

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20200123**

**Docket: A-272-18**

**Citation: 2020 FCA 21**

**CORAM: DAWSON J.A.  
STRATAS J.A.  
WOODS J.A.**

**BETWEEN:**

**PANGAEA ONE ACQUISITION  
HOLDINGS XII S.À.R.L.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on January 22, 2020.

Judgment delivered at Toronto, Ontario, on January 23, 2020.

**REASONS FOR JUDGMENT BY:**

**WOODS J.A.**

**CONCURRED IN BY:**

**DAWSON J.A.  
STRATAS J.A.**

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**Appellant**

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**REASONS FOR JUDGMENT**

**WOODS J.A.**

[1] The appellant, Pangaea One Acquisition Holdings XII S.À.R.L., appeals from a judgment of the Tax Court of Canada (2018 TCC 158, Smith J.) that upheld an assessment of tax under Part XIII of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.).

[2] Pangaea is a company incorporated under the laws of Luxembourg and is a non-resident of Canada.

[3] In 2013, Telus Communications Inc. offered to purchase all the shares of Public Mobile Holdings Inc. At the time, the shares were owned by three shareholders, one of which was Pangaea. Pursuant to a unanimous shareholders' agreement, Pangaea had a veto right such that the other shareholders could not sell their shares without Pangaea's consent.

[4] Pangaea made it clear that it was not willing to sell at the price offered. In order to induce Pangaea to accept the offer, another shareholder, Thomvest Seed Capital Inc., provided a payment to Pangaea pursuant to a letter agreement. Under the agreement, Thomvest paid \$3,000,000 to Pangaea in return for Pangaea's agreement to execute a proposed share purchase agreement with Telus. In the share purchase agreement, the three shareholders of Public Mobile would each agree to sell its shares to Telus. Shortly after the letter agreement with Thomvest was signed, the share purchase agreement was executed.

[5] Thomvest withheld Part XIII tax on the \$3,000,000 payment to Pangaea. Pangaea sought a refund of the tax from the Minister of National Revenue which was denied. The Minister also issued an assessment of the tax to Pangaea pursuant to subsection 227(7) of the Act. Pangaea appealed from this assessment to the Tax Court.

[6] The Minister's assessment was made on the basis that the \$3,000,000 payment was in respect of a restrictive covenant which was subject to Part XIII tax by virtue of subsection

56.4(2) and paragraph 212(1)(i) of the Act. The term “restrictive covenant” is defined in subsection 56.4(1) of the Act:

**restrictive covenant**, of a taxpayer, means an agreement entered into, an undertaking made, or a waiver of an advantage or right by the taxpayer, whether legally enforceable or not, that affects, or is intended to affect, in any way whatever, the acquisition or provision of property or services by the taxpayer or by another taxpayer that does not deal at arm’s length with the taxpayer, other than an agreement or undertaking

(a) that disposes of the taxpayer’s property; or

(b) that is in satisfaction of an obligation described in section 49.1 that is not a disposition except where the obligation being satisfied is in respect of a right to property or services that the taxpayer acquired for less than its fair market value.

**clause restrictive** En ce qui concerne un contribuable, accord, engagement ou renonciation à un avantage ou à un droit, ayant force exécutoire ou non, qui est conclu, pris ou consenti par lui et qui influe, ou vise à influencer, de quelque manière que ce soit, sur l’acquisition ou la fourniture de biens ou de services par lui ou par un autre contribuable avec lequel il a un lien de dépendance, à l’exception d’un accord ou d’un engagement qui, selon le cas :

a) dispose des biens du contribuable;

b) a pour objet l’exécution d’une obligation visée à l’article 49.1 qui ne constitue pas une disposition, sauf si l’obligation se rapporte à un droit sur des biens ou des services que le contribuable a acquis pour une somme inférieure à leur juste valeur marchande.

[7] The Tax Court concluded that the letter agreement was a restrictive covenant, as defined, and therefore the payment made under it was subject to tax under paragraph 212(1)(i) of the Act.

[8] In this Court, Pangaea submits that the arrangement did not come within the “restrictive covenant” definition because it did not affect, or intend to affect, in any way whatever, the provision of property by Pangaea. There are two parts to this submission.

[9] First, Pangaea submits that the Tax Court erred in directing its focus to what the letter agreement affected. Pangaea suggests that the Court should have focussed instead on Pangaea's waiver of its veto right under the unanimous shareholders' agreement. It is submitted that this waiver did not affect the provision of property by Pangaea and therefore did not fall within the definition of "restrictive covenant."

[10] The Tax Court did not err in directing its focus to the letter agreement. The relevant question is whether the \$3,000,000 payment to Pangaea is "in respect of a restrictive covenant" (subsection 56.4(2) and paragraph 212(1)(i) of the Act). Since the \$3,000,000 payment was made under the letter agreement, it was not an error for the Tax Court to focus on the terms of that agreement. The letter agreement provides that the \$3,000,000 is paid for Pangaea's execution of the share purchase agreement with Telus. The letter agreement does not refer to Pangaea's veto right under the unanimous shareholders' agreement. Accordingly, the Tax Court did not err in focussing on the actual terms of the letter agreement.

[11] Second, Pangaea submits that the definition of "restrictive covenant" is properly interpreted to include only non-compete agreements. It is suggested that this is supported by a textual, contextual and purposive interpretation of the phrase "affects, or is intended to affect, in any way whatever, the ... provision of property ... by the taxpayer." This is a question of law for which the applicable standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[12] In my view, none of the text, context or purpose of the legislation supports Pangaea's submission.

[13] As for the text, the language used clearly applies more broadly than to non-compete agreements. The provision specifies that a restrictive covenant includes an instrument "intended to affect, in any way whatever" the disposition of property by a taxpayer. Such inclusive language tends to rebut the contention that the language is meant to apply only to non-compete agreements.

[14] As for the context, Pangaea submits that a textual interpretation of section 56.4 of the Act leads to certain results that were unintended by Parliament. Reference was made to circumstances involving leasehold improvements and section 42 of the Act. This submission does not support the very narrow interpretation that Pangaea suggests. Even if a textual interpretation of section 56.4 gives rise to some applications of the provision that were not intended by Parliament, this is not a sufficient reason to conclude that the provision only applies to non-compete agreements.

[15] As for a purposive interpretation, Pangaea refers to comments made by the Minister of Finance when the provision was introduced in 2003, and comments by a Department of Finance official when appearing before a Senate Committee in 2008. Neither of these comments support the narrow interpretation that is suggested by Pangaea.

[16] The interpretation of the term “restrictive covenant” suggested by Pangaea is rejected. In my view, the letter agreement between Pangaea and Thomvest is a “restrictive covenant,” as defined, because the agreement is intended to affect the provision of property by Pangaea by having an effect on its disposition. The intention of the letter agreement is to require Pangaea to sell its shares of Public Mobile by executing the share purchase agreement with Telus. In this way, the agreement is intended to affect the disposition by Pangaea of its shares of Public Mobile.

[17] I would dismiss the appeal with costs fixed in the amount of \$1,500 inclusive of disbursements.

“Judith Woods”

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J.A.

“I agree  
Eleanor R. Dawson J.A.”

“I agree  
David Stratas J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-272-18

**STYLE OF CAUSE:** PANGAEA ONE ACQUISITION  
HOLDINGS XII S.À.R.L. v. HER  
MAJESTY THE QUEEN

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 22, 2020

**REASONS FOR JUDGMENT BY:** WOODS J.A.

**CONCURRED IN BY:** DAWSON J.A.  
STRATAS J.A.

**DATED:** JANUARY 23, 2020

**APPEARANCES:**

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