Federal Court of Appeal  Cour d'appel fédérale

**Date: 20180410**

**Docket: A-189-17**

**Citation: 2018 FCA 74**

[ENGLISH TRANSLATION]

**CORAM:** **NOËL C.J.**
**PELLETIER J.A.**
**DE MONTIGNY J.A.**

**BETWEEN:**

**FIDUCIE FINANCIÈRE SATOMA**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Montréal, Quebec, on February 14, 2018.

Judgment delivered at Ottawa, Ontario, on April 10, 2018.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: PELLETIER J.A.
DE MONTIGNY J.A.

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## REASONS FOR JUDGMENT

**NOËL C.J.**

[1] This is an appeal brought by the Satoma Trust (the Satoma Trust or the appellant) from a decision rendered by Associate Chief Justice Lamarre of the Tax Court of Canada (the Tax Court judge) confirming the reassessments issued by the Minister of National Revenue (the Minister) under the General Anti-Avoidance Rule (GAAR) found in section 245 of the *Income Tax Act*,

R.S.C. 1985, c.1 (5th Supp.) (the Act) with respect to the appellant's 2005, 2006 and 2007 taxation years.

[2] The Tax Court judge found that the series of transactions which allowed taxable dividends received by the Satoma Trust to be transformed into tax-paid amounts without any tax actually being paid resulted in an abuse of the provisions relied upon to achieve this goal, specifically subsections 75(2) and 112(1).

[3] In support of its appeal, the appellant maintains that the Tax Court judge's conclusion that it received a tax benefit and that it abused subsections 75(2) and 112(1) is premature as no such benefit or abuse can arise until it makes a distribution to its individual beneficiaries. As such, these issues are hypothetical for the time being and the Tax Court judge erred in addressing them.

[4] For the reasons that follow, I am of the view that no such error was shown to have been committed and that the appeal should accordingly be dismissed.

[5] The legislative provisions relevant to the analysis are reproduced in the appendix to these reasons.

**FACTS**

[6] The facts are set out in the agreed statement of facts as supplemented by the evidence adduced at trial (Reasons, paras. 2-26). They need not be repeated. The following summary is sufficient for present purposes.

[7] The series of transactions was carried out in pursuance of a tax plan put in place at the request of Mr. Pilon who was seeking to expand his business operations. At the time, Mr. Pilon was a shareholder in Gennium produits pharmaceutiques inc. (Gennium), a company involved in the distribution of generic pharmaceuticals and which he operated. His plan was to become involved in the manufacture of generic pharmaceuticals using for financing purposes the surpluses accumulated by Gennium. Given the high risk of lawsuits facing manufacturers, it was important for Mr. Pilon to ensure that Gennium remained legally separate from any corporate entity involved in this venture and that the surpluses used to finance these operations be shielded from lawsuits directed at these entities.

[8] For that purpose, a trust with a right of reversion as contemplated by subsection 75(2) of the Act was settled (*i.e.*: the Satoma Trust). The plan was conceived so as to allow the attribution rule provided for under this provision to be brought into operation. This rule is to the effect that where a taxpayer contributes property to a trust in circumstances where the property can revert back to the contributor, any income derived from the property or substituted property will be attributed back to the contributor.

[9] In this case, 9134-1024 Québec Inc. (9134) was designated as a beneficiary under the Satoma Trust and made a $100 contribution to the trust by way of a donation with the result that the donated property could revert back to it. As such, subsection 75(2) became applicable.

[10] The Satoma Trust subsequently used the donated amount to purchase shares in 9163-9683 Québec Inc. (9163) with the result that these shares became "substituted […] property". This gave rise to the possibility that the shares revert back to 9134 with the result that any income derived therefrom, including dividend income, would be attributable to 9134.

[11] With this structure in place, the following series of transactions was undertaken. Gennium first declared a dividend to the Fiducie familiale Louis Pilon (Louis Pilon Family Trust), which it then distributed to 9134. As 9134 was also one of its beneficiaries, the Louis Pilon Family Trust was able to deduct these amounts from its income pursuant to paragraph 104(6)(*b*). As well, pursuant to subsection 104(19), the amounts received by 9134 retained their character as taxable dividends as they passed through the trust which allowed 9134 to claim the intercorporate dividend deduction under subsection 112(1).

[12] 9134 then transferred the funds to 9163 by way of surplus contributions which were then used by 9163 to fund the payment of dividends on the class of shares held by the Satoma Trust. In conformity with the attribution rule set out in subsection 75(2), the dividends received by the Satoma Trust were attributed to 9134 which again took advantage of the intercorporate dividend deduction provided for in subsection 112(1).

[13] Although, for purposes of the Act, the dividends were paid to 9134, they were in fact received by the Satoma Trust which then used these funds as directed by M. Pilon. Between 2005 and 2007, this structure allowed the Satoma Trust to receive and retain a total of $6 250 100 in taxable dividends on which no tax was paid. Of this amount, $4 575 000 were used to finance the corporations engaged in the manufacturing of generic pharmaceuticals. To this day, the appellant has not made any distributions to its beneficiaries.

- *The reassessments*

[14] The Minister conceded that the appellant had succeeded in avoiding tax on the taxable dividends which it received, when regard is had to the text of the provisions relied upon to achieve this result. However, being of the view that this result was abusive, a decision was made to invoke the GAAR.

[15] The reassessments nullify the result achieved by including in the computation of the appellant's income the taxable dividends which it received pursuant to paragraph 12(1)(*j*).

**DECISION OF THE TAX COURT**

[16] The issue before the Tax Court judge was whether the appellant obtained a tax benefit and, if so, whether the series of transactions undertaken to achieve this result was abusive. The appellant conceded that in the event that a tax benefit was achieved, the series of transactions used to obtain it are properly labelled as avoidance transactions.

[17] The Tax Court judge began her analysis with respect to the tax benefit by noting that the Louis Pilon Family Trust already served the purpose of shielding Gennium from potential liability arising from the drug manufacturing activities. The creation of the Satoma Trust with its right of reversion was rather aimed at eliminating any tax consequences on the transfer of funds between itself and Gennium (Reasons, para. 59). Once in the hands of the Satoma Trust, the funds could be used for investment purposes or to make distributions to its beneficiaries without tax being paid by anyone (*Ibidem*).

[18] However, the Tax Court judge found that when funds are taken out of the corporate tax system and paid to individuals – including trusts which for the purpose of computing income are treated as individuals – the Act contemplates that tax be paid (Reasons, para. 61). In this respect, a trust which is in receipt of taxable amounts can either discharge the tax liability itself or distribute these amounts to its beneficiaries in the year of receipt, in which case the tax liability is incurred by the beneficiaries and the trust is entitled to deduct the amounts so distributed in the computation of its income. Subsections 104(2) and (6) are cited in support of this analysis (Reasons, para. 62).

[19] In this case, the Tax Court judge concluded that the application of the attribution rule found in subsection 75(2) had the effect of ensuring that neither the Satoma Trust nor its beneficiaries would be subject to tax on the taxable dividends it received, regardless of how the appellant choses to use the funds (Reasons, para. 64). Indeed, having 9134 include the dividends in its income without ever receiving them led to these amounts becoming effectively "capitalized" in the Satoma Trust (Reasons, para. 63).

[20] In order to show that this conclusion was premature, the appellant argued before the tax Court judge that it remains open for it make distributions to its corporate beneficiaries, in which case their shareholders will be taxable on these amounts when they are eventually distributed by way of dividends. The Tax Court judge rejected this argument. She found the suggestion illusory in light of the fact that shareholders of the Satoma Trust's corporate beneficiaries are also the individual beneficiaries under the trust and therefore presently entitled to receive the funds tax-free (Reasons, para. 67).

[21] The appellant also canvased several alternatives that it argued would have allowed it to achieve the same tax-free outcome. The Tax Court judge reviewed these alternatives and found that contrary to the result achieved here, each proposed scenario would ultimately result in tax being paid (Reasons, paras. 73-74).

[22] Turning to the abuse analysis, the Tax Court judge concluded that subsection 75(2) is an anti-avoidance rule whose reason for being is to prevent taxpayers from income splitting with a trust. Where a taxpayer contributes property to a trust in circumstances where it can revert to the taxpayer, any income derived from that property will be attributed to the taxpayer who made the contribution rather than be considered income of the trust (Reasons, paras. 104-106).

[23] With respect to subsection 112(1), the Tax Court judge concluded that its reason for being is to prevent double taxation. It does so by allowing dividends to be passed between corporations without any tax consequences at the intermediary steps. Taxation only occurs when the dividends are received by their ultimate shareholder. The shareholder is then able to apply the

gross-up and credit mechanism, which achieves integration. This mechanism ensures that the combined amount of tax paid by the corporation and the individual is the same as would have been paid by a shareholder who earned the income directly without the interposition of a corporation (Reasons, paras. 98, 99, 107).

[24] The Tax Court judge concluded that both were frustrated in this case. The combined use of subsections 75(2) and 112(1) allowed for the surplus of Gennium to find its way into the hands of the Satoma Trust without tax liability ever being incurred by it or its beneficiaries. This goes against the object, spirit and purpose of both provisions (Reasons, para. 117). Neither provision was intended to transfer funds from a corporation to a trust on a tax-free basis (Reasons, para. 119).

## POSITION OF THE PARTIES

- *The appellant*

[25] The appellant challenges the finding that the tax benefit identified by the Tax Court judge was in fact obtained and her finding that this tax benefit gives rise to an abuse.

[26] Specifically, the appellant argues that the Tax Court judge's conclusion that a tax benefit was obtained was premature. It relies on *OSFC Holdings Ltd. v. Canada*, 2001 FCA 260 [*OSFC*] at paragraph 42 for the proposition that a tax benefit must materialize if it to be recognized as such (Memorandum of the appellant, para. 55). In the case at bar, a tax benefit cannot materialize until a tax-free distribution is made to the trust's individual beneficiaries, which has yet to occur

(*ibidem*). This being the case, the Tax Court judge's conclusion was based on what could happen rather than the facts in existence at the time. This constitutes an error of law (Memorandum of the appellant, para. 47 c)).

[27] The appellant further submits that because no distribution has been made to the trust's beneficiaries, it is also premature to determine whether there has been abuse (Memorandum of the appellant, para. 68 c)).

[28] In any event, in order to counter any suggestion that this series of transactions was abusive, the appellant argues that the same result could have been achieved in a manner that would have been acceptable by the Minister. Specifically, the appellant could have both attributed and distributed the dividends to 9134, which could have then simply contributed them to the Satoma Trust for it to use for investment purposes (Memorandum of the appellant, para. 63).

- *The respondent*

[29] The respondent supports the conclusion reached by the Tax Court judge and essentially adopts the reasons she gave. With respect to the tax benefit, the respondent argues that the Tax Court judge committed no overriding or palpable error in concluding that the tax benefit was achieved from the moment subsection 75(2) took effect (Memorandum of the respondent, para. 29). The tax benefit was obvious: the appellant received taxable dividends in the amount of $6 250 100 on which it did not pay tax (Memorandum of the respondent, para. 32). Tax was therefore avoided (Memorandum of the respondent, para. 35).

[30] The respondent argues that Tax Court judge correctly identified subsection 75(2) as an attribution rule whose purpose is to prevent income splitting with a trust. Subsection 75(2) seeks to prevent a tax payer from reducing its tax liability by transferring income producing property to a trust while at the same time retaining rights in the property or substituted property (Memorandum of the respondent, para. 42). The Tax Court judge also correctly concluded that subsection 112(1) seeks to achieve neutrality through the concept of integration (Memorandum of the respondent, para. 43). Subsection 112(1) also ensures that the shareholder who is the ultimate recipient of the dividends is subject to tax; its purpose is not to give rise to a perpetual exemption of dividend income (Memorandum of the respondent, para. 67).

[31] The transaction at issue frustrated these provisions because subsection 75(2) was used to transfer dividends received by the Satoma Trust to 9134, which both included and deducted them from its income, thereby allowing the appellant to conserve the dividends it received in the form of capital (Memorandum of the respondent, para. 81). As such, subsection 75(2), an anti-avoidance rule that seeks to prevent income splitting was used to avoid tax. Moreover, the appellant was left with over 6 million dollars of Gennium’s surplus without it or anyone having paid tax, even though the surplus had been transferred from the corporation to an individual liable for tax (Memorandum of the respondent, para. 82). The Tax Court judge therefore correctly concluded that the object, sprit and purpose of subsections 112(1) and 75(2) were frustrated.

**ANALYSIS**

- *Preliminary observations*

[32] Before turning to the GAAR analysis, it is useful to consider briefly the reason why the series of transactions was undertaken and the reason why the Minister had to resort to the GAAR in order to be in a position to challenge the result that was obtained by the series.

[33] The fundamental goal of allowing the funds held by Gennium to be transferred and used to finance the operations of the manufacturing companies while shielding these funds from potential lawsuits directed against the manufacturing companies could have been achieved without providing for a right of reversion (Reasons, para. 58). The Satoma Trust's structure which incorporates this right was put in place with a clear purpose in mind: provoking the attribution of the taxable dividends from the Satoma Trust to 9134 so that 9134 could avail itself of the deduction provided for under subsection 112(1) and allow the Satoma Trust to hold and dispose of these funds as it saw fit on a tax-free basis.

[34] This is what led the Minister to invoke the GAAR. In resorting to the GAAR, the Minister accepted that based on the text of the provisions relied upon, the taxable dividends paid to the Satoma Trust were properly included in the income of 9134 and therefore were not subject to tax in the hands of the Satoma Trust with the result that the gross amount of the dividends which it received could be used for investment purposes or could be distributed on a tax-free basis to the beneficiaries even though no tax has been paid in the process.

[35] There was a discussion in the Court below as to whether a traditional word-based analysis of the provisions in issue (*Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721 [*Copthorne*], para. 70) allowed for this result (Reasons, paras. 29-33). The issue was whether subsection 75(2), by deeming the taxable dividends received by the Satoma Trust to be that of 9134, excluded the possibility of taxing the dividends in the hands of the Satoma Trust. The argument rests on the wording of other attribution rules which specifically provide that when income is deemed to be the income of a taxpayer, it cannot be included in the income of another (See for instance section 74.1). Subsection 75(2) is silent in this regard.

[36] In my view, express exclusions of this type are inserted for greater certainty. This is because the liability for income tax under the Act is cast on "a taxpayer" in the singular (section 3), and there is no basis on which Parliament could have intended the same income to be included in determining the tax liability of more than one taxpayer (See *Canada v. Sommerer*, 2012 FCA 207 at para. 55). Subsection 82(2) reinforces this conclusion by providing that where a dividend is attributed to another person pursuant to subsection 75(2), that person is also deemed to have received it. The same dividend cannot be received by two persons at once.

[37] It follows that because the liability for tax on the taxable dividends paid to Satoma Trust was that of 9134, the Satoma Trust did not have to include these dividends in the computation of its own income. The result is that although the liability for tax on the taxable dividends was discharged by 9134, it remains that no tax has effectively been paid because 9134 claimed the deduction available to it pursuant to subsection 112(1).

[38] The result so achieved is in compliance with subsections 75(2) and 112(1) when construed with a focus on their wording (*Copthorne*, para. 66). The GAAR was therefore the only means by which the Minister could take issue with this outcome (Reasons, para. 33).

- *The GAAR analysis*

[39] There are three questions which must be addressed in a GAAR analysis: was there a tax benefit? If so, was the transaction giving rise to the tax benefit an avoidance transaction? If so, was the transaction giving rise to the tax benefit abusive? (*Copthorne* at para. 33 citing *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 [*Trustco*] at paras. 18, 21, 36).

[40] The appellant concedes that if there was a tax benefit, the plan put in place at the instigation of Louis Pilon gives rise to at least one avoidance transaction which suffices to qualify the series the same way (Reasons, para. 76; *Copthorne* at paras. 40-41). Only the first and third questions are in issue.

(1) *The tax benefit*

[41] Turning to the first, the question whether to a tax benefit has been established rarely gives rise to a prolonged debate given the definition of that term which extends to a reduction, an avoidance or a deferral of tax (subsection 245(1)). However, in this case the appellant made this question the focus of the Tax Court judge's analysis. She devoted 28 paragraphs to this issue (Reasons, paras. 47-75).

[42] Before us, the appellant again focuses the debate on this part of the analysis (Memorandum of the appellant, paras. 50-53, 56-60). It submits that the Tax Court judge erred when she held that a tax benefit had been established even though a tax-free distribution by the trust had yet to be made (Memorandum of the appellant, para. 47a)iv)).

[43] The question whether a tax benefit has been achieved is one of fact with the result that the decision of the Tax Court judge on this point can only be reversed if a palpable and overriding error has been committed (*Trustco* at para. 17; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 10). No such error has been shown.

[44] A trust has a hybrid nature under the Act. It can retain the taxable amounts paid to it, in which case the trust pays tax as any individual liable for tax as expressed in subsection 104(2). It can also pay these amounts to its beneficiaries in which case the liability for tax falls on the beneficiaries to whom the distribution are made pursuant to subsection 104(13) and in which case the trust is permitted to deduct a corresponding amount from its income pursuant to paragraph 104(6)(*b*).

[45] In this case, a tax benefit was obtained by the appellant when the attribution rule provided for in subsection 75(2) became operational. Specifically, this allowed the Satoma Trust to avoid paying tax on the taxable dividends which it received in circumstances where no part thereof was distributed to the beneficiaries. The Tax Court judge had to go no further in order to find that a tax benefit had been achieved by the appellant (Compare *Trustco* at para. 20).

[46] The suggestion that no tax benefit can be said to arise before a tax-free distribution is made to the individual beneficiaries ignores the fact that the reassessments are directed at the Satoma Trust, which as noted is deemed under the Act to be an individual liable for tax on all taxable amounts received.

[47] For the same reason, the appellant's reliance on *OSFC* (Memorandum of the appellant, para. 55) is misplaced. In that case, this Court explained that the pre-packaged losses which Standard Trust was selling did not procure a tax benefit in and of themselves. Someone had to become a participant in the structure proposed by Standard Trust and claim their share of the pre-packaged losses in order for a tax benefit to arise (*OSFC*, para. 42).

[48] The analogy with *OSFC* would be apt if the reassessments issued by the Minister were directed against the beneficiaries of the Satoma Trust as they have yet to benefit from the plan put in place by Louis Pilon. However, the opposite is true with respect to the appellant since it has avoided paying tax on the taxable dividends which it received even though no distribution has taken place.

[49] The appellant has not shown that the Tax Court judge committed an error in holding that a tax benefit has been achieved.

(2) *The abuse*

[50] The question whether the provisions relied upon to achieve the tax benefit have been abused gives rise to a question of mixed fact and law with respect to which the onus rests on the

Crown (*Trustco*, paras. 44, 63). Specifically, it was incumbent on the Crown to identify the object, spirit and purpose of subsections 75(2) and 112(1) and demonstrate why these provisions were frustrated by the tax benefit achieved (*ibidem*).

[51] The Tax Court judge held that this burden had been met. The appellant's main argument against this finding is again that the abuse has yet to materialize. Specifically, the appellant again contends that a tax-free distribution has to take place before any abuse can be said to arise. Until then, the question whether there has been an abuse is [TRANSLATION] "hypothetical" (Memorandum of the appellant, para. 68c)).

[52] In my view, the combined use of subsections 75(2) and 112(1) gave rise to an abuse. This abuse arose when the optional deduction provided for under subsection 112(1) was claimed. Subsection 75(2) is an anti-avoidance provision designed to prevent income splitting. Although this provision when looked upon on its own operated in a manner that is consistent with this objective, its combined use with subsection 112(1) offends the object, spirit and purpose of this latter provision (*Lipson v. Canada*, 2009 SCC 1, [2009] 1 S.C.R. 3 at para. 42). In this respect, the object, spirit and purpose of subsection 112(1) is to allow dividends to be passed on tax-free within corporate groups subject to tax being eventually paid when the dividends reach the final recipients. This objective has been frustrated as the dividends can now be passed on to the beneficiaries without tax.

[53] The structure put in place by Louis Pilon effectively took the taxable dividends received by the appellant outside the tax system without any tax having been paid thereon. In the end,

subsection 104(2), which provides that a trust is deemed to be an individual for purposes of computing its tax liability was not engaged, notwithstanding the fact that it retained the totality of the taxable dividends paid to it. As well, paragraph 104(13)(*a*) which provides that trust distributions must be included in a beneficiaries' income where the amounts so distributed "would be the trust's income", was also frustrated because as explained, the dividends in this case were not income in the hands of the Trust. This is why it was and continues to be open to the Satoma Trust to distribute the taxable dividends which it received on a tax-free basis at the time of its choice without the need to produce information returns.

[54] Given this, one can see that the transformation of the taxable dividends into tax-paid dividends did indeed materialize and that the alleged abuse is anything but hypothetical.

[55] Finally, the appellant contends that there was no abuse because the same result could have been achieved by other means that are not abusive. First, the appellant explains that it could have distributed the amounts which it holds to its corporate beneficiaries rather than directly to the individual beneficiaries who own these corporations, in which case the amounts would initially be distributed on a tax-free basis as the plan contemplated but the individual beneficiaries would eventually pay tax when they ultimately receive these amounts by way of dividends.

[56] The Tax Court judge properly qualified this suggestion as "illusory" since it would have the effect of nullifying the most significant aspect of the tax advantage sought to be obtained by recreating the tax liability which the appellant succeeded in avoiding (Reasons, para. 67).

[57] The appellant maintains that there is nothing illusory about this suggestion when regard is had to the record which shows that its representatives invoked this possibility on two occasions, in 2010 and 2014 (Memorandum of the appellant, para. 69b)). It omits to point out however, that this was done in an effort to settle the dispute after the auditors had taken issue with the series of operations and raised the prospect of applying the GAAR.

[58] I note that in proposing to add this extra level of distribution in order to ensure that the taxable dividends are eventually taxed pursuant to subsection 112(1), the appellant necessarily recognizes that as matters presently stand, the amounts represented by these dividends can be distributed directly to the individual beneficiaries without any tax being paid.

[59] The appellant presented other means which in its view would have achieved the same result. For instance, it could have not only attributed but also distributed the dividends to 9134, which could then have paid these amounts back to the Satoma Trust to be used for investment purposes (Memorandum of the appellant, para. 63). During oral argument, counsel for the appellant further suggested that upon receiving the dividends from the Louis Pilon Family Trust, 9134 could also have returned these amounts to the Louis Pilon Family Trust for it to use for investment purposes.

[60] However, in contrast with the result obtained here, neither of these alternatives results in no tax being paid. As the Tax Court judge explained with respect to the first scenario, Louis Pilon would ultimately be subject to tax pursuant to section 15 (shareholder benefit) as he is the sole shareholder of 9134 and the funds would eventually find their way to the Satoma Trust of

which he is a beneficiary (Reasons, para. 74). Based on the same reasoning, a shareholder benefit would also result under the second scenario when the funds are returned by 9134 to the Louis Pilon Family Trust as Louis Pilon is also a beneficiary of that trust.

[61] Therefore, the Tax Court judge properly rejected the argument that the same result could have been achieved by alternative means and correctly held that the Minister had succeeded in demonstrating the abuse.

- *The tax consequences*

[62] The reassessments issued by the Minister pursuant to subsection 245(5) deny the tax benefit obtained by the Satoma Trust by imposing in its hands the taxable dividends received from 9163 pursuant to paragraph 12(1)(*j*). This is a reasonable adjustment of the tax consequences given the abuse demonstrated by the Minister.

**DISPOSITION**

[63] I would dismiss the appeal with costs.

"Marc Noël"
Chief Justice

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

"I agree
Yves de Montigny J.A."

## APPENDIX

| ***Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.)** | ***Loi de l'impôt sur le revenu*, L.R.C. (1985), ch. 1 (5e suppl.)** |
|---|---|
| **Dividends from resident corporations** | **Dividendes de sociétés résidant au Canada** |
| **Income inclusions** | **Sommes à inclure dans le revenu** |
| **12(1)** There shall be included in computing the income of a taxpayer for a taxation year as income from a business or property such of the following amounts as are applicable | **12(1)** Sont à inclure dans le calcul du revenu tiré par un contribuable d'une entreprise ou d'un bien, au cours d'une année d'imposition, celles des sommes suivantes qui sont applicables : |
| **(j)** any amount of a dividend in respect of a share of the capital stock of a corporation resident in Canada that is required by subdivision h to be included in computing the taxpayer's income for the year; | **j)** tout montant de dividende relatif à une action du capital-actions d'une société résidant au Canada qui est à inclure, en application de la sous-section h, dans le calcul du revenu du contribuable pour l'année; |
| **Trusts** | **Fiducies** |
| **75(2)** If a trust, that is resident in Canada and that was created in any manner whatever since 1934, holds property on condition | **75(2)** Si une fiducie résidant au Canada, qui a été créée de quelque façon que ce soit depuis 1934, détient des biens à condition : |
| **(a)** that it or property substituted therefor may | **a)** soit que ces derniers ou des biens qui leur sont substitués puissent : |
| **(i)** revert to the person from whom the property or property for which it was substituted was directly or indirectly received (in this subsection referred to as "the person"), or | **(i)** ou bien revenir à la personne dont les biens ou les biens qui leur sont substitués ont été reçus directement ou indirectement (appelée « la personne» au présent paragraphe), |
| **(ii)** pass to persons to be determined by the person at a time subsequent to the creation of the trust, or | **(ii)** ou bien être transportés à des personnes devant être désignées par la personne après la création de la fiducie; |
| **(b)** that, during the existence of the person, the property shall not be disposed of except with the person's consent or in accordance with the person's direction, | **b)** soit que, pendant l'existence de la personne, il ne soit disposé des biens qu'avec son consentement ou suivant ses instructions, |
| any income or loss from the property or from property substituted for the | tout revenu ou toute perte résultant des biens ou de biens y substitués, ou |

property, and any taxable capital gain or allowable capital loss from the disposition of the property or of property substituted for the property, shall, during the existence of the person while the person is resident in Canada, be deemed to be income or a loss, as the case may be, or a taxable capital gain or allowable capital loss, as the case may be, of the person.

tout gain en capital imposable ou toute perte en capital déductible provenant de la disposition des biens ou de biens y substitués, est réputé, durant l'existence de la personne et pendant qu'elle réside au Canada, être un revenu ou une perte, selon le cas, ou un gain en capital imposable ou une perte en capital déductible, selon le cas, de la personne.

**Certain dividends received by taxpayer**

**82(2)** Where by reason of subsection 56(4) or 56(4.1) or sections 74.1 to 75 of this Act or section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, there is included in computing a taxpayer's income for a taxation year a dividend received by another person, for the purposes of this Act, the dividend shall be deemed to have been received by the taxpayer.

**Dividendes réputés reçus par le contribuable**

**82(2)** Le dividende reçu par une personne et qui est inclus en application du paragraphe 56(4) ou (4.1) ou des articles 74.1 à 75 de la présente loi ou de l'article 74 de la *Loi de l'impôt sur le revenu*, chapitre 148 des Statuts revisés du Canada de 1952, dans le calcul du revenu d'un contribuable — autre que cette personne — pour une année d'imposition est réputé reçu par le contribuable pour l'application de la présente loi.

**Taxed as individual**

**104(2)** A trust shall, for the purposes of this Act, and without affecting the liability of the trustee or legal representative for that person's own income tax, be deemed to be in respect of the trust property an individual, but where there is more than one trust and

**Impôt à titre de particulier**

**104(2)** Pour l'application de la présente loi, et sans que l'assujettissement du fiduciaire ou des représentants légaux à leur propre impôt sur le revenu en soit atteint, une fiducie est réputée être un particulier relativement aux biens de la fiducie; mais lorsqu'il existe plus d'une fiducie et que :

…

[…]

**104(6)** Subject to subsections (7) to (7.1), for the purposes of this Part, there may be deducted in computing the income of a trust for a taxation year

**104(6)** Pour l'application de la présente partie mais sous réserve des paragraphes (7) à (7.1), est déductible dans le calcul du revenu d'une fiducie pour une année d'imposition :

**(b)** in any other case, the amount that the trust claims not exceeding the

**b)** dans les autres cas, la somme dont la fiducie demande la déduction et ne

amount, if any, determined by the formula

**A – B**

**where**

**A** is the part of its income (determined without reference to this subsection and subsection (12)) for the year that became payable in the year to, or that was included under subsection 105(2) in computing the income of, a beneficiary, and

**B** is

**(i)** if the trust is a trust for which a day is to be determined under paragraph (4)(a) or (a.4) by reference to a death or later death, as the case may be, that has not occurred before the beginning of the year, the total of

**(A)** the part of its income (determined without reference to this subsection and subsection (12)) for the year that became payable in the year to, or that was included under subsection 105(2) in computing the income of, a beneficiary (other than an individual whose death is that death or later death, as the case may be), and

**(B)** the total of all amounts each of which

**(I)** is included in its income (determined without reference to this subsection and subsection (12)) for the year — if the year is the year in which that death or later death, as the case may be, occurs and paragraph (13.4)(b) does not apply in respect of the trust for the year — because of the application of subsection (4), (5),

dépassant pas l'excédent établi selon la formule suivante :

**A – B**

**où :**

**A** est la partie de son revenu (déterminé compte non tenu du présent paragraphe ni du paragraphe (12)) pour l'année qui est devenue à payer à un bénéficiaire au cours de l'année ou qui est incluse en application du paragraphe 105(2) dans le calcul du revenu d'un bénéficiaire,

**B** est, selon le cas :

**(i)** lorsque la fiducie est une fiducie à l'égard de laquelle un jour est déterminé en application des alinéas (4)a) ou a.4) relativement à un décès ou à un décès postérieur, selon le cas, qui ne s'est pas produit avant le début de l'année, le total des sommes suivantes :

**(A)** la partie du revenu de la fiducie pour l'année, déterminée compte non tenu du présent paragraphe et du paragraphe (12), qui est devenue à payer à un bénéficiaire au cours de l'année, ou qui est incluse en application du paragraphe 105(2) dans le calcul du revenu d'un bénéficiaire, autre qu'un particulier dont le décès est, selon le cas, le décès ou le décès postérieur,

**(B)** le total des sommes dont chacune :

**(I)** d'une part, est incluse dans le revenu de la fiducie (déterminé compte non tenu du présent paragraphe et du paragraphe (12)) pour l'année — si l'année est celle au cours de laquelle le décès ou le décès postérieur, selon le cas, se produit et que l'alinéa (13.4)b) ne s'applique pas relativement à la fiducie pour l'année

(5.1) or (5.2) or 12(10.2), and

— en raison de l'application des paragraphes (4), (5), (5.1) ou (5.2) ou 12(10.2),

**(II)** is not included in the amount determined for clause (A) for the year, and

**(II)** d'autre part, n'est pas incluse dans la valeur de la division (A) pour l'année,

**(ii)** if the trust is a SIFT trust for the year, the amount, if any, by which

**(ii)** lorsque la fiducie est une fiducie intermédiaire de placement déterminée pour l'année, l'excédent éventuel de la somme visée à la division (A) sur la somme visée à la division (B) :

**(A)** the amount determined for A for the trust for the year exceeds

**(A)** la partie visée à l'élément A relativement à la fiducie pour l'année,

**(B)** the amount, if any, by which the amount determined for A for the trust for the year exceeds its non-portfolio earnings for the year.

**(B)** l'excédent de la somme visée à l'élément A relativement à la fiducie pour l'année sur ses gains hors portefeuille pour l'année.

**Income of beneficiary**

**Revenu des bénéficiaires**

**(13)** There shall be included in computing the income for a particular taxation year of a beneficiary under a trust such of the following amounts as are applicable:

**(13)** Les montants applicables suivants sont à inclure dans le calcul du revenu du bénéficiaire d'une fiducie pour une année d'imposition donnée :

**(a)** in the case of a trust (other than a trust referred to in paragraph (a) of the definition trust in subsection 108(1)), such part of the amount that, but for subsections (6) and (12), would be the trust's income for the trust's taxation year that ended in the particular year as became payable in the trust's year to the beneficiary; and

**a)** dans le cas d'une fiducie qui n'est pas visée à l'alinéa a) de la définition de fiducie au paragraphe 108(1), la partie du montant qui, si ce n'était les paragraphes (6) et (12), représenterait son revenu pour son année d'imposition s'étant terminée dans l'année donnée, qui est devenue payable au bénéficiaire au cours de l'année de la fiducie;

**Deduction of taxable dividends received by corporation resident in Canada**

**Déduction des dividendes imposables reçus par une société résidant au Canada**

**112(1)** Where a corporation in a taxation year has received a taxable dividend from

**112(1)** Lorsqu'une société a reçu, au cours d'une année d'imposition, un dividende imposable :

**(a)** a taxable Canadian corporation, or

**a)** soit d'une société canadienne imposable;

**(b)** a corporation resident in Canada (other than a non-resident-owned investment corporation or a corporation exempt from tax under this Part) and controlled by it,

an amount equal to the dividend may be deducted from the income of the receiving corporation for the year for the purpose of computing its taxable income.

**b)** soit d'une société résidant au Canada (autre qu'une société de placement appartenant à des non-résidents et une société exonérée d'impôt en vertu de la présente partie) et dont elle a le contrôle,

une somme égale au dividende peut être déduite du revenu pour l'année de la société qui le reçoit, dans le calcul de son revenu imposable.

**Definitions**

**245(1) In this section,**

***tax consequences*** to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount that is relevant for the purposes of computing that amount; (*attribut fiscal*)

***tax benefit*** means a 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; (*avantage fiscal*)

**Définitions**

**245(1) Les définitions qui suivent s'appliquent au présent article.**

***attribut fiscal*** S'agissant des attributs fiscaux d'une personne, revenu, revenu imposable ou revenu imposable gagné au Canada de cette personne, impôt ou autre montant payable par cette personne, ou montant qui lui est remboursable, en application de la présente loi, ainsi que tout montant à prendre en compte pour calculer, en application de la présente loi, le revenu, le revenu imposable, le revenu imposable gagné au Canada de cette personne ou l'impôt ou l'autre montant payable par cette personne ou le montant qui lui est remboursable. (*tax consequences*)

***avantage fiscal*** Réduction, évitement ou report d'impôt ou d'un autre montant exigible en application de la présente loi ou augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi. Y sont assimilés la réduction, l'évitement ou le report d'impôt ou d'un autre montant qui serait exigible en application de la présente loi en l'absence d'un traité fiscal ainsi que l'augmentation d'un remboursement d'impôt ou d'un autre montant visé

| | |
|---|---|
| | par la présente loi qui découle d'un traité fiscal. (*tax benefit*) |
| ***transaction*** includes an arrangement or event. (*opération*) | ***opération*** Sont assimilés à une opération une convention, un mécanisme ou un événement. (*transaction*) |
| **General anti-avoidance provision** | **Disposition générale anti-évitement** |
| **(2)** 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. | **(2)** En cas d'opération d'évitement, les attributs fiscaux d'une personne doivent être déterminés de façon raisonnable dans les circonstances de façon à supprimer un avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, de cette opération ou d'une série d'opérations dont cette opération fait partie. |
| … | […] |
| **(4)** Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction | **(4)** Le paragraphe (2) ne s'applique qu'à l'opération dont il est raisonnable de considérer, selon le cas : |
| **(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 | **a)** qu'elle entraînerait, directement ou indirectement, s'il n'était pas tenu compte du présent article, un abus dans l'application des dispositions d'un ou de plusieurs des textes suivants : |
| **(i)** this Act, | **(i)** la présente loi, |
| **(ii)** the *Income Tax Regulations*, | **(ii)** le *Règlement de l'impôt sur le revenu*, |
| **(iii)** the *Income Tax Application Rules*, | **(iii)** les *Règles concernant l'application de l'impôt sur le revenu,* |
| **(iv)** a tax treaty, or | **(iv)** un traité fiscal, |
| **(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 | **(v)** tout autre texte législatif qui est utile soit pour le calcul d'un impôt ou de toute autre somme exigible ou remboursable sous le régime de la présente loi, soit pour la détermination de toute somme à prendre en compte dans ce calcul; |

**(b)** would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

**b)** qu'elle entraînerait, directement ou indirectement, un abus dans l'application de ces dispositions compte non tenu du présent article lues dans leur ensemble.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-189-17 |
| **STYLE OF CAUSE:** | FIDUCIE FINANCIÈRE SATOMA<br>v. HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
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| **REASONS FOR JUDGMENT BY:** | NOËL C.J. |
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| **DATED:** | APRIL 10, 2018 |

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