Federal Court of Appeal | Cour d'appel fédérale

Date: 20190403

Docket: A-276-17

Citation: 2019 FCA 62

CORAM: **WEBB J.A.**
NEAR J.A.
WOODS J.A.

BETWEEN:

DON GILLEN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Saskatoon, Saskatchewan, on November 5, 2018.

Judgment delivered at Ottawa, Ontario, on April 3, 2019.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from a judgment of Justice D'Arcy of the Tax Court of Canada dated August 30, 2017 (2017 TCC 163). Don Gillen had been denied a capital gains deduction in relation to the disposition of certain shares in 2008 and his appeal to the Tax Court of Canada was dismissed.

[2] For the reasons that follow I would dismiss this appeal.

I. Background

[3] The Tax Court Judge made several factual findings that are not in dispute in this case.

[4] Don Gillen and his spouse owned all the shares of Kinderock Resources Limited (Kinderock). On October 4, 2007, Kinderock applied to the government of Saskatchewan for four potash exploration permits covering a total of 340,960 acres. On October 17, 2007, Kinderock submitted an additional seven applications that covered approximately 647,000 acres in total. As a result, Kinderock had a total of 11 applications for potash exploration permits covering approximately one million acres. The applications for potash exploration permits submitted by Kinderock will be referred to herein as the Applications.

[5] Around this time Don Gillen decided that he wanted to build a management team for the potash project. Brad Devine and Bruce Carson became part of this team.

[6] Since Kinderock had previously carried out other activities, it was determined that a new corporation should be formed to hold the permits once they were issued. To that end, Devonian Potash Inc. (Devonian) was incorporated on November 22, 2007. It was also decided that a limited partnership should be formed to hold the shares of Devonian. The GDC Potash Holdings Limited Partnership was formed on December 7, 2007 with Kinderock as a general partner and with three family trusts as the limited partners.

[7] The three family trusts acquired the following units in the limited partnership:

Family Trust	**Number of Units**	**Percentage of Units**
Gillen Family Trust	2,000	67%
Devine Family Trust	300	10%
Carson Family Trust	700	23%
Total:	3,000	100%

[8] The only trust indenture that is part of the record is the one for the Gillen Family Trust, which indicates that it was settled as of December 7, 2007.

[9] On the same day (December 7, 2007), the limited partnership entered into a Subscription and Roll-over Agreement with Devonian which provided that the limited partnership would acquire 999 shares of Devonian for $675,000. The limited partnership would pay the subscription price by transferring any issued permits and outstanding Applications to Devonian and providing certain services to Devonian.

[10] Two of the Applications were cancelled by the government of Saskatchewan on November 21, 2007. However, on February 14, 2008, Kinderock filed two new Applications to replace one of the Applications that had been cancelled. For each of the Applications filed in February 2008, the applicant is identified as Kinderock and there is no indication on the Application that Kinderock is applying for the permit other than in its own right.

[11] On February 15, 2008, an offer to purchase the shares of Devonian was received from a numbered company, which was dealing with Devonian and its shareholders at arm’s length. The offer led to further discussions which culminated in an Option to Purchase Shares, also dated

February 15, 2008. The option was for the purchaser to acquire the shares of Devonian for a purchase price of $15 million. The option provided in Article 3.2 that it "shall be deemed to have been exercised upon all the Permits (other than the Late Permit) having been granted to [Devonian] by the Saskatchewan Government" and notice having been provided to the purchaser. The Late Permit is defined as the permits to be issued pursuant to the Application submitted by Kinderock in February 2008.

[12] On March 31, 2008, the government of Saskatchewan granted permits in relation to six of the Applications. On the same day, the limited partnership executed a bill of sale in favour of Devonian. The bill of sale indicates that the limited partnership was transferring the Purchased Assets to Devonian as of March 31, 2008. Although the bill of sale indicates that the year was 2007, the Tax Court Judge accepted that this was an error. The definition of "Purchased Assets" for the purposes of the bill of sale is the same definition as found in the Subscription and Roll-over Agreement and is essentially any issued permits and outstanding Applications. Devonian issued a share certificate for 999 common shares in the name of the limited partnership also on March 31, 2008.

[13] On April 9, 2008, the government of Saskatchewan issued three additional permits. On April 25, 2008, the numbered company purchased the shares of Devonian. The sale of the shares of Devonian for $15 million occurred less than 7 months after the first Application was filed by Kinderock.

[14] The limited partnership reported a gain of $14,386,399 from the disposition of the shares of Devonian. An amount of $9,221,643 of the gain was allocated to the Gillen Family Trust. The Gillen Family Trust in turn allocated the gain to Don Gillen and other members of his family. Don Gillen claimed a capital gains deduction in relation to the gain that had been allocated to him.

II. Relevant statutory provisions

[15] Under section 110.6 of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1 (the Act), individuals are entitled to deduct from the taxable capital gain that they realize from the disposition of certain property, an amount as determined in accordance with this section.

[16] There are a number of conditions that must be satisfied in order for an individual to qualify for the capital gains deduction. In particular, paragraph (b) of the definition of "qualified small business corporation share" in subsection 110.6(1) of the Act provides that:

qualified small business corporation share of an individual (other than a trust that is not a personal trust) at any time (in this definition referred to as the "determination time") means a share of the capital stock of a corporation that,	***action admissible de petite entreprise*** S'agissant d'une action admissible de petite entreprise d'un particulier (à l'exception d'une fiducie qui n'est pas une fiducie personnelle) à un moment donné, action du capital-actions d'une société qui, à la fois:
…	[…]
(b) throughout the 24 months immediately preceding the determination time, was not owned by anyone other than the individual or a person or partnership related to the individual, and	**b)** tout au long de la période de 24 mois qui précède le moment donné, n'est la propriété de nul autre que le particulier ou une personne ou société de personnes qui lui est liée;
…	[…]

[17] As a result of this provision, the shares of a particular corporation will not qualify as qualified small business corporation shares if such shares, at any time in the 24 months immediately preceding the disposition of such shares, were owned by anyone other than the individual or a person or partnership related to that individual. Paragraph 110.6(14)(f) of the Act imposes certain rules in relation to this determination:

(14) For the purposes of the definition ***qualified small business corporation share*** in subsection 110.6(1),	**(14)** Pour l'application de la définition de ***action admissible de petite entreprise*** au paragraphe (1):
…	[…]
(f) shares issued after June 13, 1988 by a corporation to a particular person or partnership shall be deemed to have been owned immediately before their issue by a person who was not related to the particular person or partnership unless the shares were issued	**f)** les actions émises après le 13 juin 1988 par une société en faveur d'une personne ou société de personnes donnée sont réputées avoir été la propriété, immédiatement avant leur émission, d'une personne qui n'était pas liée à la personne ou société de personnes donnée, sauf si les actions ont été émises :
(i) as consideration for other shares,	**(i)** soit en contrepartie d'autres actions,
(ii) as part of a transaction or series of transactions in which the person or partnership disposed of property to the corporation that consisted of	**(ii)** soit dans le cadre d'une opération ou d'une série d'opérations dans laquelle la personne ou société de personnes donnée a disposé, en faveur de la société, de biens qui représentent:
(A) all or substantially all the assets used in an active business carried on by that person or the members of that partnership, or	**(A)** soit la totalité, ou presque, des éléments d'actif utilisés dans une entreprise exploitée activement par cette personne ou par les associés de cette société de personnes,

(B) an interest in a partnership all or substantially all the assets of which were used in an active business carried on by the members of the partnership, or	**(B)** soit une participation dans une société de personnes dont la totalité, ou presque, des éléments d'actif sont utilisés dans une entreprise exploitée activement par les associés de la société de personnes;
(iii) as payment of a stock dividend; and	**(iii)** soit en paiement d'un dividende en actions;
…	[…]

[18] Paragraph 110.6(14)(f) of the Act provides that shares that are issued to a person will be deemed to have been owned by an unrelated person immediately before they were issued unless one of the exceptions in subparagraphs (i), (ii) or (iii) apply. The exceptions in subparagraphs (i) and (iii) are not applicable in this case since the shares of Devonian were not issued as consideration for other shares, nor were they issued as a stock dividend. The only exception that is in issue in this appeal is the one in clause 110.6(14)(f)(ii)(A) of the Act. Therefore, since the shares in this case were issued by Devonian to the limited partnership on March 31, 2008 and sold on April 25, 2008, the shares would not satisfy the condition in paragraph (b) of the definition of "qualified small business corporation share" unless they were issued as part of a transaction or series of transactions in which all or substantially all of the assets used by the limited partnership in carrying on an active business were transferred to Devonian.

[19] "Active business" is defined in subsection 248(1) of the Act:

active business, in relation to any business carried on by a taxpayer resident in Canada, means any business carried on by the taxpayer	***entreprise exploitée activement*** Relativement à toute entreprise exploitée par un contribuable résidant au Canada, toute entreprise exploitée

other than a specified investment business or a personal services business;	par le contribuable autre qu'une entreprise de placement déterminée ou une entreprise de prestation de services personnels.

[20] "Business" is also defined in subsection 248(1) of the Act:

business includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(c), section 54.2, subsection 95(1) and paragraph 110.6(14)(f), an adventure or concern in the nature of trade but does not include an office or employment;	***entreprise*** Sont compris parmi les entreprises les professions, métiers, commerces, industries ou activités de quelque genre que ce soit et, sauf pour l'application de l'alinéa 18(2)c), de l'article 54.2, du paragraphe 95(1) et de l'alinéa 110.6(14)f), les projets comportant un risque ou les affaires de caractère commercial, à l'exclusion toutefois d'une charge ou d'un emploi.
(emphasis added)	(soulignement ajouté)

[21] As a result of the definition of "business", in determining whether any particular person or partnership is carrying on an active business for the purposes of paragraph 110.6(14)(f) of the Act, an adventure or concern in the nature of trade will not be a business and hence will not be an active business.

III. Decision of the Tax Court

[22] The only issue before the Tax Court was whether the exception in subparagraph 110.6(14)(f)(ii) of the Act applied in this case. The Tax Court Judge reviewed the various agreements that the parties submitted and the testimony of the witnesses. The Tax Court Judge concluded that the beneficial interest in the Applications was transferred by the limited partnership to Devonian immediately upon the formation of the limited partnership. Therefore, the limited partnership did not use these assets in an active business and did not satisfy the

exception in subparagraph 110.6(14)(f)(ii) of the Act. As a result, the gain realized on the disposition of the shares of Devonian did not qualify for the capital gains deduction.

IV. Issue and standard of review

[23] The issue in this case is whether the Tax Court Judge made an error in determining that the exception in clause 110.6(14)(f)(ii)(A) of the Act did not apply and, in particular, whether he erred in finding that the limited partnership had transferred its beneficial interest in the Applications to Devonian on December 7, 2007, immediately after it had acquired such beneficial interest. The result of this finding was that the limited partnership did not use the assets that were transferred to Devonian in carrying on an active business.

[24] The standard of review for any question of fact or mixed fact and law is palpable and overriding error and for any question of law (including any extricable question of law) is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[25] Palpable and overriding error is a high standard. As the Supreme Court of Canada noted in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352:

> **38** It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in S*outh Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31 (F.C.A.), at para. 46:
>
> > Palpable and overriding error is a highly deferential standard of review .... "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding

> error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> **39** Or, as Morissette J.A. put it in *G. (J.) c. Nadeau*, 2016 QCCA 167 (C.A. Que.), at para. 77, [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

V. Analysis

[26] While Don Gillen has attempted to characterize the alleged errors as errors of law, in my view, he is effectively challenging the findings of fact or mixed fact and law made by the Tax Court Judge in relation to the date on which beneficial interest in the assets was transferred to Devonian. This requires the interpretation of various contracts. As noted by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633:

> **50** With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[27] Since the interpretation of contracts is a question of mixed fact and law, the standard of review that will be applied to the interpretation of the contracts as found by the Tax Court Judge is palpable and overriding error, which, as noted above, is a “highly deferential standard of review”.

[28] Don Gillen’s position is that the limited partnership did not convey any assets to Devonian when it was formed on December 7, 2007, but rather that it only conveyed assets to Devonian on March 31, 2008 after the first permits were issued by the government of

Saskatchewan. Therefore, in his submission, the limited partnership used its interest in the Applications in carrying on an active business from December 7, 2007 to March 31, 2008.

[29] The Subscription and Roll-over Agreement dated December 7, 2007 is a key document in this case. This agreement provides that the limited partnership subscribed for and agreed to purchase from Devonian 999 shares for the total subscription price of $675,000. Article 2.2 of this agreement provides that:

> The Subscription Price shall be paid and satisfied by [the limited partnership]:
>
> (a) transferring to [Devonian] on the Closing Date all Permits that have been issued to it on or prior to the Closing Date and all Applications that are then outstanding but in respect of which Permits have not yet been issued as of the Closing Date; and
>
> (b) performing and/or providing, or at the expense of the [limited partnership] engaging geologists, engineers, surveyors, lawyers, accountants and other service providers to perform and/or provide, all engineering, geological and/or other work, studies, reports, surveys, information and other services reasonably necessary or desirable in connection with the preparation and/or filing of the Applications or otherwise necessary or desirable to obtain the Permits and all other services reasonably necessary or desirable in connection with the incorporation and organization of [Devonian] and/or the administration of the business and affairs of [Devonian] pending the Closing Date,
>
> all of which Applications and Permits and the benefit of all of which services are hereafter referred to collectively as the "**Assets**" or the "**Purchased Assets**", it being acknowledged and agreed to by the parties that the value of the said Purchased Assets is not less than the Subscription Price.
>
> (emphasis in original)

[30] "Closing Date" is defined in Article 1.1 of this agreement as "the date that the first of the Permits are issued or such other date as may be mutually agreed to by the parties". Don Gillen submitted, in paragraph 66 of his memorandum, that "[t]he Purchased Assets are only determinable on the Closing Date as defined in Section 2.2 [*sic*]" and that the Closing Date was only when the first permit was issued by the government of Saskatchewan on March 31, 2008. He submitted that the issuance of the first permit was a "condition precedent" to the transfer of any assets from the limited partnership to Devonian.

[31] The linking of the Closing Date to the issuance of the first permit is consistent with the first part of the definition of Closing Date. However, as provided in the definition of Closing Date, the parties could agree to another date. Don Gillen signed the Subscription and Roll-over Agreement as the President of Devonian and also as the President of Kinderock. Since he was the President of both parties to this agreement, presumably he could also agree on behalf of both parties to a different Closing Date.

[32] Assuming that the Closing Date was the date that the first permit was issued (March 31, 2008), these provisions suggest that any outstanding Applications would not be transferred until then and, therefore, the limited partnership would retain whatever interest it had in the Applications until March 31, 2008.

[33] However, this position is inconsistent with Article 2.3 of the Subscription and Roll-over Agreement and with various other documents that are part of the record.

A. *Article 2.3 of the Subscription and Roll-over Agreement*

[34] Article 2.3 of the Subscription and Roll-over Agreement provides that:

> As and from the date hereof and until the Closing Date the [limited partnership] shall hold, and hereby acknowledges and declares that it does hold, the Applications and all other Purchased Assets that now exist or hereafter arise from the performance of its obligations under Section 2.2 for the benefit of and as trustee and agent for [Devonian] and that the [limited partnership] has no right, title or interest in any of such Purchased Assets except the right to receive the Purchased Shares in accordance with the terms and conditions of this Agreement and the [limited partnership] further acknowledges and agrees that, acting as such trustee and agent, it shall hold legal title to the Purchased Assets subject to the direction of [Devonian] as the principal and beneficial owner thereof and it shall not in any way convey, charge or otherwise encumber or deal with the Purchased Assets except in accordance with the directions of [Devonian] and it shall convey, charge or otherwise encumber or deal with the Purchased Assets as directed by [Devonian].
>
> (emphasis added)

[35] Purchased Assets, as defined in Article 2.2, consist of all permits issued on or before the Closing Date, all outstanding Applications and certain services. At any moment in time, the parties could determine what permits had then been issued and which Applications were then outstanding. As of December 7, 2007, no permits had been issued and no services would have been performed by the limited partnership (which was only formed on that day). Therefore, as of that date, the only assets that existed and which were to be conveyed by the limited partnership to Devonian were the Applications.

[36] Article 2.3 specifically identifies the Applications as assets that are being held in trust for Devonian. The same two parties who agreed that the Closing Date was either the date that the first permit is issued or such other date as may be mutually agreed to by them, also agreed that, as and from the date of the agreement (December 7, 2007), the limited partnership was holding the Applications in trust for Devonian and that the limited partnership had no right, title and interest in the Purchased Assets, "except the right to receive the Purchased Shares".

[37] Article 2.3 also provides that the limited partnership is holding "all other Purchased Assets that now exist or hereafter arise from the performance of its obligations under Section 2.2 for the benefit of and as trustee and agent for" Devonian. This reference to holding any Purchased Assets that may arise after December 7, 2007 in trust for Devonian, further contradicts the position that no assets were transferred by the limited partnership to Devonian until March 31, 2008.

B. *Article 2.9 of the GDC Potash Holdings Limited Partnership agreement*

[38] Don Gillen submits that Article 2.3 of the Subscription and Roll-over Agreement is insufficient to convey any interest in the Applications from the limited partnership to Devonian as of December 7, 2007. However, it is important to note that the Applications were made by Kinderock before the limited partnership was formed. It was only after the Applications had been made that the structure of using Devonian to acquire the permits and having the shares of Devonian held by the limited partnership (with the three family trusts as limited partners) was agreed upon.

[39] There is no rollover or transfer agreement or any election form in the record related to the transfer of assets from Kinderock to the limited partnership. When the Tax Court Judge raised the issue of the lack of documentation related to this transfer, the only document identified by counsel was Article 2.9 of the GDC Potash Holdings Limited Partnership agreement. This transfer of assets from Kinderock to the limited partnership is critical since these are the assets that Don Gillen is claiming were being used by the limited partnership in carrying on an active business and then transferred to Devonian. Article 2.9 of the GDC Potash Holdings Limited Partnership agreement provides that:

> The Partners agree that the Partnership shall be completely bound by any contract entered into for the benefit of or in relation to the Partnership prior to the date hereof and/or prior to the Partnership being duly registered as a limited partnership under the *Registration Act*, in the same manner as if such contracts had been entered into by the Partnership itself. The Partners further agree that the liabilities and expenses of the Partnership shall include all liabilities and expenses incurred in relation to activities undertaken for the benefit of the Partnership prior to the date hereof and/or prior to the Partnership being duly registered under the *Registration Act*.
>
> Without limiting the generality of the foregoing, the Partners acknowledge and agree that:
>
> (a) the Applications were made by the General Partner on behalf of and for the benefit of the Partnership and the General Partner shall hold, and hereby acknowledges and declares that it does hold, the Applications and all rights and interest therein or to be derived therefrom for the benefit of and as trustee and agent for the Partnership (subject however to the provisions of the Subscription and Roll-over Agreement);
>
> (b) the General Partner is entitled to be reimbursed for all costs and expenses incurred by it in connection with the Applications or otherwise relating to the lands covered by such Applications in priority to any distributions of Income or Net Cash Receipts to the Limited Partners hereunder; and
>
> (c) the General Partner does not and shall not have or retain any rights or interests in or derived from the Applications in its

> own corporate capacity other than the right to be reimbursed for the costs and expenses as aforesaid.

(emphasis added)

[40] The language used in Article 2.9 with respect to the General Partner declaring that it is holding the Applications "for the benefit of and as trustee and agent for the Partnership" is identical to the language used in Article 2.3 of the Subscription and Roll-over Agreement with respect to the limited partnership holding the Applications "for the benefit of and as trustee and agent for [Devonian]".

[41] Since the only documentation that is in the record which relates to the transfer of assets from Kinderock to the limited partnership is Article 2. 9 of the GDC Potash Holdings Limited Partnership agreement, Don Gillen must be relying on this wording to confirm that the beneficial interest in the Applications was conveyed from Kinderock to the limited partnership. Since this language is being used to support this transfer, the same language would confirm a transfer of the beneficial interest from the limited partnership to Devonian as of December 7, 2007. The two provisions (Article 2.9 of the GDC Potash Holdings Limited Partnership agreement and Article 2.3 of the Subscription and Roll-over Agreement) cannot be otherwise reconciled.

C. *Applicable Provincial Regulations*

[42] Don Gillen also argued, in support of his position that Article 2.3 of the Subscription and Roll-over Agreement did not convey any interest in the Applications to Devonian, that the applicable provincial regulations related to the Applications do not allow for a transfer of the

Applications. Therefore, no interest could be transferred from the limited partnership to Devonian until the Permits were issued. However, this argument does not assist him. This same restriction would apply to any purported transfer of an interest in the Applications from Kinderock to the limited partnership. Either a beneficial interest in the Applications could be transferred or it could not. If a beneficial interest could be transferred from Kinderock to the limited partnership before any permit is issued, such beneficial interest could also be transferred from the limited partnership to Devonian. If a beneficial interest in the Applications could not be transferred, then it could also not be transferred from Kinderock to the limited partnership, and the limited partnership would not have acquired any assets from Kinderock. This would not assist Don Gillen in establishing that the limited partnership transferred all or substantially all of its assets that it was using in carrying on an active business to Devonian as the limited partnership would not have had any assets that it was using in carrying on active business.

[43] If the transactions are viewed as only the permits being transferred from Kinderock to the limited partnership and then by the limited partnership to Devonian, again the permits would not be used in an active business being carried on by the limited partnership as they would be transferred immediately upon being received by the limited partnership. The documents for the transfer of the permits also only show a transfer from Kinderock to Devonian. There is no indication on the transfer form that the permits were transferred from Kinderock to the limited partnership and then from the limited partnership to Devonian.

D. *Article 4.14 of the Option to Purchase Shares*

[44] To further illustrate the inconsistency between the documents and the position of Don Gillen that the limited partnership, and not Devonian, held the beneficial interest in the Applications from December 7, 2007 until March 31, 2008, Article 4.14 of the Option to Purchase Shares among Don Gillen, Kinderock and the numbered company provides that:

> The only assets of [Devonian] are the Permit Applications. [Devonian] is the beneficial owner of such Permit Applications and as at the Closing Date shall be both the legal and beneficial owner of such Permit Applications (or of the Permits issued pursuant thereto), free and clear of all charges, demands, encumbrances or liens whatsoever.
>
> (emphasis added)

[45] "Permit Applications" are defined in the Option to Purchase Shares as follows:

> "Permit Applications" means those applications, as more fully described in Schedule A hereto, made by Kinderock to the Saskatchewan Government for the issue of the Permits.

[46] The representation that Devonian was, as of the date of the Option to Purchase Shares (February 15, 2008), the beneficial owner of the permit applications is inconsistent with Don Gillen's position that as of that date, the limited partnership was the beneficial owner of such applications. There is also no indication that Kinderock was acting as general partner of the limited partnership in relation to such Applications.

E. *Election Form Related to the Transfer of Assets of Devonian*

[47] Another inconsistency appears in the election form related to the transfer of assets by the limited partnership to Devonian. This form relates to the transfer of permits and Applications to Devonian. It indicates that these were transferred by the limited partnership to Devonian on March 31, 2008. The form, however, states that the fair market value of the transferred property was $675,000. As of March 31, 2008, six of the permits had been issued by the government of Saskatchewan and there was an option to purchase the shares of Devonian for $15 million. This option would become an agreement to purchase the shares once all of the permits were issued (other than the permit for the Application filed in February 2008). Since over half of the permits were issued as of the time that the election was being made, it is far from clear why the fair market value of the transferred property would have been $675,000 as of that time.

[48] The Tax Court Judge found that the $675,000, which is the subscription price as set out in the Subscription Agreement dated December 7, 2007, was determined by Mr. Carson (a chartered accountant) "on the basis of the money spent on the Purchased Applications and on acquiring other assets and on his estimate of the economic value of the Purchased Applications and Purchased Permits on December 7, 2007" (reasons, para. 48). Using the value determined as of December 7, 2007 is consistent with the beneficial interest in the Applications being transferred on December 7, 2007. It is inconsistent with 6 issued permits and the remaining Applications being transferred on March 31, 2008, after an offer of $15 million for the shares of Devonian had been received from an arm's length third party.

F. *Conclusion*

[49] There are too many inconsistencies in the documents to support a finding that the Tax Court Judge committed a palpable and overriding error in determining that the limited partnership transferred its beneficial interest in the Applications to Devonian on December 7, 2007. By making this finding and accepting that the shares of Devonian were not issued until March 31, 2008, it simply means that the limited partnership paid the subscription price for these shares almost four months before the shares were issued. While certain corporation statutes prohibit a corporation from issuing shares before payment is received (see for example subsections 25(3) and (5) of *The Business Corporations Act*, R.S.S. 1978, c. B-10, s. 25) there is no prohibition on a corporation receiving payment for shares well in advance of the shares being issued.

[50] Near the end of his reasons, the Tax Court Judge also referred to the "relation-back" theory. As he noted in paragraph 124 of his reasons, he had found that the limited partnership had transferred beneficial interest in the applications on December 7, 2007, without regard to the "relation-back" theory. Since the Tax Court Judge did not make a palpable and overriding error in finding, based on his review of the contracts and the other evidence, that the beneficial ownership in the assets was transferred as of December 7, 2007, in my view it is not necessary to address his comments on the "relation-back" theory and I would decline to do so.

[51] As a result, Don Gillen has failed to establish that the Tax Court Judge committed any error in making his finding that the beneficial interest in the Applications was transferred by the limited partnership to Devonian on December 7, 2007. Since the only interest that the limited partnership had (or could have had) on December 7, 2007 was a beneficial interest in the Applications (since, as noted by Don Gillen, the Applications could not have been transferred to the limited partnership), the limited partnership, after it transferred its beneficial interest in these assets to Devonian, did not have any other assets that it could have used in an active business.

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

"Wyman W. Webb"
J.A.

“I agree
D. G. Near J.A.”

“I agree
Judith Woods J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED AUGUST 30, 2017, CITATION NO. 2017 TCC 163 (DOCKET NUMBER 2014-2991(IT)G

DOCKET:	A-276-17
STYLE OF CAUSE:	DON GILLEN v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	NOVEMBER 5, 2018
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NEAR J.A. WOODS J.A.
DATED:	APRIL 3, 2019

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