

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170110

Docket: A-189-16

Citation: 2017 FCA 3

**CORAM: PELLETIER J.A.
STRATAS J.A.
WOODS J.A.**

BETWEEN:

**SOCIÉTÉ GÉNÉRALE VALEURS
MOBILIÈRES INC.**

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on January 10, 2017.
Judgment delivered from the Bench at Toronto, Ontario, on January 10, 2017.

REASONS FOR JUDGMENT OF THE COURT BY:

WOODS J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on January 10, 2017).

WOODS J.A.

[1] In the course of an appeal instituted in the Tax Court of Canada by Société Générale Valeurs Mobilières Inc., the Crown sought a determination of questions of law pursuant to subsection 58(1) of the *Tax Court of Canada Rules (General Procedure)*. With the consent of

Société Générale, the Associate Chief Justice of the Tax Court set the matter down for determination.

[2] In a decision cited as 2016 TCC 131, Paris J. (the judge) ultimately decided the questions in the Crown's favour, and Société Générale has appealed to this Court.

[3] The questions for determination relate to the tax sparing provision in the Convention between the Government of Canada and the Government of the Federative Republic of Brazil for the Avoidance of Double Taxation with Respect to Taxes on Income (1984) (the Treaty). In general, this provision requires Canada to limit Canadian tax on certain Brazilian source income so that Canadian taxpayers may benefit from tax incentives provided on this income by Brazil. If it were not for the tax sparing provision, Canada would have the right to tax Canadian residents on this income in Canada. The Treaty mechanism requires Canada to provide a foreign tax credit on the qualifying Brazilian income as if Brazilian tax were imposed even if the income was not taxed in Brazil.

[4] The specific questions before Tax Court concerned the calculation of the Canadian foreign tax credit. In particular, did the relevant Treaty provision require Canada to provide a foreign tax credit calculated by reference to Canadian tax on gross income?

[5] The specific questions are reproduced below:

Where a Canadian resident taxpayer earns bond interest income arising in Brazil that may be taxed by Brazil under Article XI of Canada's tax treaty with Brazil, and earns taxable income from other sources, is the amount of Canadian income

tax that is referred to in Article XXII(2) of the treaty as being “appropriate to the income which may be taxed in Brazil”:

- a. equal to the Canadian income tax on the amount of such interest income that is or is deemed to be taxed in Brazil, which is a gross amount; and
- b. if the answer to (a) is yes, what is the proper test for determining the Canadian income tax payable on the gross amount of income derived from Brazil;
- c. if the answer to (a) is no, what is the proper test for determining which amounts of the Canadian resident taxpayer should be included and/or deducted from the gross income arising from sources in Brazil?

[6] The relevant provision is the second sentence of Article XXII(2) of the Treaty, which reads: “The deduction shall not, however, exceed that part of the income tax as computed before the deduction is given, which is appropriate to the income which may be taxed in Brazil.”

[7] The context provided to the judge to answer these questions was a simple statement of hypothetical facts agreed to by the parties. These are:

1. A Canadian resident taxpayer earns bond interest income which arises in Brazil.
2. The bond interest may be taxed by Brazil under Article XI of the Treaty.
3. The taxpayer earns income from other sources that is taxable in Canada.
4. The taxpayer is deemed by Article XXII(3) of the Treaty to have paid Brazilian tax equal to 20 percent of the gross bond interest arising in Brazil.

[8] The determinations of the judge are reproduced below.

1. The amount of Canadian income tax referred to in the second sentence of Article XXII(2) of the *Treaty* as being “appropriate to the income which may be taxed in Brazil” is the actual Canadian income tax attributable [to] the income taxed in Brazil, which is computed on the net income arising from Brazil.
2. The proper test for determining which amounts of the Canadian resident taxpayer should be included or deducted from the gross interest arising from sources in Brazil is that found in subsection 4(1) of the *Income Tax Act*.

[9] Société Générale submits that the judge erred in determining that Canada may limit the foreign tax credit to actual Canadian tax on net bond interest. It submits that the relevant amount is to be calculated as the gross bond interest multiplied by the Canadian tax rate. This issue is a question of law for which the standard of review is correctness (*Housen v. Nikolaissen*, 2002 SCC 33).

[10] In our view, the judge correctly determined the questions, and we agree with the reasons that he gave.

[11] In this Court, Société Générale submits that the judge’s interpretation of the Treaty should be rejected because it is inconsistent with the clear language of the provision. It also submits that, if the judge’s interpretation were correct, the drafters of the Treaty would have used the language that was used in many other treaties.

[12] We disagree with these submissions. In our view, the judge’s interpretation is more consistent with the language of the relevant provision. In particular, the judge is correct that the ordinary meaning of the text takes into account not only the gross income which may be taxed by

Brazil, but also the actual Canadian tax as computed under the *Income Tax Act*, which is based on net income.

[13] The interpretation by the judge is the one that is most consistent with the text, the context and the purpose of the provision.

[14] Finally, we acknowledge that the text of the Treaty may be different from many of Canada's other treaties. However, in these circumstances this is not a reason in and of itself to give the provision a different interpretation.

[15] The appeal will be dismissed, with costs in this Court and in the Court below.

"Judith M. Woods"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-189-16

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE B. PARIS OF THE
TAX COURT OF CANADA, DATED JUNE 30, 2016, DOCKET NO. 2013-4035(IT)G**

STYLE OF CAUSE:

SOCIÉTÉ GÉNÉRALE VALEURS
MOBILIÈRES INC. v. HER
MAJESTY THE QUEEN

PLACE OF HEARING:

Toronto, Ontario

DATE OF HEARING:

JANUARY 10, 2017

REASONS FOR JUDGMENT OF THE COURT BY:

PELLETIER J.A.
STRATAS J.A.
WOODS J.A.

DELIVERED FROM THE BENCH BY:

WOODS J.A.

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