt surplus may escape taxation in the hands of the Canadian taxpayer – *i.e.*, the Canadian taxpayer may claim a deduction offsetting the amount of the dividends included into income. Which non-resident corporations fall under paragraph 113(1)(*a*)? That is where ownership status of the non-resident corporation comes into the analysis.

- *Ownership status of the non-resident corporation.* Paragraph 113(1)(*a*) of the Act applies to dividends paid by a "foreign affiliate." Subsection 95(1) defines "foreign affiliate." Where a Canadian taxpayer holds at least a one per cent interest of any class of shares in a non-resident corporation and the taxpayer's holdings, when combined with the holdings of any related person, total ten per cent or more of the class, the non-resident corporation is a "foreign affiliate" of the Canadian taxpayer.

[17] For completeness, I observe that the rules in this Part of the Act are not quite that simple. For example, if the non-resident corporation has the status of "controlled foreign affiliate," certain passive income earned by the non-resident corporation (*i.e.*, foreign accrual property income) can be imputed to the Canadian taxpayer even if the Canadian taxpayer has not received it. But for present purposes, I need to delve into this legislative scheme only to the extent I have.

[18] Here is the text of subsection 90(1), the definition of "foreign affiliate" in subsection 95(1), and the exemption in paragraph 113(1)(*a*):

90. (1) In computing the income for a taxation year of a taxpayer resident in Canada, there is to be	**90.** (1) Est à inclure dans le calcul du revenu pour une année d'imposition d'un contribuable

included any amount received by the taxpayer at any time in the year as, on account or in lieu of payment of, or in satisfaction of, a dividend on a share owned by the taxpayer of the capital stock of a non-resident corporation.

résidant au Canada toute somme qu'il a reçue au cours de l'année au titre ou en paiement intégral ou partiel d'un dividende sur une action lui appartenant du capital-actions d'une société non-résidente.

95. (1) In this subdivision,

95. (1) Les définitions qui suivent s'appliquent à la présente sous-section.

…

…

"foreign affiliate", at any time, of a taxpayer resident in Canada means a non-resident corporation in which, at that time,

(*a*) the taxpayer's equity percentage is not less than 1%, and

(*b*) the total of the equity percentages in the corporation of the taxpayer and of each person related to the taxpayer (where each such equity percentage is determined as if the determinations under paragraph (*b*) of the definition "equity percentage" in subsection 95(4) were made without reference to the equity percentage of any person in the taxpayer or in any person related to the taxpayer) is not less than 10%,

except that a corporation is not a foreign affiliate of a non-resident-owned investment corporation;

« société étrangère affiliée » Quant à une société qui, à un moment donné, est une société étrangère affiliée d'un contribuable qui réside au Canada, société non-résidente dans laquelle, à la fois :

a) le pourcentage d'intérêt du contribuable est d'au moins 1 % à ce moment;

b) le total du pourcentage d'intérêt du contribuable et de celui de chacune des personnes qui lui est liée est d'au moins 10 % à ce moment, chaque pourcentage étant déterminé comme si le calcul prévu à l'alinéa *b*) de la définition de « pourcentage d'intérêt » au paragraphe (4) était effectué compte non tenu du pourcentage d'intérêt d'une personne dans le contribuable ou dans une personne liée à celui-ci.

Toutefois nulle société ne peut être une société étrangère affiliée d'une société de placement appartenant à des non-résidents.

113. (1) Where in a taxation year a corporation resident in Canada has received a dividend on a share owned by it of the capital stock of a foreign affiliate of the corporation, there may be deducted from the income for the year of the corporation for the purpose of computing its taxable income for the year, an amount equal to the total of

(*a*) an amount equal to such portion of the dividend as is prescribed to have been paid out of the exempt surplus, as defined by regulation (in this Part referred to as "exempt surplus") of the affiliate;

113. (1) Une société résidant au Canada qui, au cours d'une année d'imposition, a reçu un dividende sur une action lui appartenant du capital-actions d'une société étrangère affiliée de cette société peut déduire de son revenu pour l'année, pour le calcul de son revenu imposable pour cette année, le total des sommes suivantes :

a) la fraction du dividende qui est, par règlement, considérée comme ayant été prélevée sur le surplus exonéré défini par règlement (appelé « surplus exonéré » à la présente partie) de la société affiliée;

[19] The "foreign affiliate" status of a non-resident corporation, which is dependent on the non-resident corporation's ownership status, can give rise to tax savings for a Canadian taxpayer because of the ability to claim a deduction offsetting the amount of the dividends included into income. And often the Canadian taxpayer can easily manipulate that status to get those tax savings. For example, it can transform a non-resident corporation into a "foreign affiliate" by acquiring more shares in it. Or it can dispose of shares to avoid the non-resident corporation from becoming a "controlled foreign affiliate." In this context, "taxpayers jockey to get on the right side of the distinctions to take advantage of the rules": Vern Krishna, *The Fundamentals of Canadian Income Tax* (9th ed., 2006) at page 1327.

[20] To address Canadian taxpayers' ability to manipulate the ownership status of non-resident corporations, Parliament enacted paragraph 95(6)(*b*). Broadly speaking, paragraph 95(6)(*b*) provides that where a person acquires or disposes of shares of a corporation and it can reasonably be considered that the principal purpose of the acquisition or disposition is to permit a person to avoid, reduce or defer the payment of tax, the acquisition or disposition is deemed not to have occurred. Paragraph 95(6)(*b*) reads as follows:

95. (6) For the purposes of this subdivision (other than section 90),	**95.** (6) Pour l'application de la présente sous-section, sauf l'article 90:
…	…
(*b*) where a person or partnership acquires or disposes of shares of the capital stock of a corporation or interests in a partnership, either directly or indirectly, and it can reasonably be considered that the principal purpose for the acquisition or disposition is to permit a person to avoid, reduce or defer the payment of tax or any other amount that would otherwise be payable under this Act, that acquisition or disposition is deemed not to have taken place, and where the shares or partnership interests were unissued by the corporation or partnership immediately before the acquisition, those shares or partnership interests, as the case may be, are deemed not to have been issued.	*b*) dans le cas où une personne ou une société de personnes acquiert des actions du capital-actions d'une société ou des participations dans une société de personnes, ou en dispose, directement ou indirectement et où il est raisonnable de considérer que la principale raison de l'acquisition ou de la disposition est de permettre à une personne d'éviter, de réduire ou de reporter le paiement d'un impôt ou d'un autre montant qui serait payable par ailleurs en vertu de la présente loi, les actions ou les participations sont réputées ne pas avoir été acquises ou ne pas avoir fait l'objet d'une disposition et, dans le cas où elles n'avaient pas été émises par la société ou la société de personnes immédiatement avant

l'acquisition, ne pas avoir été émises.

[21] If paragraph 95(6)(*b*) applies, the tax treatment of any dividend received by the Canadian taxpayer from the non-resident corporation is determined on the basis that the shares in issue were not acquired or disposed of, as the case may be. The intended consequence is to deprive the taxpayer of whatever tax benefit was sought by the acquisition or disposition of those shares. In this case, if the Minister correctly applied paragraph 95(6)(*b*), the practical result is that the taxpayers would not be able to claim offsetting deductions for the amounts they received from the non-resident corporations.

(5) The Minister's position

[22] The Minister reassessed Lehigh and CBR Alberta for their 1996 and 1997 taxation years. The Minister denied the taxpayers the paragraph 113(1)(*a*) deduction representing the amount of dividends received from the non-resident corporation, NAM LLC. Her position was that it could reasonably be considered that the taxpayers' principal purpose in acquiring shares in NAM LLC was to avoid taxes that would otherwise be payable under Part I of the Act. As a result, in the Minister's view, paragraph 95(6)(*b*) applied and deemed the acquired shares not to have been issued for the purpose of subdivision i of Division B of Part I of the Act (other than section 90).

[23] Accordingly, in her reassessment, the Minister included the dividends in the taxpayers' income but, in calculating their taxable income, did not allow the deduction under paragraph 113(1)(*a*).

[24] Initially, the Minister also relied on the general anti-avoidance rule in section 245 of the Act but that position was later abandoned.

(6) The taxpayers' position

[25] The taxpayers objected. They say that they acquired the shares of the non-resident corporation, NAM LLC, for purposes other than avoiding Canadian tax and, therefore, paragraph 95(6)(*b*) did not apply. Accordingly, having received dividends from the non-resident corporation, they should be permitted to claim the associated deductions under paragraph 113(1)(*a*).

(7) The Tax Court's decision

[26] After reviewing the facts of the case, the Tax Court considered the proper interpretation of paragraph 95(6)(*b*), applying *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601.

[27] In its analysis, the Tax Court focused on the words "the principal purpose for the acquisition or disposition" in paragraph 95(6)(*b*). In its view, the principal purpose of the acquisition or disposition of shares is central to whether the provision applies.

[28] The Tax Court held that the principal purpose of an acquisition or disposition is a question of fact to be determined in consideration of all the circumstances of the case. One salient fact is whether the acquisition or disposition is part of a series of acquisitions or dispositions conducted with a view to avoiding tax. One indication of an anti-avoidance purpose was whether the specific acquisition or disposition was arranged for a purpose different from the overall purpose of the series of acquisitions or dispositions.

[29] The Tax Court found that surrounding provisions, the legislative evolution of the provisions and statements of legislative intent were consistent with its interpretation of the purpose test in paragraph 95(6)(*b*).

[30] Having interpreted paragraph 95(6)(*b*) in that way, the Tax Court proceeded to a three-stage inquiry: it identified the tax otherwise payable under the Act that the taxpayers are alleged to have intended to avoid, it determined whether the acquisition or disposition of shares permitted this avoidance, reduction or deferral, and it assessed the taxpayers' principal purpose in acquiring the shares.

[31] At the first stage of this inquiry, the Tax Court found that the "tax…that would otherwise be payable" in paragraph 95(6)(*b*) required it to compare what happened with the arrangement that might reasonably have been carried out by the taxpayer where the acquisition or disposition of shares had not occurred.

[32] Following this methodology, the Tax Court found that the taxpayers had shown that there is no tax that would have otherwise been payable. It accepted the taxpayers' position that the reasonable alternative arrangement in this case is one in which Lehigh subscribes for shares directly in CBR US with borrowed funds. This was in substance the arrangement that existed after 1997 when NAM LLC was dissolved. In this post-1997 scenario, the Canadian tax results are the same as those that were achieved in the transactions at issue here. For good measure, the Tax Court noted that since the tax savings in issue could have been obtained without acquiring the shares, it accepted that the acquisition's principal purpose was to avoid U.S. tax, not Canadian tax.

[33] The Tax Court concluded that paragraph 95(6)(*b*) did not apply to the taxpayers' acquisition of the shares of the non-resident corporation, NAM LLC. Therefore, they could rely on paragraph 113(1)(*a*) to deduct the dividends received from NAM LLC.

B. Analysis

[34] Before us are the same two issues that were before the Tax Court: the factual issue of the taxpayers' "principal purpose" in acquiring the shares of the non-resident corporation, and the proper interpretation of paragraph 95(6)(*b*). In these reasons, I shall deal with the latter issue first.

[35] The taxpayers submit that paragraph 95(6)(*b*) focuses upon the principal purpose of the particular acquisition or disposition of the shares, not the principal purpose of the series of

transactions of which the acquisition or disposition forms a part. It is meant to remedy a situation where a taxpayer attempts to manipulate the ownership status of a non-resident corporation for the principal purpose of gaining a tax advantage from that ownership status. It is not meant to remedy a situation where a taxpayer engages in a series of transactions that achieve any other favourable tax result.

[36] The Crown disagrees and submits that paragraph 95(6)(*b*) has a broader anti-avoidance purpose. The Crown argues that in discerning the principal purpose of an acquisition of shares of a non-resident corporation, one may look to the entire series of transactions of which the acquisition or disposition forms a part in order to determine whether there is any tax avoidance purpose at all.

[37] To resolve this debate, we must resort to the usual principles of statutory interpretation. The Supreme Court has set out the governing principles in *Canada Trustco, supra*.

[38] There, the Supreme Court reminded us that the general approach to the interpretation of all statutory provisions applies to the interpretation of provisions in taxation statutes. One must look to the text, context and purpose of the provision (at paragraph 10):

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": [citation omitted]. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play [*sic*] a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary

> meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[39] The provisions in taxation statutes are often detailed and particular. The *Income Tax Act* is "an instrument dominated by explicit provisions dictating specific consequences," and this invites "a largely textual interpretation": *Canada Trustco*, at paragraph 13.

[40] As a result, "[w]here Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe": *Canada Trustco, supra* at paragraph 11. Where the provision at issue is "clear and unambiguous," its words "must simply be applied": *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622 at paragraph 40. In such circumstances, a supposed purpose "cannot be used to create an unexpressed exception to clear language" or "supplant" clear language: *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 at paragraph 23, citing P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (5th ed. 2005), at page 569.

[41] When interpreting provisions in taxation statutes, we must keep front of mind their real life context: many taxpayers study closely the text of the Act to manage and plan their affairs intelligently. Accordingly, we must interpret "clear and unambiguous" text in the Act in a way that promotes "consistency, predictability and fairness," with due weight placed upon the particular wording of the provision: *Canada Trustco*, at paragraph 12, citing *Shell Canada Ltd., supra* at paragraph 45.

[42] We must not supplant or qualify the words of paragraph 95(6)(*b*) by creating "unexpressed exceptions derived from [our] view of the object and purpose of the provision," or by resorting to tendentious reasoning. Otherwise, we would inject "intolerable uncertainty" into the Act, undermining "consistency, predictability and fairness": *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at paragraph 51, citing P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (2nd ed. 1997) at pp. 475-76; see also *Canada Trustco*, at paragraph 12.

[43] In the course of applying these principles, legislative history and explanatory documents such as technical notes, budget papers and committee minutes can offer assistance.

[44] Overall, though, our task is to discern the meaning of the provision's text using all of the objective clues available to us.

[45] Doing this, following the above principles, I accept the taxpayers' interpretation of paragraph 95(6)(*b*).

[46] The words of paragraph 95(6)(*b*) are precise and unequivocal. Paragraph 95(6)(*b*) requires us to focus on the principal purpose for the acquisition or disposition of the shares, not the principal purpose of the series of transactions of which the acquisition or disposition forms a part. There is no basis for this Court to read in those extra words and, as shall be seen, good reason not to.

[47] I note the use of the specific words “disposition” and “acquisition” in paragraph 95(6)(*b*). They suggest that paragraph 95(6)(*b*) is aimed at a particular species of tax avoidance. In this context, dispositions and acquisitions, in and by themselves, can only be for the purpose of affecting the status of a non-resident corporation.

[48] The wider context of paragraph 95(6)(*b*) within the Act also supports the taxpayers’ interpretation.

[49] Whenever the Act broadens its focus from an individual transaction to a series of transactions, it uses quite specific words to do so: see, for example, subsections 55(2), 83(2.1), 129(1.2), the definition of “term preferred share” in section 248, and section 245. This last-mentioned provision – the general anti-avoidance rule in the Act – illustrates this well. It provides that a transaction may be regarded as an avoidance transaction if it is part of a “series of transactions or events” giving rise to a tax benefit.

[50] Paragraph 95(6)(*b*) contains no such specific language. It does not state that the tax benefit be identified as having resulted from a series of transactions of which the share acquisition or disposition was a part. Rather, the words of paragraph 95(6)(*b*) require that the tax benefit must flow from the share acquisition or disposition itself and obtaining the tax benefit must be the principal purpose of the share acquisition or disposition.

[51] Parliament knows very well what words to use to give effect to the Crown's reading of paragraph 95(6)(*b*). It has not done so.

[52] Certain amendments to the Act made while paragraph 95(6)(*b*) has been on the books provide another contextual clue to the meaning of paragraph 95(6)(*b*): subsection 17(2) in 1999, section 18.2 in 2007, and the debt dumping rules in 2013. These amendments addressed particular tax avoidance techniques. If paragraph 95(6)(*b*) has the meaning the Crown urges upon us – a broad anti-avoidance weapon in the hands of the Minister – why were these amendments necessary?

[53] Indeed, the particularity of the wording of paragraph 95(6)(*b*) resembles the particularity of these amendments to the Act. Paragraph 95(6)(*b*) appears to be just one of many particular anti-avoidance provisions in the Act and should be construed as such.

[54] Another contextual factor is the architecture of the Act. Paragraph 95(6)(*b*) appears in subdivision i ("Shareholders of Corporations Not Resident in Canada") of Division B ("Computation of Income") of Part I of the Act. When paragraph 95(6)(*b*) is triggered, it affects whether a particular share acquisition or disposition should be considered when computing income. It is not in a more general part of the Act such as Part XVI ("Tax Avoidance"). In the absence of specific wording suggesting otherwise, this supports the conclusion that paragraph 95(6)(*b*) addresses concerns about acquisitions or dispositions of "shares of corporations not resident in Canada," not other transactions or more general tax avoidance concerns.

[55] On the facts of this case, the tax advantage is created by section 113 and depends on whether the non-resident corporation has the status of "foreign affiliate" under subsection 95(1). Taxpayers can easily manipulate this status by acquiring or disposing of shares. Paragraph 95(6)(*b*) creates a fix by requiring in appropriate cases that the acquisition or disposition of shares be ignored. Under this interpretation, the fix fits the problem. It would take clearer wording to lead to the conclusion that the fix in paragraph 95(6)(*b*) is aimed at a broader problem.

[56] From the foregoing analysis then, it seems to me that the species of tax avoidance addressed by paragraph 95(6)(*b*) is the manipulation of share ownership of the non-resident corporation to meet or fail the relevant tests for foreign affiliate, controlled foreign affiliate or related-corporation status in subdivision i of Division B of Part I of the Act.

[57] This, however, is not the end of the inquiry. Even where the wording is clear and unequivocal and the context of the provision within the Act supports its clear and unequivocal wording, *Canada Trustco* instructs us to examine the underlying purpose of the provision in order to try to understand its meaning.

[58] Here, the Crown's submissions concerning the purpose of paragraph 95(6)(*b*) smacked of the sort of economic realities submission advanced in *Shell*, *supra*. On that, the Supreme Court said this (at paragraphs 39-40):

> …this Court has never held that the economic realities of a situation can be used to recharacterize a taxpayer's *bona fide* relationships. To the contrary, we have held that, absent a specific provision of the Act to the contrary or a finding that

> they are a sham, the taxpayer's legal relationships must be respected in tax cases….
>
> Second, it is well established in this Court's tax jurisprudence that a searching inquiry for either the "economic realities" of a particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction. Where the provision at issue is clear and unambiguous, its terms must simply be applied. [References omitted]

[59] The Crown is right to say that paragraph 95(6)(*b*) has an anti-avoidance purpose. But identifying that purpose does not take us very far. It begs the questions of exactly what avoidance techniques are being addressed by paragraph 95(6)(*b*), how far paragraph 95(6)(*b*) goes to redress the avoidance of tax, and in what circumstances it applies.

[60] Anti-avoidance provisions in the Act come in all shapes and sizes and must be analyzed individually. For example, while section 245 is a broad anti-avoidance provision, many others are designed narrowly to address a particular species of avoidance. The above analysis suggests that paragraph 95(6)(*b*) addresses a particular species of avoidance and is not aimed at general anti-avoidance.

[61] As part of the Court's examination of the purpose underlying a provision, it is sometimes useful to consider the implications associated with the rival interpretations placed before it. Some implications are consistent with the broad themes of the Act and the legal principles governing its administration. Others, not so much.

[62] In this case, the Crown's oral and written submissions suggest that paragraph 95(6)(*b*) is capable of being applied in a variety of circumstances where a taxpayer has engaged in what the Minister considers to be abusive tax planning involving foreign corporations. Indeed, the Crown seems to believe that the paragraph can be used even if the non-resident corporation has obtained foreign affiliate status without any artificial manipulation of share ownership.

[63] At the same time, however, the Crown does not take the view that whenever paragraph 95(6)(*b*) can be applied, it will. Rather, the Crown says that paragraph 95(6)(*b*) will be applied only where the tax avoidance is unacceptable.

[64] Unacceptability is in the eye of the beholder. It can shift depending on one's subjective judgment and mood at the time. Using it, as the Crown suggests, to restrain the indiscriminate use of paragraph 95(6)(*b*) creates the spectre of similarly-situated taxpayers being treated differently for no objective reason. This would violate the principle that, absent clear legislative wording, the same legal principles should apply to all taxpayers: *Bronfman Trust v. The Queen*, [1987] 1 S.C.R. 32 at page 46.

[65] A hypothetical but commonly-occurring scenario illustrates this problem. Where a Canadian taxpayer borrows to buy shares in a non-resident subsidiary corporation that carries on an active business, the tax result will always exceed the commercial result. The Canadian taxpayer will be able to deduct interest on the loan and deduct the dividends. As a practical matter, the tax advantages of borrowing to buy shares in a non-resident corporation often enter into the taxpayer's decision-making.

[66] In that scenario, will paragraph 95(6)(*b*) always be a live issue? What would govern the Minister's discretion whether or not to apply paragraph 95(6)(*b*)? Unlike section 245, where there is an express limiting factor on the Minister's discretion – the presence of abuse or misuse – paragraph 95(6)(*b*) does not contain any sort of limiting factor at all. A standard of unacceptability, even if it were open to us to invent it and insert it into paragraph 95(6)(*b*), is in itself unacceptable, as I have explained.

[67] Absent clear wording, I would be loath to interpret paragraph 95(6)(*b*) in a way that gives the Minister such a broad and ill-defined discretion – a standardless sweep – as to whether or not a tax is owing, limited only by her view of unacceptability. It would be contrary to fundamental principle. It would also promote arbitrary application, the bane of consistency, predictability and fairness.

C. Conclusion and application to the facts of this case

[68] For the foregoing reasons, I conclude that paragraph 95(6)(*b*) is targeted at those whose principal purpose for acquiring or disposing of shares in a non-resident corporation is to meet or fail the relevant tests for foreign affiliate, controlled foreign affiliate or related-corporation status in subdivision i of Division B of Part I of the Act with a view to avoiding, reducing or deferring Canadian tax.

[69] The principal purpose of the acquisition or disposition of shares in the non-resident corporation is a question of fact to be determined on the basis of all relevant circumstances. An entire series of transactions may form part of the circumstances relevant to discerning the principal purpose of the acquisition or disposition of shares in the non-resident corporation. But it is not open to the Minister to look at an entire series of transactions to discern a tax avoidance purpose that is not the specific target of paragraph 95(6)(*b*).

[70] Manipulating the shareholdings in the non-resident corporation to change its status in subdivision i of Division B of Part I of the Act in order to avoid, reduce or defer Canadian tax by itself does not necessarily trigger paragraph 95(6)(*b*) of the Act. The purpose must be the principal – *i.e.* dominant or main purpose – not just one of many different purposes.

[71] In this case, the Tax Court found that the principal purpose behind the acquisition of shares in the non-resident corporation, NAM LLC, viewed in light of the entire series of transactions, was to achieve overall U.S. tax savings. Further, the Tax Court found that the Canadian tax savings could have been obtained without acquiring the shares in the non-resident corporation.

[72] On the basis of these considerations and the record of evidence before it, the Tax Court concluded that the taxpayers' acquisition of shares in the non-resident corporation did not result in an avoidance of Canadian tax. In substance, the Tax Court rejected the submission that the taxpayers' principal purpose was to manipulate share ownership of the non-resident corporation

to meet the test for “foreign affiliate” in subdivision i of Division B of Part I of the Act and gain a Canadian tax benefit.

[73] In reaching these conclusions, the Tax Court did not err in principle. Further, these conclusions were open on the record before it. This Court has no ground to intervene.

[74] It follows that paragraph 95(6)(*b*) does not apply in this case. Therefore, I agree with the result reached by the Tax Court – the Minister’s reassessments for the 1996 and 1997 taxation years cannot stand.

D. Proposed disposition

[75] For the foregoing reasons, I would dismiss the appeals with costs.

"David Stratas"
J.A.

“I agree
Pierre Blais C.J.”

“I agree
K. Sharlow J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-327-13

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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 8, 2014
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	BLAIS C.J. SHARLOW J.A.
DATED:	APRIL 23, 2014

APPEARANCES:

Daniel Bourgeois	FOR THE APPELLANT
Warren Mitchell Matthew Williams	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPELLANT
Thorsteinssons LLP Vancouver, British Columbia	FOR THE RESPONDENT

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