Federal Court of Appeal  Cour d'appel fédérale

Date: 20170908

Docket: A-243-15

Citation: 2017 FCA 177

CORAM: **STRATAS J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

SCDA (2005) INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on March 6, 2017.

Judgment delivered at Ottawa, Ontario, on September 8, 2017.

REASONS FOR JUDGMENT BY: WEBB J.A.

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

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the judgment of Pizzitelli J. of the Tax Court of Canada (Tax Court) dated April 20, 2015 (2015 TCC 97). SCDA (2005) Inc. (SCDA) had filed its tax return for its 2006 taxation year on the basis that it was entitled to increase the cost base of certain investments by approximately $1.2 billion under subsection 138(11.3) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the Act) without triggering any tax. The Minister of National Revenue disagreed and reassessed SCDA for 2006 and 2007 on the basis that the cost base of the

assets included in its designated insurance property was not increased to the fair market value of these assets at the beginning of 2006 under subsection 138(11.3) of the Act. The Tax Court judge dismissed SCDA's appeal from the reassessments.

[2] For the reasons that follow, I would dismiss this appeal.

I. Background

[3] There is no dispute between the parties that prior to 2006 SCDA only carried on a life insurance business in Canada. It was the position of SCDA before the Tax Court that it had commenced to carry on business in Bermuda in 2006. Since, based on this position, it would then be carrying on an insurance business in Canada and in another country, it designated certain investments as designated insurance property for the purposes of subsection 138(11.3) of the Act. Because SCDA had only been carrying on a life insurance business in Canada prior to 2006, it did not designate any property as designated insurance property for 2005.

[4] The properties, with an accrued and unrealized gain of almost $1.2 billion, were added to the list of designated insurance properties in 2006 and SCDA filed its tax return for 2006 and 2007 on the basis that the cost base of these assets was increased by this amount. SCDA also did not include any portion of any gain arising from this deemed disposition in its income as determined for the purposes of the Act.

[5] There were two issues before the Tax Court. One issue was the factual determination of whether SCDA had commenced to carry on an insurance business in Bermuda in 2006 or 2007.

The other issue was the interpretation of subsection 138(11.3) of the Act. If SCDA is not correct in its interpretation of subsection 138(11.3) of the Act then, for the purposes of this appeal, it is irrelevant whether SCDA commenced to carry on business in Bermuda in 2006 or 2007.

II. Statutory provisions

[6] The provisions in issue in this appeal are unique to insurance corporations. The particular subsection in issue in this case is subsection 138(11.3) of the Act. This subsection applies to life issuers and is as follows:

(11.3) Subject to subsection 138(11.31), where a property of a life insurer resident in Canada that carries on an insurance business in Canada and in a country other than Canada or of a non-resident insurer is	(11.3) Sous réserve du paragraphe (11.31), lorsque le bien d'un assureur sur la vie résidant au Canada qui exploite une entreprise d'assurance au Canada et à l'étranger ou le bien d'un assureur non-résident remplit l'une des conditions suivantes :
(*a*) designated insurance property of the insurer for a taxation year, was owned by the insurer at the end of the preceding taxation year and was not designated insurance property of the insurer for that preceding year, or	*a*) il est un bien d'assurance désigné de l'assureur pour une année d'imposition qui, bien que lui appartenant à la fin de l'année d'imposition précédente, n'était pas son bien d'assurance désigné pour cette année précédente,
(*b*) not designated insurance property for a taxation year, was owned by the insurer at the end of the preceding taxation year and was designated insurance property of the insurer for that preceding year,	*b*) il n'est pas un bien d'assurance désigné pour une année d'imposition, mais appartenait à l'assureur à la fin de l'année d'imposition précédente et était son bien d'assurance désigné pour cette année précédente,
the following rules apply:	les règles suivantes s'appliquent :
(*c*) the insurer is deemed to have disposed of the property at the beginning of the year for proceeds of disposition equal to its fair	*c*) l'assureur est réputé avoir disposé du bien au début de l'année pour un produit de disposition égal à sa juste valeur marchande à ce

market value at that time and to have reacquired the property immediately after that time at a cost equal to that fair market value	moment et l'avoir acquis de nouveau immédiatement après ce moment à un coût égal à cette juste valeur marchande;
(*d*) where paragraph (*a*) applies, any gain or loss arising from the disposition is deemed not to be a gain or loss from designated insurance property of the insurer in the year, and	*d*) en cas d'application de l'alinéa *a*), le gain ou la perte éventuel découlant de la disposition est réputé ne pas être un gain ou une perte provenant d'un bien d'assurance désigné de l'assureur pour l'année;
(*e*) where paragraph (*b*) applies, any gain or loss arising from the disposition is deemed to be a gain or loss from designated insurance property of the insurer in the year.	*e*) en cas d'application de l'alinéa *b*), le gain ou la perte éventuel découlant de la disposition est réputé être un gain ou une perte provenant d'un bien d'assurance désigné de l'assureur pour l'année.
(emphasis added)	(soulignement ajouté)

[7] Designated insurance property is defined in subsection 138(12) as follows:

designated insurance property for a taxation year of an insurer (other than an insurer resident in Canada that at no time in the year carried on a life insurance business) that, at any time in the year, carried on an insurance business in Canada and in a country other than Canada, means property determined in accordance with prescribed rules except that, in its application to any taxation year, designated insurance property for the 1998 or a preceding taxation year means property that was, under this subsection as it read in its application to taxation years that ended in 1996, property used by it in the year in, or held by it in the year in the course of, carrying on an insurance business in Canada;	**bien d'assurance désigné** En ce qui concerne l'année d'imposition d'un assureur (sauf celui résidant au Canada qui n'a exploité d'entreprise d'assurance-vie à aucun moment de l'année) qui, au cours de l'année, exploite une entreprise d'assurance au Canada et à l'étranger, bien déterminé en conformité avec les règles prévues par règlement. Toutefois, pour son application à une année d'imposition, l'expression bien d'assurance désigné pour l'année d'imposition 1998 ou une année d'imposition antérieure s'entend d'un bien qui était, aux termes du présent paragraphe dans sa version applicable aux années d'imposition terminées en 1996, un bien utilisé ou détenu pendant l'année par un assureur dans le cadre de l'exploitation d'une entreprise

	d’assurance au Canada.
(emphasis added)	(soulignement ajouté)

[8] The rules related to “designated insurance property” are set out in section 2401 of the *Income Tax Regulations*, C.R.C. c. 945. Essentially the regulations ensure that sufficient assets are designated to cover the insurance company’s Canadian reserve liabilities.

[9] Subsection 138(2) of the Act provides, in part, in relation to life insurers that are resident in Canada that:

(2) Notwithstanding any other provision of this Act,	(2) Malgré les autres dispositions de la présente loi :
(*a*) if a life insurer resident in Canada carries on an insurance business in Canada and in a country other than Canada in a taxation year, its income or loss for the year from carrying on an insurance business is the amount of its income or loss for the taxation year from carrying on the insurance business in Canada;	*a*) si un assureur sur la vie résidant au Canada exploite une entreprise d’assurance au Canada et à l’étranger au cours d’une année d’imposition, son revenu ou sa perte pour l’année résultant de l’exploitation d’une entreprise d’assurance correspond au montant de son revenu ou de sa perte pour l’année provenant de l’exploitation de l’entreprise d’assurance au Canada;
(*b*) if a life insurer resident in Canada carries on an insurance business in Canada and in a country other than Canada in a taxation year, for greater certainty,	*b*) si un assureur sur la vie résidant au Canada exploite une entreprise d’assurance au Canada et à l’étranger au cours d’une année d’imposition, il est entendu :
(i) in computing the insurer’s income or loss for the taxation year from the insurance business carried on by it in Canada, no amount is to be included in respect of the insurer’s gross investment revenue for the taxation year derived from	(i) qu’aucun montant n’est à inclure, dans le calcul de son revenu ou de sa perte pour l’année résultant de l’entreprise d’assurance qu’il exploite au Canada, au titre de ses revenus bruts de placement pour l’année provenant de biens qu’il utilisait

property used or held by it in the course of carrying on an insurance business that is not designated insurance property for the taxation year of the insurer, and

(ii) in computing the insurer's taxable capital gains or allowable capital losses for the taxation year from dispositions of capital property (referred to in this subparagraph as "insurance business property") that, at the time of the disposition, was used or held by the insurer in the course of carrying on an insurance business,

(A) there is to be included each taxable capital gain or allowable capital loss of the insurer for the taxation year from a disposition in the taxation year of an insurance business property that was a designated insurance property for the taxation year of the insurer, and

(B) there is not to be included any taxable capital gain or allowable capital loss of the insurer for the taxation year from a disposition in the taxation year of an insurance business property that was not a designated insurance property for the taxation year of the insurer;

(emphasis added)

ou détenait dans le cadre de l'exploitation d'une entreprise d'assurance et qui ne sont pas des biens d'assurance désignés pour l'année d'imposition de l'assureur,

(ii) que, dans le calcul de ses gains en capital imposables ou de ses pertes en capital déductibles pour l'année résultant de la disposition d'immobilisations (appelées « biens d'entreprise d'assurance » au présent sous-alinéa) qu'il utilisait ou détenait, au moment de la disposition, dans le cadre de l'exploitation d'une entreprise d'assurance:

(A) l'assureur doit inclure le montant de chacun de ses gains en capital imposables ou pertes en capital déductibles pour l'année résultant de la disposition, au cours de l'année, de tout bien d'entreprise d'assurance qui était un bien d'assurance désigné pour l'année d'imposition de l'assureur,

(B) l'assureur ne doit inclure aucun montant au titre de son gain en capital imposable ou de sa perte en capital déductible pour l'année résultant de la disposition, au cours de l'année, de tout bien d'entreprise d'assurance qui n'était pas un bien d'assurance désigné pour l'année d'imposition de l'assureur;

(soulignement ajouté)

[10] Subsection 138(10) of the Act provides that:

(10) Notwithstanding sections 142.3, 142.4, 142.5 and 142.51, where in a taxation year an insurer (other than an insurer resident in Canada that does not carry on a life insurance business) carries on an insurance business in Canada and in a country other than Canada, in computing its income for the year from carrying on an insurance business in Canada,	(10) Malgré les articles 142.3, 142.4, 142.5 et 142.51, dans le cas où un assureur (sauf celui résidant au Canada qui n'exploite pas d'entreprise d'assurance-vie) exploite, au cours d'une année d'imposition, une entreprise d'assurance au Canada et à l'étranger, les règles ci-après s'appliquent au calcul de son revenu pour l'année tiré de l'exploitation d'une entreprise d'assurance au Canada :
(*a*) sections 142.3, 142.5 and 142.51 apply only in respect of property that is designated insurance property for the year in respect of the business; and	*a*) les articles 142.3, 142.5 et 142.51 ne s'appliquent qu'aux biens qui sont des biens d'assurance désignés pour l'année relativement à l'entreprise;
(*b*) section 142.4 applies only in respect of the disposition of property that, for the taxation year in which the insurer disposed of it, was designated insurance property in respect of the business.	*b*) l'article 142.4 ne s'applique qu'à la disposition de biens qui étaient des biens d'assurance désignés relativement à l'entreprise pour l'année d'imposition où l'assureur en a disposé.
(emphasis added)	(soulignement ajouté)

[11] SCDA's position that the net effect of these provisions can be summarized as follows. When a life insurance company that is carrying on business in Canada first commences to carry on an insurance business in another country, it designates certain investments as designated insurance property. Since it was not carrying on business outside Canada the year before, that company did not have any assets that were designated insurance property for that previous year (since by definition designated insurance property is only the property of an insurance company carrying on business in Canada and another country). Adding a property to the designated insurance property list in the year that a company commences an insurance business in another

country, in SCDA's view, would result in a deemed disposition under paragraph 138(11.3)(*c*) of the Act of the properties added to the list for proceeds equal to the fair market value of such properties at the beginning of such year and a reacquisition of these assets at a cost equal to such fair market value.

[12] Any gain that would arise from such deemed disposition would be deemed to not be a gain from designated insurance property of the insurer in the year (para. 138(11.3)(*d*) of the Act). Hence, such gain would not be taxable to the insurance company as a result of the provisions of 138(2) or 138(10), as the case may be. In this particular case this would mean that the accrued and unrealized gain of approximately $1.2 billion (which gain accrued while the investments were held by a corporation resident in Canada) would not be taxable in Canada.

III. Tax Court Decision

[13] The Tax Court judge noted that the Supreme Court of Canada has set out the approach to be used in interpreting the provision of the Act in *Canada Trustco Mortgage Co. v. The Queen*, 2005 SCC 54, [2005] 2 SCR 601 at paragraph 10. The Tax Court judge then completed a thorough textual, contextual and purposive analysis and concluded that subsection 138(11.3) of the Act did not apply in the first year that a Canadian resident life insurance company commences to carry on business in another country. He concluded that since that corporation would not be carrying on business in another country in the previous year the designated insurance property definition did not apply for the previous year and hence there was no deemed disposition of assets added to the list of designated insurance property in the first year that the Canadian resident company commences to carry on an insurance business in another country.

[14] Following the Tax Court hearing, the parties provided submissions on costs. By reasons dated June 5, 2015 the Tax Court judge awarded enhanced costs to the Crown in the amount of $474,663.

IV. Issue

[15] In my view the first issue that needs to be addressed in this appeal is the question of the interpretation of subsection 138(11.3) of the Act. As noted, if SCDA is not correct in its interpretation of this subsection it is irrelevant whether SCDA commenced to carry on business in Bermuda in 2006 or 2007. Therefore the issue of statutory interpretation will be considered first.

[16] SCDA also appealed the award of enhanced costs.

V. Standard of review

[17] The standard of review for the statutory interpretation question is correctness and for any findings of fact is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

VI. Analysis – Subsection 138(11.3) of the Act

[18] At the hearing of this appeal SCDA raised a new argument that was not raised before the Tax Court and that was not in its memorandum of fact and law. In its oral submissions, SCDA

focused its statutory interpretation argument on the opening words of subsection 138(11.3) of the Act. The opening words are as follows:

> […] where property of a life insurer resident in Canada that carries on an insurance business in Canada and a country other than Canada or of a non-resident insurer […]
>
> (emphasis added)

[19] SCDA argued that subsection 138(11.3) applies not only when a Canadian corporation commences to carry on an insurance business in another country but also when a non-resident insurer enters Canada. SCDA argued that, therefore, unless the deemed disposition was triggered under subsection 138(11.3) of the Act in the first year that either the Canadian insurer commences an insurance business in another country or the non-resident insurer commences business in Canada, then the non-resident would be subject to tax in Canada on gains that had accrued while that person was not a resident of Canada. SCDA's argument was that this could not have been an intended result under the Act. Since subsection 138(11.3) of the Act applies to both corporations resident in Canada who commence to carry on an insurance business in another country and non-resident corporations that commence to carry on an insurance business in Canada, SCDA submitted that, in each case, in the first year of such change the deemed disposition rules under subsection 138(11.3) must be applied to avoid the taxation in Canada of gains that accrued to the non-resident Corporation before it started to carry on business in Canada.

[20] I agree with SCDA that the implications for non-resident insurers who commence to carry on business in Canada can be examined to determine the application of subsection 138(11.3) of the Act and whether it was intended that the deemed disposition would be triggered

in the first year of either a foreign insurance business (for Canadian insurers) or a Canadian insurance business (for non-resident insurers). However, counsel for the Crown noted, in response to this argument, that for a non-resident insurer, who commences to carry on an insurance business in Canada, the provisions of subsection 138(11.91) of the Act will apply. This subsection provides as follows:

(11.91) Where, at any time in a particular taxation year,	(11.91) Si, à un moment donné d'une année d'imposition donnée, un assureur non-résident commence à exploiter une entreprise d'assurance au Canada et si, immédiatement avant ce moment, l'assureur n'exploitait pas une telle entreprise ou avait cessé, en application d'une loi fédérale ou de tout texte pris ou approuvé en vertu d'une telle loi et ayant force de loi, d'être exonéré de l'impôt prévu à la présente partie sur tout revenu tiré d'une telle entreprise, les présomptions suivantes s'appliquent au calcul de son revenu pour l'année donnée :
(*a*) a non-resident insurer carries on an insurance business in Canada, and	
(*b*) immediately before that time, the insurer was not carrying on an insurance business in Canada or ceased to be exempt from tax under this Part on any income from such business by reason of any Act of Parliament or anything approved, made or declared to have the force of law thereunder,	
for the purpose of computing the income of the insurer for the particular taxation year,	
(*c*) the insurer shall be deemed to have had a taxation year ending immediately before the commencement of the particular taxation year,	*a*) l'assureur est réputé avoir une année d'imposition se terminant immédiatement avant le début de l'année donnée;
(*d*) for the purposes of paragraph (4)(*a*), subsection (9), the definition designated insurance property in subsection (12) and paragraphs 12(1)(*d*) and (*e*), the insurer is deemed to have carried on the business in Canada in that preceding year and to have claimed the maximum amounts to which it would have been entitled under	*b*) pour l'application de l'alinéa (4)*a*), du paragraphe (9), de la définition de bien d'assurance désigné au paragraphe (12) et des alinéas 12(1)*d*) et *e*), l'assureur est réputé avoir exploité l'entreprise au Canada au cours de cette année précédente et avoir déduit le montant maximal auquel il aurait eu droit en application des alinéas

paragraphs (3)(*a*) (other than under subparagraph (3)(*a*)(ii.1), (iii) or (v)), 20(1)(*l*) and (*l*.1) and 20(7)(*c*) for that year,

(*d*.1) for the purposes of subsection 20(22) and subparagraph 138(3)(*a*)(ii.1),

(i) the insurer is deemed to have carried on the business referred to in paragraph 138(11.91)(*a*) in Canada in the preceding taxation year referred to in paragraph 138(11.91)(*c*), and

(ii) the amounts, if any, that would have been prescribed in respect of the insurer for the purposes of paragraphs 138(4)(*b*) and 12(1)(*e*.1) for that preceding year in respect of the insurance policies of that business are deemed to have been included in computing its income for that year, and

(*e*) the insurer is deemed to have disposed, immediately before the beginning of the particular taxation year, of each property owned by it at that time that is designated insurance property in respect of the business referred to in paragraph (*a*) for the particular taxation year, for proceeds of disposition equal to the fair market value at that time and to have reacquired, at the beginning of the particular taxation year, the property at a cost equal to that fair market value.

(emphasis added)

(3)*a*) (exception faite de ses sous-alinéas (ii.1), (iii) et (v)), 20(1)*l*) et *l*.1) et 20(7)*c*) pour cette année;

b.1) pour l'application du paragraphe 20(22) et du sous-alinéa (3)*a*)(ii.1):

(i) l'assureur est réputé avoir exploité l'entreprise d'assurance au Canada au cours de l'année d'imposition précédente visée à l'alinéa *a*),

(ii) les montants éventuels qui auraient été visés par règlement quant à l'assureur pour l'application des alinéas (4)*b*) et 12(1)*e*.1) pour cette année précédente relativement aux polices d'assurance de l'entreprise sont réputés avoir été inclus dans le calcul du revenu de l'assureur pour cette année;

c) l'assureur est réputé avoir disposé, immédiatement avant le début de l'année donnée, de chaque bien qui lui appartenait à ce moment et qui est un bien d'assurance désigné relatif à l'entreprise d'assurance au Canada pour cette année, pour un produit de disposition égal à la juste valeur marchande du bien à ce moment, et l'avoir acquis de nouveau, au début de l'année donnée, à un coût égal à cette juste valeur marchande.

(soulignement ajouté)

[21] As a result of this subsection, the non-resident insurer will be deemed, as of the time that is immediately before the commencement of the taxation year in which it commences to carry on an insurance business in Canada, to have disposed of each property that is a designated insurance property. If SCDA is correct that a disposition of assets added to the designated insurance property list is also triggered under subsection 138(11.3) of the Act when such non-resident insurer commences to carry on an insurance business in Canada, then there would be two deemed dispositions of such assets – one under subsection 138(11.91) of the Act immediately before the commencement of such first taxation year during which the non-resident insurer commences to carry on an insurance business in Canada and the other under subsection 138(11.3) of the Act at the beginning of such year. In my view, Parliament would not have intended to trigger two dispositions of the same assets, one right after the other. Therefore, reviewing the context of subsection 138(11.3) of the Act as it applies to the other person identified in this subsection (the non-resident insurer who commences to carry on an insurance business in Canada) strongly reinforces the contextual analysis undertaken by the Tax Court judge and does not detract from his analysis.

[22] In my view, this analysis can only lead to the conclusion that Parliament did not intend that the deemed disposition as provided in subsection 138(11.3) of the Act would apply to either Canadian resident insurers who commence to carry on an insurance business in another country or non-resident insurers who commence to carry on an insurance business in Canada. Since Parliament addressed the deemed disposition of assets issue for non-resident insurers who commence to carry on an insurance business in Canada in subsection 138(11.91) of the Act, in my view this would mean that Parliament did not intend that subsection 138(11.3) of the Act

would trigger tax-free dispositions of assets for a Canadian resident insurer in its first year of carrying on an insurance business in another country.

[23] For SCDA, for whatever year it commenced to carry on business in Bermuda, the definition of designated insurance property was simply inapplicable in relation to its previous year (when it was carrying on business only in Canada). Therefore, the rules in subsection 138(11.3) of the Act related to the addition of property to the designated insurance property list will only commence to apply in the second year that SCDA is carrying on business in another country. There would be no deemed disposition under subsection 138(11.3) of the Act in the first year that the Canadian insurer carries on business in another country and first designates assets as designated insurance property. As a result I would dismiss SCDA's appeal in relation to its interpretation of subsection 138(11.3) of the Act.

VII. Analysis – Enhanced Costs

[24] SCDA has appealed the award of enhanced costs, in part, on the basis that the Tax Court judge took into account an offer of settlement that SCDA alleges does not have any element of compromise. The Crown had offered to settle the matter on the basis that SCDA commenced to carry on business in Bermuda in 2007 and that subsection 138(11.3) of the Act would first apply to SCDA in its 2008 taxation year. Each party would also bear its own costs.

[25] In his reasons for awarding enhanced costs the Tax Court judge reviewed Rules 147(3.2) to (3.5) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a. These rules apply

"if a respondent makes an offer of settlement and the appellant obtains a judgment as favourable as or less favourable than the terms of the offer of settlement or fails to obtain judgment".

[26] The offer that the Crown had made in this case was to accept that SCDA had commenced to carry on business in Bermuda in 2007 and that each party would bear their own costs. The Crown did not accept SCDA's interpretation of subsection 138(11.3) of the Act and, therefore, as part of its offer the Crown proposed that it would accept that subsection 138(11.3) of the Act would first apply in 2008. The Tax Court judge found that there was an element of compromise in this offer as it would allow SCDA "to participate in the subsection 138(11.3) regime fully one taxation year earlier than my decision allows it to do at the earliest by agreeing the Appellant was carrying on business in 2007, the latter as argued by the Appellant. This alone makes the settlement offer beyond a cost waiver only type of offer" (reasons for costs award para. 11).

[27] SCDA submits that there was no element of compromise in this offer in relation to SCDA commencing to carry on business in Bermuda in 2007. I agree with SCDA on this point. In this case there is nothing to suggest that even if SCDA were to be found to be carrying on business in 2007 in Bermuda there would be any change in the amounts reassessed under the Act unless SCDA was correct in its interpretation of subsection 138(11.3) of the Act. As a result any admission or acceptance that SCDA had commenced to carry on business in 2007 would not reduce the tax liability of SCDA in and of itself. Therefore, in my view, this offer that SCDA had commenced to carry on business in 2007 does not include an element of compromise as, in and of itself, it would have no effect on the amounts reassessed.

[28] The Crown also offered to waive costs. In this case it is not necessary to consider whether the waiver of costs could be sufficient to make this offer a settlement offer for the purposes of Rule 147(3.2) (*Mckenzie v. The Queen*, 2012 TCC 329, [2012] DTC 1291) because the Tax Court Judge did not only rely on Rule 147(3.2). He also examined all of the factors set out in rule 147(3) in determining the amount of costs to be awarded under Rule 147(1). In paragraph 17 of his reasons the Tax Court judge concludes that even though he found that the Crown was entitled to costs under Rule 147(3.2) he also believes that the Crown would have otherwise been entitled to such enhanced costs based on his review of the factors as set out in Rule 147(3).

[29] One of the Rule 147(3) factors is "any offer of settlement made in writing" (Rule 147(3)(*d*)). Therefore, in awarding costs under Rule 147(1), any settlement offer is simply one of the factors to be considered. In *Allen (Next Friend of) v. University Hospitals Board*, 2006 ABCA 101, 384 A.R. 23, the majority of the Alberta Court of Appeal stated that:

> 15 To be genuine, an offer of settlement made pursuant to Part 12 must include an element of compromise: *Re Blue Range Resources Corp.* (2000), 281 A.R. 351 (C.A.), 2001 ABCA 177 at para. 1. An offer to settle for the full amount of a liquidated claim plus judgment interest and costs to the date of service of the offer cannot be characterized as a genuine offer as it lacks an element of compromise: *Labbee v. Peters, supra.* Likewise, an offer to accept the full amount of a trial judgment plus interest and costs to the date of service is not a genuine offer to compromise an appeal: *Blue Range, supra* at paras. 11 and 13. The addition of an offer to forego costs that may be incurred after service of the offer does not introduce an element of compromise. Where a settlement offer does not contain an element of compromise, the court may nevertheless consider it to have been reasonable in the circumstances and exercise its discretion to award enhanced costs.
>
> (emphasis added)

[30] The Tax Court judge's consideration of the offer made by the Crown, as one of the factors to be considered under Rule 147(3), is consistent with the comments of the Alberta Court of Appeal. The Tax Court judge found that the offer was "as reasonable and principled as the Respondent could make in these circumstances" (para. 16(d)). In my view, the Tax Court judge did not commit any error in considering the Crown's offer as one of the factors under Rule 147(3).

[31] The only other issue raised by SCDA in relation to the costs award was the statement in paragraph 116 of its memorandum of fact and law that the Tax Court judge erred when "he determined that, by advancing an interpretation entitling it to a 'wind-fall tax benefit', [SCDA] had engaged in 'reprehensible' conduct". No further explanation or argument is advanced in support of this alleged error. However, the only reference to 'reprehensible' conduct is in paragraph 16(g) of the reasons of the Tax Court judge. This reference should be read in the context in which it was used by the Tax Court judge. The paragraph in which it appears, is as follows:

> While I certainly agree the trial itself was conducted in an efficient and professional manner by both sides, I cannot ignore that my decision found that the Appellant's actions led me to conclude that it was engaged in window dressing to enable it to argue it met the factual criteria of the judicial tests for carrying on business when it did not; to give the illusion of doing so as the Respondent pleaded and argued. While this type of conduct is different than the type of conduct referenced in *Merchant v The Queen*, [1998] T.C.J. No. 278, 98 DTC 1734, relied upon by the Appellant, which awarded solicitor and client costs where the Appellant therein did "everything possible to obstruct the Crown from putting its case forward in an orderly way", the conduct of the Appellant in acting in such a manner as to create the illusion it did, which it relied upon to make and further its appeal, is nonetheless conduct that is, in my view, reprehensible and should be discouraged. In the case at hand of course, the Respondent is only seeking a percentage of solicitor and client costs, a position that I feel is quite reasonable on its part having regard to such conduct.
>
> (emphasis added)

[32] The reference to ‘reprehensible’ conduct was in relation to his finding that SCDA was engaged in window dressing, not in relation to its advancing its interpretation of the Act. This alleged error is without any merit.

[33] In relation to the award of enhanced costs, I would simply note that SCDA is a large corporation and it was attempting to increase the cost base of its investments by approximately $1.2 billion without paying any tax on this gain which would have accrued while SCDA was a resident of Canada. The amounts in issue are identified as a factor under Rule 147(3)(*b*) and in my view, play a significant role in this case. I would also dismiss the appeal in relation to the award of enhanced costs.

VIII. Conclusion

[34] As a result I would dismiss the appeal with costs.

“Wyman W. Webb”
J.A.

“I agree
David Stratas J.A.”

“I agree
Donald J. Rennie J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED APRIL 20, 2015, NO. 2012-1431(IT)G and 2013-203(IT)G

DOCKET:	A-243-15
STYLE OF CAUSE:	SCDA (2005) INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 6, 2017
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	STRATAS J.A. RENNIE J.A.
DATED:	SEPTEMBER 8, 2017

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