

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180608

**Dockets: A-142-17
A-141-17**

Citation: 2018 FCA 114

**CORAM: NADON J.A.
DAWSON J.A.
GLEASON J.A.**

Docket: A-142-17

BETWEEN:

1245989 ALBERTA LTD.

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-141-17

AND BETWEEN:

PERRY WILD

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Winnipeg, Manitoba, on April 12, 2018.

Judgment delivered at Ottawa, Ontario, on June 8, 2018.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

NADON J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The Minister of National Revenue issued notices of determination pursuant to section 245 and subsection 152(1.11) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) regarding the 2007 taxation year of Perry Wild and the 2008 taxation year of 1245989 Alberta Ltd. (1245). The Minister applied the general anti-avoidance rule (GAAR) contained in section 245 of the Act to reduce the paid-up capital of Mr. Wild's 2337.5 Class E preferred shares of 1245 from \$595,264 to \$110. The determinations were made as a result of the Minister's review of certain transactions which are described below.

[2] The taxpayers appealed the Minister's determination to the Tax Court of Canada. At trial, the taxpayers conceded that there had been a series of transactions that resulted directly or indirectly in a tax benefit and conceded that four specific transactions were avoidance transactions.

[3] For reasons reported as 2017 TCC 51, the Tax Court found that the avoidance transactions achieved a result that section 84.1 of the Act was intended to prevent, and that they defeated the provision's underlying rationale. Therefore the Tax Court concluded that the transactions had been undertaken in a manner that defeated the object, spirit and purpose of section 84.1 and subsection 89(1) of the Act. It followed that the transactions constituted an abuse under subsection 245(4) of the Act and that the Minister had properly applied the GAAR. The Tax Court therefore dismissed the appeals with costs.

[4] The taxpayers appeal from the judgment of the Tax Court.

[5] For the reasons that follow, I conclude that the Tax Court erred by determining that section 84.1 of the Act was abused. I therefore propose to allow the appeal and set aside the notices of determination.

[6] The provisions of the Act relevant to my analysis are set out in Appendix 1 to these reasons. Unless otherwise stated, all references in these reasons to statutory provisions are references to the Act.

I. The facts

[7] P.W. Rentals Ltd. (PWR) is an Alberta company that rents oilfield equipment to oil companies. At all material times, Mr. Wild was the sole shareholder of PWR. As of January 1, 2004, he owned 110 Class A common shares of PWR which had a fair market value (FMV) of \$2,337,500, an adjusted cost base (ACB) of \$110 and a paid-up capital (PUC) of \$110.

[8] Commencing in May 2006, together with his wife, Mr. Wild implemented a corporate reorganization. The end result of the corporate reorganization was that Mr. Wild owned 2337.5 Class E preferred shares of 1245 with a FMV of \$2,337,500, an ACB of \$750,000 and a PUC of \$595,264. Thus, the FMV of the Class E preferred shares of 1245 was identical to the FMV of the Class A shares of PWR initially owned by Mr. Wild; however, the PUC and ACB were substantially increased from the \$110 amount that attached to the Class A shares of PWR. This occurred in circumstances where in the reorganization Mr. Wild did not make any capital

contribution to PWR, 1245 or any other relevant corporate entity. Because Mr. Wild used his lifetime capital gains exemption, no tax was paid on any of the transactions. The Tax Court found that “PWR’s existing assets were merely shuffled from one corporate entity to another, leased back to PWR and a FMV of approximately \$2.3 million was maintained with no tax consequences.” (reasons, paragraph 96).

[9] The means by which this result was effected is set out in a statement of agreed facts filed at trial, which in material part is reproduced in Appendix 2 to these reasons.

II. The decision of the Tax Court

[10] As previously explained, at trial Mr. Wild conceded that he had obtained a tax benefit.

The precise concession is contained in paragraph 27 of the statement of agreed facts:

The foregoing transactions constituted a series of transactions, which series did result directly or indirectly in a tax benefit.

[11] The “foregoing transactions” are the various steps in the corporate reorganization that began with the incorporation of 1245 and culminated with Mr. Wild owning 2,337.5 Class E preferred shares of 1245 with the FMV, ACB and PUC described above in paragraph 8.

[12] No concession was made that any tax benefit had been realized.

[13] Mr. Wild also conceded that the transfer of his shares in PWR, PWR’s transfer of property to a second holding company, 1251237 Alberta Ltd. (1251), 1251’s issuance of the same class of share to Mr. Wild and PWR, Mr. Wild’s transfer of shares of PWR to 1245,

PWR's transfer of property to 1245 and 1245's issuance of the same class of share to Mr. Wild and PWR constituted avoidance transactions within the meaning of subsection 245(3). Therefore, the issue before the Tax Court was whether the series of avoidance transactions abused the provisions relied upon to achieve the tax benefit.

[14] The Tax Court began its analysis of this issue by noting that tax planning is not *per se* abusive. A finding of abuse will only be warranted when the result is obtained by abusing one or more provisions of the Act (reasons, paragraphs 33 to 35). Citing *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721, the Tax Court noted that in order to make such a finding, the relevant provisions must first be construed based on their text, context and purpose in order to determine their object, spirit and purpose (reasons, paragraph 36). Where a transaction leads to an outcome that a provision seeks to prevent, or defeats the provision's underlying rationale or circumvents the provision's effect in a manner inconsistent with its object, spirit and purpose, the transaction will amount to abusive tax avoidance (reasons, paragraph 42, citing *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601).

[15] The Tax Court then proceeded to analyse the provisions alleged to have been abused: subsection 89(1) and section 84.1.

[16] Subsection 89(1) states that in respect of a share of any class of the capital stock of a corporation, the PUC is an amount equal to the paid-up capital of that class of share divided by the number of issued shares of that class outstanding at that time. Because shareholders within a

class of shares are presumed to be treated equally, “all shareholders of the class have the same PUC regardless of the capital contribution made by each shareholder” (reasons, paragraph 50).

[17] The provisions which provide context to subsection 89(1) include those which are incorporated by reference into the definition of PUC: sections 84.1, 212.1 and subsections 85(2.1) and 87(3). Sections 84.1 and 212.1 and subsection 85(2.1) are anti-avoidance provisions, while subsection 87(3) prevents the inflation of PUC on amalgamation.

[18] The Tax Court found that the purpose of subsection 89(1) is to ensure that “the PUC, calculated and averaged within the class, accurately represents and is restricted to the funds invested in the shares of the corporation by its shareholders.” (reasons, paragraph 55). Amounts invested in a company by a shareholder can be returned as a tax-free return of capital because the PUC was contributed from after-tax funds; however, any amount paid to a shareholder that exceeds PUC is taxed as a dividend (reasons, paragraph 54).

[19] With respect to subsection 84.1, the Tax Court found that based on its text section 84.1 applies to a non-arm’s length transfer of a share in a Canadian corporation to another Canadian corporation when after the transfer the corporations are connected. When section 84.1 applies, it acts to ensure that the PUC of the shares of the corporation to which the shares are transferred does not exceed the PUC of the transferred shares (reasons, paragraph 57). For completeness I would simply add that section 84.1 reduces (or grinds) the PUC of the newly acquired shares to the greater of the PUC of the transferred shares or the shareholder’s ACB of the transferred shares, the ACB being subject to further modification in certain situations.

[20] The provisions that provide context to section 84.1 include sections 84, 212.1 and 85(2.1) because, although they apply to different factual scenarios, “the common textual thread is the aim to prevent a corporation from having its surpluses stripped.” (reasons, paragraph 61).

[21] The Tax Court found that the object, spirit and purpose of section 84.1 was correctly identified in *Descarries v. Canada*, 2014 TCC 75, [2014] D.T.C. 1081: an anti-avoidance rule “to prevent taxpayers from performing transactions whose goal is to strip a corporation of its surpluses tax-free through the use of a tax-exempt margin or a capital gain exemption.” (reasons, paragraph 67).

[22] The Tax Court found that the series of avoidance transactions abused section 84.1, thereby allowing Mr. Wild to indirectly withdraw PWR’s earnings tax-free by using his capital gains exemption to offset the capital gain realized on a sale to a non-arm’s length party in a share for share exchange. This was achieved by triggering the PUC averaging mechanism in section 89 when 1251 and 1245 issued the same class of shares to Mr. Wild and to PWR (reasons, paragraphs 95, 96, 97 and 104).

[23] This use of the PUC averaging was found to result in the artificial inflation of the PUC of Mr. Wild’s shares in circumstances where he made no new capital contribution (reasons, paragraph 104).

[24] The Tax Court further found that the facts in this case were similar to those in *Descarries*, notably because both transactions were “designed and implemented in a surplus-

stripping context involving a complex plan.” (reasons, paragraph 91). Even though Mr. Wild’s tax planners took a different route and relied on different provisions than in *Descarries*, the intended result was the same: surplus-stripping (reasons, paragraph 99). Based on Mr. Wild’s inability on discovery to explain adequately why particular assets were transferred, how the elected amounts under section 85 were determined and why the same class of shares was issued by the holding companies – and the Tax Court’s view that a shareholder would typically demand a separate class of shares to avoid any negative impact of PUC averaging – the Tax Court found that the transaction was carried out “solely with surplus stripping in mind.” The reorganization “was primarily for the purpose of conveying the tax benefit to Mr. Wild.” (reasons, paragraph 96). Finally, the Tax Court found that the abuse of section 84.1 was achieved by misusing the PUC computation in subsection 89(1) to trigger the share averaging that artificially inflated the PUC of Mr. Wild’s shares without any new capital contributions (reasons, paragraph 104).

III. Issue on appeal

[25] As explained above, the issue before the Tax Court was whether the series of avoidance transactions abused the provisions relied upon to achieve the admitted tax benefit. The issue before this Court is whether the Tax Court erred by finding that the avoidance transactions achieved a result that section 84.1 was intended to prevent. More specifically, the issue may be stated as whether subsection 89(1) was misused to increase the PUC of the shares held by Mr. Wild, achieving a result section 84.1 was intended to prevent.

IV. Standard of review

[26] The inquiry as to whether there has been an abuse gives rise to a question of mixed fact and law. Therefore, the standard of palpable and overriding error applies (*Canada Trustco* at paragraph 44; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 37).

However, the abuse analysis proceeds in two stages. The first stage requires the determination of the object, spirit and purpose of the provisions giving rise to the tax benefit. The second stage turns on whether the provisions, so construed, were frustrated by the resulting tax benefit (*Canada Trustco*, paragraph 44). The object, spirit and purpose of a provision is ascertained by application of the principles of statutory interpretation giving rise to an extricable question of law (*Copthorne*, paragraph 70). The exercise of determining the object, spirit and purpose of a provision is therefore reviewable under the standard of correctness (*Canada Trustco*, paragraph 44; *Housen*, at paragraphs 8, 37).

V. Application of the standard of review

[27] As explained above, the Tax Court found that the object, spirit or purpose of section 84.1 is to prevent the removal of taxable corporate surplus as a tax-free return of capital through the use of the capital gains exemption (or tax-exempt margin).

[28] On this appeal no party took issue with the Tax Court's conclusion on the object, spirit and purpose of section 84.1. The respondent more precisely framed the intention to be "to prevent the inappropriate increase of PUC and the tax free distribution of a corporation's retained

earnings or surplus through non-arm's length transactions designed to artificially or unduly increase or preserve the PUC of shares.”

[29] Having determined the object, spirit or purpose of section 84.1, the question was whether the transactions at issue abused or mis-used section 84.1.

[30] Without doubt, the transactions increased the PUC of the Class E preferred shares of 1245 held by Mr. Wild. However, there was no evidence before the Tax Court that there had been any distribution of 1245's retained earnings (referred to as corporate surplus by the Tax Court). Indeed, during oral argument of their appeal counsel for the appellants confirmed both that PWR had not distributed its retained earnings to 1245 and that the corporate reorganization could be unwound.

[31] Thus, while the corporate reorganization changed the tax attribute of the Class E preferred shares, creating the potential for a tax-free distribution of 1245's retained earnings, that potential has, to date, not been realized.

[32] Because the tax-free distribution of retained earnings section 84.1 is intended to prevent has not occurred section 84.1 has not, to date, been mis-used or abused.

[33] This situation is analogous to that considered by Justice Rothstein writing for the majority in *OSFC Holdings Ltd. v. Canada*, 2001 FCA 260, [2002] 2 F.C. 288.

[34] There, the liquidator of Standard Trust Company sought to maximize the recovery from the disposition of Standard's assets. To do this the liquidator packaged a portion of Standard's mortgage portfolio into a smaller portfolio consisting of 17 non-performing loans where payments of principal and interest were in arrears for 90 days or more (STIL II portfolio).

[35] The STIL II portfolio was then transferred to a partnership in which Standard and a wholly-owned subsidiary were the partners, with Standard having a 99% interest in the partnership.

[36] Prior to the end of the partnership's first fiscal year Standard sold its 99% interest in the partnership to an arm's length purchaser, OSFC Holdings Ltd. At the partnership's year end, 99% of its loss of some \$52 million would accrue to the arm's length purchaser.

[37] The Minister applied the GAAR and disallowed the purchaser's share of the non-capital loss. The Tax Court dismissed the taxpayer's appeal. In the appeal to this Court one of the issues was whether a tax benefit resulted from the relevant series of transactions.

[38] At paragraph 42 of the reasons, Justice Rothstein concluded that neither the incorporation of the wholly owned subsidiary, nor the formation of the partnership, nor the transfer of the STIL II portfolio to the partnership resulted in any tax benefit. The tax benefit accrued only when OSFC acquired its partnership interest and became entitled to share in the partnership's loss.

[39] Returning to the present case, just as the pre-packaging of tax losses in *OSFC* did not result in a tax benefit, the transactions that resulted in the increased PUC of the Class E preferred shares of 1245 did not result in a tax benefit.

[40] The Tax Court erred in law and in fact by misapprehending the appellant's concession about the tax benefit. The parties agreed that the corporate reorganization resulted in an increased PUC, which increase carried the potential for a tax-free distribution of 1245's retained earnings. The parties did not agree that any benefit had been realized by the increase in the PUC and there was no evidence before the Tax Court that would allow it to conclude that section 84.1 had been mis-used or abused by the tax-free distribution of retained earnings.

[41] As section 84.1 was not mis-used or abused, the Minister erred in applying the GAAR.

[42] As for the notices of determination issued by the Minister, subsection 152(1.11) permits the Minister to issue a notice of determination where "the Minister ascertains the tax consequences to a taxpayer by reason of subsection 245(2)". Put another way, a notice of determination may be issued to correct an abuse where the GAAR applies. As there was no mis-use or abuse to justify the application of the GAAR, it follows that the notices of determination should be vacated.

[43] I therefore propose to allow the appeal and set aside the judgment of the Tax Court. Pronouncing the judgment that ought to have been pronounced, I would vacate the notices of determination. In the circumstances I think it appropriate that each party bear their own costs.

[44] Without pronouncing in any way on an eventual outcome, this judgment is without prejudice to the entitlement of the Minister of National Revenue to reassess the appellants in the event that the appellants do move to remove PWR's taxable corporate surplus as a tax-free return of capital.

[45] While this is sufficient to dispose of this appeal, I note that the Tax Court's conclusion that section 84.1 was abused appears to have been influenced by Mr. Wild's inability to explain the purpose of certain transactions or why the transactions were structured as they were. The purpose of the transaction is relevant when considering whether the transaction giving rise to the taxable benefit was an avoidance transaction (*Copthorne*, paragraph 40). The purpose of a transaction should not be the focus of the abuse analysis where the question is whether a transaction abused the object, spirit or purpose of the provisions relied on.

“Eleanor R. Dawson”

J.A.

“I agree.
M. Nadon J.A.”

“I agree.
Mary J. L. Gleason J.A.”

APPENDIX 1

Income Tax Act, R.S.C. 1985 c. 1 (5th Supp.)

84.1 (1) Where after May 22, 1985 a taxpayer resident in Canada (other than a corporation) disposes of shares that are capital property of the taxpayer (in this section referred to as the “subject shares”) of any class of the capital stock of a corporation resident in Canada (in this section referred to as the “subject corporation”) to another corporation (in this section referred to as the “purchaser corporation”) with which the taxpayer does not deal at arm’s length and, immediately after the disposition, the subject corporation would be connected (within the meaning assigned by subsection 186(4) if the references therein to “payer corporation” and to “particular corporation” were read as “subject corporation” and “purchaser corporation” respectively) with the purchaser corporation,

(a) where shares (in this section referred to as the “new shares”) of the purchaser corporation have been issued as consideration for the subject shares, in computing the paid-up capital, at any particular time after the issue of the new shares, in respect of any particular class of shares of the capital stock of the purchaser corporation, there shall be deducted an amount determined by the formula

$$(A - B) \times C/A$$

where

A is the increase, if any, determined without reference to this section as it applies to the acquisition of the subject

84.1 (1) Lorsque, après le 22 mai 1985, un contribuable qui réside au Canada (à l’exclusion d’une société) dispose d’actions qui sont des immobilisations du contribuable — appelées « actions concernées » au présent article — d’une catégorie du capital-actions d’une société qui réside au Canada — appelée « la société en cause » au présent article — en faveur d’une autre société — appelée « acheteur » au présent article — avec laquelle le contribuable a un lien de dépendance et que, immédiatement après la disposition, la société en cause serait rattachée à l’acheteur, au sens du paragraphe 186(4) si les mentions « société payante » et « société donnée » y étaient respectivement remplacées par « la société en cause » et « acheteur » :

a) dans le cas où les actions de l’acheteur — appelées « nouvelles actions » au présent article — ont été émises en contrepartie des actions concernées, le montant calculé selon la formule suivante est déduit dans le calcul du capital versé, à un moment postérieur à l’émission des nouvelles actions, au titre d’une catégorie donnée d’actions du capital-actions de l’acheteur :

$$(A - B) \times C/A$$

où :

A représente le montant correspondant à l’augmentation — conséquence de l’émission des nouvelles actions — du

shares, in the paid-up capital in respect of all shares of the capital stock of the purchaser corporation as a result of the issue of the new shares,

capital versé au titre de toutes les actions du capital-actions de l'acheteur, calculée sans que le présent article soit appliqué à l'acquisition des actions concernées,

B is the amount, if any, by which the greater of

B l'excédent éventuel du plus élevé des montants suivants :

(i) the paid-up capital, immediately before the disposition, in respect of the subject shares, and

(i) le capital versé au titre des actions concernées immédiatement avant la disposition,

(ii) subject to paragraphs 84.1(2)(a) and 84.1(2)(a.1), the adjusted cost base to the taxpayer, immediately before the disposition, of the subject shares,

(ii) le prix de base rajusté des actions concernées pour le contribuable immédiatement avant la disposition, sous réserve des alinéas (2)a) et a.1),

exceeds the fair market value, immediately after the disposition, of any consideration (other than the new shares) received by the taxpayer from the purchaser corporation for the subject shares, and

sur la juste valeur marchande, immédiatement après la disposition, de tout contrepartie, à l'exclusion des nouvelles actions, reçue de l'acheteur par le contribuable pour les actions concernées,

C is the increase, if any, determined without reference to this section as it applies to the acquisition of the subject shares, in the paid-up capital in respect of the particular class of shares as a result of the issue of the new shares; and ...

C le montant correspondant à l'augmentation — conséquence de l'émission des nouvelles actions — du capital versé au titre de la catégorie donnée d'actions, calculée sans que le présent article soit appliqué à l'acquisition des actions concernées;

...

...

89 (1) In this subdivision,

89 (1) Les définitions qui suivent s'appliquent à la présente sous-section.

paid-up capital at any particular time means,

capital versé À un moment donné :

(a) in respect of a share of any class of the capital stock of a corporation, an amount equal to the paid-up capital at that time, in respect of the class of shares of the capital stock of the

a) à l'égard d'une action d'une catégorie quelconque du capital-actions d'une société, somme égale au capital versé à ce moment, relativement à la catégorie d'actions

corporation to which that share belongs, divided by the number of issued shares of that class outstanding at that time,

(b) in respect of a class of shares of the capital stock of a corporation,

...

(iii) if the particular time is after March 31, 1977, an amount equal to the paid-up capital in respect of that class of shares at the particular time, computed without reference to the provisions of this Act except subsections 51(3) and 66.3(2) and (4), sections 84.1 and 84.2, subsections 85(2.1), 85.1(2.1) and (8), 86(2.1), 87(3) and (9), paragraph 128.1(1)(c.3), subsections 128.1(2) and (3), section 135.2, subsections 138(11.7), 139.1(6) and (7), 148(7), 192(4.1) and 194(4.1) and sections 212.1 and 212.3, ...

...

152 (1.11) Where at any time the Minister ascertains the tax consequences to a taxpayer by reason of subsection 245(2) with respect to a transaction, the Minister

(a) shall, in the case of a determination pursuant to subsection 245(8), or

(b) may, in any other case,

determine any amount that is relevant for the purposes of computing the income, taxable income or taxable income earned in Canada of, tax or other amount payable by, or amount refundable to, the taxpayer under this Act and, where such a determination is

du capital-actions de la société à laquelle appartient cette action et divisé par le nombre des actions émises de cette catégorie qui sont en circulation à ce moment;

b) à l'égard d'une catégorie d'actions du capital-actions d'une société :

...

(iii) si le moment donné est postérieur au 31 mars 1977, somme égale au capital versé au moment donné au titre de cette catégorie d'actions, calculée compte non tenu des dispositions de la présente loi, à l'exception des paragraphes 51(3) et 66.3(2) et (4), des articles 84.1 et 84.2, des paragraphes 85(2.1), 85.1(2.1) et (8), 86(2.1) et 87(3) et (9), de l'alinéa 128.1(1)c.3, des paragraphes 128.1(2) et (3), de l'article 135.2, des paragraphes 138(11.7), 139.1(6) et (7), 148(7), 192(4.1) et 194(4.1) et des articles 212.1 et 212.3;

...

152 (1.11) Lorsque, par application du paragraphe 245(2), le ministre établit, à un moment, les attributs fiscaux d'un contribuable en ce qui concerne une opération, il doit, en cas de montant à déterminer conformément au paragraphe 245(8), ou peut, dans les autres cas, déterminer tout montant à prendre en compte pour calculer, en application de la présente loi, le revenu, le revenu imposable ou le revenu imposable gagné au Canada de ce contribuable ou l'impôt ou un autre montant payable par ce contribuable ou un montant qui lui est remboursable. Une fois le montant déterminé, le ministre doit dès que possible envoyer au contribuable un

made, the Minister shall send to the taxpayer, with all due dispatch, a notice of determination stating the amount so determined.

avis lui indiquant ce montant.

...

...

245 (1) In this section,

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

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 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 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 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.

transaction includes an arrangement or event.

opération Sont assimilés à une opération une convention, un mécanisme ou un événement.

(2) Where a transaction is an

(2) En cas d'opération d'évitement, les

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.

(3) An avoidance transaction means any transaction

(a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit; or

(b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit.

(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

(a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of

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.

(3) L'opération d'évitement s'entend :

a) soit de l'opération dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que l'opération est principalement effectuée pour des objets véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un objet véritable;

b) soit de l'opération qui fait partie d'une série d'opérations dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que l'opération est principalement effectuée pour des objets véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un objet véritable.

(4) Le paragraphe (2) ne s'applique qu'à l'opération dont il est raisonnable de considérer, selon le cas :

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 <i>Income Tax Regulations</i> , | (ii) le <i>Règlement de l'impôt sur le revenu</i> , |
| (iii) the <i>Income Tax Application Rules</i> , | (iii) les <i>Règles concernant l'application de l'impôt sur le revenu</i> , |
| (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. |
| (5) Without restricting the generality of subsection (2), and notwithstanding any other enactment, | (5) Sans préjudice de la portée générale du paragraphe (2) et malgré tout autre texte législatif, dans le cadre de la détermination des attributs fiscaux d'une personne de façon raisonnable dans les circonstances de façon à supprimer l'avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, d'une opération d'évitement : |
| (a) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part, | a) toute déduction, exemption ou exclusion dans le calcul de tout ou partie du revenu, du revenu imposable, du revenu imposable gagné au Canada ou de l'impôt payable peut être en totalité ou en partie admise ou refusée; |
| (b) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person, | b) tout ou partie de cette déduction, exemption ou exclusion ainsi que tout ou partie d'un revenu, d'une perte ou d'un autre montant peuvent être attribués à une personne; |

(c) the nature of any payment or other amount may be recharacterized, and

c) la nature d'un paiement ou d'un autre montant peut être qualifiée autrement;

(d) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,

d) les effets fiscaux qui découleraient par ailleurs de l'application des autres dispositions de la présente loi peuvent ne pas être pris en compte.

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

(6) Where with respect to a transaction

(6) Dans les 180 jours suivant l'envoi à une personne d'un avis de cotisation, de nouvelle cotisation ou de cotisation supplémentaire qui tient compte du paragraphe (2) en ce qui concerne une opération, ou d'un avis concernant un montant déterminé en application du paragraphe 152(1.11) en ce qui concerne une opération, toute personne autre qu'une personne à laquelle un de ces avis a été envoyé a le droit de demander par écrit au ministre d'établir à son égard une cotisation, une nouvelle cotisation ou une cotisation supplémentaire en application du paragraphe (2) ou de déterminer un montant en application du paragraphe 152(1.11) en ce qui concerne l'opération.

(a) a notice of assessment, reassessment or additional assessment involving the application of subsection 245(2) with respect to the transaction has been sent to a person, or

(b) a notice of determination pursuant to subsection 152(1.11) has been sent to a person with respect to the transaction,

any person (other than a person referred to in paragraph (a) or (b)) shall be entitled, within 180 days after the day of sending of the notice, to request in writing that the Minister make an assessment, reassessment or additional assessment applying subsection (2) or make a determination applying subsection 152(1.11) with respect to that transaction.

(7) Notwithstanding any other provision of this Act, the tax consequences to any person, following the application of this section, shall only be determined through a notice of assessment, reassessment, additional

(7) Malgré les autres dispositions de la présente loi, les attributs fiscaux d'une personne, par suite de l'application du présent article, ne peuvent être déterminés que par avis de cotisation, de nouvelle cotisation ou de cotisation

assessment or determination pursuant to subsection 152(1.11) involving the application of this section.

(8) On receipt of a request by a person under subsection 245(6), the Minister shall, with all due dispatch, consider the request and, notwithstanding subsection 152(4), assess, reassess or make an additional assessment or determination pursuant to subsection 152(1.11) with respect to that person, except that an assessment, reassessment, additional assessment or determination may be made under this subsection only to the extent that it may reasonably be regarded as relating to the transaction referred to in subsection 245(6).

supplémentaire ou que par avis d'un montant déterminé en application du paragraphe 152(1.11), compte tenu du présent article.

(8) Sur réception d'une demande présentée par une personne conformément au paragraphe (6), le ministre doit, dès que possible, après avoir examiné la demande et malgré le paragraphe 152(4), établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire ou déterminer un montant en application du paragraphe 152(1.11), en se fondant sur la demande. Toutefois, une cotisation, une nouvelle cotisation ou une cotisation supplémentaire ne peut être établie, ni un montant déterminé, en application du présent paragraphe que s'il est raisonnable de considérer qu'ils concernent l'opération visée au paragraphe (6).

APPENDIX 2

1. P.W. Rentals Ltd. (“PWR”) is an Alberta corporation.
2. PWR is an oil field rental company that supplies portable accommodations, commonly referred to as well site trailers, to the oil field sector.
3. On March 1, 2003, Perry Wild and Shilo Wild each purchased 100 common shares of PWR from treasury.
4. At all material times, Shilo Wild was Perry Wild’s spouse.
5. On March 2, 2003, PWR redeemed the 100 common shares held by Shilo Wild with the result that at all material times Perry Wild was the sole shareholder of PWR.
6. As of January 1, 2004 Perry Wild owned 110 Class A common shares of PWR with a fair market value (“FMV”) of \$2,337,500, an ACB of \$110 and a paid-up capital (“PUC”) of \$110.
7. In an effort to protect the assets of PWR, Perry and Shilo Wild implemented the corporate reorganization described below.
8. 1245989 Alberta Ltd. (“1245”) was incorporated in Alberta on May 30, 2006 and on that date Perry Wild purchased 100 Class A common shares of 1245 for \$100.
9. 1251237 Alberta Ltd. (“1251”) was incorporated in Alberta on June 22, 2006 and on that date Shilo Wild purchased 100 Class A common shares of 1251 for \$100.

1st transfers: from Perry Wild and PWR to 1251

10. On June 1, 2007, Wild transferred 16.4 Class A common shares of PWR to 1251 for 348.5 Class C preferred shares of 1251, pursuant to s. 85 of the Act, as follows:
 - a. the FMV of the 16.4 Class A common shares of PWR transferred by Perry Wild was \$348,500 and their ACB and PUC was \$16.40;
 - b. the redemption amount of the 348.5 Class C preferred shares of 1251 was \$1,000 per share or \$348,500;
 - c. Perry Wild and 1251 elected for Perry Wild’s proceeds of disposition (“POD”) of the 16.4 Class A common shares of PWR, his ACB of the Class C preferred shares of 1251 and 1251’s ACB in respect of the 16.4 Class A common shares of PWR to be \$129,000;
 - d. Perry Wild reported a capital gain of \$128,984 on the transfer of the 16.4 Class A common shares of PWR and claimed the capital gains exemption in the same

amount pursuant to s. 110.6 of the Act with the result that no tax was payable on the gain, and

- e. the PUC of the 348.5 Class C preferred shares of 1251 that Perry Wild received in consideration for the 16.4 common shares of PWR was reduced to \$16.40 (the PUC of the transferred PWR shares) by operation of s. 84.1 of the Act.
11. On June 2, 2007, PWR transferred Class 8 equipment to 1251 for 348.5 Class C preferred shares of 1251 pursuant to s. 85 of the Act, as follows:
 - a. the FMV of the Class 8 equipment transferred by PWR was \$348,500 and its undepreciated capital cost was \$256,279;
 - b. the redemption amount of the 348.5 Class C preferred shares of 1251 was \$1,000 per share or \$348,500;
 - c. PWR and 1251 elected for PWR's POD and 1251's ACB in respect of the Class 8 equipment transferred to be \$256,279; and
 - d. the ACB and the PUC of the 348.5 Class C preferred shares of 1251 received by PWR were both \$256,279, the elected amount, by operation of sections 85(1) and 85(2.1) of the Act.
 12. Because Perry Wild had caused 1251 to issue Class C preferred shares to him on the rollover of the 16.4 common shares of PWR and then to issue the same class of shares to PWR on the rollover of the Class 8 equipment, the PUC of Perry Wild's 348.5 Class C preferred shares of 1251 was increased to \$128,148 and the PUC of the 348.5 Class C preferred shares of 1251 received by PWR was reduced to a like amount as a result of subsection 89(1).

1st corporate offsetting transactions

13. On June 3, 2007, 1251 redeemed the 348.5 Class C preferred shares owned by PWR and issued a promissory note of \$348,500 in favour of PWR.
14. On June 4, 2007, PWR purchased/redeemed the 16.4 Class A common shares of PWR owned by 1251 and issued a promissory note of \$348,500 in favour of 1251.
15. On June 5, 2007, PWR and 1251 offset their respective \$348,500 promissory notes against each other.

2nd transfers: from Perry Wild and PWR to 1245

16. On June 6, 2007, Perry Wild transferred the remaining 93.6 Class A common shares he held in PWR to 1245 for 1,989 Class E preferred shares of 1245 pursuant to s. 85 of the Act, as follows:
 - a. the FMV of the 93.6 Class A common shares of PWR transferred by Perry Wild was \$1,989,000 and their ACB and PUC were \$93.60;
 - b. the redemption amount of the 1,989 Class E preferred shares of 1245 issued to Perry Wild was \$1,000 per share or \$1,989,000;
 - c. Perry Wild and 1245 elected for his POD of his shares of PWR, the ACB of the Class E preferred shares of 1245 he received and 1245's ACB in respect of the 93.6 Class A common shares of PWR to be \$621,000;
 - d. Perry Wild reported a capital gain of \$620,906 on the transfer of the 93.6 Class A common shares of PWR and claimed the capital gains exemption pursuant to s. 110.6 of the Act with the result that no tax was payable on the gain, and
 - e. the PUC of the 1,989 Class E preferred shares of 1245 that Perry Wild received on the transfer was reduced to \$93.6 (the PUC of the transferred PWR shares) by operation of s. 84.1 of the Act.
17. On June 7, 2007 PWR transferred land and depreciable property to 1245 for the assumption of \$613,738 of PWR debt and 1,826.242 Class E preferred shares of 1245 pursuant to s. 85 of the Act, as follows:
 - a. the FMV of the land and depreciable property transferred by PWR was \$2,439,980 and its cumulative undepreciated capital cost was \$1,509,652;
 - b. the redemption amount of the 1,826.242 Class E preferred shares of 1245 was \$1,000 per share or \$1,826,242;
 - c. PWR and 1245 elected that PWR's POD and 1245's ACB in respect of the land and depreciable property was \$1,509,652; and
 - d. the ACB and PUC of the 1,826.242 Class E preferred shares of 1245 that PWR received in consideration for the land and depreciable property of PWR became \$895,914 by operation of sections 85(1) and 85(2.1) of the Act.
18. Because Perry Wild caused 1245 to issue Class E preferred shares to himself and to PWR, the PUC of Perry Wild's 1,989 Class E preferred shares of 1245 was increased to

\$467,115.62 and the PUC of the 1,826.242 Class E preferred shares of 1245 received by PWR was reduced to a like amount as a result of subsection 89(1).

2nd corporate offsetting transactions

19. On June 8, 2007, 1245 redeemed the 1,826.242 Class E preferred shares owned by PWR and issued a promissory note of \$1,826,242 in favour of PWR.
20. On June 9, 2007, PWR purchased/redeemed 86 of the 93.6 Class A common shares of PWR owned by 1245 and issued a promissory note of \$1,827,500 in favour of 1245.
21. On June 10, 2007, PWR and 1245 offset their respective promissory notes against each other; an outstanding balance of \$1,258 remained payable to 1245 by PWR.
22. On June 11, 2007, Perry Wild transferred the 348.5 Class C preferred shares of 1251 he obtained, as set out in subparagraph 10 above, to 1245 for 348.5 Class E preferred shares of 1245, pursuant to s. 85 of the Act, as follows:
 - a. the FMV of the 348.5 Class C preferred shares transferred by Perry Wild was \$348,500, their ACB was \$129,000 and their PUC was \$128,148;
 - b. the redemption amount of the Class E preferred shares of 1245 that Perry Wild received was \$1,000 per share;
 - c. Perry Wild and 1245 elected for Wild's POD and 1245's ACB in respect of the 348.5 Class C preferred shares of 1251 to be \$129,000; and
 - d. the PUC and ACB of the 348.5 Class E preferred shares of 1245 that Perry Wild received was \$128,148.
23. On June 12, 2007, 1251 purchased/redeemed the 348.5 Class C preferred shares of 1251 owned by 1245 and issued a promissory note of \$348,500 in favour of 1245.
24. On June 13, 2007 PWR split its 7.6 Class A common shares at a ratio of 13.158 to 1, resulting in 1245 owning 100 Class A common shares of PWR now held by 1245.
25. As of June 13, 2007 Perry Wild owned 2,337.5 Class E preferred shares of 1245 with a FMV of \$2,337,500, an ACB of \$750,000 and PUC of \$595,264.
26. Perry Wild did not make any other capital contributions to PWR, 1251 or 1245 from January 1, 2004 to June 13, 2007.
27. The foregoing transactions constituted a series of transactions, which series did result directly or indirectly in a tax benefit.

28. The following transactions were avoidance transactions as that term is defined in subsection 245(3) of the Act:
 - a. utilizing s. 85 of the Act, on June 1, 2007 Perry Wild transferred 16.4 common shares of PWR to 1251 for 348.5 Class C preferred shares of 1251 as described in paragraph 10 hereof; and
 - b. utilizing s. 85 of the Act, on June 2, 2007 PWR at the direction of Perry Wild, transferred class 8 equipment to 1251 for 348.5 Class C preferred shares of 1251 as described in paragraph 11 and 12 hereof.

29. The following transactions were also avoidance transactions as that term is defined in subsection 245(3) of the Act:
 - a. utilizing s. 85 of the Act, on June 6, 2007 Perry Wild transferred 93.6 common shares of PWR to 1245 for 1,989 Class E preferred shares of 1245 as described in paragraph 16 hereof; and
 - b. utilizing s. 85 of the Act, on June 7, 2007 Perry Wild transferred land, depreciable properties and debt of PWR to 1245 for 1,826.2420 Class E preferred shares of 1245 as described in paragraph 17 and 18 hereof.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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GLEASON J.A.

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