Docket: 2017-922(IT)G

BETWEEN:

DEML INVESTMENTS LIMITED,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard May 2-4, 2022 at Calgary, Alberta

Before: The Honourable Justice Bruce Russell

Appearances:

Counsel for the Appellant:	Anu Koshal Raj Juneja
Counsel for the Respondent:	Grant Nash Carla Lamash

JUDGMENT

The appeal of the reassessments pertaining to the Appellant's taxation years ended November 30, 2010 and 2011, both raised May 18, 2016, is dismissed.

The Court is to receive submissions as to costs, not exceeding 10 pages each, by March 31, 2024, should the parties by then not have resolved that matter.

Signed at Ottawa, Canada, this 29th day of February 2024.

"B. Russell"

Russell J.

Citation: 2024 TCC 27
Date: 20240311
Docket: 2017-922(IT)G

BETWEEN:

DEML INVESTMENTS LIMITED,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

AMENDED REASONS FOR JUDGMENT

Russell J.

I. Overview:

[1] This is a general anti-avoidance rule (GAAR) matter, involving Canadian resource property (CRP) as defined in the federal *Income Tax Act* (Act).[1]

[2] In 2008, the Appellant DEML Investments Limited's parent corporation paid $50,688,330 to acquire the shares of a corporation holding a 99% interest in a partnership of which it was a partner. The partnership held resource property primarily consisting of petroleum and natural gas (PNG) rights, which constitute CRP, and as well depreciable property. After several admitted avoidance transactions, by January 30, 2009 the resource property held by the Appellant was valued at $59,363,463. As well, in relation to that resource property the Appellant now had continuation of entitlement to approximately $47 million in resource tax pools.

[3] By February 1, 2009, the Appellant's interest in the partnership had low value and an adjusted cost base (ACB) of $45,850,237. On November 30, 2010, the Appellant disposed of its partnership interest and accordingly claimed a $45,850,237

[1] subsection 66(15) of the Act

capital loss (Capital Loss), virtually all of which the Appellant sought to carry-back to offset a substantial capital gain reported in its 2007 taxation year.

[4] The Minister of National Revenue (Minister) viewed the claimed Capital Loss as an artificial loss and denied it on the basis of GAAR. The Minister maintains that various admitted avoidance transactions involving the CRP of the resource property resulted in abuse or misuse of provisions of the Act, including capital loss and "bump" provisions, thus justifying the appealed GAAR reassessments of the Appellant's 2010 and 2007 taxation years.[2]

[5] The Appellant admits that certain transactions relating to the said resource property primarily consisting of CRP were avoidance transactions, and pursuant to section 245 of the Act the claimed Capital Loss (and carry-back) was a tax benefit. The Appellant says however that no avoidance transactions abused or misused any provisions of the Act, and thus the appealed reassessments are wrong.

[6] Provisions of the Act referred to herein are reproduced in the annex to these reasons for judgment.

II. Issue:

[7] The issue is whether any avoidance transaction(s) in this matter circumvented, defeated or frustrated the object, spirit and purpose of any provisions of the Act, so as to justify the Minister's application of GAAR in denying the Appellant's 2010 Capital Loss and carry-back to 2007 to offset a capital gain.

III. Evidence:

[8] At the hearing, the parties tendered an agreed statement of facts and true copies of relevant documentation, without oral testimony.

[9] The pertinent facts are the following, including agreement as to the tax benefit and seven avoidance transactions:

> -the Appellant during its 2007 to 2010 taxation years was a wholly-owned subsidiary of Direct Energy Marketing Limited (Direct Energy), a Canadian energy company;

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[2] Respondent's written representations, paras. 1-6

-in its 2007 taxation year, the Appellant reported a substantial capital gain;

-in early 2008, Direct Energy chose to acquire certain Canadian oil and gas properties (Resource Properties) owned by Transglobe Energy Corporation (Transglobe), an international exploration and production company based in Calgary;

-the Resource Properties consisted of:

(a) PNG rights, which constituted CRP;

(b) tangible property used to produce oil and natural gas, which constituted depreciable property as defined in the Act and classified as Class 41 property; and

(c) miscellaneous interests of nominal value consisting of property necessary to operate the Resource Properties;

-at all relevant times Direct Energy and Transglobe dealt with each other at arm's length;

-in early 2008, Direct Energy entered into an agreement with Transglobe to acquire the Resource Properties. To implement the agreement, Direct Energy and Transglobe arranged and undertook certain pre-acquisition transactions (Steps 1 to 4, following);

- Step 1: on January 28, 2008 and March 25, 2008 respectively, Transglobe caused incorporation of two numbered companies that were wholly-owned subsidiaries, being 1377116 Alberta Ltd. (137) and 1389673 Alberta Ltd. (138);

- Step 2: (admitted Avoidance Transaction) on April 22, 2008, 137 and 138 formed the Transglobe Energy Partnership (DERP2);

- Step 3: Transglobe transferred 99% of the Resource Properties to 137 and the remaining 1% to 138. The parties elected per subsection 85(1) of the Act re these transfers;

- Step 4: (admitted Avoidance Transaction) 137 and 138 transferred the Resource Properties to their DERP2 partnership. They and DERP2 elected

per subsection 97(2) of the Act re these transfers, at costs of $1 for the CRP and $11.3 million for the depreciable property;

- Step 5: on April 30, 2008 Direct Energy acquired from Transglobe the shares of 137 and 138 for $56.7 million less adjustments, for a net purchase price of $51,200,333 broken down as follows - $50,688,330 for the shares of 137 and $512,003 for the shares of 138. Immediately following, Direct Energy's ACB of its shares of 137 was $50,688,330;

- Steps 6 to 10 include the wind-up of 137 and transfer of the Resource Properties from DERP2;

- Step 6: (admitted Avoidance Transaction) on January 28, 2009, Direct Energy transferred its shares of 137 to the Appellant. They elected per subsection 85(1) of the Act re the roll-over transfer. The Appellant acquired the shares of 137 at a cost of $50,688,330 (equal to Direct Energy's ACB in the shares). At that time, the fair market value of the shares of 137 was $55,068,750;

- Step 7: (admitted Avoidance Transaction) on the following day, January 29, 2009, 137 distributed to the Appellant its property, consisting of its 99% interest in the DERP2 partnership, with an ACB of $11.3 million. Then 137 was wound-up and dissolved;

- Step 8: (admitted Avoidance Transaction) on the following day, January 30, 2009, the Appellant made a "bump" designation under paragraph 88(1)(d) of the Act for its acquisition of the 99% interest in the DERP2 partnership. The Appellant relied on this designation to claim a $39,402,330 increase (from $11,286,000 to the said $50,688,330) to its cost of acquisition, i.e. ACB, of the 99% designated interest in the DERP2 partnership. The Appellant also was deemed to be the same corporation and a continuation of 137 for the purpose of the Resource Properties. The Appellant increased its cumulative Canadian oil and gas property expenses (CCOGPE) tax pool by $34,859,099 and its UCC by $11,286,000;

- Step 9: (admitted Avoidance Transaction) on January 30, 2009, DERP2 distributed the Resource Properties to the Appellant as a return of capital of $59,363,463. This was the then fair market value of the Resource Properties. Of that amount $41,512,833 was allocated to the PNG rights, i.e. CRP; $12,112,166 to the Class 41 depreciable property;

$3,783,463 to working capital and $1 to miscellaneous interests. This distribution reduced the Appellant's ACB of its DERP2 partnership interest by the said fair market value (from $50,688,431 to $(8,675,032)).[3] The Appellant's CCOGPE balance was increased by the fair market value of the PNG rights;[4]

- on January 31, 2009, being DERP2's fiscal year end, DERP2's proceeds of distribution for the CRP (the PNG rights) was allocated to its partners. The Appellant's CCOGPE balance was reduced by $43,077,705. The Appellant's ACB of its DERP2 partnership interest increased by the said $43,077,705 to the amount of $34,402,673;

- Step 10: on the next day, February 1, 2009, the Appellant transferred the assets it acquired from DERP2 to another partnership (LP1). Following this transfer the Appellant held a minority interest in LP1. The remaining interests in LP1 were held by persons related to the Appellant;

- between June and October 2010, Direct Energy decided to divest itself of certain of the Resource Properties that were located in the Redwater district (Redwater Properties). To effect sale of the Redwater Properties, the Appellant arranged for undertaking of the following transactions (Steps 11 and 12). At all relevant times the Appellant and the intended purchaser, Orion Oil & Gas Corporation (Orion), dealt with each other at arm's length;

- Step 11: (admitted Avoidance Transaction) on November 29, 2010, LP1 transferred the Redwater Properties (valued at $6.7 million) to the Appellant. The Appellant in turn transferred the Redwater Properties back into DERP2. The Appellant and DERP2 elected per subsection 97(2) of the Act respecting that transfer. As a result of the transfer, the Appellant's ACB of its DERP2 partnership interest increased by approx. $6.7 million;

- Step 12: on November 30, 2010, the Appellant sold to Orion its DERP2 partnership interest and its shares in 138, for a base purchase price of $6.7 million;

[3] subparagraph 53(2)(c)(v) of the Act
[4] paragraph 66.4(5) of the Act

- for its 2010 taxation year the Appellant reported the aforesaid Capital Loss of $45,850,237, from disposition of its DERP2 partnership interest. The Appellant had reported an ACB in the DERP2 partnership interest of $52,550,237 and proceeds of disposition of $6.7 million;

- the Appellant "carried back" and deducted in computing its taxable income for its 2007 taxation year $44,879,994 of the Capital Loss, as a net capital loss from its 2010 taxation year, to offset the capital gain the Appellant had reported in its 2007 taxation year;

- the Minister on reassessment determined the Capital Loss to be nil and reassessed the Appellant's 2007 taxation year to deny the deduction of the net capital loss in that taxation year from the 2010 taxation year;

- the deduction by the Appellant in computing taxable income for the 2007 taxation year of a portion ($44,879,994) of the Capital Loss is a tax benefit (Tax Benefit) as defined under subsection 245(1) of the Act.

- Direct Energy had a business purpose for agreeing to acquire the Resource Properties: their production and development potential were geographically adjacent to Direct Energy's core properties, and the properties were geologically similar to Direct Energy's core assets, primarily conventional natural gas;

- the parties agree that each of the transactions described at Step 2, Step 4, Step 6, Step 7, Step 8, Step 9 and Step 11 above:

a. resulted directly or indirectly, alone or as part of a series of transactions, in the Tax Benefit;

b. was arranged and undertaken primarily for the purpose of obtaining the Tax Benefit;

c. may not reasonably be considered to be a transaction undertaken or arranged primarily for a purpose other than to obtain the Tax Benefit; and

d. is an "avoidance transaction" per subsection 245(3) of the Act.

IV. GAAR:

[10] Section 245 of the Act (the GAAR provision) provides as follows (excluding subsection (1) definitions except for "tax benefit"):

> 245(1) "tax benefit" means 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;
>
> 245(2) General anti-avoidance provision [GAAR] - 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.
>
> 245(3) Avoidance transaction - 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 partly of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.
>
> 245(4) Application of subsection (2) - 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.

V. Issue and Parties' Positions:

[11] As stated, the sole issue is whether per paragraph 245(4) any avoidance transaction(s) undertaken or arranged to achieve the Tax Benefit resulted directly or indirectly in abuse or misuse of any provision(s) of the Act.

[12] Answering this is a two-step process – first, to determine the object, spirit and purpose (OSP) of relevant provisions of the Act through a unified textual, contextual and purposive approach; and second, to determine whether an avoidance transaction or series of avoidance transactions frustrated or defeated the OSP of relevant provisions of the Act.

[13] The Appellant submits that its position is justified by the Act's resource rules, stating that they applied as intended and that the legislative text supports three "key points". These points are:

> (a) CRP is neither capital property, nor inventory, therefore it receives its own special treatment under the Act;
>
> (b) the cost associated with acquiring CRP is not tied to the property itself, but allocated to certain resource tax pools. CRP does not have an ACB associated with it. When a taxpayer acquires or disposes of CRP, the tax pools' balances accordingly increase or decrease; and
>
> (c) when CRP is owned by a partnership, the costs associated with that property are tracked at the partner level, not at the partnership level.[5]

[14] Also, the Appellant cites CRA Ruling 2005–0147681R3 entitled "Transfer of Canadian Resource Properties", which the Appellant says presents a similar series of transactions to those herein, and then concluding that the GAAR would not apply. The 2005 Ruling states also that it, "may not represent the current position of the CRA."[6]

VI. <u>Resource Property Provisions:</u>

[15] The Act provides for differing regimes in recognizing costs incurred to acquire differing types of properties. Three such regimes are relevant in this matter, in determining whether there was statutory abuse in a GAAR context. They are:

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[5] Appellant's written submissions, paras. 53, 54

[6] Tab 30, appellant's authorities

> (a) the capital gain/loss regime which relates to acquisition costs of capital property;
>
> (b) the CCA regime which is pertinent to acquisition costs of depreciable property; and
>
> (c) the CCOGPE tax pools regime, pertinent to acquisition costs of Canadian resource property, i.e. CRP.

[16] Costs pertaining to CRP acquisitions are added to the CCOGPE tax pool. The concept of ACB, applicable in the context of capital property, does not apply to CRP acquisition costs, as CRP is not capital property, per the section 54 definition of "capital property" and subparagraphs 39(1)(a)(ii) and 39(1)(b)(ii).

[17] The CCOGPE tax pool (one of three tax pools) is established by paragraphs 66.4(5)(a) and (b) of the Act. CRP costs allocated to this pool include costs of acquiring CRP relevant to the oil and gas industry such as for land, licences, permits, exploration rights, leases, wells and royalty interests. This includes the PNG rights relevant in this appeal; with CRP being a prominent portion of the Resource Properties.

[18] The Appellant asserts that CRP triggers special treatment. As stated, CRP does not have an ACB associated with it as it is not capital property pursuant to section 54 and subparagraphs 39(1)(a)(ii) and 39(1)(b)(ii). The latter two provisions also provide that no capital gain or loss can be realized on property that is CRP.[7]

[19] Also, the Appellant notes that CRP is not depreciable property, due to subsection 13(21) which limits depreciable property to being property for which capital cost allowance may be claimed under paragraph 20(1)(a).[8]

[20] The Appellant submits that as CRP is not capital property and no ACB may be associated with it, the cost of acquiring CRP is instead recognized by way of tax pools, in particular the CCOGPE tax pool. Per paragraph 66.4(2)(b) a taxpayer's CCOGPE balance is deductible in calculating a taxpayer's income for a taxation year on a 10 percent declining balance. When CRP is disposed of, the taxpayer's CCOGPE balance is reduced by the amount of proceeds of disposition of the CRP.

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[7] Appellant's written submissions, para. 56
[8] Appellant's written submissions, para. 57

VII. Analysis:

[21] The Respondent submits that capital loss provisions of the Act were abused. The Respondent asserts that the Appellant, in claiming the Capital Loss, claimed an artificial or paper loss, and not a real loss.

[22] The Appellant refutes that submission, saying there was no abuse and that the claimed Capital Loss arose due to "the unique features of the resource rules [which] specifically contemplate different tax results than are available in any other regime in the Act."[9]

[23] The Respondent submits also that the "bump" rules in the Act were abused.

[24] The Appellant responds that the "bump" rules in the Act were applied as intended.

[25] In the recent decision of *Deans Knight Income Corp. v. Canada*, 2023 SCC 16, the Supreme Court of Canada recognized that GAAR was added to the Act (in 1988) due to "abusive tax avoidance" brought on by "creative tax planners."

[26] Rowe J., writing the 7/1 majority opinion in *Deans Knight*, referenced this as follows (underlining added):[10]

> 42. [Prior to the GAAR coming into force in 1988]…abusive tax avoidance had become a problem of significant concern for Parliament. Taxpayers, aided by expert advice, increasingly devised complex legal transactions to avoid tax in ways unintended by Parliament. Once the avoidance mechanisms relied on became evident, either from advance ruling requests or tax assessments, Parliament would react to 'plug' the loopholes in the [Income Tax] Act to prevent future use. The problem was that increasingly convoluted rules were vulnerable, creating new loopholes to exploit…. As this 'cycle of action and reaction' between creative tax planners and Parliament continued, the Act grew in size and complexity…
>
> 44. The GAAR was Parliament's chosen mechanism to interrupt this cycle...

[27] The GAAR, "confers…the unusual duty of going beyond the words of the legislation" in applying the three-step GAAR analysis, described as follows:[11]

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[9] Ibid., para. 195
[10] *Deans Knight*, paras. 42, 44
[11] *Ibid.*, paras. 51, 52

> 51. …'[i]t is relatively straightforward to set out the GAAR scheme. It is much more difficult to apply it'… This is because the GAAR confers upon courts the 'unusual duty of going behind the words of the legislation'... While the duty imposed by the GAAR is unusual, the analysis involves a structured, three-step test that has been the subject of thorough guidance by this Court. In order for the GAAR to apply, the following questions must be asked… (1) Was there a tax benefit? (2) Was the transaction giving rise to the tax benefit an avoidance transaction? (3) Was the avoidance transaction giving rise to the tax benefit abusive?
>
> 52. …at the third step, the Minister bears the burden of proving that the avoidance transaction results in an abuse. (underlining added)

[28] Regarding the first of these three questions (was there a tax benefit?), the parties agree that the Appellant's claimed deduction for its 2007 taxation year of $44,879,994 of the total $45,850,237 Capital Loss from its disposition in its 2010 taxation year of its DERP2 partnership interest, is the Tax Benefit per subsection 245(1) of the Act.[12]

[29] As for the second question (was the transaction giving rise to the Tax Benefit an avoidance transaction?), the parties concur that seven of the twelve transactional steps as set out above were avoidance transactions – being steps 2, 4, 6, 7, 8, 9 and 10. The parties accept, per the subsection 245(3) definition of avoidance transaction, that each of these avoidance transactions was arranged and undertaken primarily for the purpose of obtaining the Tax Benefit, i.e. the Capital Loss claimed by the Appellant.

[30] It is the third of these questions (was/were the avoidance transaction(s) that gave rise to the Tax Benefit abusive?) that is at issue herein.

[31] In *Deans Knight* Rowe, J. addressed this third stage question in applying the GAAR as follows (under the heading, "The Abuse Analysis Focuses on Whether the Result of the Transactions Frustrates the Provision's Object, Spirit and Purpose"):

> At the abuse stage, the avoidance transactions will be abusive where the outcome or result of the avoidance transaction '(a) is an outcome that the provisions relied on seek to prevent; (b) defeats the underlying rationale of the provisions relied on; or (c) circumvents certain provisions in a manner that frustrates the object, spirit and purpose of those provisions' (*Lipson*, at para. 40, citing *Trustco*, at para. 45). These considerations are not independent of one another and frequently overlap (*Copthorne*, at para. 72). Ultimately, the analysis remains squarely focused on abuse. Courts must go beyond the legal form and technical compliance of the

[12] Agreed Statement of Facts, para. 15

> transactions; they must compare the result of the transactions to the underlying rationale of the provision and determine whether that rationale has been frustrated. In coming to such a conclusion, the abusive nature of the transaction "must be clear" (*Trustco*, at paras. 62 and 66; *Copthorne*, at para. 68; *Alta Energy*, at para. 33).[13] (underlining added)

[32] Also, it was made clear that the GAAR may apply regardless of precisely worded provisions:

> Importantly, there is no bar to applying the GAAR in situations where the Act specifies precise conditions that must be met to achieve a particular result, as with a specific anti-avoidance rule. Thus, I do not agree with the appellant's submission that where Parliament has legislated with precision, as here, where loss carryovers are denied in specific instances, the GAAR is not meant to play a role. Of course, the GAAR will not apply in all circumstances - the analysis is inherently case specific. Further, the way a provision has been drafted is important within the text, context and purpose analysis, since it may shed light on the conduct that Parliament sought to target and how it went about doing so. But the proposition that the GAAR can have almost no role where Parliament has legislated a specific anti-avoidance rule is to read a restriction into s.245 without a basis for doing so. It ignores the fact that the GAAR was enacted in the first place partly because specific anti-avoidance rules were being circumvented through abusive tax planning, and that such rules were among those most commonly found to have been abused in GAAR decisions…[14] (underlining added)

[33] Rowe J. added:[15]

> In summary, at the third stage of the GAAR analysis:
>
> -The object spirit and purpose is a description of the provision's underlying rationale. The means (the *how*) do not always provide a full answer as to the rationale underlying the provision (the *why*).
>
> -The text, context and purpose of a provision provide indicia of its rationale. The text can shed light on what the provision was designed to encourage or prevent based on what it expressly permits or restricts, how it is worded and structured, and the nature of the provision. Similarly, the context can serve to identify the function of the provision within a coherent scheme.

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[13] *Ibid.*, para. 69
[14] *Ibid.*, para. 71
[15] *Ibid.*, para.73

> -Finally, the provision's purpose can help to discern the outcomes that Parliament sought to achieve or prevent.
>
> -Once the object, spirit and purpose has been ascertained, the abuse analysis goes beyond the legal form and technical compliance of the transactions to consider whether the result frustrates the provision's rationale. (underlining added)

VIII. Assertions of abuse:

[34] The Respondent asserts two categories of abuse of provisions of the Act. The first abuse assertion is in respect of certain capital loss provisions of the Act. The second is in respect of "bump" provisions of the Act utilized to increase the ACB of the Appellant's DERP2 partnership interest, enabling increase of the claimed Capital Loss.

[35] I first address the claimed abuse of capital loss provisions of the Act that were applied to obtain the Capital Loss/Tax Benefit. The capital loss provisions of the Act said to have been abused are paragraphs 3(b), 38(b) and 11(b), subparagraphs 39(1)(b)(i) and (ii) and definitions "adjusted cost base" in section 54 and "net capital loss" in subsection 111(8).[16]

[36] As noted, there are two parts to the abuse analysis. The first is establishment of the OSP of the statutory provisions at issue. The second is establishment that one or more avoidance transactions of the Appellant abused the OSP of those provisions.

[37] In *Triad Gestco Ltd. v. Canada,* 2012 FCA 258, the Federal Court of Appeal (FCA) accepted the "textual, contextual and purposive analysis" of the specified capital loss provisions, as follows:

> 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 Ltd.*, 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

[16] Respondent's written submissions, paras. 162-173

> in an abuse and a misuse of the relevant provisions, specifically paragraphs 38(b), 39(1)(b) and 40(1)(b) (*1207192 Ontario Ltd.*, 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. (underlining added)

[38] The capital loss provisions addressed in *Triad Gestco* (paragraphs 38(b), 39(1)(b) and 40(1)(b)) are included in the capital loss provisions that in this appeal the Crown has claimed were abused (sections 3, 38, 39, 40, 53 and 54). The underlying rationale of the capital loss provisions identified in *Triad Gestco* is that a capital loss offsetting a capital gain is to be reflective of "an economic loss on the disposition of property". That is, the loss cannot be an artificial or paper loss.

[39] Here the Minister determined there was no real or economic loss, as stated in the Respondent's written submissions, paragraph 170, as follows:

> 170. The appellant's capital loss does not reflect any kind of impoverishment on the part of the appellant. The entire capital loss relies on ACB from transactions that occurred in a period – the period from April 2008 until January 30, 2009 - during which the Resource Properties increased in value by $8,675,133 from the price paid by Direct Energy for the shares in 137. All of the price paid by Direct Energy for those shares was indirectly attributable to the Resource Properties. During this period there were no transactions involving the appellant and DERP2 other than those involving the Resource Properties. At the end of the period, the appellant held the Resource Properties at a value of over $59 million.[17] [underlining added]

[40] As indicated by this statement, the Respondent observes that while the Appellant claimed the Capital Loss of some $45 million, at the same time the value of the Resource Properties, held by the Appellant, had increased by over $8 million from when purchased by the Appellant's parent Direct Energy, to an amount exceeding $59 million. This does not indicate there having been any loss, let alone one of some $45 million.

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[17] Respondent's Written Submissions, para. 170

[41] The Appellant asserts that, for resource properties, gain or loss is not based on any particular resource property but rather "on a pool-wide basis by increasing or decreasing CCOGPE as the case may be."[18]

[42] That is so, however I do not accept that that constrains a GAAR analysis from viewing the pertinent circumstances in a general and common-sense basis.

[43] The Appellant did not show that the claimed Capital Loss (i.e., the Tax Benefit) was a real loss, as opposed to being an artificial or paper loss. To the contrary, the Capital Loss was reflective of the ACB of the DERP2 partnership interest that per Step 8 had been substantially "bumped" per paragraph 88(1)(d). That does not reflect any actual as opposed to paper loss. The Appellant acknowledges that this Step 8 was an avoidance transaction, and as such, "was arranged and undertaken primarily for the purpose of obtaining the Tax Benefit."[19]

[44] Thus, I conclude that the Appellant has claimed an artificial loss, rather than a true loss, not abiding by the OSP of the capital loss provisions of the Act, as pronounced by the FCA in *Triad Gestco*. Also, it is apparent that the approx. $51 million that Direct Energy paid for the shares of 137 would be due to the value of the 99% interest in the Resource Properties that 137 held, most all of which was CRP, and which by January 30, 2009 had increased in value to more than $59 million. That certainly is not indicative of any loss.

[45] This breach of the OSP of capital loss provisions of the Act is a clear abuse of those provisions – i.e., paragraphs 3(b), 38(b), 39(1)(b), 40(1)(b) and 111(1)(b), the definition "adjusted cost base" in section 54 and "net capital loss" in subsection 111(8). Consistent with the OSP of these provisions, these provisions are abused when utilized in respect of artificial or paper losses as opposed to real losses.

[46] The Appellant refutes the proposition that it abused the capital gain/loss provisions of the Act. The Appellant submits that the loss pertaining to its claimed Capital Loss is due to the "unique" provisions in the Act respecting CRP. The provisions "specifically contemplate different tax results than are available in any other regime in the Act."[20]

[47] GAAR, where the applicable OSP has been abused, should prevent a taxpayer from doing indirectly what cannot be done directly. Applying the GAAR turns on

[18] Appellant's Reply Submissions, paras. 3 to 7
[19] Ex. 1 - Agreed Statement of Facts, paras. 17(b) & (d).
[20] See fn. 5

viewing what has actually happened. Here the substantial Capital Loss was claimed where there was no economic loss or impoverishment, thus per *Triad Gestco* breaching the OSP of the Act's capital loss provisions, including paragraph 39(1)(b).

[48] In that context it is abusive where a capital loss nevertheless was claimed based on the value of a partnership interest, which value derives from the CRP (of the Resource Properties) while held by that partnership. So here, CRP was made indirectly the basis for the claimed capital loss. As said, this is tax planning to do indirectly what cannot be done directly, and GAAR exists to deal with such situations.

[49] Furthermore, on November 30, 2010 when the DERP2 partnership interest was disposed of, creating the subject Capital Loss, the agreed statement of facts indicates that the Appellant continued to own the Resource Properties (minus a portion referenced as the Redwater Properties), acquired from the DERP2 partnership a year earlier (Step 9). Thus, the Appellant remained entitled to the CCOGPE and UCC tax pools pertaining to the Resource Properties while also enjoying an increase in the value of the Resource Properties of more than $8 million. This is all while the Appellant was seeking to benefit from the carry-back to 2007 of most of the claimed Capital Loss – which was a paper loss only – to offset the substantial capital gain reported in that year.

[50] I find that is abusive of the capital loss provisions, which are not intended to be useable for CRP based value, particularly while at the same time there remains entitlement to the CCOGPE and UCC tax pools. That appears why the Act does not want CRP involved with claimed capital losses. The CCOPEG cost regime applies to CRP; not either the capital loss/gain cost regime or CCA cost regimes.

[51] The Appellant cites also the above-mentioned CRA Ruling - # 2005-0147681R3. In this Ruling, issued in 2006, the Canada Revenue Agency (CRA) held that a partnership that no longer owned certain resource properties, which generated a high ACB, could still preserve that ACB. However, in that Ruling the CRA did not take a position with regards to claimed capital losses on a partnership interest in such a partnership, which is the situation in the present matter. Nor did the Ruling deal with ACB that had been "bumped" for the purposes of increasing a capital loss to be applied against a previously reported capital gain.

[52] Furthermore, the FCA has warned that prior rulings and opinions provided by the CRA are "of little assistance" in GAAR cases. The courts are not bound by

the opinion of the Minister or CRA. Determining the object, spirit and purpose of a provision is a question of law and is the sole responsibility of the courts.[21]

[53] The series of avoidance transactions defeats the underlying rationale of the capital loss provisions by carrying back a loss where there is no economic loss. Following *Triad Gestco* there is abuse where a capital loss is carried back without any corresponding economic loss.

[54] Of particular note, in *2763478 Canada Inc. v. Canada*, 2018 FCA 209, the FCA wrote:

> The appellant points out that the phrases "paper loss" and "economic" or "true" loss appear nowhere in the ITA… That is so, but as the Supreme Court explained in *Copthorne* (paragraph 70), construction focused on the object, spirit and purpose of a provision may give it a broader meaning than a construction which focuses on the words (to the same effect, see *Triad Gestco*, at paragraph 51). When one considers the object, spirit and purpose of the capital gains regime, it seems clear that allowing a paper loss to offset a true gain would frustrate its reason for being.[22]
> [emphasis added]

[55] The Appellant argues that *Triad Gestco* should be distinguished in favour of the reasoning applied in *Donahue Forest Products Inc*.[23] As a matter of jurisprudence, the *Triad Gestco* decision is quite more recent. In *Donahue,* the FCA affirms that there is "nothing in the Act that bars the taxpayer from realizing a loss on the sale of shares to arm's length of third parties, even if a significant portion of the assets to which the loss on the shares may be attributed remains within the group of corporations." However, unlike the present fact situation, in *Donohue* there was a true economic loss - following the collapse of the price of wood pulp, Donahue Inc.'s investment became worthless. This crucial distinction as to real versus false loss, calls for, in the present case, the application of *Triad Gestco* rather than *Donohue*.

[56] As the purpose of the capital loss provisions is to recognize real losses, there is clear abuse where artificial losses are deducted. That is even more so when those losses are based on non-capital CRP, that will also be deducted through CCOGPE pools at a 100% inclusion rate thus creating a double deduction. As the Appellant

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[21] *Birchcliff Energy Ltd. v. Canada*, 2019 FCA 151, at para. 32
[22] *2763478 Canada Inc. v. Canada*, 2018 FCA 209, para. 56
[23] *Donohue Forest Products Inc.*, 2002 FCA 422.

stated, CRP is not capital property and does not have an ACB – therefore, how can it be the economic basis for a capital loss.

[57] The avoidance transactions at issue undermine the integrity of the capital gains and loss scheme of the Act, in addition to benefitting from the CCOGPE tax pool.

[58] Accordingly, I conclude that from a GAAR perspective that in this matter there was abuse of the identified capital loss provisions arising from the avoidance transactions.

[59] I now address the Respondent's second abuse submission, that avoidance transactions undertaken to achieve the Capital Loss/Tax Benefit, through augmenting the ACB of the Appellant's DERP2 partnership interest, abused provisions of the Act. The provisions are paragraphs 88(1)(b), (c) and (d), subparagraphs 39(1)(b)(i) and (ii), paragraphs 3(b), 38(b) and 111(b) and the definitions "adjusted cost base" in section 54 and "net capital loss" in subsection 111(8), subparagraph 53(1)(e)(viii), section 66.4 and subsection 66(13) of the Act.

[60] The subsection 88(1) "bump" provisions are described in *Canada v. Oxford Properties Group Inc.*, 2018 FCA 30 at paragraph 76, 77 and 78, as follows:

> 76. In vertical amalgamation, paragraph 88(1)(a) deems the parent corporation to have acquired the property of its subsidiary at the subsidiary's tax cost. Prior to the wind-up, however, it is possible that the parent's tax cost of the shares in its subsidiary (the ACB of the shares) will exceed the tax cost of the subsidiary's underlying property. Upon a vertical amalgamation, these shares will disappear. Without further adjustment, the tax cost in those shares would also disappear, thereby giving rise to potential double taxation in the event that the underlying property is subsequently sold. This is because the deemed cost of the underlying property in the hands of the parent, being equal to the subsidiary's tax cost, would not reflect any appreciation in value up to the time of the wind-up.
>
> 77. The bump provided for in paragraphs 88(1)(c) and (d) rectifies this situation by first calculating the difference between the ACB of the parent's shares and the tax cost of the subsidiary's property. This amount is then allowed to be added to the tax cost of the non-depreciable capital property which the parent inherited from its subsidiary. In other words, the tax cost of this property is bumped. The bump essentially allows any ACB that would otherwise be lost on a vertical amalgamation to be preserved and transferred to different property that is taxed the same way.
>
> 78. Subparagraph 88(1)(c)(iii) prohibits the parent from bumping the cost of "ineligible property" which includes depreciable property. The issue the bumps

> seeks to address is the disappearance of the shares and the tax cost (the shares' ACB) embedded therein. Preserving and transferring ACB that would otherwise be lost to an asset that is taxed with the same rate of inclusion is the way in which this is accommodated. Allowing property that is taxed on the basis of a 50% rate of inclusion to augment the value of property that is taxed on the basis of a 100% rate of inclusion would result in an obvious revenue loss. That explains why depreciable property or other types of property that give rise to a 100% rate of inclusion cannot be bumped.

[61] In this matter, 137 was the wholly-owned subsidiary of its parent the Appellant. Per Step 7, being an avoidance transaction, on January 29, 2009 137 distributed its property (99% interest in DERRP2 partnership) to its parent the Appellant. 137 was then wound-up and dissolved.

[62] The Step 8 avoidance transaction closely followed, whereby the Appellant made a paragraph 88(1)(d) designation respecting its acquisition from 137 of the 99% interest in the DERP2 partnership. This "bump" designation of the capital property allowed the Appellant to claim a $39,402,330 increase to the cost at which it had acquired the said partnership interest. The cost thus ACB went from $11,286,101 to $50,688,431. And then on the following day, January 30, 2009, DERP2 distributed the Resource Properties to the Appellant.

[63] Paragraph 88(1)(c) sets out the basic eligibility criteria for the bump (also known as the bump denial rules). These rules include that the property must be capital property of the subsidiary at the time the parent acquired control of the subsidiary. CRP is specifically excluded from capital property, per subparagraph 39(1)(b)(ii). Thus, CRP cannot be bumped. The property must not be "ineligible property", such as depreciable property.[24]

[64] But for the bump rules, the parent's tax cost in the subsidiary's shares would disappear on the wind-up and the parent would lose that positive tax attribute to shelter future capital gains.

[65] Note that subparagraph 88(1)(d)(ii.1) was introduced in 2013, well after the transactions relating to this present appeal. This anti-avoidance provision ended the practice of bumping ACBs of partnership interests where the fair market value of the partnership was derived from ineligible assets, such as depreciable property or CRP.

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[24] subparagraph 88(1)(c)(iii), Act

[66] The FCA examined the object, spirit, and purpose of paragraph 88(1)(d) in the *Queen v. Oxford Properties Group Inc.,* 2018 FCA 30. In that case, the taxpayer undertook a complex series of transactions, which involved rolling three real estate properties, through a tiered partnership structure, increasing (bumping) the ACB of the partnership interest and selling the partnership interests to tax-exempt entities without tax being paid on the latent recapture, and accrued gains in the property being held by the partnerships. Essentially, the taxpayer avoided latent recapture under subsection 100(1) and eliminated capital gains on the sale of their partnership interests.

[67] To my mind there is a ready answer as to whether the “bump” provisions of the Act have been abused in the circumstances at bar. It was the “bump” of the ACB of the DERP2 partnership interest that led to the very substantial increase of the Capital Loss/Tax Benefit, while not reflective of any real loss as discussed above. Thus, as concluded above, the capital gain/loss provisions of the Act were abused or misused.

[68] The primary tool for doing this was the “bump” mechanism of the Act, causing the increasing of ACBs. It thus appears obvious that likewise the “bump” provisions in subsection 88(1) of the Act were abused, for having been the legislative tool used for creation of the artificial loss reflected by the Capital Loss.

[69] I note also that the “bump” provisions well fit the category of capital loss provisions of the Act. After all, it is the ACB that is “bumped”; and the ACB is a primary factor in the determination of the amount of a capital gain or loss. Thus the “no artificial loss” OSP of capital loss provisions of the Act encompass also the subsection 88(1) “bump” provisions. Hence, in the context of a GAAR analysis, abuse of these provisions would include the “bump” provisions where the ACB was “bumped” in creation of the artificial loss here underlying the Capital Loss leading to the Tax Benefit.

[70] Put another way, it seems incomprehensible that an artificial loss would signal misuse of capital loss provisions of the Act without equally indicating misuse of the very “bump” provisions of the Act used to achieve the artificial loss through the “bumping” of an ACB.

[71] I accordingly find that the identified “bump” provisions of the Act were likewise misused by the avoidance transactions leading to and including the “bumped” enhancement of the ACB of the DERP2 partnership interest, to enable the

Appellant to claim in 2010 the Capital Loss sufficiently sized to be carried-back and set-off against the Appellant's 2007 capital gain.

IX. Conclusion:

[72] In conclusion, I have found that both of the Respondent's claims of statutory misuse in a GAAR context have been made out. That being the sole issue, the appeal will be denied, with costs.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated February 29, 2024, in order to correct the words underscored in paragraphs 5, 9, 10, 18, 36 and 72 hereof.

Signed at Ottawa, Canada, this 11th day of March 2024.

"B. Russell"

Russell J.

13.[25]

(21) Definitions In this section,

"depreciable property" of a taxpayer as of any time in a taxation year means property acquired by the taxpayer in respect of which the taxpayer has been allowed, or would, if the taxpayer owned the property at the end of the year and this Act were read without reference to subsection (26), be entitled to, a deduction under paragraph 20(1)(a) in computing income for that year or a preceding taxation year;

39.[26]

(1) Meaning of capital gain and capital loss For the purposes of this Act,

(a) a taxpayer's **capital gain** for a taxation year from the disposition of any property is the taxpayer's gain for the year determined under this Subdivision (to the extent of the amount thereof that would not, if section 3 were read without reference to the expression "other than a taxable capital gain from the disposition of a property" in paragraph 3(a) and without reference to paragraph 3(b), be included 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

…

(ii) a Canadian resource property,

…

(b) a taxpayer's **capital loss** for a taxation year from the disposition of any property is the taxpayer's loss for the year determined under this Subdivision (to the extent of the amount thereof that would not, if section 3 were read in the manner described in paragraph (a) of this subsection and without reference to the expression "or the taxpayer's allowable business investment loss for the year" in paragraph 3(d), be deductible in computing the taxpayer's income for the year or any other

[25] *Stikeman Income Tax Act Annotated 2008*, 44th ed. (Toronto: Thomson Carswell, 2008) at page 68.
[26] *Stikeman Income Tax Act Annotated 2008*, 44th ed. (Toronto: Thomson Carswell, 2008) at page 189.

taxation year) from the disposition of any property of the taxpayer other than

…

(ii) property described in any of subparagraphs 39(1)(a)(ii) to (iii) and (v); and

…

53.[27]

(1) Adjustments to cost base In computing the adjusted cost base to a taxpayer of property at any time, there shall be added to the cost to the taxpayer of the property such of the following amounts in respect of the property as are applicable:

…

(e) where the property is an interest in a partnership,

…

(viii) an amount deemed, before that time, by subsection 66.1(7), 66.2(6) or 66.4(6) to be an amount referred to in the description of G in the definition "cumulative Canadian exploration expense" in subsection 66.1(6), paragraph (a) of the description of F in the definition "cumulative Canadian development expense" in subsection 66.2(5) or the description of G in that definition, or paragraph (a) of the description of F in the definition "cumulative Canadian oil and gas property expense" in subsection 66.4(5) or the description of G in that definition in respect of the taxpayer,

…

(2) Amounts to be deducted[28] In computing the adjusted cost base to a taxpayer of property at any time, there shall be deducted such of the following amounts in respect of the property as are applicable:

(c) where the property is an interest in a partnership,

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[27] *Stikeman Income Tax Act Annotated 2008*, 44th ed. (Toronto: Thomson Carswell, 2008) at page 229-230.
[28] *Stikeman Income Tax Act Annotated 2008*, 44th ed. (Toronto: Thomson Carswell, 2008) at page 236.

…

(ii) an amount in respect of each fiscal period of the partnership ending after 1971 and before that time, other than a fiscal period after the fiscal period in which the taxpayer ceased to be a member of the partnership, equal to the taxpayer's share of the total of

(A) amounts that, but for paragraph 96(1)(d), would be deductible in computing the income of the partnership for the fiscal period by virtue of the provisions of the Income Tax Application Rules relating to exploration and development expenses,

(B) the Canadian exploration and development expenses and foreign resource pool expenses, if any, incurred by the partnership in the fiscal period,

(C) the Canadian exploration expense, if any, incurred by the partnership in the fiscal period,

(D) the Canadian development expense, if any, incurred by the partnership in the fiscal period, and

(E) the Canadian oil and gas property expense, if any, incurred by the partnership in the fiscal period,

…

54. Definitions [29] In this subdivision,

"capital property" of a taxpayer means

(a) any depreciable property of the taxpayer, and

(b) any property (other than depreciable property), any gain or loss from the disposition of which would, if the property were disposed of, be a capital gain or a capital loss, as the case may be, of the taxpayer;

66.

…

[29] *Stikeman Income Tax Act Annotated 2008*, 44th ed. (Toronto: Thomson Carswell, 2008) at page 236.

(5) Dealers[30] Subsections (3) and (4) and sections 59, 64, 66.1, 66.2, 66.21, 66.4 and 66.7 do not apply in computing the income for a taxation year of a taxpayer (other than a principal-business corporation) whose business includes trading or dealing in rights, licences or privileges to explore for, drill or take minerals, petroleum, natural gas or other related hydrocarbons.

…

(15)[31] In this section,

…

"Canadian resource property" of a taxpayer means any property of the taxpayer that is

(a) any right, licence or privilege to explore for, drill for or take petroleum, natural gas or related hydrocarbons in Canada,

(b) any right, licence or privilege to

(i) store underground petroleum, natural gas or related hydrocarbons in Canada or

(ii) prospect, explore, drill or mine for minerals in a mineral resource in Canada,

(c) any oil or gas well in Canada or any real property in Canada the principal value of which depends on its petroleum or natural gas content (but not including any depreciable property),

(d) any rental or royalty computed by reference to the amount or value of production from an oil or gas well in Canada or from a natural accumulation of petroleum or natural gas in Canada,

(e) any rental or royalty computed by reference to the amount or value of production from a mineral resource in Canada,

(f) any real property in Canada the principal value of which depends on its mineral resource content (but not including any depreciable property), or

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[30] *Stikeman Income Tax Act Annotated 2008*, 44th ed. (Toronto: Thomson Carswell, 2008) at page 318.
[31] *Stikeman Income Tax Act Annotated 2008*, 44th ed. (Toronto: Thomson Carswell, 2008) at page 333.

(g) any right to or interest in any property described in any of paragraphs (a) to (f), other than a right or an interest that the taxpayer has because the taxpayer is a beneficiary under a trust or a member of a partnership;

66.1

…

(2)[32] In computing the income for a taxation year of a principal-business corporation (other than a corporation that would not be a principal-business corporation if the definition "principal-business corporation" in subsection 66(15) were read without reference to paragraphs (h) and (i) of that definition), there may be deducted any amount that the corporation claims not exceeding the lesser of

(a) the total of

(i) the amount, if any, by which its cumulative Canadian exploration expense at the end of the year exceeds the amount, if any, designated by it for the year under subsection 66(14.1), and

(ii) the amount, if any, by which

(A) the total determined under subparagraph 66.7(12.1)(a)(i) in respect of the corporation for the year

exceeds

(B) the amount that would be determined under subsection 66.1(1) in respect of the corporation for the year, if that subsection were read without reference to paragraph (c) thereof, and

(b) the amount, if any, by which

(i) the amount that would be its income for the year if no deduction (other than a prescribed deduction) were allowed under this subsection or section 65

exceeds

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[32] *Stikeman Income Tax Act Annotated 2008*, 44th ed. (Toronto: Thomson Carswell, 2008) at page 339.

(ii) the total of all amounts each of which is an amount deducted by the corporation under section 112 or 113 in computing its taxable income for the year.

66.4

…

(5) Definitions[33] In this section

…

"Canadian oil and gas property expense" of a taxpayer means any cost or expense incurred after December 11, 1979 that is

(a) the cost to the taxpayer of, including any payment for the preservation of a taxpayer's rights in respect of, any property described in paragraph (a), (c) or (d) of the definition "Canadian resource property" in subsection 66(15), or any right to or interest in such property (other than a right or an interest that the taxpayer has by reason of being a beneficiary under a trust or a member of a partnership), or an amount paid to Her Majesty in right of Province of Saskatchewan as a net royalty payment pursuant to a net royalty petroleum and natural gas lease that was in effect on March 31, 1977 to the extent that it can reasonably be regarded as a cost of acquiring the lease,

(b) subject to section 66.8, the taxpayer's share of any expense referred to in paragraph (a) incurred by a partnership in a fiscal period thereof at the end of which the taxpayer was a member of the partnership, unless the taxpayer elects in respect of the share in prescribed form and manner on or before the day that is 6 months after the taxpayer's taxation year in which that period ends, or

(c) any cost or expense referred to in paragraph (a) incurred by the taxpayer pursuant to an agreement in writing with a corporation, entered into before 1987, under which the taxpayer incurred the cost or expense solely as consideration for shares, other than prescribed shares, of the capital stock of the corporation issued to the taxpayer or any interest in such shares or right thereto,

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[33] *Ibid* at 357-359

but for greater certainty, shall not include

(d) any consideration given by the taxpayer for any share or any interest therein or right thereto, except as provided by paragraph (c), or

(e) any expense described in paragraph (c) incurred by any other taxpayer to the extent that the expense was,

(i) by virtue of that paragraph, a Canadian oil and gas property expense of that other taxpayer

(ii) by virtue of paragraph (i) of the definition "Canadian exploration expense" in subsection 66.1(6), a Canadian exploration expense of that other taxpayer, or

(iii) by virtue of paragraph (g) of the definition "Canadian development expense" in subsection 66.2(5), a Canadian development expense of that other taxpayer,

but any amount of assistance that a taxpayer has received or is entitled to receive in respect of or related to the taxpayer's Canadian oil and gas property expense shall not reduce the amount of any of the expenses described in any of paragraphs (a) to (c);

"cumulative Canadian oil and gas property expense" of a taxpayer at any time in a taxation year means the amount determined by the formula

$$(A+B+C+D+D.1) - (E+F+G+H+I+I.1+J)$$

where

A is the total of all Canadian oil and gas property expenses made or incurred by the taxpayer before that time,

B is the total of all amounts determined under subsection 66.4(1) in respect of the taxpayer for taxation years ending before that time,

C is the total of all amounts referred to in the description of F or G that are established by the taxpayer to have become bad debts before that time

D is such part, if any, of the amount determined for I as has been repaid before that time by the taxpayer pursuant to legal obligation to repay all or any part of that amount,

D.1 is the total of all specified amounts, determined under paragraph 66.7(12.2)(c) in respect of the taxpayer for taxation years ending before that time,

E is the total of all amounts deducted in computing the taxpayer's income for a taxation year end before that time in respect of the taxpayer's cumulative Canadian oil and gas property expense,

F is the total of all amounts each of which is an amount in respect of property described in paragraph (a), (c) or (d) of the definition "Canadian resource property" in subsection 66(15) or any right to or interest in such a property, other than such a right or interest that the taxpayer has by reason of being a beneficiary under a trust or a member of a partnership, (in this description referred to as "the particular property") disposed of by the taxpayer before that time equal to the amount, if any, by which

(a) the amount, if any, by which the proceeds of disposition in respect of the particular property that became receivable by the taxpayer before that time exceed any outlays or expenses made or incurred by the taxpayer before that time for the purpose of making the disposition and that were not otherwise deductible for the purposes of this Part

exceeds the total of

(b) the amount, id any, by which

(i) the total of all amounts that would be determined under paragraph 66.7(5)(a), immediately before the time (in this paragraph and paragraph (c) referred to as the "relevant time") when such proceeds of disposition became receivable, in respect of the taxpayer and an original owner of the particular property (or of any other property acquired by the taxpayer with the particular property in circumstances in which subsection 66.7(5) applied and in respect of which the proceeds of disposition became receivable by the taxpayer at the relevant time) if

(A) amounts that became receivable at or after the relevant time were not taken into account,

(B) each designation made under subparagraph 66.7(4)(a)(iii) in respect of an amount that became

receivable before the relevant time were made before the relevant time,

(C) paragraph 66.7(5)(a) were read without reference to "10% of", and

(D) no reduction under subsection 80(8) at or after the relevant time were taken into account

exceeds the total of

(ii) all amounts that would be determined under paragraph 66.7(5)(a) at the relevant time in respect of the taxpayer and an original owner of the particular property (or of that other property described in subparagraph (i)) if

(A) amounts that become receivable after the relevant time were not taken into account

(B) each designation made under subparagraph 66.7(4)(a)(iii) in respect of an amount that became receivable at or before the relevant time were made before the relevant time,

(C) paragraph 66.7(5)(a) were read without reference to "10% of", and

(D) no reduction under subsection 80(8) at or after the relevant time were taken into account, and

(iii) such portion of the amount determined under this paragraph as was otherwise applied to reduce the amount otherwise determined under this description, and

(c) the amount, if any, by which

(i) the total of all amounts that would be determined under paragraph 66.7(4)(a), immediately before the relevant time, in respect of the taxpayer and an original owner of the particular property (or of any other property acquired by the taxpayer with the particular property in circumstances in which subsection 66.7(4) applied and in respect of which the proceeds of

disposition became receivable by the taxpayer at the relevant time) if

(A) amounts that became receivable at or after the relevant time were not taken into account,

(B) each designation made under subparagraph 66.7(4)(a)(iii) in respect of an amount that became receivable before the relevant time were made before the relevant time,

(C) paragraph 66.7(4)(a) were read without reference to “30% of”, and

(D) no reduction under subsection 80(8) at or after the relevant time were taken into account

exceeds the total of

(ii) all amounts that would be determined under paragraph 66.7(4)(a) at the relevant time in respect of the taxpayer and an original owner of the particular property (or of that other property described in subparagraph (i)) if

(A) amounts that became receivable after the relevant time were not take into account,

(B) each designation made under subparagraph 66.7(4)(a)(iii) in respect of an amount that became receivable at or before the relevant time were made before the relevant time,

(C) paragraph 66.7(4)(a) were read without reference to “30% of”,

(D) amounts described in subparagraph 66.7(4)(a)(ii) that became receivable at the relevant time were not taken into account, and

(E) no reduction under subsection 80(8) at or after the relevant time were taken into account, and

(iii) such portion of the amount otherwise determined under this paragraph as was otherwise applied to reduce the amount otherwise determined under this description,

G is the total of all amounts that became receivable by the taxpayer before that time that are to be included in the amount determined under this description by virtue of paragraph 66.(12.5)(a),

H is the total of all amounts each of which is an amount received before that time on account of any amount referred to in the description of C,

I is the total amount of assistance that the taxpayer has received or is entitled to receive in respect of any Canadian oil and gas property expense incurred after 1980 or that can reasonable be related to any such expense after 1980,

I.1 is the total of all amounts by which the cumulative Canadian oil and gas property expense of the taxpayer is required because of subsection 80(8) to be reduced at or before that time, and

J is the total of all amounts that are required to be deducted before that time under paragraph 66.7(12)(d) in computing the taxpayer's cumulative Canadian oil and gas property expense;

…

88.

(1) Winding-up[34] Where a taxable Canadian corporation (in this subsection referred to as the "subsidiary") has been wound up after May 6, 1974 and not less than 90% of the issued shared of each class of the capital stock of the subsidiary were, immediately before the winding-up, owned by another taxable Canadian corporation (in this subsection referred to as the "parent") and all of the shared of the subsidiary that were not owned by the parent immediately before the winding-up were owned at that time by persons with whom the parent was dealing at arm's length, notwithstanding any other provision of this Act other than subsection 69(11), the following rules apply:

(a) subject to paragraphs 88(1)(a.1) and 88(1)(a.3), each property (other than an interest in partnership) of the subsidiary that was distributed to

[34] *Stikeman Income Tax Act Annotated 2008*, 44th ed. (Toronto: Thomson Carswell, 2008) at page 500-512

the parent on the winding-up shall be deemed to have been disposed of by the subsidiary for proceeds equal to

(i) in the case of a Canadian resource property, a foreign resource property or a right to receive production (as defined in subsection 18.1(1)) to which a matchable expenditure (as defined in subsection 18.1(1)) relates, nil, and

(ii) [Repealed, 1994, c. 7, Sch. VIII, s. 38(1)]

(iii) in the case of any other property, the cost amount to the subsidiary of the property immediately before the winding-up;

…

(a.2) each interest of the subsidiary in a partnership that was distributed to the parent on the winding-up shall, except for the purpose or paragraph 98(5)(g), be deemed not to have been disposed of by the subsidiary;

…

(c) subject to paragraph 87(2)(e.3) (as modified by paragraph 88(1)(e.2)), and notwithstanding paragraph 87(2)(e.1) (as modified by paragraph 88(1)(e.2)), the cost to the parent of each property of the subsidiary distributed to the parent on the winding-up shall be deemed to be

(i) in the case of a property that is an interest in a partnership, the amount that but for this paragraph would be the cost to the parent of the property, and

(ii) in any other case, the amount, if any, by which

(A) the amount that would, but for subsection 69(11), be deemed by paragraph 88(1)(a) to be the proceeds of disposition of the property

exceeds

(B) any reduction of the cost amount to the subsidiary of the property made because of section 80 on the winding-up,

Plus where the property was a capital property (other than an ineligible property) of the subsidiary at the time that the parent last acquired control of the subsidiary and was owned by the subsidiary thereafter without interruption until such time as it was distributed to the parent on the winding-up, the amount determined under paragraph 88(1)(d) in respect of the property and, for the purposed of this paragraph, “ineligible property” means

(iii) depreciable property,

…

(d) the amount determined under this paragraph in respect of each property of the subsidiary distributed to the parent on the winding-up is such portion of the amount, if any, by which the total determined under subparagraph 88(1)(b)(ii) exceeds the total of

(i) the amount, if any, by which

(A) the total of all amounts each of which is an amount in respect of any property owned by the subsidiary immediately before the winding-up equal to the cost amount to the subsidiary of the property immediately before the winding-up, plus the amount of any money of the subsidiary on hand immediately before the winding-up,

exceeds the total of

(B) all amounts each of which is the amount of any debt owing by the subsidiary, or of any other obligation of the subsidiary to pay any amount, that was outstanding immediately before the winging-up, and

(C) the amount of any reserve (other than a reserve referred to in paragraph 20(1)(n), subparagraph 40(1)(a)(iii) or 44(1)(e)(iii) of this Act or in subsection 64(1) or (1.1) of the Income Tax Act, chapter 148 of the Revised Statutes of Canada, 1952, as these two provisions read immediately before November 3, 1981) deducted in computing the subsidiary’s income for its taxation year

during which its assets were distributed to the parent on the winding-up, and

(i.1) the total of all amounts each of which is an amount in respect of any share of the capital stock of the subsidiary disposed of by the parent on the winding-up or in contemplation of the winding-up, equal to the total of all amounts received by the parent or by a corporation with which the parent was not dealing at arm's length (otherwise than because of a right referred to in paragraph 251(5)(b) in respect of the subsidiary) in respect of

(A) taxable dividends on the share or on any share (in this subparagraph referred to as a "replaced share") for which the share or a replaced share was substituted or exchanged to the extent that the amounts thereof were deductible from the recipient's income for any taxation year by virtue of section 112 or subsection 128(6) and were not amounts on which the recipient was requested to pay tax under Part VII of the Income Tax Act, chapter 148 of the Revised Statues of Canada, 1952, as it read on March 31 1977, or

(B) capital dividends and life insurance capital dividends on the share or on any share (in this subparagraph referred to as a "replaced share") for which a share or a replaced share was substituted or exchanged,

As is designated by the parent in respect of that capital property in its return of income under this Part for its taxation year in which the subsidiary was so wound up, except that

(ii) in no case shall the amount so designated in respect of any such capital property exceed the amount, if any, by which the fair market value of the property at the time parent last acquired control of the subsidiary exceeds the cost amount to the subsidiary of the property immediately before the winding-up, and

(iii) in no case shall the total of amounts so designated in respect of all such capital properties exceed the amount, if any, by which the total determined under subparagraph 88(1)(b)(ii) exceeds the

total of the amounts determined under subparagraphs 88(1)(d)(i) and 88(1)(d)(i.1),

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…

(2)[35] Notwithstanding any other provision of this Act other than subsection 13(21.2), where a taxpayer at any time disposes of any property that is a capital property, Canadian resource property, foreign resource property, eligible capital property or inventory of the taxpayer to a partnership that immediately after that time is a Canadian partnership of which the taxpayer is a member, if the taxpayer and all the other members of the partnership jointly so elect in prescribed form within the time referred to in subsection 96(4),

(a) the provisions of paragraphs 85(1)(a) to 85(1)(f) apply to the disposition as if

(i) the reference therein "corporation's cost" were read as a reference to "partnership's cost",

(ii) the references therein to "other than any shares of the capital stock of the corporation or a right to receive any such shares" and to "other than shares of the capital stock of the corporation or a right to receive any such shares" were read as references to "other than an interest in the partnership",

(iii) the references therein to "shareholder of the corporation" were read as references to "member of the partnership",

(iv) the references therein to "the corporation" were read as references to "all the other members of the partnership", and

(v) the references therein to "to the corporation" were read as references to "to the partnership";

(b) in computing, at any time after the deposition, the adjusted cost base to the taxpayer of the taxpayer's interest in the partnership immediately after the deposition,

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[35] *Stikeman Income Tax Act Annotated 2008*, 44th ed (Toronto: Thomson Carswell, 2008) at page 722.

(i) there shall be added the amount, if any, by which the taxpayer's proceeds of disposition of the property exceed the fair market value, at the time of the disposition, of the consideration (other than an interest in the partnership) received by the taxpayer for the property, and

(ii) there shall be deducted the amount, if any, by which the fair market value, at the time of the disposition, of the consideration (other than an interest in the partnership) received by the taxpayer for the property so disposed of by the taxpayer exceeds the fair market value of the property at the time of the disposition; and

(c) where the property so disposed of by the taxpayer to the partnership is taxable Canadian property of the taxpayer, the interest in the partnership received by the taxpayer as consideration therefor shall be deemed to be taxable Canadian property of the taxpayer.

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COURT FILE NO.:	2017-922(IT)G
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