Federal Court of Appeal  Cour d'appel fédérale

Date: 20201119

Docket: A-354-19

Citation: 2020 FCA 201

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

BETWEEN:

KEYBRAND FOODS INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on September 17, 2020.

Judgment delivered at Ottawa, Ontario, on November 19, 2020.

REASONS FOR JUDGMENT BY: WEBB J.A.

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

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from a decision of the Tax Court (2019 TCC 161) which dismissed the appeal of Keybrand Foods Inc. (Keybrand) from the reassessment denying its claim for an allowable business investment loss (ABIL) and its claim for a deduction for a certain interest expense in its taxation year ending April 24, 2011. Keybrand had also been reassessed to deny a claim for a capital loss but it was successful before the Tax Court in appealing that issue and the Crown did not appeal that finding by the Tax Court.

[2] The main issues in this appeal are whether the Tax Court Judge erred in finding that Keybrand and Vidabode Group Inc. (Vidabode) were not dealing with each other at arm's length for the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) when Keybrand acquired shares in Vidabode in December 2010, and in finding that Keybrand had not borrowed the money, that was used to acquire these shares in Vidabode, for the purpose of earning income.

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

I. Background

[4] Keybrand is a wholly owned subsidiary of B.W. Strassburger Ltd. (BWS). Bernhardt Strassburger and his siblings own BWS. BWS and Keybrand are active in the restaurant and food service industry.

[5] In 2005, one of Mr. Strassburger's siblings suggested to Mr. Strassburger that they should invest in Vidabode, which was a Nova Scotia company that was incorporated in 2005. Vidabode had developed a new concrete product called Vidacrete, as well as a production system for Vidacrete. Vidacrete was to be used in the construction of houses. The business plan was "to sell master licensing agreements for the production plant technology for $7.5 million dollars and collect royalties per cubic metre of cement produced" (paragraph 15 of the Tax Court Judge's reasons). Although Mr. Strassburger was not in favour of investing in this company, he was outvoted by his siblings.

[6] The first investment in Vidabode was made in 2006 by Twincorp Inc., a company wholly owned by Mr. Strassburger. In the following years, BWS acquired common and non-voting preferred shares of Vidabode and also loaned money to Vidabode. Dorothy Strassburger (Mr. Strassburger's mother) also acquired non-voting preferred shares of Vidabode. However, Keybrand did not acquire any shares of Vidabode until late 2010.

[7] To help finance the operations of Vidabode and certain capital acquisitions, Mr. Strassburger had arranged for GE Capital to provide financing to Vidabode. As part of this arrangement, Keybrand, BWS, and another company owned by the Strassburger family guaranteed the debt to GE Capital.

[8] Vidabode struggled financially. Between 2005 (its first year of operation) and 2009 (its last year prior to the share purchase in issue), Vidabode incurred the following losses:

Year Ending	**Net Loss**
December 31, 2005	($152,091)
December 31, 2006	($443,407)
December 31, 2007 (restated)	($1,116,253)
December 31, 2008	($7,117,929)
December 31, 2009	($8,622,524)
Total:	($17,452,204)

[9] The financial statements for the year ended December 31, 2009 indicate that the accumulated deficit, as of that time, was $17,708,743. Sometime prior to the summer of 2010, it became clear that Vidabode would not be able to meet its obligations to GE Capital. As of the end of 2009, the amount owed to GE Capital was in excess of $15 million. A balloon payment of approximately $3 million was due in September 2010. Sometime prior to September 2010,

Mr. Strassburger's siblings informed him that the funds to make this balloon payment were not to be provided by either BWS or Keybrand. At the directors' meeting of Vidabode held on August 27, 2010, Mr. Strassburger raised the issue of how Vidabode would be able to make this balloon payment. No solution was found and Vidabode defaulted in making this balloon payment. GE Capital called all of its loans.

[10] In order to pay the amount outstanding to GE Capital, Keybrand borrowed $14,452,515 from TD Bank on or about December 29, 2010. This money was used to pay the subscription price payable to Vidabode for the shares issued to Keybrand. Vidabode in turn used the funds to pay its debt to GE Capital.

[11] According to the shareholders' register for Vidabode, a total of 19,343,493 (16,448,428 + 2,895,065) common shares were issued to Keybrand on December 22, 2010. This issue date of December 22, 2010 was, however, one week before Keybrand borrowed the money from TD Bank to pay for these shares. While the effect of subsection 25(3) and (5) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, is that shares of a CBCA corporation cannot be issued in exchange for a promissory note or a promise to pay, there is no similar restriction in the *Companies Act*, R.S.N.S. 1989, c.81. This could explain why no issue was raised concerning the validity of the issuance of the shares on December 22, 2010.

[12] There was conflicting evidence concerning the number of common shares of Vidabode that were owned by BWS prior to December 22, 2010. At the meeting of the directors of Vidabode held on December 22, 2010, Mr. Strassburger indicated, more than once, that BWS

already had a controlling interest in Vidabode. The Tax Court Judge, in a lengthy footnote, referred to this and ultimately concluded that prior to Vidabode issuing common shares to Keybrand in December 2010, BWS owned approximately 41% of the common shares of Vidabode. The Crown is not challenging this finding by the Tax Court Judge. The other common shareholders of Vidabode were Atlantic Aboriginal Capital Inc. (AACI) and David B. MacDonald. There was no suggestion that Keybrand was not dealing at arm's length with AACI and David B. MacDonald.

[13] The Tax Court Judge described the issuance of the shares of Vidabode to Keybrand as follows:

> [41] Once the TD financing was complete Mr. Strassburger started looking at what was the best way to pay off GE Capital. Based on advice from legal, accounting and tax professionals, he was told that [Keybrand] should take shares. [Keybrand] subscribed, on or about 22 December 2002 [*sic*], to 19,343,493 common shares of Vidabode at a par value of one dollar each. On or about 29 December 2010, [Keybrand] borrowed $14,452,515 that were used to buy 14,452,515 of the shares.
>
> [footnote references omitted]

[14] The Tax Court Judge referred to the shares as having a par value of one dollar each. The *Companies Act* does contemplate that the authorized capital could consist of shares with a par value (section 10). However, the financial statements for 2009 indicate that the common shares did not have a par value. The same financial statements also indicate that the authorized capital, in relation to common shares, consisted of 1,000 common shares and that 10,000,000 common shares were issued and outstanding. Whether Vidabode had the necessary authorized capital to issue the common shares that were issued as of December 31, 2009 or the additional 19,343,493

common shares issued in December 2010 is not in issue in this appeal. In any event, the reference to the par value of one dollar each should presumably be read as a reference to a subscription price of one dollar each.

[15] As noted by the Tax Court Judge in a footnote, the parties agreed on the total number of shares issued to Keybrand and the total amount that Keybrand had borrowed to acquire the shares. However, in its tax return for the year ending April 24, 2011, Keybrand claimed an ABIL of $9,667,636 (one-half of $19,335,272). No explanation was provided for the difference between the amount claimed and what would have been claimed if the adjusted cost base of the 19,343,493 shares acquired by Keybrand would have been $1 per share or $19,343,493 in total.

[16] In any event, assuming that 19,343,493 common shares of Vidabode were issued to Keybrand for $1 per share, the only consideration identified by the Tax Court Judge in paragraph 41 of his reasons that was paid by Keybrand to acquire shares was the $14,452,515 that Keybrand had borrowed from TD Bank to acquire 14,452,515 shares. The Tax Court Judge, in footnote 49, notes that "[…] I am satisfied that when a party borrows over $14 million and converts almost $5 million in pre-existing debt to acquire shares with a fair market value of nil that is certainly an indicia that a transaction is not at arm's length". However, it is far from clear from the record whether the pre-existing debt that was used to acquire the shares of Vidabode was debt owing to Keybrand or BWS.

[17] The only reference to any amount owing by Vidabode to Keybrand, is the reference to a $500,000 amount that Keybrand paid on behalf of Vidabode in 2010. Vidabode issued a

promissory note to Keybrand for this amount that included interest at 10% per annum. This $500,000 amount was the subject of a claim for a capital loss — it was not included as part of the ABIL claim. The claim for the capital loss related to the $500,000 loan (an allowable capital loss of $250,000) was allowed by the Tax Court and the Crown has not appealed that finding.

[18] There are several references in the Tax Court Judge's reasons to amounts advanced by BWS. The financial statements for Vidabode as of December 31, 2009 indicate that, as of that time, BWS held promissory notes totaling $6,441,394 payable by Vidabode. It is also clear from Mr. Strassburger's testimony that he would often refer to Keybrand and BWS without distinguishing between the two corporate entities. Therefore, it is far from clear whether any amounts were owing by Vidabode to Keybrand (rather than BWS) in December 2010 that could have been used by Keybrand to acquire shares of Vidabode and, as a result, whether Keybrand paid any more than $14,452,515 to acquire the shares of Vidabode.

[19] The Tax Court Judge also found that, prior to the directors' meeting held on December 22, 2010, Keybrand's advisors were considering and preparing for the possibility of the insolvency of Vidabode. Mr. Strassburger sent a letter to BDO Canada Limited appointing BDO Canada Limited as receiver and manager under the general security agreement held by BWS for the amount owing by Vidabode to BWS. The letter was dated December 15, 2010 but not signed until January 5, 2011. BDO Canada Limited became the receiver and manager of Vidabode on or about April 14, 2011 and Vidabode filed for bankruptcy on May 6, 2011.

II. Decision of the Tax Court

[20] There are three issues that were raised before the Tax Court. The most significant issue was related to the claim for an ABIL. The two other issues related to the claim by Keybrand for a deduction for the interest payable in relation to the amount that Keybrand borrowed to acquire shares of Vidabode in December 2010, and the claim by Keybrand for a capital loss in relation to the amount of $500,000 that Keybrand had paid on behalf of Vidabode in 2010.

[21] The only issue that was raised before the Tax Court in relation to the ABIL was whether Keybrand was dealing at arm's length with Vidabode. The parties had agreed, prior to the Tax Court hearing, that the fair market value of the shares that were acquired by Keybrand in December 2010 was nil as of that time. If Keybrand and Vidabode were not dealing with each other at arm's length, Keybrand would be deemed to have acquired the shares at that amount. If the adjusted cost base of the shares was nil, there would be no capital loss and hence no ABIL on the disposition of these shares.

[22] The Tax Court Judge found that Keybrand and Vidabode were not dealing with each other at arm's length and, therefore, no ABIL was realized by Keybrand.

[23] With respect to the interest on the money borrowed by Keybrand to acquire the shares of Vidabode, the Tax Court Judge found that this loan was not incurred for the purpose of earning income and, as a result, Keybrand could not claim a deduction for this interest.

[24] With respect to the $500,000 loan, as noted above, Tax Court Judge found that Keybrand could claim a capital loss in relation to this loan. The capital loss arising from the disposition of this loan is not an issue in this appeal.

III. Issues and standards of review

[25] The issues in this appeal are whether the Tax Court Judge erred in finding that Vidabode and Keybrand were not dealing with each other at arm's length, and whether the Tax Court Judge erred in finding that Keybrand did not borrow the funds, that were used to acquire the shares of Vidabode, for the purpose of earning income.

[26] To the extent that these issues raise questions of law, the standard of review is correctness and to the extent that these issues raise questions of fact or questions of mixed fact and law, for which there is no extricable question of law, the standard of review is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33).

IV. Analysis

A. *ABIL – Were Keybrand and Vidabode dealing with each other at arm's length?*

[27] This appeal arises as a result of a claim for an ABIL by Keybrand in its tax return for its taxation year ending April 24, 2011. An ABIL is one-half of the business investment loss (para. 38(c) of the Act) from the disposition of property and a business investment loss is a certain type

of a capital loss (para. 39(1)(c) of the Act). A business investment loss (and hence an ABIL) is only available in relation to a capital loss realized as a result of a disposition of shares of the capital stock of a small business corporation (as defined in subs. 248(1) of the Act), or a disposition of a debt owing by a current or former small business corporation, as provided in paragraph 39(1)(c) of the Act. If the taxpayer is a corporation, the debt must be owing to it by another corporation with which it deals at arm's length (subpara. 39(1)(c)(iv) of the Act).

[28] In filing its tax return for its taxation year ending April 24, 2011, Keybrand did not indicate whether the ABIL that was being claimed was in relation to debt or shares. However, the case has proceeded on the basis that the ABIL was claimed in relation to the shares of Vidabode that were acquired by Keybrand in December 2010. In order to realize a capital loss (and hence a business investment loss), there would have to be a disposition by Keybrand of the shares of Vidabode. According to the shareholders' register for Vidabode, Keybrand did not dispose of the shares of Vidabode. Therefore, Keybrand must have been relying on a deemed disposition of these shares under subsection 50(1) of the Act.

[29] Since Vidabode did not declare bankruptcy until after the end of the taxation year of Keybrand ending on April 24, 2011, presumably Keybrand was claiming that the conditions as set out in subparagraph 50(1)(b)(iii) of the Act were satisfied on April 24, 2011 and that it made the appropriate election in its tax return. There is no discussion in the Tax Court reasons of the disposition of property that gave rise to the ABIL claim. While there is no dispute that there was a deemed disposition of shares of Vidabode by Keybrand, the conditions that must have been satisfied for this deemed disposition to have occurred are relevant in determining whether the

amount borrowed by Keybrand to acquire the shares of Vidabode was borrowed for the purpose of earning income as discussed below in relation to the interest deductibility issue.

[30] The Tax Court reasons, in relation to the ABIL claim, focus only on the issue of whether Keybrand and Vidabode were dealing with each other at arm's length when the shares of Vidabode were acquired in December 2010.

[31] Whether Vidabode and Keybrand were dealing with each other at arm's length in December 2010 is relevant as a result the provisions of paragraph 69(1)(a) of the Act:

69 (1) Except as expressly otherwise provided in this Act,	69 (1) Sauf disposition contraire expresse de la présente loi :
(a) where a taxpayer has acquired anything from a person with whom the taxpayer was not dealing at arm's length at an amount in excess of the fair market value thereof at the time the taxpayer so acquired it, the taxpayer shall be deemed to have acquired it at that fair market value;	a) le contribuable qui a acquis un bien auprès d'une personne avec laquelle il avait un lien de dépendance pour une somme supérieure à la juste valeur marchande de ce bien au moment de son acquisition est réputé l'avoir acquis pour une somme égale à cette juste valeur marchande;

[32] As noted above, the parties agreed that the fair market value of the common shares of Vidabode in December 2010 was nil. Therefore, if Vidabode and Keybrand were not dealing with each other at arm's length when the shares were acquired, Keybrand would be deemed to have acquired the shares at this amount and not at the amount that it actually paid. Since it would be deemed to have acquired the shares at this amount, the adjusted cost base of these shares would be nil. As a result, there would be no capital loss (and hence no business investment loss) realized on a subsequent disposition of those shares.

[33] The general rule for determining if two or more persons are dealing with each other at arm's length is set out in subsection 251(1) of the Act:

251. (1) For the purposes of this Act,	251. (1) Pour l'application de la présente loi :
(a) related persons shall be deemed not to deal with each other at arm's length;	a) des personnes liées sont réputées avoir entre elles un lien de dépendance;
(b) a taxpayer and a personal trust (other than a trust described in any of paragraphs (a) to (e.1) of the definition "trust" in subsection 108(1)) are deemed not to deal with each other at arm's length if the taxpayer, or any person not dealing at arm's length with the taxpayer, would be beneficially interested in the trust if subsection 248(25) were read without reference to subclauses 248(25)(b)(iii)(A)(II) to (IV); and	b) un contribuable et une fiducie personnelle (sauf une fiducie visée à l'un des alinéas a) à e.1) de la définition de « fiducie » au paragraphe 108(1)) sont réputés avoir entre eux un lien de dépendance dans le cas où le contribuable, ou une personne avec laquelle il a un tel lien, aurait un droit de bénéficiaire dans la fiducie si le paragraphe 248(25) s'appliquait compte non tenu de ses subdivisions b)(iii)(A)(II) à (IV);
(c) in any other case, it is a question of fact whether persons not related to each other are, at a particular time, dealing with each other at arm's length.	c) dans les autres cas, la question de savoir si des personnes non liées entre elles n'ont aucun lien de dépendance à un moment donné est une question de fait.

[34] In this case, there is no allegation that Keybrand was related to Vidabode for the purposes of the Act. As a result, paragraph 251(1)(c) of the Act is applicable: "it is a question of fact whether persons not related to each other are, at a particular time, dealing with each other at arm's length".

[35] The test of whether two persons are dealing with each other at arm's length applies "at a particular time". The particular time will be determined based on the provision of the Act that

requires this determination. In this case, Section 69 is the relevant provision and it applies "where a taxpayer has acquired anything from a person with whom the taxpayer was not dealing at arm's length at an amount in excess of the fair market value thereof at the time the taxpayer so acquired it". Since the relevant transaction is the acquisition of property, the particular time to determine if Keybrand and Vidabode were dealing with other arm's length would be the time related to the acquisition of this property.

[36] There was very little evidence of any dealings between Keybrand and Vidabode in relation to the acquisition of the shares in issue. At the hearing of this appeal, the parties focused on the Directors' meeting of Vidabode held on December 22, 2010 when the issuance of the shares of Vidabode was first raised by Mr. Strassburger with the other directors of Vidabode. This was also the same day that, according to the shareholders' register for Vidabode, these shares were issued to Keybrand. The parties have not suggested that any other time would be relevant for determining whether Keybrand and Vidabode were dealing with each other at arm's length.

[37] Although Parliament stated that "it is a question of fact", in *RMM Canadian Enterprises Inc. v. Canada*, [1997] T.C.J. No. 302, 97 D.T.C. 302, Justice Bowman, as he then was, noted:

> 33 It is true that a determination whether persons are at arm's length requires that the court make findings of fact, but whether, on the facts, there is in law an arm's-length relationship is necessarily a question of law. Even Parliament which, subject to constitutional limitations, is supreme and has the power to deem cows to be chickens, cannot turn a question of law into a question of fact. All that paragraph 251(1)(b) [now para. 251(1)(c)] means is that in determining whether, as a matter of law, unrelated persons are at arm's length, the factual underpinning of their relationship must be ascertained. The meaning of "arm's length" within the Income Tax Act is obviously a question of law.

[38] This passage was quoted by this Court in *McLarty v. Canada*, 2006 FCA 152, at paragraph 54. However, on appeal to the Supreme Court of Canada (*Canada v. McLarty*, 2008 SCC 26 (*McLarty*)), there is no mention of this passage. In paragraphs 44 and 45 Justice Rothstein, writing on behalf of the majority, simply noted:

> 44 Arm's length is not defined in the *Income Tax Act*. However, s. 251(1) provides:
>
> > (1) For the purposes of this Act,
> >
> > > (a) related persons shall be deemed not to deal with each other at arm's length;
> > >
> > > (b) it is a question of fact whether persons not related to each other were at a particular time dealing with each other at arm's length.
>
> 45 The parties in this case were not related. It is therefore a question of fact whether they were dealing at arm's length.

[39] The reference to a “question of fact” (in paragraph 45 quoted above) appears to simply be a repetition of the words as used in the Act. In my view, it is still necessary to determine the meaning of “dealing at arm’s length” for the purposes of the Act. The meaning of this expression is a question of law, which will require an interpretation of the decisions of the courts that have addressed this issue. The applicable law will then be applied to the facts of a particular situation. The result, in any particular case, will depend significantly on the facts of that case.

[40] The Tax Court Judge began his analysis of the question of whether Keybrand and Vidabode were dealing with each other at arm’s length with a quotation from the decision of the

Supreme Court of Canada in *McLarty*. One of the issues in *McLarty* was whether Mr. McLarty was dealing at arm's length with Compton Resource Corporation.

[41] However, following the reference to *McLarty*, the Tax Court Judge then referred to the decision of this Court in *McGillivray Restaurant Ltd. v. Canada*, 2016 FCA 99, (*McGillivray Restaurant*) (which, in turn, referred to the decision of this Court in *Silicon Graphics Ltd. v. Canada*, 2002 FCA 260 (*Silicon Graphics*)).

[42] The issue in *McGillivray Restaurant* was whether two corporations were associated with each other and, specifically, whether a particular individual had de facto control over a corporation, within the meaning of subsection 256(5.1) of the Act:

> 3 The issue in this appeal is whether, in the years covered by the reassessments, the taxpayer was associated with G.R.R. Holdings Ltd. (GRR) and MorCourt Properties Ltd. (MorCourt) on the basis that an individual, Mr. Gordon R. Howard, who had *de jure* and *de facto* control over GRR and MorCourt, also had *de facto* control over the taxpayer, within the meaning of subsection 256(5.1).
>
> [emphasis added]

[43] Subsection 256(5.1) of the Act states:

(5.1) For the purposes of this Act, where the expression "controlled, directly or indirectly in any manner whatever," is used, a corporation shall be considered to be so controlled by another corporation, person or group of persons (in this subsection referred to as the "controller") at any time where, at	(5.1) Pour l'application de la présente loi, lorsque l'expression « contrôlée, directement ou indirectement, de quelque manière que ce soit, » est utilisée, une société est considérée comme ainsi contrôlée par une autre société, une personne ou un groupe de personnes — appelé « entité dominante » au présent paragraphe

that time, the controller has any direct or indirect influence that, if exercised, would result in control in fact of the corporation, except that, where the corporation and the controller are dealing with each other at arm's length and the influence is derived from a franchise, licence, lease, distribution, supply or management agreement or other similar agreement or arrangement, the main purpose of which is to govern the relationship between the corporation and the controller regarding the manner in which a business carried on by the corporation is to be conducted, the corporation shall not be considered to be controlled, directly or indirectly in any manner whatever, by the controller by reason only of that agreement or arrangement.	— à un moment donné si, à ce moment, l'entité dominante a une influence directe ou indirecte dont l'exercice entraînerait le contrôle de fait de la société. Toutefois, si cette influence découle d'un contrat de concession, d'une licence, d'un bail, d'un contrat de commercialisation, d'approvisionnement ou de gestion ou d'une convention semblable — la société et l'entité dominante n'ayant entre elles aucun lien de dépendance — dont l'objet principal consiste à déterminer les liens qui unissent la société et l'entité dominante en ce qui concerne la façon de mener une entreprise exploitée par la société, celle-ci n'est pas considérée comme contrôlée, directement ou indirectement, de quelque manière que ce soit, par l'entité dominante du seul fait qu'une telle convention existe.
[emphasis added]	[Non souligné dans l'original.]

[44] Subsection 256(5.1) of the Act only applies when the expression "controlled, directly or indirectly in any manner whatever" is used in the Act. This expression is used in the provisions related to the determination of whether one corporation is associated with another corporation (subsection 256(1)) and to determine if a corporation is a Canadian-controlled private corporation (subsection 125(7)) (which was the issue in *Silicon Graphics*). The expression "controlled directly or indirectly in any manner whatever" is not, however, used in section 251 of the Act and, therefore, subsection 256(5.1) of the Act does not apply when the issue is whether, as a question of fact (as stated in paragraph 251(1)(c) of the Act), one person is dealing at arm's length with another.

[45] There is undoubtedly significant overlap between situations in which a person has control in fact of a corporation (as contemplated by subsection 256(5.1) of the Act) and in which a person is not dealing at arm's length with that corporation. In a case where a person is found to have control in fact of a corporation, for the purposes of subsection 256(5.1) of the Act, that same person would probably be found to not be dealing at arm's length with that corporation. However, the purpose and application of a finding that a person has control in fact of a corporation (subs. 256(5.1)) are not the same as the purpose and application of a finding that a person is not dealing at arm's length with that corporation. As well, it would not necessarily follow that a person who is found to not be dealing at arm's length with a corporation would also be found to have control in fact of that corporation as contemplated by subsection 256(5.1) of the Act.

[46] The determination of whether a person has control in fact of a corporation as contemplated by subsection 256(5.1) of the Act is not tied or linked to a particular transaction. Rather it is a more general question of having control of a corporation for the purposes of determining whether two corporations are associated with each other or whether a corporation is a Canadian-controlled private corporation. In contrast, the question of whether a person is dealing at arm's length or non-arm's length with another person (which is not restricted to corporations) for the purposes of section 69, is focused on a particular transaction. For the purposes of section 69, the question is isolated to a particular acquisition and whether a taxpayer has acquired anything from a person with whom the taxpayer was not dealing at arm's length. That the test is only applied at a particular time is reinforced by the wording of paragraph 251(1)(c) of the Act which refers to persons dealing with each other at a particular time.

[47] The question in this case is whether Keybrand was dealing at arm's length with Vidabode when it acquired the shares of Vidabode, and not whether Keybrand controlled, directly or indirectly in any manner whatever, Vidabode, for the purposes of subsection 256(5.1) of the Act. It is important to recognize that a separate and distinct line of cases have addressed the issue of whether two persons are dealing with each other at arm's length. It is those cases that should be relied on in this matter.

[48] As a result, in my view, the Tax Court Judge erred in law in relying on *McGillivray Restaurant*. The relevant case law to determine whether two persons are dealing with each other at arm's length for the purposes of paragraph 251(1)(c) of the Act, is the case law that addresses this issue. The question in this appeal is, therefore, whether the application of the relevant case law to the facts of this case will result in a finding that Keybrand and Vidabode were not dealing with each other at arm's length when Keybrand acquired shares in Vidadode in December 2010.

[49] The issue of whether two persons are dealing with each other at arm's length, as a question of fact, has been the subject of several articles and various cases. There have been at least four articles written for the Canadian Tax Foundation's annual conference on this subject:

- Evelyn P. Moskowitz, "Dealing at Arm's Length: A Question of Fact" in *Report of Proceedings of the Thirty-Ninth Tax Conference, 1987 Conference Report* (Toronto: Canadian Tax Foundation, 1988) 33:1;

- Susan Eng, "The Arm's Length Rules" in *Report of the Proceedings of the Fortieth Tax Conference, 1988 Conference Report* (Toronto: Canadian Tax Foundation, 1989) 13:1;

- Tom Stack, "Arm's Length as a Question of Fact" in *Report of the Proceedings of the Forty-Ninth Tax Conference, 1997 Conference Report* (Toronto: Canadian Tax Foundation, 1998) 16:1; and

- Sandra Mah and Mark Meredith, “Factual Non-Arm’s Length Relationships” in *Report of the Proceedings of the Sixty-Sixth Tax Conference, 2014 Conference Report* (Toronto: Canadian Tax Foundation, 2015) 16:1.

[50] The Supreme Court of Canada in *McLarty* noted that the test for determining whether two persons are dealing with each other at arm’s length was outlined in an Interpretation Bulletin published by the Canada Revenue Agency:

> 62 The Canada Revenue Agency Income Tax Interpretation Bulletin IT-419R2 "Meaning of Arm's Length" (June 8, 2004) sets out an approach to determine whether the parties are dealing at arm's length. Each case will depend on its own facts. However, there are some useful criteria that have been developed and accepted by the courts: see for example *Peter Cundill & Associates Ltd. v. Canada*, [1991] 1 C.T.C. 197 (F.C.T.D.), aff'd [1991] 2 C.T.C. 221 (F.C.A.). The Bulletin provides:
>
> > **22.** [...] By providing general criteria to determine whether there is an arm's length relationship between unrelated persons for a given transaction, it must be recognized that all-encompassing guidelines to cover every situation cannot be supplied. Each particular transaction or series of transactions must be examined on its own merits. The following paragraphs set forth the CRA's general guidelines with some specific comments about certain relationships.
> >
> > **23.** The following criteria have generally been used by the courts in determining whether parties to a transaction are not dealing at "arm's length":
> >
> > > was there a common mind which directs the bargaining for both parties to a transaction;
> > >
> > > were the parties to a transaction acting in concert without separate interests; and
> > >
> > > was there "de facto" control.

[51] It would appear that the first reference by the courts to “de facto” control in the context of whether two persons are dealing with each other at arm’s length, was in *Robson Leather Company Ltd. v. The Minister of National* Revenue, 77 D.T.C. 5106, [1977] C.T.C. 132 (F.C.A.D.) (*Robson Leather*):

> Now, was there any separation of interests as between Robson and Dr. Appel? Eclipse, all the shares of which were beneficially owned by Charles Robson, owned 50% of the issued shares of Appel Process, the other 50% being owned by Appel Consultants Limited. While the exact shareholdings in the latter company is not completely clear from the evidence, it does disclose Dr. Appel was a shareholder and, apparently, a director and that Lorenzen was the accountant, financial advisor, director and secretary of both Appel Process and Appel Consultants Limited prior to October 31, 1964. It also discloses that Appel Process was indebted to the Robson group of companies to the extent of approximately $350,000, that Dr. Appel and his family were without income, that Robson had refused to advance any further monies to Appel Process and that Lorenzen had advised Appel and Appel Consultants Limited that if they were willing to sell their shares in Appel Process he might be able to find a buyer. In all these circumstances, and particularly due to the large debt owing to Robson with little or no prospect of Appel Process ever being in a position to repay it, it does not require a very fertile imagination to see that Robson, to use a colloquialism, was in the driver's seat when his representative, Lorenzen, who was also Appel's representative was given the approval to bargain for the purchase of the Appel Process shares.
>
> Therefore, while Robson did not have voting control, the financial plight of Dr. Appel and his company was such that Robson, who from a practical point of view could be perhaps the only possible purchaser, was in a position to exert the kind of pressure that enabled him to have his will prevail in the business of Appel Process. When the transaction of purchase was completed on October 28, 1964, the interests of Lorenzen being as already found, inseparable from that of Robson, Robson effectively controlled by one means or another, the decision making of both the vendor and purchaser, with the result that the sale of the patent rights to Robson Leather for $500,000 on October 31, 1964 was not a transaction between parties dealing at arms' length.
>
> To put the position in the language of the relevant jurisprudence as cited earlier, the directing mind at the material time, which I take it to be October 31, 1964 when the U.S. patent rights were sold, was Charles N. Robson. He was in the position of having de facto control of both sides of the transaction, which thus was one not made at arms' length.
>
> [emphasis added]

[52] While this Court did refer to “de facto” control, it was simply restating what was said in the previous sentence – that Charles N. Robson was the directing mind of the transactions and hence he had de facto control of both sides of the transaction. There was no distinction drawn between a person being the directing mind of the transaction and the person being in de facto control of the transaction. This was also noted by Evelyn P. Moskowitz in her paper “Dealing at Arm’s Length: a Question of Fact” at pages 33:5 and 33:6 and Tom Stack in his paper “Arm’s Length as a Question of Fact” at page 16:15.

[53] In my view, there is no practical difference between the concepts of de facto control and directing mind, in relation to the determination of whether two persons are dealing with each other at arm’s length. If a person is the directing mind for a particular transaction, that person would also have de facto control of the terms and implementation of that transaction and vice versa.

[54] For our purposes, a comparison of the underlying facts in *Robson Leather* and this case reveals a striking similarity. In *Robson Leather*, there was a substantial debt owing by Appel Process “to Robson with little or no prospect of Appel Process ever being in a position to repay it”. Likewise, in this case, Vidabode was substantially indebted to the companies controlled by the Strassburger family with no means by which it could repay this debt. This debt would be substantially increased if Keybrand or one or more of the other Strassburger companies that had guaranteed the debt to GE Capital had honoured their guarantee.

[55] In *Robson Leather*, "Robson had refused to advance any further monies to Appel Process". In this case, the Strassburger family had strongly indicated that no further funds would be advanced to Vidabode to cover any debts or operating costs (other than the amount to be used to repay GE Capital, which presumably included the missed balloon payment). It was also clear, in this case, that the other shareholders of Vidabode were either not willing or not able to advance any funds to Vidabode. Therefore, the only source of funds to repay GE Capital was Keybrand or one or more of the other Strassburger companies.

[56] As well, when the deal to buy 19,343,493 common shares for $1 per share was discussed at the directors' meeting held on December 22, 2010, Mr. Strassburger responded to the question of how he had arrived at this valuation by stating "[…] just because it was easy to do". Although some questions were raised at this directors' meeting concerning the effect that this issuance of shares would have on the percentage of shares that would be held by AACI, there was no negotiation concerning the price at which the shares would be issued or any other terms related to the issuance of these shares. There were also some discussions concerning whether AACI would be participating in the purchase of shares, but in the end, AACI did not purchase any further shares.

[57] The financial statements for Vidabode for its year ending December 31, 2009 further highlight the degree of dependency of Vidabode on BWS and Keybrand. These statements indicate a liability of $6,441,394 to BWS (who owned 41% of the common shares). By contrast, the amount due to AACI (who owned 34% of the common shares) was only $563,090. There are also two numbered Nova Scotia companies that are identified as "associated companies" and the

total owed to these two companies was $250,043. There is no indication of who owned these companies.

[58] Given the degree of financial dependence of Vidabode on BWS and Keybrand and the lack of any negotiation with respect to the terms and conditions (including the price) related to the share subscription, it is more likely than not that Keybrand controlled both sides of the transaction related to the issue of shares by Vidabode to Keybrand.

[59] That a degree of dependence could support a finding that parties are not dealing with each other at arm's length is also found in *Swiss Bank Corp. et al. v. Minister of National Revenue,* [1974] S.C.R. 1144, 31 D.L.R. (3d) 1 (*Swiss Bank*):

> In my opinion, the interposition of the managing agent and the two depositaries between City Park and the certificate holders does not, despite the regulations, create an arm's length situation between them, within the exception in s.106(1)(b)(iii)(A). City Park owes its very existence to the funds provided by the certificate holders, is without support from any other source and those funds are committed to provide a return only to the certificate holders. In short, City Park is completely a captive to the interests of the certificate holders, acting through professional managers and fiduciaries.

[60] In this case, Vidabode was also completely captive to the interests of Keybrand and BWS. If Keybrand would not have provided the necessary funds for Vidabode to pay GE Capital in December 2010 (or otherwise paid or arranged for the payment of this debt), Vidabode could not have continued to operate.

[61] As well, in *Peter Cundill & Associates Limited v. Her Majesty the Queen*, 91 D.T.C. 5543, [1991] 2 C.T.C. 221 (F.C.A.D.), the Court quoted the following passage from the decision of the Trial Division:

> It is apparent from the evidence presented at trial that while Peter Cundill only owns 50% of the shares of the plaintiff, he exercises an influence and control over the affairs and future of the plaintiff that is disproportionate to his shareholding. The financial well-being of the company is directly dependent upon the investment decisions which he makes. While the plaintiff stated that it did have replacements in mind should the plaintiff ever lose the services of Peter Cundill, it is clear that they considered him to be among the best, if not the best, investment counsellor in the field and that replacing him would have been a source of great disruption to the plaintiff's affairs. In many ways Peter Cundill was the 'product' of the company and the source of most of its goodwill. It is clear that in negotiating the terms of compensation between [the Bermuda company] and the plaintiff, Peter Cundill was in a bargaining position of great strength because of the plaintiff's reliance on him. It is also worthy of note that a significant, if not the overriding, reason that Peter Cundill reduced his shareholding in the plaintiff to a 50% holding was to comply with the wishes of securities regulators. Based on the foregoing, I find that the plaintiff and [the Bermuda company] were not dealing at arm's length and therefore the plaintiff does not come within the statutory exception.

[62] The Appeal Division drew a distinction between a person being the directing mind of both parties to a transaction and that person having de facto control of both:

> All of the findings of fact were supported by the evidence and are not open to be disturbed by us. On a fair reading of his reasons, it is clear that the learned trial judge concluded that Cundill was the directing mind of both parties to the negotiation of the agreement, not that he was in de facto control of both.

[63] In stating that Peter Cundill was not “in de facto control of both” presumably this Court was referring to the broader sense of having de facto control of a corporation and not to “having de facto control of both sides of the transaction”, as this expression was used in *Robson Leather*.

[64] With respect to whether parties can be found to be dealing at non-arm's length if one party is significantly dependent on the other, the Appeal Division noted:

> The principal challenge to the judgment is based on the finding, which I have emphasized and which plainly flows from the findings preceding it, namely, that Cundill's bargaining position was one of great strength. The Appellant says that there is no authority for the proposition that economic or other dependence or interdependence results in a non-arm's length relationship. I agree. However, it does seem to me that the existence of such dependence on an individual by both parties to a negotiation is not irrelevant to the question whether that individual may, in fact, be the directing mind of both in that negotiation.
>
> [footnote references omitted]

[65] It is not clear whether in making the statement that "no authority for the proposition that economic or other dependence or interdependence results in a non-arm's length relationship" the Court or the parties had considered the decisions of the Appeal Division in *Robson Leather* or the Supreme Court in *Swiss Bank*. However, the Court did acknowledge that the existence of such dependence is not irrelevant. In my view, in light of *Robson Leather* and *Swiss Bank*, the degree of financial dependence of Vidabode on Keybrand and BWS in December 2010 was a significant factor pointing towards a finding that Keybrand and Vidabode were not dealing with each other at arm's length.

[66] With respect to whether the disparity between the amount paid (in excess of $14 million) and the fair market value of the shares acquired (nil) is a factor in determining if the parties were dealing at arm's length, this Court in *Petro-Canada v. Canada*, 2004 FCA 158, noted:

> 55 The Judge addressed these questions implicitly rather than expressly, and concluded that the joint exploration corporations did not deal with each other at arm's length when entering into the agreement for the purchase and sale of the seismic data. In my view, the evidence justifies that conclusion. The terms of the transactions did not reflect ordinary commercial dealings between vendors and purchasers acting in their own interests. The joint exploration corporations, for example, did not attempt to negotiate a volume discount, as the evidence indicated would be normal for such large acquisitions of seismic data. Neither joint exploration corporation acted independently and in its own interest in entering into the transactions. The terms of the transaction were in fact dictated jointly by Petro-Canada and Phillips (in the case of the Phillips JEC) and jointly by Petro-Canada and CanEagle (in the case of the CanEagle JEC). The joint exploration corporations, for all practical purposes, were indifferent as to the purchase price of the seismic data because, whatever it turned out to be, the shareholders would ensure that the purchase price was funded. Any tax relief relating to the cost of the seismic data would be transferred to Petro-Canada by means of a renunciation.
>
> [emphasis added]

[67] This Court in *Remai Estate v. The Queen*, 2009 FCA 340 (*Remai Estate*) commented on the relevance of whether the terms of a transaction reflect ordinary commercial terms that would be reached between parties acting in their own interests:

> 33 The Crown concedes that *Peter Cundill* is the proper legal test, but argues that the Judge erred in law by failing to ask whether "the terms of the transactions ... reflect ordinary commercial dealings between ... [parties] acting in their own interests" (per Sharlow J.A. in *Petro-Canada v. The Queen*, 2004 FCA 158, 2004 DTC 6329 at para. 55).
>
> 34 In my opinion, this is not an error of law, because whether the terms of a transaction reflect "ordinary commercial dealings between parties acting in their own interests" is not a separate requirement of the legal tests for determining if a transaction is at arm's length. Rather, the phrase is a helpful definition of an arm's length transaction which it is the purpose of the components of the *Peter Cundill* analytical framework to identify. It may also enable a judge to reflect on the soundness of the conclusion to which an application of the individual *Peter Cundill* factors has led.

[68] This Court, in *Remai Estate*, simply noted that failing to consider "whether the terms of a transaction reflect 'ordinary commercial dealings between parties acting in their own interests'" was not an error of law. However, since "'ordinary commercial dealings between parties acting in their own interests' […] is a helpful definition of an arm's length transaction", the lack of ordinary commercial terms that would be agreed upon by parties acting in their own interests may support a finding that the transaction is not an arm's length transaction and, therefore, that the parties were not dealing with each other at arm's length.

[69] In my view, in an extraordinary situation such as here, where a person pays in excess of $14 million for shares that do not have any value, the magnitude of the discrepancy raises doubts that the parties were dealing with each other at arm's length.

[70] As a result, it is more likely than not that Keybrand was the directing mind of both parties to the transaction related to its acquisition of the common shares of Vidabode in December 2010. Consequently, the Tax Court Judge did not err in concluding that Keybrand and Vidabode were not dealing at arm's length when Keybrand acquired shares of Vidabode in December 2010.

B. *Interest Deductibility*

[71] Keybrand has also appealed the finding that the loan that it incurred to finance its acquisition of shares of Vidabode in December 2010 was not incurred for the purpose of earning income. Subparagraph 20(1)(c)(i) of the Act provides that interest will be deductible if the interest is paid or payable on "borrowed money used for the purpose of earning income from a

business or property". In *Ludco Enterprises Ltd., et al. v. Her Majesty the Queen*, 2001 SCC 62, (*Ludco*) the Supreme Court of Canada noted:

> 54. […] In the result, the requisite test to determine the purpose for interest deductibility under s. 20(1)(c)(i) is whether, considering all the circumstances, the taxpayer had a reasonable expectation of income at the time the investment is made.

[72] Keybrand borrowed the funds to acquire the shares of Vidabode on or about December 29, 2010. In reaching his conclusion that Keybrand did not have a reasonable expectation of income when it borrowed the money to acquire the shares of Keybrand, the Tax Court Judge set out the factual findings on which he was relying in paragraphs 80 to 90 of his reasons. Keybrand does not challenge any of these findings of fact. These facts include:

- As of the end of December 2010, Vidabode had still not made a sale of a cement plant license and there were no prospective purchasers who had paid a deposit;

- Keybrand, BWS and Mr. Strassburger's family had no intention of providing any funds to Vidabode, other than the funds necessary to pay out GE Capital;

- There was no reason to think that AACI or any other party was prepared to advance any money to Vidabode to allow it to pay its accounts payable and keep operating; and

- Without the funds necessary to allow Vidabode to continue to operate, the reasonable expectation in late December 2010 was that Vidabode would quickly collapse.

[73] As noted above, Keybrand is not challenging any of the individual findings of fact made by the Tax Court Judge, but only his final determination that these facts would lead to the conclusion that Keybrand had no reasonable expectation of income in acquiring the shares of Vidabode. Essentially, Keybrand is asking this Court to reweigh the evidence and come to a different conclusion. This is not the role of this Court (*Ahmar v. Canada*, 2020 FCA 65, at para. 28).

[74] In any event, there was sufficient basis for the Tax Court Judge to reach the conclusion that he did. It should also be noted that in order for the interest incurred on the amount borrowed by Keybrand to be deductible, Keybrand would have had to borrow the money the purpose of earning income from a business or property (para. 20(1)(c) of the Act). With respect to questions of a taxpayer's intention or purpose, the Supreme Court in *Symes v. Canada*, [1993] 4 S.C.R. 695 at page 736, 110 D.L.R. (4th) 470 noted:

> As in other areas of law where purpose or intention behind actions is to be ascertained, it must not be supposed that in responding to this question, courts will be guided only by a taxpayer's statements, ex post facto or otherwise, as to the subjective purpose of a particular expenditure. Courts will, instead, look for objective manifestations of purpose, and purpose is ultimately a question of fact to be decided with due regard for all of the circumstances.
>
> [emphasis added]

[75] In the recent case of *MacDonald v. Canada*, 2020 SCC 6, the Supreme Court also noted:

> 43 Mr. MacDonald's ex-post facto testimony regarding his intentions cannot overwhelm the manifestations of a different purpose objectively ascertainable from the record.

[76] The circumstances as outlined in paragraph 72 above all support the finding of the Tax Court that Keybrand did not have a reasonable expectation of income in acquiring the shares of Vidabode and hence did not borrow the money for the purpose of earning income from property, despite the statements of Keybrand to the contrary. As well, in my view, subsequent actions or steps taken by Keybrand or BWS could be used to either confirm or contradict Keybrand's stated purpose in borrowing the funds to acquire the shares of Vidabode.

[77] There are two key subsequent actions or steps taken by Keybrand and BWS that contradict an intention to earn income when the funds were borrowed on December 29, 2010 to pay for the shares of Vidabode. The first action is the appointment by BWS of a receiver and manager of Vidabode a very short time later on January 5, 2011. As noted above, the Tax Court Judge also found that Keybrand's advisors were considering and preparing for the possible insolvency of Vidabode prior to December 22, 2010.

[78] Contemplating the possible appointment of a receiver and manager for Vidabode before the shares were acquired and appointing a receiver and manager for Vidabode one week after Keybrand borrowed the money to buy shares in Vidabode, contradicts the allegation that Keybrand borrowed the money for the purposes of earning income from the shares of Vidabode. It is more likely than not that appointing a receiver and manager such a short time after acquiring the shares (when such action was contemplated before the shares were acquired) indicates that Keybrand did not, when it acquired the shares, have any reasonable expectation that it would earn any income from these shares.

[79] The second action is Keybrand's own indirect statement in its tax return for its year ending April 24, 2011. As noted above in paragraphs 28 and 29, since there was no actual disposition of the shares of Vidabode, Keybrand had to rely on the deemed disposition rules of subsection 50(1) of the Act:

50. (1) For the purposes of this subdivision, where	50. (1) Pour l'application de la présente sous-section, lorsque, selon le cas :
(a) a debt owing to a taxpayer at the end of a taxation year (other than a debt owing to the taxpayer in respect of the disposition of personal-use property) is established by the taxpayer to have become a bad debt in the year, or	a) un contribuable établit qu'une créance qui lui est due à la fin d'une année d'imposition (autre qu'une créance qui lui serait due du fait de la disposition d'un bien à usage personnel) s'est révélée être au cours de l'année une créance irrécouvrable;
(b) a share (other than a share received by a taxpayer as consideration in respect of the disposition of personal-use property) of the capital stock of a corporation is owned by the taxpayer at the end of a taxation year and	b) une action du capital-actions d'une société (autre qu'une action reçue par un contribuable en contrepartie de la disposition d'un bien à usage personnel) appartient au contribuable à la fin d'une année d'imposition et :
(i) the corporation has during the year become a bankrupt,	(i) soit la société est devenue un failli au cours de l'année,
(ii) the corporation is a corporation referred to in section 6 of the *Winding-up and Restructuring Act* that is insolvent (within the meaning of that Act) and in respect of which a winding-up order under that Act has been made in the year, or	(ii) soit elle est une personne morale visée à l'article 6 de la *Loi sur les liquidations et les restructurations*, insolvable au sens de cette loi et au sujet de laquelle une ordonnance de mise en liquidation en vertu de cette loi a été rendue au cours de l'année,
(iii) at the end of the year,	(iii) soit les conditions suivantes sont réunies à la fin de l'année :
(A) the corporation is insolvent,	(A) la société est insolvable,

(B) neither the corporation nor a corporation controlled by it carries on business,	(B) ni la société ni une société qu'elle contrôle n'exploite d'entreprise,
(C) the fair market value of the share is nil, and	(C) la juste valeur marchande de l'action est nulle,
(D) it is reasonable to expect that the corporation will be dissolved or wound up and will not commence to carry on business	(D) il est raisonnable de s'attendre à ce que la société soit dissoute ou liquidée et ne commence pas à exploiter une entreprise,
and the taxpayer elects in the taxpayer's return of income for the year to have this subsection apply in respect of the debt or the share, as the case may be, the taxpayer shall be deemed to have disposed of the debt or the share, as the case may be, at the end of the year for proceeds equal to nil and to have reacquired it immediately after the end of the year at a cost equal to nil.	le contribuable est réputé avoir disposé de la créance ou de l'action à la fin de l'année pour un produit nul et l'avoir acquise de nouveau immédiatement après la fin de l'année à un coût nul, à condition qu'il fasse un choix, dans sa déclaration de revenu pour l'année, pour que le présent paragraphe s'applique à la créance ou à l'action.

[80] Since Vidabode did not file for bankruptcy until May 6, 2011 and since there is no indication that there was a winding-up order under the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, a deemed disposition of the shares would only occur on April 24, 2011 if the conditions in subparagraph 50(1)(b)(iii) of the Act were satisfied as of that date. Two key requirements of subparagraph 50(1)(b)(iii) of the Act are that, as of April 24, 2011, “neither the corporation nor a corporation controlled by it carries on business” (clause B) and “it is reasonable to expect that the corporation will be dissolved or wound up and will not commence to carry on business” (clause D).

[81] In claiming the ABIL in its tax return for the year ending April 24, 2011, Keybrand was effectively stating that, less than four months after Keybrand had borrowed the money to buy the shares of Vidabode, Vidabode was not carrying on any business and it was reasonable, at that time, to conclude that Vidabode would be dissolved or wound up and would not commence to carry on business. This statement is inconsistent with the purpose, as of December 29, 2010 (less than four months earlier), of borrowing in excess of $14 million to buy shares of Vidabode for the purpose of earning income.

[82] There is no basis to interfere with the Tax Court Judge's finding that Keybrand did not have a reasonable expectation of income when it acquired the shares of Vidabode and hence that Keybrand did not borrow the money on December 29, 2010 for the purpose of earning income.

[83] As its final argument in its memorandum, Keybrand argued that the appropriate time to determine whether there was a reasonable expectation of income was when Keybrand entered into the guarantee with GE Capital in 2008, and not when Keybrand, on December 29, 2010, borrowed the money that was used to acquire the shares of Vidabode.

[84] In this case, it is not necessary to determine this issue. Even if the appropriate time to determine whether there was a reasonable expectation of income was when Keybrand entered into the guarantee with GE Capital in 2008, Keybrand, at that time, had no source of income (actual or potential) related to Vidabode. There was no guarantee fee that was paid and Keybrand did not own any shares of Vidabode in 2008. Therefore, even if the appropriate time was when the guarantee was signed, it would not assist Keybrand.

V. Conclusion

[85] As a result, I would dismiss the appeal. Subsequent to the hearing of the appeal, the parties notified the Court that they had reached an agreement with respect to costs. The parties agreed that if the Crown were successful in this appeal, the Crown would be entitled to costs in the amount of $2,312. I would therefore award costs to the Crown in the amount of $2,312.

"Wyman W. Webb"
J.A.

“I agree
Judith Woods J.A.”

“I agree
Marianne Rivoalen 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 2, 2019, CITATION NO. 2019 TCC 161 (DOCKET NO. 2016-2904(IT)G)

DOCKET:	A-354-19
STYLE OF CAUSE:	KEYBRAND FOODS INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 17, 2020
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	WOODS J.A. RIVOALEN J.A.
DATED:	NOVEMBER 19, 2020

APPEARANCES:

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