Federal Court of Appeal | Cour d'appel fédérale

Date: 20130513

Dockets: A-415-12
A-414-12
A-413-12

Citation: 2013 FCA 128

CORAM: PELLETIER J.A.
GAUTHIER J.A.
TRUDEL J.A.

A-415-12

BETWEEN:

GROUPE HONCO INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

A-414-12

BETWEEN:

9069-4654 QUÉBEC INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

A-413-12

BETWEEN:

GESTION PAUL LACASSE INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on April 10, 2013.

Judgment delivered at Ottawa, Ontario, on May 13, 2013.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: PELLETIER J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] These are three appeals that were consolidated by an order of this Court dated November 14, 2012. They all arise from a judgment of the Tax Court of Canada (TCC) (2012 TCC 305) in which Justice Boyle (the Judge), on common evidence, dismissed the appeals of the three appellant companies (Groupe Honco) against the assessment issued for each company for the 2004 taxation year.

[2] The sole issue to be decided by the TCC was whether the anti-avoidance rule set out in subsection 83(2.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) applied in this case.

83(2.1) Notwithstanding subsection 83(2), where a dividend that, but for this subsection, would be a capital dividend is paid on a share of the capital stock of a corporation and the share (or another share for which the share was substituted) was acquired by its holder in a transaction or as part of a series of transactions one of the main purposes of which was to receive the dividend, (*a*) the dividend shall, for the purposes of this Act (other than for the purposes of Part III and computing the capital dividend account of the corporation), be deemed to be received by the shareholder and paid by the corporation as a taxable dividend and not as a capital dividend; and (*b*) paragraph 83(2)(*b*) does not apply in respect of the dividend.	83 (2.1) Malgré le paragraphe (2), le dividende versé par une société sur une action de son capital-actions qui serait, sans le présent paragraphe, un dividende en capital est réputé, pour l'application de la présente loi — à l'exception de la partie III et sauf pour le calcul du compte de dividendes en capital de la société — reçu par l'actionnaire et versé par la société comme dividende imposable, et non comme dividende en capital, et l'alinéa (2)*b*) ne s'applique pas à ce dividende si l'actionnaire a acquis l'action — ou une action qui lui est substituée — par une opération, ou dans le cadre d'une série d'opérations, dont un des principaux objets consistait à recevoir ce dividende.
[Emphasis added.]	[Je souligne.]

[3] In this case, the Judge found that there was a series of transactions, including, among others, the purchase of shares of an unrelated company, 9072-7207 Québec Inc. (Old Supervac) by 9069-4654 Québec Inc., a Groupe Honco subsidiary that I will refer to as New Supervac. He also found that one of the main purposes of this series of transactions was to make possible the acquisition of Old Supervac's capital dividend account. By virtue of subsection 83(2.1), above, any dividends paid were accordingly deemed to have been received by the shareholder and paid by the company as a taxable dividend rather than as a capital dividend. Hence these appeals.

[4] On appeal before us, the appellants submit first that the Judge erred in finding that there had been a series of transactions. The transactions taken into account by the Judge were effected, they maintain, over too long a period to be considered a series within the meaning of the Act and *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721 [*Copthorne*]. The appellants add that if they are wrong on this point, the Judge should have considered transactions involving Old Supervac that took place well before the transaction of November 17, 1999, namely, the purchase of Old Supervac's shares by New Supervac. The appellants also submit that the Judge misdirected himself in law by finding that the acquisition of the capital dividend account was a "main purpose". Finally, the Judge, it is claimed, erred in law and in fact by imposing a higher burden of proof on them and concluding that they had failed to refute the Minister's assumptions of fact, and the following assumption in particular:

> [TRANSLATION]
>
> [New Supervac] acquired the shares of [Old Supervac] for the purpose of benefiting from its capital dividend account (Amended Reply to the Notice of Appeal, Minister's assumptions of fact, Appeal Book, Volume 1, p. 149 at para. 109(x)).

[5] I am of the view that the appeals should be dismissed. I will deal with the following subjects:

1) The applicable standards of review herein.

2) The series of transactions and subsection 83(2.1) of the Act.

3) The main purpose within the meaning of subsection 83(2.1) of the Act.

4) The appellants' burden of proof and the Judge's findings of fact.

The relevant facts

[6] The facts to be considered in ruling on the issues are uncontested and can be summarized as follows: Paul Lacasse is the principal and controlling shareholder of Groupe Honco. In 1997, Groupe Honco undertook to deliver to Old Supervac, a company wholly controlled by Eddy Bédard, a $600,000 turnkey structure. Old Supervac manufactured high-pressure vacuum trucks, a specialty which requires special certification from the American Society of Mechanical Engineers [ASME]. Before construction was complete, Old Supervac ran into serious financial difficulties that made it appear that it would be unable to pay its debt to Groupe Honco. It was therefore agreed by Lacasse and Bédard that the new structure would not be transferred to Old Supervac, but rather that Old Supervac would occupy it as a tenant. During the same period, Bédard was diagnosed with terminal pancreatic cancer.

[7] By late 1998, it was clear that Old Supervac's operations could not be made profitable and that its search for new investors was not yielding results. It was at this stage that Paul Lacasse, concerned that he would be unable to recover the amounts due for the new construction, proposed in a letter dated December 28 that New Supervac purchase all of Old Supervac's inventory and lease all of its assets. The letter also proposed that Old Supervac's shareholders should undertake to sell their shares as soon as they were fully paid (letter dated December 28, 1998, Appeal Book, Volume 4 at p. 699). A few weeks later, on January 13, 1999, New and Old Supervac entered into an asset leasing and share option agreement (*ibid.* at p. 700). Paul Lacasse

thereupon took over the management of Old Supervac's inventory and work in progress, and under his direction the business returned to profitability.

[8] On May 19, 1999, Eddy Bédard died. Old Supervac was the beneficiary of life insurance policies. The death benefits were paid into its capital dividend account. The proceeds of those insurance policies were used, among other things, to repay Old Supervac's creditors after Mr. Bédard's death and pay a dividend to his spouse, Annette Légaré.

[9] On October 7, 1999, New Supervac acquired Old Supervac's assets. Finally, on November 17, 1999, it also acquired all of Old Supervac's shares. At the same time, Old Supervac ratified the transfer to Paul Lacasse of the only Class A preferred share, which had been assigned to Annette Légaré by the Eddy Bédard estate on October 26, 1999 (Appeal Book, Volume 5 at pp. 859 and 992). It is important to note that, under Old Supervac's articles of incorporation, this Class A preferred share, originally issued by the company to Eddy Bédard for insurance purposes, entitled the holder to receive a dividend from the company's capital dividend account in the event that life insurance proceeds were paid into that account (Old Supervac's Articles of Incorporation, Appeal Book, Volume 5 at p. 1006, clause 3.5).

[10] In accordance with that clause, Annette Légaré received a dividend of $186,000 paid in two stages: an initial payment of $150,000 on October 30, 1999 (see the resolution of Old Supervac's board of directors dated October 29, 1999, Appeal Book, Volume 5 at pp. 887 et seq.); and a payment of $36,000 after the acquisition of Old Supervac's common shares by New Supervac (see the resolution of Old Supervac's board of directors dated October 31, 1999,

Appeal Book, Volume 5 at pp. 894 et seq.). I will return later on to the payment of this dividend to Annette Légaré.

[11] On January 1, 2001, Old Supervac and New Supervac were merged to enable the latter to benefit from the tax losses of the former. The Canada Revenue Agency (CRA) initially refused to consider these losses deductible, which gave rise to a Notice of Objection by New Supervac on November 1, 2002. Finally, in December 2003, New Supervac's grounds of objection were accepted by the CRA. According to the appellants, it was during a telephone conversation in which the CRA informed New Supervac's accountants of this decision that the existence of a capital dividend account originating from Old Supervac was brought up for the first time. There was approximately $947,084 in the account.

[12] In 2004, New Supervac exercised the option of declaring a capital dividend in favour of its shareholder, Groupe Honco, which in turn declared a dividend in favour of its shareholder, Gestion Paul Lacasse Inc, which thereupon exercised the option of paying a capital dividend to Paul Lacasse (see Form T2054 signed on December 20, 2004, Appeal Book, Volume 5 at p. 974).

[13] In March 2007, relying on subsection 83(2.1), reproduced above, the Minister issued to each of the appellants a Notice of Assessment concluding that the dividend received was not a capital dividend and, after review of the Notices of Objection filed by the appellants, ratified the assessments (for Groupe Honco, see Appeal Book, Volume 5 at pp. 947 et seq.; for New Supervac, see *ibid.* at pp. 940 et seq.; for Gestion Paul Lacasse Inc., see *ibid.* at pp. 979 et seq.).

[14] Having set out the facts, I will now consider the issues.

The applicable standards of review

[15] The Judge's findings of law are subject to the standard of correctness. His findings of mixed fact and law or of fact will be upheld in the absence of a palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235) [*Housen*].

The series of transactions and subsection 83(2.1) of the Act

[16] As mentioned above, the appellants deny the existence of a series of transactions in this case. Relying on *Copthorne*, their counsel argues that too much time passed between the various transactions for them to be considered a series. He adds that, in the event that his clients are wrong on this, the series started in 1997, when Paul Lacasse and Eddy Bédard negotiated the construction of a structure for Old Supervac (Appellants' Memorandum of Fact and Law at paras. 14 et seq.).The judge therefore erred, it is submitted, in placing the emphasis on New Supervac's purchase of Old Supervac's shares.

[17] I am not persuaded that *Copthorne* is as helpful to the appellants as they suggest. First, *Copthorne* dealt with an assessment based on the general anti-avoidance rule found in section 245 of the Act, not the anti-avoidance rule specifically mentioned set out in subsection 83(2.1), on which the appellants' assessments are based. Furthermore, *Copthorne*

states that the length of time elapsed between the series and the related transaction may be a relevant consideration in some cases, as may the events that have taken place between them. *Copthorne* does not prescribe a limitation period such that the existence of a series would depend strictly on a temporal condition. Each case must be decided on its own facts (*Copthorne* at para. 47).

[18] On the basis of the evidence, the Judge held that

> . . . the acquisition of the Old Supervac shares and the declaration of the capital dividend . . . form a part of the same series of transactions . . . given that, at the time of declaring the dividend and electing to have the dividend be a capital dividend, New Supervac was or would have been contemplating the existence of its capital dividend account which had been acquired upon the acquisition of the Old Supervac shares. (Judge's Reasons at para. 15)

[19] This finding of fact is amply supported by the evidence. When the Old Supervac shares were acquired on November 17, 1999, the appellants and Paul Lacasse were aware of the existence of Old Supervac's capital dividend account. In light of the facts described above, it could not have been otherwise. I will refer more specifically to the evidence in my analysis of the burden of proof.

[20] As for the argument that the Judge erred by not looking further back in time and in focusing on the share purchase agreement and the statutory declaration (Form T2054), I am of the view that it is without merit. First of all, the Minister's assumption of fact, reproduced above, invited the Judge to do this, and in addition, the issue of the capital dividend account only came

up because the share purchase agreement was entered into, which agreement included the single Class A preferred share issued by Old Supervac when it was incorporated.

The main purpose

[21] In paragraph 19 of his reasons, the Judge accepts the appellants' statement that the relevant main purposes were:

> 1) to permit Groupe Honco to recover its costs of building the Supervac structure;
>
> 2) through the acquisition of the Old Supervac shares, to permit the New Supervac business to be carried on as part of Groupe Honco without the need for new certification by the ASME; and
>
> 3) through the acquisition of the Old Supervac shares, to permit the amalgamation of New Supervac and Old Supervac to create New Supervac, which permitted Old Supervac's tax losses to be utilized against New Supervac's income.

[22] However, the appellants invite us to find that the transactions at issue are unrelated to the capital dividend account (Appellants' Memorandum of Fact and Law at para. 49). They ask the following questions: [TRANSLATION] "How many purposes" do there have to be in a series of transactions before a "purpose" can no longer be considered a "main purpose"? If there are already three main purposes, can there be a fourth? In my view, this question opens the door to a false debate.

[23] Subsection 83(2) of the Act, found in Subdivision h, entitled, "Corporations Resident in Canada and Their Shareholders", sets out the rules applicable to a capital dividend when it comes

to computing the income of a corporation's shareholders. As a general rule, the purpose of the capital dividend account is to enable a private company to distribute to its shareholders tax-exempt amounts that it collects, without having those amounts become taxable in the shareholders' hands. Subsection 83(2.1) imposes a restriction on this general principle "where . . . the share . . . was acquired by its holder in a transaction or as part of a series of transactions one of the main purposes of which was to receive the dividend".

[24] The phrase "one of the main purposes" is unambiguous and implies that a taxpayer may have more than one main motive in acquiring shares. With respect, it seems to me that counsel for the appellants is ignoring the purpose and spirit of subsection 83(2.1) of the Act in attempting to persuade us that the word "main" does not leave open the possibility of having two or three motivations that explain a transaction or series of transactions. According to this interpretation, a taxpayer would merely have to present two or three plausible and credible main purposes for a transaction or series of transactions to shield himself or herself from the anti-avoidance rule. The intention to receive a capital dividend would be the [TRANSLATION] "one purpose too many" that could not give rise to the application of subsection 83(2.1) simply because it would take a back seat to the other purposes advanced by the taxpayer. I am unable to agree with this interpretation. The fact that the taxpayer has provided reasons for getting involved in a transaction or series of transactions in no way excludes a finding that one of the main purposes—one generally not disclosed by the taxpayer—is to obtain a tax advantage.

[25] In order to succeed in this case, the appellants had the burden of demonstrating to the Judge that the acquisition of the capital dividend account and the receipt of tax-free dividends

was not one of the main purposes of the purchase of the Old Supervac shares. The Judge held that they had not discharged their burden nor been successful in refuting the Minister's assumption of fact. I agree with him for the reasons I will give in the final point in my analysis.

Burden of proof

[26] It is well known that in tax matters, the standard of proof is the balance of probabilities. As stated in *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 at paras 92-96, the initial onus is on the taxpayer to "demolish" the exact assumptions on which the Minister based his assessment. The taxpayer meets this burden by making out at least a *prima facie* case. Only if this condition is met does the onus shift to the Minister, who must then rebut the taxpayer's evidence and prove on the balance of probabilities the validity of his assumptions.

[27] Evidence considered sufficient to establish a fact until proof of the contrary constitutes *prima facie* evidence. Although it is not conclusive evidence, "the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted", considering that "[i]t is the taxpayer's business" (*Orly Automobiles Inc. v. Canada.*, 2005 FCA 425 at para. 20); *Amiante Spec. Inc. v. Canada*, 2009 FCA 139 at paras. 23-24). In this case, the appellants submit that they have established [TRANSLATION] "that the main purposes of the transaction were other than to receive a dividend" (Appellants' Memorandum of Fact and Law at para. 8). They note that they were in the rather unusual position of having to prove [TRANSLATION] "a lack of intent" (*ibid.*).

[28] The appellants are critical of the Judge more particularly for writing that "[i]n matters of intention in particular, the availability of contemporaneous corroborative evidence from written documents or from third parties takes on somewhat greater significance" (Judge's Reasons at para. 29). The appellants see in this excerpt an error by the Judge in that he imposed too high a burden on them. In light of the Judge's reasons as a whole, I find that this criticism is base less.

[29] Ultimately, as the TCC indicated, the question of whether the appellants discharged their burden had to be decided "upon a preponderance of the totality of the evidence" (*ibid.* at para. 18) (emphasis added). Having heard all the witnesses, the Judge summarized the testimony of each and noted, among other things, numerous gaps in the appellants' oral and documentary evidence that could have been filled had the persons with knowledge of the relevant facts been called to the stand or had certain documents been filed. This is a finding that was open to him to make.

[30] In the first place, as we are reminded by the Supreme Court of Canada at paragraph 18 of *Housen*:

> The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

[31] Furthermore, where purpose or intention is to be ascertained, it must not be supposed that courts will be satisfied with only the taxpayer's statements, *ex post facto* or otherwise, as to the subjective purpose of a particular transaction (*Symes v. Canada*, [1993] 4 S.C.R. 695 at para. 68).

[32] It was certainly open to the Judge to draw a negative inference from the absence of key witnesses or relevant documents such as Old Supervac's amended financial statements (Judge's Reasons at para. 23; *Diaz v. Canada*, 2013 FCA 11 at para. 3).

[33] Finally, it is clear from his reasons as a whole that the Judge fully understood the issues and applied himself to addressing them in light of the facts in evidence that he had accepted and the applicable legal and evidentiary rules. I cannot identify any error warranting this Court's intervention.

[34] Ultimately, the Judge did not accept the appellants' argument and found it "remarkable, surprising and perhaps convenient that [Mr. Lacasse,] an experienced businessman who had built up several businesses and acquired at least one other, who was aided by an outside law firm and an outside firm of chartered accountants, and who:

> 1) was aware of the terminal illness of Mr. Bédard,
>
> 2) was aware that an insurance policy was held by Old Supervac on the life of Mr. Bédard,
>
> 3) had in hand at the time the Old Supervac shares were acquired following the exercise of the option financial statements indicating that life insurance proceeds had been received and that a capital dividend had been paid to the former shareholders of Old Supervac in that same period, and
>
> 4) was planning to obtain the benefit of the tax loss accounts of Old Supervac
>
> could have missed the availability of Old Supervac's remaining capital dividend account." (Judge's Reasons at para. 28)
>
> [Emphasis in original.]

[35] The evidence adduced supported this finding by the Judge. Let us not forget that Paul Lacasse had suggested that he had never heard of the capital dividend account before December 2003 (see step 15 of the table of significant events filed during the hearing of these appeals). Better still, he did not know what a capital dividend account was. Yet the documentary evidence clearly establishes that on November 16, 1999, the day before the share purchase agreement was executed, Old Supervac, which was already under Lacasse's control, had exercised its [TRANSLATION] "option regarding a capital dividend under subsection 83(2)" with respect to the $36,000 dividend owing to Ms. Légaré (Revenue Canada Form T2054, Appeal Book, Volume 5 at p. 891). It was stated on the form that the balance of the capital dividend account immediately before the distribution to Ms. Légaré was $797,084. The same figure appeared in Old Supervac's unaudited statements of income and deficit for the fiscal year ending on October 31, 1999, under the heading [TRANSLATION] "Other Income and Expenditures – Proceeds from Life Insurance Policy" (Appeal Book, Volume 5 at p. 871). In addition, Paul Lacasse signed the agreement as the principal shareholder of New Supervac in order to guarantee solidarily with Old Supervac the undertaking to reimburse the dividend still owing to Annette Légaré (Share Purchase Agreement, Appeal Book, Volume 5 at p. 850).

[36] Finally, I note that the Judge also found, at paragraph 9 of his Reasons, that Paul Lacasse had never said that he and Bédard "had never discussed the existence of the life insurance policy or the possibility of the eventual life insurance proceeds being able to be distributed to shareholders tax-free . . . . "

[37] In conclusion, I cannot identify in the Judge's findings of fact any decisive error that would warrant this Court's intervention.

[38] Before this Court, the appellants also raised a second issue regarding the Judge's so-called error in failing to consider the exception set out in subsection 83(2.3) of the Act. According to this subsection, the relevant anti-avoidance rule, namely that in subsection 83(2.1), does not apply in respect of a dividend paid by a corporation on a share of its capital stock "where it is reasonable to consider that the purpose of paying the dividend was to distribute an amount that was received by the corporation and included in computing its capital dividend account" as proceeds of a life insurance policy of which the corporation was the beneficiary, which it received following a person's death. Having carefully reread the transcript of the TCC hearing, I would make two observation: (1) this issue was raised as an alternative argument at the beginning of the hearing (Appeal Book, Volume 2, p. 202 at lines 13 et seq.); but, (2) during his oral submissions, both in chief and in reply (Appeal Book, Volume 3 at pp. 688 et seq.), counsel then representing the appellants never returned to that issue, even after counsel for the respondent pointed out the omission (Appeal Book, Volume 3 at p. 662) .

[39] Similarly, in his submissions before the TCC, the appellants' counsel requested a completely different alternative finding, asking the Judge [TRANSLATION] "to apply [subsection 83(2.1) to New Supervac only], in order to avoid the cascading Notices of Assessment that followed" (*ibid.* at pp. 596 et seq.). The Judge discusses this request at paragraph 35 of his reasons.

[40] In such circumstances, uncontested by the appellants' new counsel, I find it difficult to accept the appellants' criticism of the Judge. Moreover, the appellants could have brought a motion asking the Judge to reconsider the judgments disposing of their appeals with a view to amending those judgments because the Court had failed to deal with an issue that it should have addressed (sections 168 and 172 of the *Tax Court of Canada Rules (General Procedure)* (SOR/90-688a)). They did not do so.

[41] Despite all this, the appellants submit that this Court should deal with the issue. Again, I observe that the issue has been raised before us in a most tentative manner, and that only paragraphs 30 and 31 of the Appellants' Memorandum of Fact and Law are devoted to it, without any development of the legal argument. In light of this and in view of the conclusion I have reached, I propose to decline the invitation to consider it.

[42] Accordingly, I would dismiss the appeals, with costs payable jointly and severally by the appellants but limited to one set in both this Court and the Tax Court of Canada. The Court Registrar shall file a copy of these reasons in each file (A-415-12, A-414-12, A-413-12).

"Johanne Trudel"

J.A.

"I concur.
J.D. Denis Pelletier J.A."

"I concur.
Johanne Gauthier J.A."

Certified true translation

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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PLACE OF HEARING:	Montréal, Quebec
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DATED:	May 13, 2013

APPEARANCES:

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Nathalie Labbé Simon Vincent	FOR THE RESPONDENT

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FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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