Date: 20090521

Docket: A-416-07

Citation: 2009 FCA 163

CORAM: **DESJARDINS J.A.**
EVANS J.A.
RYER J.A.

BETWEEN:

COPTHORNE HOLDINGS LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 11, 2009.

Judgment delivered at Ottawa, Ontario, on May 21, 2009.

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: DESJARDINS J.A.
EVANS J.A.

Date: 20090521

Docket: A-416-07

Citation: 2009 FCA 163

CORAM: **DESJARDINS J.A.**
EVANS J.A.
RYER J.A.

BETWEEN:

COPTHORNE HOLDINGS LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

RYER J.A.

[1] This is an appeal from a decision of Campbell J. (the "Tax Court Judge") of the Tax Court of Canada (2007 TCC 481), dated August 28, 2007, partially allowing an appeal by Copthorne Holdings Ltd. ("the appellant") from an assessment made by the Minister of National Revenue (the "Minister") against a predecessor of the appellant as a result of the application of the general anti-avoidance rule (the "GAAR") in subsection 245(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "ITA"). In these reasons, a reference to the appellant will be a reference to predecessors of the appellant as the context may require. Unless otherwise indicated, all statutory references in these reasons are to the corresponding provisions of the ITA.

[2] The assessment arose out of a 1996 redemption of preferred shares in the capital of the appellant that were held by a related non-resident corporation. Because the appellant believed that the paid-up capital ("PUC"), as defined in subsection 89(1), of the redeemed shares was equal to the proceeds that it paid to the non-resident corporation, the appellant did not withhold any amount of income tax in respect of the redemption proceeds. Applying the GAAR, the Minister determined that the PUC of the redeemed shares was $87,487,834 less than the amount of the redemption proceeds and as a result, the redemption gave rise to a deemed dividend, pursuant to subsection 84(3), in the amount of $58,325,223, which was subject to withholding tax pursuant to subsection 212(2). The Minister determined that, pursuant to subsection 215(1), the appellant should have withheld and remitted 15% of the amount of the deemed dividend to the Receiver General on behalf of the non-resident corporation and issued an assessment, pursuant to subsection 215(6), for an amount equal to the amount of tax that the appellant failed to withhold and remit. In addition, the Minister assessed a penalty against the appellant, pursuant to subsection 227(8), of 10% of the amount of the assessment under subsection 215(6).

[3] The Tax Court Judge upheld the application of the GAAR and the resulting assessment of the tax, pursuant to subsection 215(6), but refused to uphold the assessment of the penalty, pursuant to subsection 227(8). The Crown has not appealed the decision of the Tax Court Judge with respect to the penalty.

[4] For the reasons that follow, I would dismiss the appeal.

RELEVANT STATUTORY PROVISIONS

[5] The relevant statutory provisions are subsection 84(3), paragraph 87(3)(*a*), subsection 89(1), section 245 and subsection 248(10). Those provisions are reproduced in the appendix to these reasons.

SUMMARY OF FACTS

[6] In the Tax Court of Canada, the trial proceeded on the basis of a detailed joint statement of facts and law (the "JSFL") that was appended to the reasons of the Tax Court Judge. A brief summary of the pertinent facts ensues.

[7] This case concerns a group of Canadian and non-resident corporations (the "Li Group"), which are controlled by Mr. Li Ka-Shing and his son, Mr. Victor Li (collectively, the "Li family"), one of which was VHHC Investments Inc. ("VHHC Investments"), a Canadian incorporated corporation. Between 1985 and 1991, the Li Group invested $96,736,845 in VHHC Investments. VHHC Investments used $67,401,279 of those funds to purchase all the shares of another Canadian incorporated corporation, VHHC Holdings Ltd. ("VHHC Holdings"). At the end of 1991, the issued shares of VHHC Investments had PUC of $96,736,845 and the issued shares of VHHC Holdings had PUC of $67,401,279, which was notionally "traceable" to the original investment by the Li Group in VHHC Investments.

[8] VHHC Holdings held shares of Husky Oil Ltd. ("Husky"), a publicly traded Canadian incorporated corporation, directly and through a Canadian incorporated subsidiary corporation,

VHSUB Holdings Inc. (“VHSUB”). By 1991, the fair market value of the Husky shares had fallen, with the result that VHSUB had an unrealized capital loss in respect of its Husky shares.

[9] Big City Project Corporation B.V. (“Big City”), a Netherlands incorporated member of the Li Group owned all the shares of Copthorne Holdings Ltd. (“Copthorne I”), a Canadian incorporated corporation and predecessor of the appellant. Copthorne I purchased the Harbour Castle Hotel in Toronto in 1981 and sold it in 1989 for a substantial capital gain.

[10] Beginning in December of 1991, the Li Group undertook a series of transactions that included the acquisition of additional shares of Husky from an unrelated party. This series included a number of intra-group loss consolidation transactions. In particular, steps were taken to enable Copthorne I to realize the accrued capital loss on the Husky shares that were owned by VHSUB and to carry back that capital loss to offset the capital gain that Copthorne I realized on the hotel sale. The Husky shares with the accrued capital loss were transferred to VHSUB by VHHC Holdings and then transferred by VHSUB to Husky Oil Holdings Ltd., a Barbados incorporated member of the Li Group. At the end of 1991, VHHC Holdings owned all of the shares of VHSUB which had a nominal fair market value and an adjusted cost base of approximately $84.3 million, which represented the accrued capital loss on the Husky shares.

[11] In 1992, VHHC Investments sold its common shares of VHHC Holdings, the PUC of which was approximately $67.4 million, to Copthorne I for a nominal price. VHHC Holdings sold approximately 83% of its VHSUB shares to Copthorne I for a nominal sum. Thereafter, VHHC

Holdings and Copthorne I sold all of the shares of VHSUB to a third party for a nominal consideration and realized the accrued capital loss. Copthorne I was then in a position to carry back that capital loss to offset its capital gain from the hotel sale.

[12] After the completion of these loss consolidation transactions, Copthorne I owned all of VHHC Holdings, the shares of which had a nominal fair market value and a PUC of approximately $67.4 million.

[13] By 1993, the Li family decided to amalgamate Copthorne I, VHHC Holdings, and two other corporations. At this time, they considered how they might preserve the PUC of the shares of VHHC Holdings. It was recognized that because VHHC Holdings was wholly-owned by Copthorne I, without more, the amalgamation would result in the elimination of the approximately $67.4 million of PUC of the shares of VHHC Holdings. However, if VHHC Holdings and Copthorne I were sister corporations, their amalgamation would result in the aggregation of the PUC of their respective shares. To avoid the elimination of the PUC of the VHHC Holdings shares, in early 1993, Copthorne I transferred its shares in VHHC Holdings to Big City, its parent corporation, for their nominal fair market value (the “1993 Share Sale”).

[14] As a result of the 1993 Share Sale, Copthorne I and VHHC Holdings became sister corporations. On January 1, 1994, Copthorne I, VHHC Holdings, and two other corporations amalgamated under the name Copthorne Holdings Ltd. (“Copthorne II”). All of the issued shares of Copthorne II were owned by Big City. The PUC of those shares was essentially the PUC of the

shares of VHHC Holdings (approximately $67.4 million), as the PUC of the other amalgamating corporations was essentially nominal.

[15] For the purpose of the assessment, the Crown took the position that the 1993 Share Sale was an avoidance transaction within the meaning of subsection 245(3). The loss consolidation transactions, the Share Sale and the amalgamation that gave rise to Copthorne II are agreed by the parties to constitute a series of transactions without regard to subsection 248(10) ("the First Series").

[16] The proceeds of the 1989 hotel sale were invested by Copthorne I in Copthorne Overseas Investment Ltd. ("COIL"), a wholly-owned Barbados incorporated corporation that established and carried on an active bond-trading business in Singapore. From the time of its incorporation until June of 1994, the income generated by COIL was foreign accrual property income ("FAPI"), as defined in subsection 95(1). In response to the June 1994 announcement of proposals to amend the FAPI provisions of the ITA (the "Proposed FAPI Amendments"), the Li family decided to dispose of the business of COIL to another entity within the Li Group and to remove some or all of the proceeds of disposition from Canada.

[17] To achieve this result, in late 1994, the Li family undertook a reorganization, which included the formation of L.F. Investments (Barbados) Ltd. ("L.F. Investments"), a Barbados incorporated corporation. L.F. Investments acquired all of the issued shares of Copthorne II and VHHC Investments. Effective January 1, 1995, those two corporations, and two others that were owned by Mr. Li Ka-Shing, amalgamated under the name Copthorne Holdings Ltd. ("Copthorne

III"). On this amalgamation, L.F. Investments received 164,138,125 Class D preferred shares (the "Class D Shares") having an aggregate redemption amount, fair market value and PUC of $164,138,025 or effectively $1.00 per share. In essence, the PUC of the Class D Shares is the total of the PUC of the shares of VHHC Investments at the end of 1991 and the PUC of VHHC Holdings that was derived from share subscriptions made by VHHC Investments.

[18] Immediately following this amalgamation, Copthorne III redeemed 142,035,895 of its Class D Shares that were held by L.F. Investments, a non-resident of Canada, for $142,035,895 ("the 1995 Redemption"). Since the redemption price of each share was equal to its PUC, the redemption did not give rise to a deemed dividend under subsection 84(3). Accordingly, Copthorne III did not withhold or remit any tax on behalf of L.F. Investments, under subsection 215(1), in respect of the redemption proceeds.

[19] The transactions described in the preceding two paragraphs are agreed to be part of a series of transactions (the "Second Series").

[20] The Minister assessed Copthorne III, pursuant to subsection 215(6), for failing to withhold and remit withholding tax on a deemed dividend that arose on the 1995 Redemption, as required by subsection 215(1). Underlying this assessment was the application of the GAAR by the Minister to deny the addition to the PUC of the Class D Shares to the extent that it included $67,401,280 of PUC that was attributable to the shares of VHHC Holdings that were transferred by VHHC Investments in the 1993 Share Sale.

[21] In applying the GAAR, the Minister determined that:

(a) L.F. Investments received a tax benefit (a "tax benefit"), within the meaning of subsection 245(1) in the form of avoided withholding tax on the 1995 Redemption;

(b) the tax benefit arose out of the portion of the PUC of the Class D Shares that resulted from a series of transactions that included an avoidance transaction (an "avoidance transaction"), within the meaning of subsection 245(3);

(c) the avoidance transaction, was the 1993 Share Sale;

(d) the series of transactions that included the avoidance transaction resulted in abuse of the ITA read as a whole, within the meaning of subsection 245(4); and

(e) to deny the tax benefit, it would be reasonable to reduce the PUC of the Class D Shares by the amount of the "inappropriate increase" that resulted from the series of transactions that included the avoidance transaction.

[22] In the circumstances, the Minister determined that the deemed dividend that arose on the 1995 Redemption was $58,325,223 and that 15% of that amount should have been withheld by Copthorne III pursuant to subsection 215(1). Accordingly, the Minister assessed Copthorne III Part XIII tax in the amount of $8,748,783.40 pursuant to subsection 215(6). In addition, the Minister assessed a penalty of 10% of that amount pursuant to subsection 227(8).

[23] Copthorne III objected to the assessment. The Minister confirmed it and Copthorne III appealed to the Tax Court of Canada.

[24] In an unrelated transaction that occurred in 2002, Copthorne III was amalgamated with five other corporations owned by the Li family and continued as Copthorne Holdings Ltd., the appellant in this appeal

DECISION OF THE TAX COURT OF CANADA

[25] In the Tax Court of Canada, the issues were whether the Minister properly applied the GAAR and if so, whether the penalty was validly imposed. No issue was taken with respect to the calculation of the imposed tax and penalty.

[26] The Tax Court Judge quoted from paragraph 66 of the decision of the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 D.T.C. 5523, which summarizes the approach that should be taken to determine the validity of a GAAR assessment and reads as follows:

> 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).

> 3. If the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer.
>
> 4. The courts proceed by conducting a unified textual, contextual and purposive analysis of the provisions giving rise to the tax benefit in order to determine why they were put in place and why the benefit was conferred. The goal is to arrive at a purposive interpretation that is harmonious with the provisions of the Act that confer the tax benefit, read in the context of the whole Act.
>
> 5. Whether the transactions were motivated by any economic, commercial, family or other non-tax purpose may form part of the factual context that the courts may consider in the analysis of abusive tax avoidance allegations under s. 245(4). However, any finding in this respect would form only one part of the underlying facts of a case, and would be insufficient by itself to establish abusive tax avoidance. The central issue is the proper interpretation of the relevant provisions in light of their context and purpose.

[27] In addressing the series of transactions issue, the Tax Court Judge acknowledged the agreement of the parties that there were two series of transactions. She held that the avoidance transaction, the 1993 Share Sale, was in the First Series and that the tax benefit flowed from the 1995 Redemption, which was a part of the Second Series. She determined that the GAAR assessment could not be sustained unless the tax benefit was realized as part of the same series of transactions that included the avoidance transaction.

[28] The Tax Court Judge referred to the expression “series of transactions”, which appears in subsections 245(2) and (3), and the interpretation that was given to that expression in *Canada Trustco* and *OSFC Holdings Ltd. v. Her Majesty the Queen*, 2001 FCA 260, [2002] 2 F.C. 288. In *Canada Trustco*, the Court adopted the “pre-ordination” test that was laid down by Justice Rothstein in *OSFC* with respect to the determination of whether there is a series of transactions for the purposes of those provisions. Under this test, a series of transactions will include those transactions that are pre-ordained to produce a given result, with no practical likelihood that the planned steps

will not occur in the sequence that has been planned. This test is often referred to as the common law test and a series of transactions that is found to exist as a result of the application of this test is often referred to as the common law series. No issue arose before the Tax Court Judge with respect to the existence or extent of any common law series. However, the Tax Court Judge was required to consider the extended meaning of series of transactions that is found in subsection 248(10).

[29] The Tax Court Judge accepted the Minister's argument that the First Series, which included the avoidance transaction, was the common law series and that the Second Series, which included the 1995 Redemption that gave rise to the tax benefit, was part of the common law series by virtue of subsection 248(10). In so holding, the Tax Court Judge reviewed paragraphs 36 of *OSFC* and 26 of *Canada Trustco*, which analyze and interpret subsection 248(10), and found that there was a "strong nexus" between the First Series and the Second Series. In particular, she found that the 1995 Redemption was undertaken with actual knowledge, and in contemplation, of the 1993 Share Sale and that the 1995 Redemption was exactly the type of transaction that was necessary to exploit the PUC that had been preserved in the 1993 Share Sale. She further held that the fact that the Li family did not have precise knowledge, at the time of the 1993 Share Sale, that they would undertake the 1995 Redemption was not determinative.

[30] The Tax Court Judge concluded on this point by essentially paraphrasing the test enunciated by Rothstein J.A. (as he then was) in *OSFC*, as adopted in *Canada Trustco*, stating at paragraph 42:

> The First Series of Transactions is related to the Second Series of Transactions because the Second Series is completed in contemplation of the First Series, within the meaning of subsection 248(10), in the sense that the Appellant had knowledge of the prior preservation of PUC and took this into account when completing the Redemption.

[31] In addressing the tax benefit issue, the Tax Court Judge held that it is sufficient if the reduction, avoidance or deferral of tax results, directly or indirectly, from a series of transactions which includes an avoidance transaction. She found that a tax benefit occurred when withholding tax was avoided on the 1995 Redemption as a result of the PUC that was preserved by virtue of the 1993 Share Sale.

[32] The Tax Court Judge determined that the 1993 Share Sale was an avoidance transaction that was undertaken to preserve the PUC associated with the shares of VHHC Holdings and that it had no legitimate non-tax purpose. In particular, she found that the 1993 Share Sale played no role in the simplification of the Li family corporate holdings.

[33] In addressing the misuse or abuse requirement, the Tax Court Judge determined that *Canada Trustco* required a unified textual, contextual and purposive analysis of the relevant statutory provisions. In the circumstances, she found those provisions to be the definition of PUC in subsection 89(1), subsection 84(3) and paragraph 87(3)(*a*).

[34] After analyzing these provisions, the Tax Court Judge determined that the underlying principles respecting the calculation of PUC were offended. That conclusion is apparent from the following excerpt from paragraph 74 of her reasons, which reads:

> When VHHC Investments is later amalgamated with Copthorne II, the underlying principles respecting the calculation of PUC are offended because approximately $67 million of PUC is essentially double counted in the PUC of the newly amalgamated corporation. It is this double counting that circumvents the proper application of the relevant provisions in a manner that frustrates and defeats the object, spirit and purpose of those provisions, which individually, together and when read in conjunction with other provisions in the *Act*, are

> meant to operate to prevent the artificial increase of PUC on amalgamation and its subsequent return to shareholders on a tax-free basis…The resulting artificial preservation and inflation in PUC allowed the stripping of surplus without appropriate withholding tax. When the many transaction distilled down to the essential core, it is clearly an abuse of the *Act* to which section 245 should apply. [Emphasis added.]

ISSUES

[35] The parties are agreed that there are four issues on appeal:

1. Did the Tax Court Judge err in concluding that the 1995 Redemption formed part of the First Series, within the meaning of subsection 248(10) of the Act?

2. Did the Tax Court Judge err in concluding that the 1993 Share Sale was an avoidance transaction?

3. Did the Tax Court Judge err in concluding that Copthorne enjoyed a tax benefit?

4. Did the Tax Court Judge err in concluding that there was abusive tax avoidance?

ANALYSIS

Standard of Review

[36] On an appeal from a decision of the Tax Court of Canada, this Court will review questions of law, including interpretations of provisions of the ITA, on a standard of correctness. Questions of fact or mixed fact and law, where there is no readily extricable legal principle, are not subject to appellate intervention in the absence of a palpable and overriding error on the part of the Tax Court Judge (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33).

General Approach to the Application of the GAAR

[37] The requirements that underpin a valid GAAR assessment are summarized in the excerpt from the reasons in *Canada Trustco* that is reproduced in paragraph 26 of these reasons. The issues raised by the parties must be considered in light of these requirements.

Series of transactions

[38] It is common ground between the parties that the transactions in the First Series and the Second Series are not part of a single series by virtue of the common law test for a series of transactions. It is similarly uncontested that the transactions in the First Series constitute a series of transactions under the common law test. The matter in dispute is whether the First Series is deemed to include the 1995 Redemption by virtue of subsection 248(10). Specifically, the issue is whether the 1995 Redemption is related to, and completed in contemplation of, the First Series. Subsection 245(2) specifies that a tax benefit may only be denied under the GAAR if it results from an avoidance transaction or from a series of transactions that includes an avoidance transaction. The Minister relies on the 1993 Share Sale as an avoidance transaction, but acknowledges the alleged tax benefit (the avoidance of withholding tax) did not arise until the 1995 Redemption. Accordingly, if these two transactions are not part of the same series, the GAAR cannot apply.

[39] The proper interpretation of subsection 248(10) is a question of law. If the Tax Court Judge ascertained the correct interpretation of that provision, its application to the facts is a question of mixed fact and law that is reviewable by this Court on the standard of palpable and overriding error.

[40] Subsection 248(10) was interpreted by Rothstein J.A. in *OSFC* (at paragraph 36). There, he stated:

> …Subsection 248(10) does not require that the related transaction be pre-ordained. Nor does it say when the related transaction must be completed. As long as the transaction has some connection with the common law series, it will, if it was completed in contemplation of the common law series, be included in the series by reason of the deeming effect of subsection 248(10). Whether the related transaction is completed in contemplation of the common law series requires an assessment of whether the parties to the transaction knew of the common law series, such that it could be said that they took it into account when deciding to complete the transaction. If so, the transaction can be said to be completed in contemplation of the common law series. [Emphasis added]

[41] The Supreme Court of Canada approved and elaborated upon Justice Rothstein's interpretation of subsection 248(10). At paragraph 26 of *Canada Trustco*, McLachlin C.J. and Major J. stated:

> 26 Section 248(10) extends the meaning of "series of transactions" to include "related transactions or events completed in contemplation of the series". The Federal Court of Appeal held, at para. 36 of *OSFC*, that this occurs where the parties to the transaction "knew of the . . . series, such that it could be said that they took it into account when deciding to complete the transaction". We would elaborate that "in contemplation" is read not in the sense of actual knowledge but in the broader sense of "because of" or "in relation to" the series. The phrase can be applied to events either before or after the basic avoidance transaction found under s. 245(3). As has been noted:
>
> > It is highly unlikely that Parliament could have intended to include in the statutory definition of "series of transactions" related transactions completed in contemplation of a subsequent series of transactions, but not related transactions in the contemplation of which taxpayers completed a prior series of transactions.
>
> (D. G. Duff, "Judicial Application of the General Anti-Avoidance Rule in Canada: *OSFC Holdings Ltd. v. The Queen*" (2003), 57 I.B.F.D. Bulletin 278, at p. 287)

[42] The debate between the parties focuses upon the degree or closeness of the connection that must be shown between the series of transactions and the related transaction for the purposes of subsection 248(10).

[43] The appellant contends that a close connection is required. To that end, the appellant argues that the prior transaction must have caused the subsequent transaction to have been completed before the requisite connection between them can be demonstrated. On the facts, the appellant argues that there is no causal connection between the First Series and the 1995 Redemption, in the sense that the latter event was caused by the Proposed FAPI Amendments and therefore could not have been caused by the First Series in which the PUC preservation transaction occurred. In other words, any causal connection that might otherwise have existed between the First Series and the 1995 Redemption was, according to the appellant, broken by the Proposed FAPI Amendments.

[44] In support of this argument, the appellant cites a passage from the decision of the Tax Court of Canada in *MIL (Investments) S.A. v. The Queen*, [2006] 5 C.T.C. 2252 (affirmed on other grounds, 2007 FCA 236). At paragraph 62 of that decision, Bell J. stated:

> There must be a strong nexus between transactions in order for them to be included in a series of transactions. In broadening the word "contemplation" to be read in the sense of "because of" or "in relation to the series", the Supreme Court cannot have meant mere possibility, which would include an extreme degree of remoteness. Otherwise, legitimate tax planning would be jeopardized, thereby running afoul of that Court's clearly expressed goals of achieving "consistency, predictability and fairness". [Emphasis added]

[45] I am satisfied that Bell J. was correct in concluding that the language of the Supreme Court of Canada in paragraph 26 of *Canada Trustco* that broadens the meaning of “in contemplation”, as

used in subsection 248(10), does not lead to the conclusion that the "mere possibility" of a connection between a series of transactions and a related translation is sufficient to include that transaction in the series. On the other hand, I am not persuaded that the indicated broadening of "in contemplation" could, as Bell J. suggests with his phrase "strong nexus", require an even closer connection between the transaction and the series than was required under the interpretation offered by Rothstein J.A. in *OSFC*.

[46] In my view, if a series is a motivating factor with respect to the completion of a subsequent transaction, the transaction can be said to have been completed "in contemplation of the series" and a direct causal relationship between the series and the transaction, as argued by the appellant, need not be established. In my opinion, this standard is reconcilable with the test as stated in *OSFC* and as broadened in *Canada Trustco.*

[47] The Tax Court Judge reviewed and cited the relevant passages from *OSFC* and *Canada Trustco*. It is clear that she did not misapprehend or misinterpret the applicable legal test with respect to whether the 1995 Redemption and the 1993 Share Sale were within a single series of transactions.

[48] In applying the test to the facts that were before her, the Tax Court Judge concluded that a strong nexus existed between the First Series and the 1995 Redemption. She found that the 1995 Redemption was exactly the type of transaction that was necessary to utilize the PUC that had been preserved in the First Series and that such redemption, in fact, became the mechanism for returning

a portion of the PUC of Copthorne III to its non-resident shareholder. Thus, she concluded that even though the specifics of the 1995 Redemption were not planned at the time of the 1993 Share Sale, that redemption was undertaken with the knowledge of the PUC preservation and taking that PUC preservation into account. As such, she found that the 1995 Redemption was completed in contemplation of the First Series.

[49] In view of my conclusion that a transaction completed after a series will be included in the series, by virtue of subsection 248(10), if the series is a motivating factor with respect to the completion of that transactions, it was unnecessary for the Tax Court Judge to have found that there was a strong nexus between the First Series and the 1995 Redemption. Nonetheless, that finding was open to the Tax Court Judge based upon the record that was before her, and in making it, the Tax Court Judge committed no palpable or overriding error.

[50] While the appellant argues, in paragraph 92 of its factum, that the preserved PUC could have been useful in "many circumstances", it is difficult for me to comprehend that the prospect of utilizing the preserved PUC to avoid withholding tax on the redemption of the Class D Shares was something that the appellant discovered by accident at the time of that redemption. Indeed, the use of PUC as a means of reducing or eliminating withholding tax on a distribution of funds or property by a Canadian corporation to its non-resident shareholders is an elementary form of income tax planning and the complexity of the tax loss utilization transactions that were undertaken in the First Series belies any suggestion that the PUC that was preserved in those transactions was not within the contemplation of the appellant when it undertook the 1995 Redemption. Thus, in my view, the

conclusion that the PUC preservation that occurred in the First Series was, to use my formulation, a motivating factor in relation to the completion of the 1995 Redemption, is unassailable.

[51] I would also note the relatively close temporal connection between the 1993 Share Sale and the 1995 Redemption. While approximately eighteen months elapsed between the 1993 Share Sale and the 1995 Redemption, the record indicates that the redemption was contemplated shortly after the introduction of the Proposed FAPI Amendments, indicating a time frame of something just over a year between the first event and the commencement of planning for the second event. While I do not wish to suggest that any particular length of time between a series and a transaction will be determinative of whether there is a sufficient connection between them so as to result in the application of subsection 248(10), in the present circumstances, it is my view that an approximately one year gap between the 1993 Share Sale and the contemplation of the 1995 Redemption militates against accepting an assertion that there was an "extreme degree of remoteness" that the 1995 Redemption would be undertaken, as was urged upon the Court.

[52] In my view, the Tax Court Judge properly interpreted subsection 248(10) and made no palpable and overriding error in her application of that legal interpretation to the facts of this case. I would therefore affirm her conclusion that the 1995 Redemption formed part of the First Series.

Avoidance transaction

[53] In *Canada Trustco*, the Supreme Court of Canada held that whether a transaction is an avoidance transaction is a question of fact and that the taxpayer has the obligation of disputing the

Minister's assumptions in that regard by showing that it may reasonably be considered to have been undertaken for *bona fide* purposes other than to obtain a tax benefit. The Tax Court Judge found that the 1993 Share Sale was an avoidance transaction. Accordingly, this Court must accept that finding unless the appellant can show that, in making it, the Tax Court Judge committed a palpable and overriding error. In my view, the appellant has failed to do so.

[54] The appellant argues that the Tax Court Judge erred in failing to consider material evidence which reveals that the "true purpose of the First Series of Transactions" was to implement the loss consolidation and to simplify the corporate structure. In addition, the appellant contends that where a series of transactions may be characterized as having an overall non-tax purpose, that purpose should, in effect, be attributed to each of the separate transactions that form part of the series.

[55] In my view, it was open to the Tax Court Judge to find that the 1993 Share Sale was not integral to the achievement of the purposes of the series that were proffered by the appellant. Indeed, paragraphs 34 to 38 of the JSFL indicate that the purpose of the 1993 Share Sale was to preserve the PUC of the shares of VHHC Holdings. Indeed, one is hard pressed to understand how either of the appellant's stated purposes for the First Series would, in any way, be facilitated by a transaction that merely transformed VHHC Holdings from a subsidiary to a sister of Copthorne I. Thus, it was not an error on the part of the Tax Court Judge to conclude that the purpose of the 1993 Share Sale was to preserve the PUC of the shares of VHHC Holdings. Having reached that conclusion, it is my view that the Tax Court Judge did not err in finding that the overall purpose of the First Series should not be attributed to the 1993 Share Sale. Such a conclusion would, in my

view, run contrary to the plain wording of subsection 245(3) and the appellant has not provided any authority that would be binding on this Court that supports such a conclusion. Accordingly, I would affirm the finding of the Tax Court Judge that the 1993 Share Sale was an avoidance transaction.

Tax benefit

[56] The existence of a tax benefit was also held in *Canada Trustco* to be a factual matter. Accordingly, the finding of the Tax Court Judge that a tax benefit resulted from the series of transactions must be accepted in absence of a palpable and overriding error on her part in reaching that finding.

[57] With respect to this issue, the appellant reiterated its argument that the 1993 Share Sale and the 1995 Redemption were not part of a single series of transactions. The appellant also argued that even if they were, the 1995 Redemption did not give rise to a tax benefit.

[58] In fact, the Tax Court Judge held that the tax benefit resulted from the series of transactions, and not from any single transaction. Because this factual conclusion is unchallenged, it cannot be said to have been based upon any palpable and overriding error. Clearly, the series of transactions entailed the preservation of the PUC of the shares of VHHC Holdings and the purported utilization of a portion of that PUC to preclude the imposition of withholding tax under Part XIII of the ITA. Accordingly, I would confirm the finding of the Tax Court Judge that the series of transactions gave rise to a tax benefit.

Abuse or misuse of the provisions of the Act

[59] In *Canada Trustco*, the Supreme Court of Canada laid down a two-step approach to the determination of the presence or absence of abusive tax planning for the purposes of subsection 245(4). Paragraphs 44 and 45 of *Canada Trustco* read as follows:

> 44 The heart of the analysis under s. 245(4) lies in a contextual and purposive interpretation of the provisions of the Act that are relied on by the taxpayer, and the application of the properly interpreted provisions to the facts of a given case. The first task is to interpret the provisions giving rise to the tax benefit to determine their object, spirit and purpose. The next task is to determine whether the transaction falls within or frustrates that purpose. The overall inquiry thus involves a mixed question of fact and law. The textual, contextual and purposive interpretation of specific provisions of the *Income Tax Act* is essentially a question of law but the application of these provisions to the facts of a case is necessarily fact-intensive.
>
> 45 This analysis will lead to a finding of abusive tax avoidance when a taxpayer relies on specific provisions of the *Income Tax Act* in order to achieve an outcome that those provisions seek to prevent. As well, abusive tax avoidance will occur when a transaction defeats the underlying rationale of the provisions that are relied upon. An abuse may also result from an arrangement that circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions. By contrast, abuse is not established where it is reasonable to conclude that an avoidance transaction under s. 245(3) was within the object, spirit or purpose of the provisions that confer the tax benefit.

[60] As indicated in these paragraphs, the question of whether an avoidance transaction falls within or frustrates the purpose of the relevant provisions of the ITA is one of mixed fact and law. As previously indicated, *Housen* instructs that appellate intervention with respect to such a question is limited to situations in which the lower court makes a palpable and overriding error, except where the question entails a readily extricable legal issue. In that case, the legal issue will be reviewed on a standard of correctness.

[61] C*anada Trustco* informs that a finding of abusive tax planning will be substantiated

(a) where the taxpayer relies on specific provisions of the ITA to achieve an outcome that those provisions seek to prevent;

(b) when a transaction defeats the underlying rationale of the provisions relied upon by the taxpayer; and

(c) where a transaction circumvents the application of certain provisions of the ITA, such as anti-avoidance provisions, in a manner that frustrates or defeats the object, spirit or purpose of those provisions.

[62] Against this backdrop, the Minister asserted that the definition of PUC in subsection 89(1), subsection 84(3) and paragraph 87(3)(*a*) were misused and abused by the appellant. The Tax Court Judge undertook a textual, contextual and purposive interpretation of these provisions, in accordance with the *Canada Trustco* approach. After completing that step, the Tax Court Judge considered whether the avoidance transaction or the series that included it frustrated the object, spirit and purpose of these provisions.

[63] In paragraph 74 of her reasons, the Tax Court Judge concluded that the principles respecting the calculation of PUC were offended, thus indicating that it is the provisions of paragraph 89(1) containing the definition of PUC, and not the provisions of either of subsection 84(3) or paragraph 87(3)(*a*), that have been abused in the circumstances of this case. I am in agreement with this conclusion.

[64] In the instant circumstances, the relevant portion of the definition of PUC is subparagraph (*b*)(iii) of the definition of PUC which bears repeating:

"paid-up capital" «*capital versé* » at any particular time means, . . . (*b*) in respect of a class of shares of the capital stock of a corporation, . . . (iii) where 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), 86(2.1), 87(3) and (9), 128.1(2) and (3), 138(11.7), 192(4.1) and 194(4.1) and section 212.1,	«capital versé » "*paid-up capital*" À un moment donné : […] *b*) à l'égard d'une catégorie d'actions du capital-actions d'une société : […] (iii) lorsque 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), 86(2.1), 87(3) et (9), 128.1(2) et (3), 138(11.7), 192(4.1) et 194(4.1) et de l'article 212.1;

[65] Under this definition, the PUC of a class of shares is essentially the stated capital of that class determined under the applicable corporate legislation, subject to the adjustments specified in the provisions of the ITA that are enumerated at the end of subparagraph (*b*)(iii) of the definition. In essence, this portion of the definition of PUC incorporates by reference statutory provisions outside the ITA that govern the computation of the stated capital of a particular corporation. Thus, it may be said that the provision that is being abused in the circumstances under consideration is not technically a provision of the ITA. Nonetheless, by virtue of subparagraph 245(4)(*a*)(v), the GAAR may apply in respect of an abuse of any other enactment that is relevant in determining any amount that is relevant for the purpose of computing any tax payable by a person under the ITA. In the circumstances, it is clear that the determination of stated capital of the Class D Shares under the

applicable corporate legislation is relevant to the computation of the PUC of those shares which, in turn, is relevant to the computation of the amount of Part XIII tax that has been assessed against the appellant.

[66] Against this backdrop, it is necessary to consider the textual, contextual and purposive interpretation of the principles governing the computation of the PUC of Copthorne II and its successor Copthorne III.

[67] In paragraph 33 of its notice of appeal to the Tax Court of Canada, the appellant stated that as a consequence of the amalgamation of Copthorne I, having a PUC of $1.00, and VHHC Holdings, having a PUC of $67,401,279, the PUC of Copthorne II, the amalgamated corporation, was $67,401,280. Because that amalgamation occurred pursuant to the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9 (the "ABCA"), it follows that the provisions of that legislation would be relevant to the determination of the PUC of Copthorne II, the amalgamated corporation.

[68] The applicable provisions of the ABCA were not put before this Court, and do not appear to have been put before the Tax Court Judge. Instead, in this Court, as in the Tax Court of Canada, the parties proceeded on the basis that the PUC of an amalgamated corporation under the ABCA would be determined by aggregating the PUC of each amalgamating corporation, except that for the purposes of this determination, the PUC of any shares held by an amalgamating corporation in another amalgamating corporation would be excluded.

[69] In these circumstances, it is readily apparent that a textual consideration of the provisions of the ABCA that are applicable for the purposes of determining the PUC of Copthorne II could not have been undertaken by the Tax Court Judge in the traditional manner contemplated by the *Canada Trustco* approach.

[70] The Tax Court Judge referred to these provisions in the context of the provisions of the ITA dealing with amalgamations, in particular subsections 87(2) and (3) and paragraph 87(9)(*b*), which she held to be concerned with preserving the continuity of PUC on amalgamations and ensuring that the PUC of an amalgamated corporation does not exceed the aggregate PUC of the amalgamating corporations.

[71] In considering the purpose of the requirement that the PUC of intercorporate shareholdings must be eliminated on an amalgamation, the Tax Court Judge, in my view, determined that its purpose is to prevent double counting of PUC in the sense that PUC that is essentially referable to property that disappears as a consequence of the amalgamation (i.e. the shares that one amalgamating corporation holds in another) should be similarly eliminated on the amalgamation. In this regard, PUC may be considered as one means of financing all or a portion of the acquisition of the property of a corporation. When that corporation amalgamates with another corporation, the property of each corporation generally becomes the property of the amalgamated corporation. In those circumstances, it is logical that the PUC that financed the property of the amalgamating corporations should become the PUC of the amalgamated corporation which has succeeded to the property of each amalgamating corporation. However, where the property of one amalgamating

corporation is shares of another amalgamating corporation, that property is eliminated on the amalgamation and it logically follows that the PUC that has financed such property should similarly be eliminated.

[72] A simple example is illustrative. If an individual incorporates a new corporation and subscribes for a no par value share for $100, the PUC attributable to that share would be $100. If that corporation incorporates a new subsidiary and subscribes for a no par value share of that subsidiary for $100, the PUC of that share would also be $100. In the case of the parent, its property would be the shares of the subsidiary that cost $100. In the case of the subsidiary, its property would be cash of $100. If the two corporations were to amalgamate, the share of the parent would remain outstanding, the intercorporate share would be eliminated and the amalgamated corporation would be left with cash of $100 as its only asset. Unless the PUC attributable to the intercorporate share that is eliminated is similarly eliminated, the PUC of the amalgamated corporation would be $200 but its property would consist of only $100 of cash. In such circumstances, it is logical to eliminate the PUC of the intercorporate share, rather than permit it to be included in the computation of the PUC of the amalgamated corporation.

[73] This example illustrates, in my view, the appropriateness of the Tax Court Judge's determination that the purpose of the requirement for the elimination of the PUC of intercorporate shareholdings on an amalgamation is to avoid duplicative increases in computing the PUC of the amalgamated corporation.

[74] Having determined that the purpose of the requirement to eliminate the PUC of intercorporate shareholdings on an amalgamation is to avoid duplicative additions to the PUC of the amalgamated corporation, the Tax Court Judge found that the elimination of the intercorporate shareholdings between Copthorne I and VHHC Holdings by virtue of the 1993 Share Sale, resulted in the circumvention of that requirement in an abusive manner. In my view, this largely factual determination was open to the Tax Court Judge and has not been demonstrated to have been based upon any palpable and overriding error on her part.

DISPOSITION

[75] For the foregoing reasons, I would dismiss this appeal, with costs.

"C. Michael Ryer"
J.A.

"I concur.
Alice Desjardins J.A."

"I agree
John M. Evans J.A."

APPENDIX

Subsection 84(3), paragraph 87(3)(*a*), subsection 89(1), section 245 and subsection 248(10) of the *Income Tax Act* are as follows:

84. (3) Where at any time after December 31, 1977 a corporation resident in Canada has redeemed, acquired or cancelled in any manner whatever (otherwise than by way of a transaction described in subsection 84(2)) any of the shares of any class of its capital stock,	**84.** (3) Lorsque, à un moment donné après le 31 décembre 1977, une société résidant au Canada a racheté acquis ou annulé de quelque façon que ce soit (autrement que par une opération visée au paragraphe (2)) toute action d'une catégorie quelconque de son capital-actions :
(*a*) the corporation shall be deemed to have paid at that time a dividend on a separate class of shares comprising the shares so redeemed, acquired or cancelled equal to the amount, if any, by which the amount paid by the corporation on the redemption, acquisition or cancellation, as the case may be, of those shares exceeds the paid-up capital in respect of those shares immediately before that time; and	*a*) la société est réputée avoir versé au moment donné un dividende sur une catégorie distincte d'actions constituée des actions ainsi rachetées, acquises ou annulées, égal à l'excédent éventuel de la somme payée par la société lors du rachat, de l'acquisition ou de l'annulation, selon le cas, de ces actions sur le capital versé relatif à ces actions, existant immédiatement avant ce moment;
(*b*) a dividend shall be deemed to have been received at that time by each person who held any of the shares of that separate class at that time equal to that portion of the amount of the excess determined under paragraph 84(3)(*a*) that the number of those shares held by the person immediately before that time is of the total number of shares of that separate class that the corporation has redeemed, acquired or cancelled, at that time.	*b*) chacune des personnes qui détenaient au moment donné une ou plusieurs actions de cette catégorie distincte est réputée avoir reçu à ce moment un dividende égal à la fraction de l'excédent déterminé en vertu de l'alinéa *a*) représentée par le rapport existant entre le nombre de ces actions que détenait cette personne immédiatement avant ce moment et le nombre total des actions de cette catégorie distincte que la société a rachetées, acquises ou annulées, à ce moment.
87. (3) Subject to subsection 87(3.1), where there is an amalgamation or a merger of 2 or more Canadian corporations, in computing at any particular time the paid-up capital in respect of any particular class of shares of the capital stock of the new corporation,	**87.** 3) Sous réserve du paragraphe (3.1), en cas de fusion ou d'unification de plusieurs sociétés canadiennes, il faut, dans le calcul à un moment donné du capital versé au titre d'une catégorie donnée d'actions du capital-actions de la nouvelle société :

(*a*) there shall be deducted that proportion of the amount, if any, by which the paid-up capital, determined without reference to this subsection, in respect of all the shares of the capital stock of the new corporation immediately after the amalgamation or merger exceeds the total of all amounts each of which is the paid-up capital in respect of a share (except a share held by any other predecessor corporation) of the capital stock of a predecessor corporation immediately before the amalgamation or merger, that

a) déduire la fraction de l'excédent éventuel du capital versé, calculé compte non tenu du présent paragraphe, à l'égard de toutes les actions du capital-actions de la nouvelle société immédiatement après la fusion ou l'unification sur le total des montants dont chacun représente le capital versé à l'égard d'une action (exception faite d'une action détenue par toute autre société remplacée) du capital-actions d'une société remplacée, immédiatement avant la fusion ou l'unification, qui est représentée par le rapport entre :

(i) the paid-up capital, determined without reference to this subsection, of the particular class of shares of the capital stock of the new corporation immediately after the amalgamation or merger

is of

(i) d'une part, le capital versé, calculé compte non tenu du présent paragraphe, à l'égard de la catégorie d'actions donnée du capital-actions de la nouvelle société immédiatement après la fusion ou l'unification,

(ii) the paid-up capital, determined without reference to this subsection, in respect of all of the issued and outstanding shares of the capital stock of the new corporation immediately after the amalgamation or merger; and …

(ii) d'autre part, le capital versé, calculé compte non tenu du présent paragraphe, à l'égard de toutes les actions émises et en circulation du capital-actions de la nouvelle société immédiatement après la fusion ou l'unification; […]

89. (1) In this subdivision…

"paid-up capital"
«*capital versé* »
at any particular time means,

89. (1) Les définitions qui suivent s'appliquent à la présente sous-section […]
«capital versé »
"*paid-up capital*"
«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 corporation to which that share belongs, divided by the number of issued shares of that class outstanding at that time,

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

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

(i) where the particular time is before May 7, 1974, 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,

(i) lorsque le moment donné est antérieur au 7 mai 1974, somme égale au capital versé au moment donné à l'égard de cette catégorie d'actions, calculée compte non tenu de la présente loi,

(ii) where the particular time is after May 6, 1974, and before April 1, 1977, an amount equal to the paid-up capital in respect of that class of shares at the particular time, computed in accordance with the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, as it read on March 31, 1977, and

(ii) lorsque le moment donné est postérieur au 6 mai 1974 et antérieur au 1er avril 1977, somme égale au capital versé au moment donné à l'égard de cette catégorie d'actions, calculée conformément à la *Loi de l'impôt sur le revenu*, chapitre 148 des Statuts revisés du Canada de 1952, dans sa version applicable au 31 mars 1977,

(iii) where 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), 86(2.1), 87(3) and (9), 128.1(2) and (3), 138(11.7), 192(4.1) and 194(4.1) and section 212.1,

(iii) lorsque 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), 86(2.1), 87(3) et (9), 128.1(2) et (3), 138(11.7), 192(4.1) et 194(4.1) et de l'article 212.1;

except that, where the corporation is a cooperative corporation (within the meaning assigned by subsection 136(2)) or a credit union and the statute by or under which it was incorporated does not provide for paid-up capital in respect of a class of shares, the paid-up capital in respect of that class of shares at the particular time, computed without reference to the provisions of this Act, shall be deemed to be the amount, if any, by which

toutefois dans le cas d'une société coopérative, au sens du paragraphe 136(2), ou d'une caisse de crédit dont la loi constitutive ne prévoit pas de capital versé au titre d'une catégorie d'actions, le capital versé au titre de cette catégorie d'actions au moment donné, calculé compte non tenu de la présente loi, est réputé égal à l'excédent éventuel du total visé au sous-alinéa (iv) sur le total visé au sous-alinéa (v):

(iv) the total of the amounts received by

(iv) le total des montants que la société a

the corporation in respect of shares of that class issued and outstanding at that time Exceeds

reçus relativement aux actions de cette catégorie, émises et en circulation à ce moment,

(v) the total of all amounts each of which is an amount or part thereof described in subparagraph (iv) repaid by the corporation to persons who held any of the issued shares of that class before that time, and

(v) le total des montants dont chacun représente tout ou partie d'un montant visé au sous-alinéa (iv) que la société a remboursé aux détenteurs des actions émises de cette catégorie avant ce moment;

(*c*) in respect of all the shares of the capital stock of a corporation, an amount equal to the total of all amounts each of which is an amount equal to the paid-up capital in respect of any class of shares of the capital stock of the corporation at the particular time**;**

c) à l'égard de toutes les actions du capital-actions d'une société, somme égale au total des montants dont chacun est une somme égale au capital versé à l'égard d'une catégorie quelconque d'actions du capital-actions de la société au moment donné.

245. (1) In this section,

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

"tax benefit"
«*avantage fiscal* »

«avantage fiscal »
"*tax benefit*"

"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"
«*attribut fiscal* »

«attribut fiscal »
"*tax consequences*"

"tax consequences" to a person means the

«attribut fiscal » S'agissant des attributs

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;
"transaction"

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.

«*opération* »
"transaction" includes an arrangement or event.

«opération »
"*transaction*"
«opération » Sont assimilés à une opération une convention, un mécanisme ou un événement.

General anti-avoidance provision

(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.

Disposition générale anti-évitement

(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.

Avoidance 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

Opération d'évitement

(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

considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

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.

Application of subsection (2)

(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

(i) this Act,

(ii) the *Income Tax Regulations*,

(iii) the *Income Tax Application Rules*,

(iv) a tax treaty, or

(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

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

Application du par. (2)

(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) la présente loi,

(ii) le *Règlement de l'impôt sur le revenu*,

(iii) les *Règles concernant l'application de l'impôt sur le revenu*,

(iv) un traité fiscal,

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

Determination of tax consequences

(5) Without restricting the generality of subsection (2), and notwithstanding any

Attributs fiscaux à déterminer

(5) Sans préjudice de la portée générale du paragraphe (2) et malgré tout autre

other enactment,

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.

Request for adjustments

Demande en vue de déterminer les attributs fiscaux

(6) Where with respect to a transaction

(6) Dans les 180 jours suivant la mise à la poste d'un avis de cotisation, de nouvelle cotisation ou de cotisation supplémentaire, envoyé à une personne, 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) envoyé à une personne en ce qui concerne

(*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 245(6)(*a*) or 245(6)(*b*)) shall be entitled, within 180 days after the day of mailing of the notice, to request in writing that the Minister make an assessment, reassessment or additional assessment applying subsection 245(2) or make a determination applying subsection 152(1.11) with respect to that transaction.

une opération, toute autre personne 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.

Exception

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

Exception

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

Duties of Minister

(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).

Obligations du ministre

(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).

248. (10) For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be

248. (10) Pour l'application de la présente loi, la mention d'une série d'opérations ou d'événements vaut mention des opérations

deemed to include any related transactions or events completed in contemplation of the series.

et événements liés terminés en vue de réaliser la série.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-416-07
(APPEAL FROM THE JUDGMENT OF MADAM JUSTICE CAMPBELL DATED AUGUST 28, 2007, IN TAX COURT OF CANADA FILE 2002-1316(IT)G)	
STYLE OF CAUSE:	COPTHORNE HOLDINGS LTD. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO
DATE OF HEARING:	FEBRUARY 11, 2009
REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	DESJARDINS J.A. EVANS J.A.
DATED:	MAY 21, 2009

APPEARANCES:

Richard W. Pound Pierre-Louis Le Saunier	FOR THE APPELLANT
Eric Noble Franco Calabrese Martin Beaudry	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stikeman Elliott LLP Montreal, Quebec	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT