Federal Court of Appeal | Cour d'appel fédérale

Date: 20180720

Docket: A-352-16

Citation: 2018 FCA 137

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

BETWEEN:

QUINCO FINANCIAL INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on June 12, 2018.

Judgment delivered at Ottawa, Ontario, on July 20, 2018.

REASONS FOR JUDGMENT BY: WEBB J.A.

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

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The sole issue in this appeal is related to the accrual of interest when a reassessment is issued as a result of the application of the general anti-avoidance rule (GAAR) in section 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act). The question is whether interest commences to accrue following the balance-due date for the particular year for which taxes are reassessed or following the date of such reassessment.

[2] This appeal arises as a result of a determination by the Tax Court of Canada under Rule 58 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (Rules) of the following question:

> If, as here, the Minister of National Revenue has relied upon section 245 of the *Income Tax Act* (Canada) ("Act") to deny capital losses when reassessing the Appellant's income tax for a taxation year, can arrears interest payable under subsection 161(1) of the Act apply to accrue in respect of any period of time after the taxpayer's balance-due day for that year and before the issuance of such reassessment?

[3] The Tax Court answered this question in the affirmative and therefore found that interest accrued in respect of the period of time after a taxpayer's balance-due date and before the issuance of the reassessment arising as a result of the application of GAAR.

[4] Quinco Financial Inc. (Quinco) has appealed this determination. For the reasons that follow, I would dismiss this appeal. In these reasons any reference to a reassessment should be read as including an assessment and vice versa.

I. Background

[5] The parties submitted an agreed statement of facts to the Tax Court which reveals that this matter relates to two predecessor corporations who amalgamated with certain other corporations to form Quinco on August 27, 2004. The two predecessor corporations that are affected in this case are Brick Warehouse Corporation/Entrepôt Brick Corporation (BWC) and Landex Investments Limited (LIL).

[6] In filing their tax returns for the taxation year that ended immediately before the amalgamation, BWC and LIL reported income based on the following capital gains, capital losses, net capital gain and net capital loss:

	BWC	**LIL**
Capital gain	$536,693,764	$79,719,764
Capital loss	($540,011,434)	($32,684,977)
Net Capital Gain (Net capital loss)	($3,317,670)	$47,034,730

[7] There is no description in the agreed statement of facts of the transaction or series of transactions which resulted in the capital losses referred to above.

[8] The returns were initially assessed as filed. Reassessments were subsequently issued to adjust the amounts to the following:

	BWC	**LIL**
Capital gain	$534,068,193	$77,162,757
Capital loss	($538,653,363)	($29,266,139)
Net Capital Gain (Net capital loss)	($4,585,170)	$47,896,618

[9] By further notices of reassessment dated April 7, 2009 the total amount of the capital losses claimed by each of BWC and LIL were denied on the basis that GAAR applied to the transactions that resulted in these losses. As a result, the allowable capital losses were reduced to nil. Since there were then significant taxable capital gains, the Part I tax liability of BWC and LIL was determined to be substantially more than had previously been assessed. Interest was charged in relation to the increased Part I tax liability for the period commencing immediately after the balance-due date for each of BWC and LIL. It is this assessment for interest that prompted the Rule 58 question in issue in this case.

II. Decision of the Tax Court

[10] The Tax Court Judge reviewed the nature of an assessment based on GAAR and completed a textual, contextual and purposive analysis of sections 245 and 161 of the Act. He concluded that a reassessment based on GAAR does not create a tax liability upon the issuance of such reassessment and that interest, as with any other reassessment that is issued in relation to Part I tax liability, commences to accrue immediately following the balance-due date for the particular year.

III. Issue

[11] The issue in this appeal is whether the Tax Court Judge was correct in his interpretation of the relevant provisions of the Act in determining that interest arising as a result of a reassessment based on GAAR commences to accrue immediately following the balance-due date for the particular year to which the reassessment relates.

IV. Standard of review

[12] As the issue in this case relates to a question of law, the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

V. Analysis

[13] In *Copthorne Holdings Ltd. v. The Queen*, 2011 SCC 63, [2011] 3 S.C.R. 721 (*Copthorne*), the Supreme Court of Canada provided the following general overview of GAAR:

> **66** The GAAR is a legal mechanism whereby Parliament has conferred on the court the unusual duty of going behind the words of the legislation to determine the object, spirit or purpose of the provision or provisions relied upon by the taxpayer. While the taxpayer's transactions will be in strict compliance with the text of the relevant provisions relied upon, they may not necessarily be in accord with their object, spirit or purpose. In such cases, the GAAR may be invoked by the Minister. The GAAR does create some uncertainty for taxpayers. Courts, however, must remember that s. 245 was enacted "as a provision of last resort" (*Trustco*, [*Canada Trustco Mortgage Co. v. The Queen*, 2005 SCC 54, [2005] 2 S.C.R. 601] at para. 21).

[14] GAAR is a provision of last resort that is invoked by the Minister when transactions are in strict compliance with the text of the provisions of the Act but, in the Minister's view, the transactions are not in accord with the object, spirit or purpose of the relevant provisions. If a reassessment based upon the application of GAAR is appealed to the courts, the question of whether GAAR applies will be determined by the courts.

[15] In this case, the Tax Court Judge commenced his analysis with a general discussion of the jurisprudence and the role of GAAR within the Act. As part of this analysis the Tax Court Judge addressed the issue of whether GAAR should be anticipated and considered by taxpayers. His analysis of that issue consisted of the following paragraphs:

> **41** In short, the Appellant, in the present case as a taxpayer possibly subject to GAAR, could have filed by deducting the future-impugned capital loss, but applying GAAR for the purposes of calculating tax payable. Upon assessment under GAAR, interest would not accrue. Moreover, thereafter the Appellant could have objected and appealed. The Court would then determine the application of the GAAR, in the first instance and the reasonableness (including timing) of the reasonable tax consequences as determined by the Minister. To suggest such an option is unavailable or dissimilar from such an option with non-GAAR provisions is not correct.

> **42** Implicit within this conclusion, is this Court's determination of GAAR's clear intent and inference that all taxpayers, who are directly subject to GAAR assessments, that is, non-third parties, are required to consider and apply GAAR. Taxpayers who are directly or may be directly subject to the nullification of a tax benefit need not ask the Minister for permission to apply GAAR (*STB Holdings Ltd*. at paragraph 23).
>
> **43** In conclusion, while not simple or uncomplicated, a taxpayer is able to approach, anticipate and account for GAAR as a taxpayer is obligated to do with all other taxing sections of the Act to which GAAR, by necessity, must correlate. If the Minister reassesses, nothing precludes a taxpayer's appeal to this Court.
>
> (emphasis added)

[16] Although he states in paragraph 42 that "all taxpayers, who are directly subject to GAAR assessments, that is, non-third parties, are required to consider and apply GAAR", in my view it is more accurate to state that all taxpayers who are contemplating a transaction or series of transactions that would result in a tax benefit should consider the risk that GAAR will apply to deny the tax benefit. If a taxpayer completes a transaction or series of transactions that results in a tax benefit and the taxpayer files a tax return on the basis that such tax benefit is available to the taxpayer, then that taxpayer is accepting the risk that the Minister may disagree and apply GAAR. As with any other filing position that may result in a dispute with the Minister, if the taxpayer is ultimately unsuccessful following the resolution of all objections and appeals, then that taxpayer will be required to pay the additional tax together with interest.

[17] The liability to pay interest is set out in section 161 of the Act. Subsection 1 of this section provides that:

161(1) Where at any time after a taxpayer's balance-due day for a taxation year	**161(1)** Dans le cas où le total visé à l'alinéa *a*) excède le total visé à l'alinéa *b*) à un moment postérieur à la date d'exigibilité du solde qui est applicable à un contribuable pour une année d'imposition, le contribuable est tenu de verser au receveur général des intérêts sur l'excédent, calculés au taux prescrit pour la période au cours de laquelle cet excédent est impayé :
(*a*) the total of the taxpayer's taxes payable under this Part and Parts I.3, VI and VI.1 for the year	*a*) le total des impôts payables par le contribuable pour l'année en vertu de la présente partie et des parties I.3, VI et VI.1;
exceeds	
(b) the total of all amounts each of which is an amount paid at or before that time on account of the taxpayer's tax payable and applied as at that time by the Minister against the taxpayer's liability for an amount payable under this Part or Part I.3, VI or VI.1 for the year,	b) le total des montants représentant chacun un montant payé au plus tard à ce moment au titre de l'impôt payable par le contribuable et imputé par le ministre, à compter de ce moment, sur le montant dont le contribuable est redevable pour l'année en vertu de la présente partie ou des parties I.3, VI ou VI.1.
the taxpayer shall pay to the Receiver General interest at the prescribed rate on the excess, computed for the period during which that excess is outstanding.	
(emphasis added)	(soulignement ajouté)

[18] Quinco's argument focused on the latter part of this section and in particular "the period during which that excess is outstanding". Quinco's argument is that this excess is only outstanding from the date that the reassessment based on GAAR is issued and not from the balance-due date of the taxpayer for the particular taxation year for which the reassessment is issued.

[19] The Supreme Court of Canada has set out the approach to be used in interpreting provisions such as the one in issue in this appeal in *Canada Trustco Mortgage Co. v. The Queen*, 2005 SCC 54, [2005] 2 S.C.R. 601 (*Canada Trustco*), at para. 10:

> **10** It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[20] In relation to how “the period during which that excess is outstanding” should be interpreted when an increase in the tax liability of a taxpayer arises as a result of the application of GAAR, Quinco submitted that the date of reassessment is the relevant date because the Minister is to determine the reasonable tax consequences for the purposes of GAAR and because the Minister has the burden to identify the provisions of the Act that are allegedly being abused and the object, spirit and purpose of these provisions. Neither of these arguments is persuasive.

[21] While the Minister determines the reasonable tax consequences in relation to a GAAR reassessment, in my view, this is essentially the same role that the Minister fulfills whenever a reassessment is issued under the Act whether it is based on GAAR or any other provision. In each case, the Minister is to determine the tax consequences (albeit absent the qualification of reasonableness for any other reassessment) that would result when a reassessment is issued.

Although Quinco submitted that it could not know what reasonable tax consequences would be determined by the Minister under GAAR, since in this case BWC and LIL had completed certain transactions (that have not been disclosed) that resulted in very large capital losses, it is not at all clear why it could not have anticipated that if GAAR applied these capital losses would be denied. There may be further resulting consequences (such as Part IV tax implications if dividends have been paid) if GAAR is invoked by the Minister but while these repercussions may add to the complexity of determining all of the implications that would arise from a denial of the allowable capital losses, they are still capable of being determined.

[22] With respect to the argument related to the burden imposed on the Minister in relation to a reassessment arising as a result of the application of GAAR, Quinco referred to the following excerpt from *Canada Trustco*:

> **65** … The taxpayer, once he or she has shown compliance with the wording of a provision, should not be required to disprove that he or she has thereby violated the object, spirit or purpose of the provision. It is for the Minister who seeks to rely on the GAAR to identify the object, spirit or purpose of the provisions that are claimed to have been frustrated or defeated, when the provisions of the Act are interpreted in a textual, contextual and purposive manner. The Minister is in a better position than the taxpayer to make submissions on legislative intent with a view to interpreting the provisions harmoniously within the broader statutory scheme that is relevant to the transaction at issue.
>
> (emphasis added)

[23] Similar comments are also made by the Supreme Court of Canada in *Copthorne*:

> **72** The analysis will then lead to a finding of abusive tax avoidance: (1) where the transaction achieves an outcome the statutory provision was intended to prevent; (2) where the transaction defeats the underlying rationale of the provision; or (3) where the transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose (*Trustco*, at para. 45; *Lipson*, at para. 40). These considerations are not independent of one another and may overlap. At this stage, the Minister must clearly demonstrate that the transaction is an abuse of the Act, and the benefit of the doubt is given to the taxpayer.
>
> …
>
> **123** While Parliament's intent is to seek consistency, predictability and fairness in tax law, in enacting the GAAR, it must be acknowledged that it has created an unavoidable degree of uncertainty for taxpayers. This uncertainty underlines the obligation of the Minister who wishes to overcome the countervailing obligations of consistency and predictability to demonstrate clearly the abuse he alleges.
>
> (emphasis added)

[24] Quinco's argument is that since the Minister must "identify the object, spirit or purpose of the provisions that are claimed to have been frustrated or defeated" any liability for any reassessment arising as a result of the application of GAAR can only arise once the Minister has issued this reassessment.

[25] However, these statements from the Supreme Court of Canada only set out the responsibility of the Minister to identify the abuse that is alleged when a reassessment based on GAAR is issued.

[26] In *Canada Trustco*, the Supreme Court of Canada set out the responsibilities of the taxpayer and the Minister when an assessment based on GAAR is in issue:

> **66** The approach to s. 245 of the Income Tax Act may be summarized as follows.
>
> 1. Three requirements must be established to permit application of the GAAR:
>
> (1) A tax benefit resulting from a transaction or part of a series of transactions (s. 245(1) and (2));
>
> (2) that the transaction is an avoidance transaction in the sense that it cannot be said to have been reasonably undertaken or arranged primarily for a bona fide purpose other than to obtain a tax benefit; and
>
> (3) that there was abusive tax avoidance in the sense that it cannot be reasonably concluded that a tax benefit would be consistent with the object, spirit or purpose of the provisions relied upon by the taxpayer.
>
> 2. The burden is on the taxpayer to refute (1) and (2), and on the Minister to establish (3).

[27] This excerpt makes it clear that the Supreme Court of Canada was only addressing the issue of the burden that is on the taxpayer and the burden that is on the Minister. The Supreme Court was not addressing the issue of when liability for taxes assessed based on the application of GAAR arises.

[28] As well, the requirement that the Minister in GAAR cases must establish that a tax benefit is not consistent with the object, spirit or purpose of the provisions relied upon by the taxpayer cannot justify a finding that any liability for any increased taxes would only arise once that reassessment is issued. In cases where GAAR is not invoked and the Minister is relying on subparagraph 152(4)(a)(i) of the Act in issuing a reassessment after the expiration of the normal reassessment period, the Minister also has the onus of proof to establish the facts that would justify issuing that reassessment (*Estate of Stanley Vine v. The Queen*, 2015 FCA 125, 471 N.R. 372, at para. 24). Quinco did not suggest that interest in that situation would only commence

when the reassessment is issued but rather sought to distinguish that situation on the basis that the reassessment would be a “normal reassessment” and not a “GAAR reassessment”.

[29] To address this submission it is important to review the context and purpose of GAAR in relation to reassessments. Subsections 245(2) and (5) of the Act set out the consequences that arise if GAAR is applied:

245(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.	**245(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.
…	[…]
(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.	

[30] When GAAR is applied, a tax benefit is denied. This could be realized, as was the case in this matter, by the denial of a deduction for allowable capital losses. The denial of the tax benefit will result in an increase in taxes payable for the particular taxation year. There is nothing in the Act that stipulates that the increased liability as a result of a reassessment based on GAAR only arises when the reassessment is issued. Since the denial of a tax benefit for a particular taxation year will increase the tax liability for that year, the question is what is the date that such liability was payable (which would determine the period during which the excess referred to in subsection 161(1) of the Act was outstanding)?

[31] Section 157 of the Act (which is in Part I) provides that all taxes for a particular year are payable on the balance-due date:

157(1) Subject to subsections (1.1) and (1.5), every corporation shall, in respect of each of its taxation years, pay to the Receiver General

(*a*) either

(i) on or before the last day of each month in the year, an amount equal to 1/12 of the total of the amounts estimated by it to be the taxes payable by it under this Part and Parts VI, VI.1 and XIII.1 for the year,

(ii) on or before the last day of each month in the year, an amount equal to 1/12 of its first instalment base for the year, or

(iii) on or before the last day of each of the first two months in the year, an amount equal to 1/12 of its second instalment base for the year, and on or before the last day of each of the following months in the year, an amount equal to 1/10 of the amount remaining after deducting the amount computed pursuant to this subparagraph in respect of the first two months from its first instalment base for the year; and

(*b*) the remainder of the taxes payable by it under this Part and Parts VI, VI.1 and XIII.1 for the year on or before its balance-due day for the year.

(emphasis added)

157(1) Sous réserve des paragraphes (1.1) et (1.5), toute société doit verser au receveur général, pour chacune de ses années d'imposition :

a) l'un des montants suivants :

(i) un montant égal à 1/12 du total des montants qu'elle estime être ses impôts payables en vertu de la présente partie et des parties VI, VI.1 et XIII.1 pour l'année, au plus tard le dernier jour de chaque mois de l'année,

(ii) un montant égal à 1/12 de sa première base des acomptes provisionnels pour l'année au plus tard le dernier jour de chaque mois de l'année,

(iii) un montant égal à 1/12 de sa deuxième base des acomptes provisionnels pur l'année, au plus tard le dernier jour de chacun des deux premiers mois de l'année, et un montant égal à 1/10 du restant une fois déduit de sa première base des acomptes provisionnels pour l'année le montant calculé en vertu du présent sous-alinéa pour les deux premiers mois, au plus tard le dernier jour de chacun des 10 mois suivants de l'année;

b) le solde de ses impôts payables pour l'année en vertu de la présente partie et des parties VI, VI.1 et XIII.1, au plus tard à la date d'exigibilité du solde qui lui est applicable pour l'année.

(soulignement ajouté)

[32] In this case the reassessments that were issued denied the allowable capital losses that were claimed for the year ending August 27, 2004. The result of the reassessments was that the Part I taxes payable for that year were increased for each of the two predecessor corporations. As the Part I taxes were payable for the year ended August 27, 2004, these taxes were payable under section 157 by the balance-due date for that year. Therefore, they were outstanding immediately following that date and interest commenced to accrue immediately following the balance-due date and not from the date that the reassessment was actually issued.

[33] In *The Queen v. Simard-Beaudry Inc.*, [1971] F.C. 396 at 403, 71 D.T.C. 5511 at 5515, the Federal Court also confirmed that "the assessment does not create the debt, but is at most a confirmation of its existence". This comment is equally applicable to a reassessment arising as a result of the application of GAAR as such reassessment simply confirms the tax debt that is owing for a particular taxation year.

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

"Wyman W. Webb"
J.A.

"I agree
David Stratas J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN AMENDED ORDER DATED MARCH 9, 2017 OF THE TAX COURT OF CANADA, NO. 2014-1744(IT)G (ORIGINAL ORDER DATED SEPTEMBER 1, 2016)

DOCKET:	A-352-16
STYLE OF CAUSE:	QUINCO FINANCIAL INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	CALGARY, ALBERTA
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CONCURRED IN BY:	STRATAS J.A. LASKIN J.A.
DATED:	JULY 20, 2018

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