Date: 20090226

Docket: A-252-08

Citation: 2009 FCA 57

CORAM: **DÉCARY J.A.**
BLAIS J.A.
SHARLOW J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

PRÉVOST CAR INC.

Respondent

Heard at Toronto, Ontario, on February 17, 2009.

Judgment delivered at Ottawa, Ontario, on February 26, 2009.

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: BLAIS J.A.
SHARLOW J.A.

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] At issue in this appeal is the interpretation of the terms "beneficial owner", "bénéficiaire effectif", in Article 10(2) of the *Convention Between Canada and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, S.C. 1986, c. 48, Schedule 1, as amended (the "Tax Treaty"). The Tax Treaty came into force on November 27, 1986 and was based on the Organization for Economic Cooperation and Development ("OECD") Model Tax Convention on Income and on Capital 1977 ("Model Convention").

[2] The context in which the issue is raised is that of a payment of dividends by a resident Canadian corporation, Prévost Car Inc. (“Prévost” or the respondent) to its shareholder Prévost Holding B.V. (“Prévost Holding”), a corporation resident in the Netherlands, which in turn paid dividends in substantially the same amount to its corporate shareholders, Volvo Bussar Corporation (Volvo), a resident of Sweden and Henlys Group plc (Henlys), a resident of the United Kingdom.

[3] Should Prévost Holding be found to be the beneficial owner, the rate of withholding tax by virtue of subsections 212(1) and 215(1) of the *Income Tax Act* and in accordance with Article 10 of the Tax Treaty would be 5%. Should Volvo and Henlys be found to be the beneficial owners, subsection 215(*c*) of the Act would have required Prévost to withhold 25% (reduced to 15% in the case of the dividend paid to Volvo because of the Canada-Sweden Tax Treaty and 10% in the case of the dividend paid to Henlys because of the Canada-U.K. Tax Treaty).

[4] In a judgment cited as 2008 TCC 231, the Associate Chief Justice Rip (as he then was) found that the beneficial owner was Prévost Holding.

[5] The relevant facts have been canvassed at length in the reasons for judgment of the Tax Court of Canada. They need not be repeated here.

[6] Counsel for the Crown argues that the Judge has used an incorrect approach in his interpretation of the term “beneficial owner” and in the end committed a palpable and overriding error in finding that Prévost Holding was, in the circumstances of this case, the beneficial owner.

Interpretation of “beneficial owner” in Article 10(2) of the Tax Treaty

[7] As I understand it, the main thrust of the Crown’s argument is that the Judge gave to the term “beneficial owner” the meaning they have in common law, thereby ignoring the meaning they have in civil law and in international law.

[8] It is common ground that there is no settled definition of “beneficial ownership” (or in French, “bénéficiaire effectif”) in the Model Convention, in the Tax Treaty or in the Canadian *Income Tax Act*. In his search for the meaning of these terms, the Judge closely examined their ordinary meaning, their technical meaning and the meaning they might have in common law, in Québec’s civil law, in Dutch law and in international law. He relied, *inter alia*, on the OECD Commentary for Article 10(2) of the Model Convention and on OECD documents issued subsequently to the 1977 Commentary, i.e. the OECD Conduit Companies Report adopted by the OECD Council on November 27, 1986 and the amendments made in 2003 by the OECD to its 1977 Commentary. He also had the benefit of expert evidence.

[9] I pause here to observe that counsel for both sides agree that the Judge was entitled to rely on subsequent documents issued by the OECD in order to interpret the Model Convention. I share their view. It is true that this Court, in *CUDD Pressure Control Inc. v. The Queen*, 98 DTC 6630, at 6635, qualified the relevance of the 1977 Commentary as being “somewhat suspect” in the search of the intention of the drafters of a Convention signed thirty-five years earlier, in 1942, but there was no Model Convention in 1942 and in any event McDonald J.A., in concurring reasons, went on to recognize that OECD Commentaries “can provide some assistance” as the 1942 Convention follows

the same general principles as the 1972 OECD Model. To the extent that it might be said that a contrary view was expressed by the Tax Court in *MIL (Investments) S.A. v. The Queen*, 2006 DTC 3307 at 3320, it does not appear that such a view was in the mind of this Court when it dismissed the appeal from the Bench, 2007 FCA 236.

[10] The worldwide recognition of the provisions of the Model Convention and their incorporation into a majority of bilateral conventions have made the Commentaries on the provisions of the OECD Model a widely-accepted guide to the interpretation and application of the provisions of existing bilateral conventions (see *Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802; Klaus Vogel, "*Klaus Vogel on Double Taxation Conventions*" 3rd ed. (The Hague: Kluwer Law International, 1997) at 43. In the case at bar, Article 10(2) of the Tax Treaty is mirrored on Article 10(2) of the Model Convention.

[11] The same may be said with respect to later commentaries, when they represent a fair interpretation of the words of the Model Convention and do not conflict with Commentaries in existence at the time a specific treaty was entered and when, of course, neither treaty partner has registered an objection to the new Commentaries. For example, in the introduction to the Income and Capital Model Convention and Commentary (2003), the OECD invites its members to interpret their bilateral treaties in accordance with the Commentaries "as modified from time to time" (par. 3) and "in the spirit of the revised Commentaries" (par. 33). The Introduction goes on, at par. 35, to note that changes to the Commentaries are not relevant "where the provisions… are different in

substance from the amended Articles" and, at par. 36, that "many amendments are intended to simply clarify, not change, the meaning of the Articles or the Commentaries".

[12] I therefore reach the conclusion, that for the purposes of interpreting the Tax Treaty, the OECD Conduit Companies Report (in 1986) as well as the OECD 2003 Amendments to the 1977 Commentary are a helpful complement to the earlier Commentaries, insofar as they are eliciting, rather than contradicting, views previously expressed. Needless to say, the Commentaries apply to both the English text of the Model Convention ("beneficial owner") and to the French text ("bénéficiaire effectif").

[13] In the end the Judge determined, at par. 100 of his reasons, that " the "beneficial owner" of dividends is the person who receives the dividends for his or her own use and enjoyment and assumes the risk and control of the dividend he or she received". To illustrate his point of view, the Judge goes on, as follows in par. 100:

> Where an agency or mandate exists or the property is in the name of a nominee, one looks to find on whose behalf the agent or mandatary is acting or for whom the nominee has lent his or her name. When corporate entities are concerned, one does not pierce the corporate veil unless the corporation is a conduit for another person and has absolutely no discretion as to the use or application of funds put through it as conduit, or has agreed to act on someone else's behalf pursuant to that person's instructions without any right to do other than what that person instructs it, for example, a stockbroker who is the registered owner of the shares it holds for clients.

[14] The Judge's formulation captures the essence of the concepts of "beneficial owner", "bénéficiaire effectif" as it emerges from the review of the general, technical and legal meanings of

the terms. Most importantly, perhaps, the formulation accords with what is stated in the OECD Commentaries and in the Conduit Companies Report.

[15] Counsel for the Crown has invited the Court to determine that "beneficial owner", "bénéficiaire effectif", "mean the person who can, in fact, ultimately benefit from the dividend". That proposed definition does not appear anywhere in the OECD documents and the very use of the word "can" opens up a myriad of possibilities which would jeopardize the relative degree of certainty and stability that a tax treaty seeks to achieve. The Crown, it seems to me, is asking the Court to adopt a pejorative view of holding companies which neither Canadian domestic law, the international community nor the Canadian government through the process of objection, have adopted.

Who is the "beneficial owner" in the case at bar

[16] The Judge found that:

a) the relationship between Prévost Holding and its shareholders is not one of agency, or mandate nor one where the property is in the name of a nominee (par. 100);
b) the corporate veil should not be pierced because Prévost Holding is not "a conduit for another person", cannot be said to have "absolutely no discretion as to the use or application of funds put through it as a conduit" and has not "agreed to act on someone else's behalf pursuant to that person's instructions without any right to do other than what that person instructs it, for example a stockbroker who is the registered owner of the shares it holds for clients" (par. 100);
c) there is no evidence that Prévost Holding was a conduit for Volvo and Henlys and there was no predetermined or automatic flow of funds to Volvo and Henlys (par. 102);

d) Prévost Holding was a statutory entity carrying on business operations and corporate activity in accordance with the Dutch law under which it was constituted (par. 103);
e) Prévost Holding was not party to the Shareholders' Agreement (par. 103);
f) neither Henlys nor Volvo could take action against Prévost Holding for failure to follow the dividend policy described in the Shareholders' Agreement (par. 103);
g) Prévost Holding's Deed of Incorporation did not obligate it to pay any dividend to its shareholders (par. 104);
h) when Prévost Holding decides to pay dividends, it must pay the dividends in accordance with the Dutch law (par. 104);
i) Prévost Holding was the registered owner of Prévost shares, paid for the shares and owned the shares for itself; when dividends are received by Prévost Holding in respect of shares it owns, the dividends are the property of Prévost Holding and are available to its creditors, if any, until such time as the management board declares a dividend and the dividend is approved by the shareholders (par. 105).

[17] These findings, to the extent that they are findings of fact, are supported by the evidence. No palpable or overriding error has been shown.

[18] To the extent that part of these findings is based on the interpretation of the contractual relationships between Prévost, Prévost Holding, Volvo and Henlys, no error of law has been shown.

Disposition

[19] I would dismiss the appeal with costs.

"Robert Décary"
J.A.

"I agree.
Pierre Blais J.A."

I agree.
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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