Federal Court of Appeal  Cour d'appel fédérale

Date: 20210129

Docket: A-308-19

Citation: 2021 FCA 17

CORAM: **NOËL C.J.**
DE MONTIGNY J.A.
LOCKE J.A.

BETWEEN:

EYEBALL NETWORKS INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard by online video conference hosted by the Registry on October 19, 2020.

Judgment delivered at Ottawa, Ontario, on January 29, 2021.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: DE MONTIGNY J.A.
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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal from a decision of Bocock J. (the Tax Court judge), cited as 2019 TCC 150, confirming an assessment issued by the Minister of National Revenue (the Minister) under subsection 160(1) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the Act).

[2] Subsection 160(1) provides that when a person transfers property to a non-arm's length person, the transferee and transferor are jointly and severally liable to pay any amount that the

transferor was liable to pay under the Act for the taxation year in which the transfer occurred and any preceding years. Under paragraph 160(1)(*e*), the transferee's liability is limited to the excess of the fair market value of the property transferred over the fair market value of the consideration given for the property. This provision applies whether or not the transferor or the transferee was aware of any tax liability at the time of the transfer.

[3] Eyeball Networks Inc. (the appellant or Newco), a non-arm's length affiliate (Oldco) and their sole shareholder, Mr. Piche, undertook a reorganization involving a number of preordained transactions in the course of which assets of Oldco were transferred to Newco. The Crown argues that the transactions are properly viewed as a series of transactions and that the overall result of the series is that Oldco received insufficient consideration from Newco for the transferred property, thereby triggering Newco's liability under subsection 160(1). The Tax Court judge rejected the Crown's contention insofar as it was based on the overall result of the series. However, he held that a single transaction entered into in the course of the reorganization did trigger the application of subsection 160(1) and confirmed the assessment on this basis.

[4] In support of its appeal, the appellant maintains that the Tax Court judge correctly held that the overall result of the series of transactions did not engage subsection 160(1), but contends that he erred in upholding the assessment based on the single transaction that he identified.

[5] The Crown challenges the Tax Court judge's conclusion on the overall result achieved by the series and submits that in any event a single transaction, distinct from the one identified by the Tax Court judge, had the effect of triggering the application of subsection 160(1).

[6] For the reasons that follow, I am of the view that neither the overall result of the series nor any of the transactions entered into in order to implement the reorganization engaged the application of subsection 160(1). I therefore propose to allow the appeal.

FACTS

[7] The Tax Court judge accepted the evidence of Mr. Piche to the effect that "the creation of Newco and the conveyance of the transferred property were necessary steps to continue the development and exploitation of the new bi-directional, video-conferencing technology" and that the reorganization was undertaken "[f]or these primary business reasons" (Reasons at paras. 2-3).

[8] Specifically, Mr. Piche explained that Oldco was associated with the online gaming industry and might have an unsavoury pedigree for the prospective buyers of the new technology. It was thought that a new company not involved in the online gaming industry would be a better vehicle for the new business. That is the context in which the reorganization took place (Reasons at para. 2).

[9] The transactions all took place on March 19, 2002, as follows (Reasons at paras. 4-13):

> **1. Agreement between Mr. Piche and Oldco**:
>
> Mr. Piche, the sole shareholder of Oldco, first sold his 11,000,000 class A common shares back to Oldco at their fair market value, which was estimated at $30 million.
>
> In exchange, Oldco issued to Mr. Piche 11,000,000 class A voting shares and 11,000,000 class C non-voting redeemable shares, having an aggregate redemption value of $30 million, subject to a price adjustment clause (Agreement dated March 19, 2002

between Christopher Piche and Oldco, Appeal Book, vol. 1 at 56-59).

2. Agreement between Mr. Piche and Newco:

Mr. Piche then sold to Newco his 11,000,000 class C non-voting redeemable shares of Oldco, valued at $30 million.

In exchange, Newco issued to Mr. Piche 11,000,000 class A non-voting shares and 11,000,000 class B voting shares.

The parties also filed a subsection 85(1) election under the Act (Agreement dated March 19, 2002 between Mr. Piche and Newco, Appeal Book, vol. 1 at 68-70).

3. Agreement whereby Oldco sells assets to Newco:

Oldco sold to Newco the assets of its new business, valued at $30,175 million.

In exchange, Newco assumed Oldco liabilities equal to $175,000 and issued to Oldco 11,000,000 class C non-voting redeemable shares, having an aggregate redemption value of $30 million, subject to a price adjustment clause.

The parties also filed a subsection 85(1) election under the Act (Agreement dated March 19, 2002 between Newco and Oldco, Appeal Book, vol. 1 at 78-81).

4. Oldco's Share Redemption and Promissory Note:

Oldco redeemed its 11,000,000 class C non-voting redeemable shares held by Newco for the stated redemption amount of $30 million and issued a promissory note of $30 million to Newco (Oldco Note) (Redemption of Shares by Oldco and Issuance of Promissory Note payable to Newco, dated March 19, 2002, Appeal Book, vol. 1 at 101-103).

5. Newco's Share Redemption and Promissory Note:

Newco redeemed its 11,000,000 class C non-voting redeemable shares held by Oldco for the stated redemption amount of $30 million and issued a promissory note of $30 million to Oldco (Newco Note) (Redemption of Shares by Newco and Issuance of Promissory Note payable to Oldco, dated March 19, 2002, Appeal Book, vol. 1 at 104-106).

6. Mutual Debt Cancellation Agreement:

Oldco and Newco entered into a mutual debt cancellation agreement whereby the liabilities created by the two promissory notes were set off against each other (the set-off) (Mutual Debt Cancellation Agreement dated March 19, 2002 between Newco and Oldco, Appeal Book, vol. 1 at 107).

7. Escrow Agreement:

The transactions were in escrow until March 22, 2002, to sort out a difficulty that had arisen in the change of the corporate name of Newco (Escrow Agreement dated March 19, 2002 between Newco and Oldco, Appeal Book, vol. 1 at 108-109).

[10] In 2003, the Minister reassessed Oldco for its 2000 and 2001 taxation years for an amount of $13,368.48. In 2004, the Minister then reassessed Oldco for its 2002 taxation year for an amount of $113,366.10 (Notice of Reassessment, 2001 taxation year, Appeal Book, vol. 1 at 127-34; Notice of Reassessment, 2002 taxation year, Appeal Book, vol. 1 at 135-40).

[11] On March 19, 2014, the Minister assessed Newco for the amount of $287,223.51 pursuant to subsection 160(1). By that assessment, Newco was held jointly and severally liable to pay Oldco’s tax liability for the 2000, 2001 and 2002 taxation years plus accrued interest on the basis that it did not give adequate consideration for the property transferred to it by Oldco on March 19, 2002.

[12] The appeal before the Tax Court judge ensued.

DECISION UNDER APPEAL

[13] The Tax Court judge began by noting that the facts were not in dispute. Focusing on the transaction whereby Oldco conveyed its assets to Newco—step 3 of the reorganization—he pointed out that the sole issue was whether Newco gave to Oldco adequate consideration for these assets. Although the tax liability of Oldco for its 2000, 2001 and 2002 taxation years was assessed after the transfer, it existed legally at the time of the transactions with the result that subsection 160(1) was potentially engaged (Reasons at para. 25).

[14] The Tax Court judge went on to observe that the terms of the conveyance agreement are clear to the effect that the consideration given by the appellant was to have a value corresponding with that of the transferred property. The question raised is whether the "inceptive value" of the consideration changed and, if so, whether it changed within the "time of transfer", thereby engaging subsection 160(1) (Reasons at para. 31). Prior to asking this question, the Tax Court judge noted that the general anti-avoidance rule (GAAR) was not invoked so that, "initially at least", no serious question can exist as to the adequacy of the consideration that was given (*ibid*).

[15] The Tax Court judge then sought to determine when the "time of transfer" begins and ends for the purpose of subsection 160(1), embarking on a textual, contextual and purposive analysis of this subsection (Reasons at paras. 32-33). His textual analysis led him to conclude that "[t]he phrase 'at the time' suggests … a 'value' snapshot of the transfer of property when it occurs" (Reasons at para. 34).

[16] Turning to the context, he observed that if the net result of the series of transactions may be examined, the evidence supports the view that insufficient consideration was given for the transferred assets (Reasons at para. 38). However, he held that the phrase "by any other means whatever" in the introductory words of subsection 160(1) did not allow for the examination of the net result of the series (Reasons at para. 39). He pointed to decisions from this Court and the Tax Court that adopted a more restrictive approach when applying this phrase in the context of subsection 160(1) and other provisions of the Act as well (Reasons at paras. 39-42).

[17] He further noted that, while this Court in *Canada v. 594710 British Columbia Ltd.*, 2018 FCA 166 [*594710 BC*], leave to appeal denied, February 21, 2019 (SCC no. 38352) relied on the phrase "by any other means whatever" in subsection 160(1) to hold that a tax benefit had been obtained through a series of transactions, it was under a GAAR analysis which calls for a different analytical approach (Reasons at para. 40).

[18] In his purposive analysis, the Tax Court judge found that in applying subsection 160(1) "both value of the transferred property and tax debtor liability must be established at the 'moment' of transfer", not through the examination of the overall result of a series of transactions (Reasons at para. 44). He went on to hold that the "time" referred to in that provision must be linked to an identifiable and distinct transaction. The Tax Court judge rejected the Crown's main contention on this basis (Reasons at paras. 43-47, 50).

[19] The Tax Court judge then addressed a point that was not argued before him. He asked whether the set-off that took place at step 6 of the series, between the Newco and Oldco

promissory notes, gave rise to a transfer of property without adequate consideration, so as to engage subsection 160(1) (Reasons at para. 51). In his view, at the time of the set-off, the fair market value of the Oldco Note held by Newco was effectively valueless when compared to the fair market value of the Newco Note held by Oldco, which in contrast was backed by assets worth $30 million (Reasons at para. 57).

[20] The Tax Court judge dismissed the appeal on the ground that the consideration given by the appellant in the context of the set-off was inadequate and, therefore, subsection 160(1) was engaged (Reasons at para. 58).

POSITION OF THE APPELLANT

[21] The appellant first submits that the Tax Court judge committed no error in rejecting the Crown's theory that subsection 160(1) can apply based on the net result of a series of transactions. Absent a sham or the pursuit of an improper purpose, the application of this provision requires that the transactions be analyzed separately and that legal effect be given to each one of them (Memorandum of the Appellant at paras. 24-25).

[22] The appellant submits that the transfer occurred when Oldco conveyed its assets to Newco in consideration of Newco's shares. Since the transfer agreement includes a clause that would adjust accordingly the value of the shares issued and the value of the consideration given had the fair market value of the assets been wrongly estimated, "no deficiency between the value of the transferred property and the consideration could ever occur" and "section 160 would [never] be engaged" (Reasons at para. 26).

[23] The appellant further submits that the Tax Court judge erred in dismissing the appeal on the ground that the set-off of the promissory notes constituted a transfer for which Newco did not give adequate consideration (Memorandum of the Appellant at para. 22). This issue was never pled nor argued so that the Tax Court judge ought not to have addressed it (Memorandum of the Appellant at para. 23).

[24] In any event, the appellant submits that the Tax Court judge erred in holding that the Oldco note was valueless, as opposed to the Newco note, since both notes were backed by the same assets. Moreover, the reasoning of the Tax Court judge "fail[ed] on a more fundamental level" as the promissory notes represented *bona fide* debts that were paid by way of the mutual set-off. The law is clear that the payment of a debt does not engage subsection 160(1) (Memorandum of the Appellant at paras. 28-30, citing *Mullins v. M.N.R.*, 91 D.T.C. 173 [*Mullins*]; *D'Argys v. M.N.R.*, 92 D.T.C. 1710 [*D'Argys*]).

POSITION OF THE CROWN

[25] The Crown takes issue with the reasons given by the Tax Court judge for upholding the assessment but agrees with the outcome. According to the Crown, the Tax Court judge construed subsection 160(1) too restrictively, and erred in relying on a single transaction in order to determine whether adequate consideration was given for the assets transferred (Memorandum of the Crown at paras. 3-4).

[26] The Crown in its pleadings both accepts and relies on the fact that the transfer of the assets from Oldco to Newco took place at step 3 of the reorganization for an agreed value of $30

million and that Oldco received 11 million class C shares having a commensurate redemption value in return (Reply to the Notice of Appeal, Appeal Book, vol. 1, pp. 33 and 35 at paras. 4c) and 12k)(iii)). However, it contends that when a transfer takes place in the course of a series of transactions as occurred here, subsection 160(1) requires that the determination of the consideration given be made at the end of the series, in light of the overall result (Memorandum of the Crown at para. 5).

[27] The Crown submits that the broad purpose of subsection 160(1) supports this position and that this position is otherwise consistent with a textual, contextual and purposive analysis of this provision (Memorandum of the Crown at para. 6).

[28] In this respect, the Crown recognizes that based on the text of subparagraph 160(1)(*e*)(i) both the value of the transferred property and the value of the consideration given must be established "at the time" of the transfer. However, it maintains that the words "at the time", beyond referring to a precise point in time, are capable of having an elastic meaning that captures "an interval between two points" (Memorandum of the Crown at paras. 41-46). According to the Crown, "where a transfer is effected through a number of preordained transactions that together result in the transferor's patrimony being depleted … [the word] 'time' can encapsulate the whole of the transactions effecting the transfer" (Memorandum of the Crown at para. 45).

[29] The Crown argues that this elastic notion of time is consistent with the broad meaning of the words used in the immediate context of subsection 160(1). Its introductory words contains the words "transfer" and "property" which are broad concepts and uses the expression "by means

of a trust or by any other means whatever", which further expands the meaning of the word "transferred" (Memorandum of the Crown at paras. 49-52).

[30] According to the Crown, these words indicate that subsection 160(1) was intended to have a broad reach and support its view that "the consideration given must be determined having regard to the whole of the transactions used to effect the transfer" (Memorandum of the Crown at para. 54). The Crown adds that this is the approach that was taken by this Court in *594710 BC*. Despite the fact that this decision was reached under the GAAR, the Crown maintains that the same approach is mandated in a non-GAAR context (Memorandum of the Crown at paras. 55-59).

[31] Turning to the broader contextual analysis, the Crown argues that the phrase "by any other means whatever", like the phrase "in any manner whatever", invite the Court to consider all the transactions that bear upon the value of the consideration given (Memorandum of the Crown at paras. 63-64). The Crown insists that it would make no sense to "put blinders on" when determining the value of the consideration (Memorandum of the Crown at para. 65).

[32] The Crown further submits that its interpretation accords with the purpose of subsection 160(1) which is "to protect the Minister's ability to collect a tax debt and its text is focused on the result of the transactions" (Memorandum of the Crown at para. 68).

[33] Giving effect to its broad interpretation, the Crown contends that the overall effect of the transactions is that "Oldco was stripped of its assets and equity" (Memorandum of the Crown at

para. 72). Although adequate consideration was given when the assets were conveyed to Newco, the cross-shareholding between these two corporations, followed by the share redemption and the mutual cancellation of the promissory notes, led to the depletion of Oldco's patrimony. Hence, subsection 160(1) must apply (Memorandum of the Crown at paras. 73-80).

[34] Because the Tax Court judge failed to give subsection 160(1) its proper reach, the Crown submits that this Court need not consider whether his alternative conclusion based on the mutual set-off is correct (Memorandum of the Crown at para. 91). At the same time, the Crown challenges the appellant's contention that the Tax Court judge based this alternative conclusion on a point that was not properly before the Court. Despite the fact that the issue was not argued, the Crown submits that it was open to the Tax Court judge to address it as the mutual set-off was part of the transactions that were taken into account by the Minister in issuing the assessment (Memorandum of the Crown at paras. 94-96).

[35] Finally, in the event that this Court rejects both the Crown's broad interpretation of subsection 160(1) and the Tax Court judge's alternative ground for upholding the assessment, the Crown invites us to nevertheless dismiss the appeal on the novel ground that the redemption by Oldco of its class C redeemable shares gave rise to a distinct transfer that triggered the application of subsection 160(1), as no consideration was received by Oldco in return (Memorandum of the Crown at paras. 92-93).

ANALYSIS

[36] The first and primary issue to be decided is whether the existence and value of the consideration given by Newco to Oldco must be determined at the time when the assets were conveyed to Newco as was held by the Tax Court judge, or after the completion of the reorganization in light of the overall result as contended by the Crown. Although respondent, the Crown effectively has the role of an appellant on this issue.

A. *Standard of review*

[37] The proper construction of subsection 160(1), specifically the words "at the time" and "at that time" in subparagraph (i), gives rise to a question of law reviewable on a standard of correctness. The application of the provision to the facts in issue gives rise to a mixed question of fact and law, which will be reviewed on a standard of overriding and palpable error, absent an extricable question of law (*Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 26-37, [2002] 2 S.C.R. 235; *Canada v. MacDonald*, 2013 FCA 110 at para. 14).

B. *Preliminary issue surrounding Mr. Piche's intent*

[38] During the hearing of the appeal, the Crown raised for the first time the spectre of an improper motive on the part of Mr. Piche. Beyond the straightforward business purpose that Mr. Piche attested to, counsel for the Crown argued, against the objection of counsel for the appellant, that he intended to leave unknown liabilities unattended. The suggestion, as I

understand it, is that Mr. Piche was aware that there might be unknown liabilities, including tax liabilities, and that avoiding these liabilities was a motivating factor behind the reorganization.

[39] The law is clear that an intent to avoid the payment of outstanding taxes is not a prerequisite for the application of subsection 160(1), but an improper motive, if present, can inform the way in which the Court views the transactions and assesses their impact (see for instance *Canada v. Livingston*, 2008 FCA 89 at paras. 19, 26-29 [*Livingston*]). The question arises as to whether it is open to the Crown to take this position at this late stage.

[40] The Tax Court judge accepted Mr. Piche's evidence that the reorganization was driven by his desire to separate the new technology from the old one and exploit it through the use of a distinct corporate entity for the *bona fide* reasons that he gave (Reasons at para. 2). No other motive was ascribed to the reorganization. The Tax Court judge made clear in open court his understanding that the Crown was not arguing that the reorganization was aimed at avoiding tax liabilities and asked to be corrected if he was wrong. Counsel for the Crown did not disavow the Tax Court judge's understanding (Transcript, Appeal Book, vol. 2 at 70-71) and Mr. Piche was not cross-examined on his evidence.

[41] In my view, it is too late for the Crown to now suggest that the reorganization was driven by a desire to avoid pre-existing tax liabilities. Having chosen not to challenge Mr. Piche's evidence at trial, the Crown must live with that choice.

C. *Must the consideration given be determined at the time of the conveyance of the assets or after the reorganization has been completed?*

[42] Before turning to this question, it is useful to set out subsection 160(1) in its relevant part:

160(1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to	**160(1)** Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :
…	[…]
(*c*) a person with whom the person was not dealing at arm's length,	**c)** une personne avec laquelle elle avait un lien de dépendance,
the following rules apply:	les règles suivantes s'appliquent :
…	[…]
(*e*) the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of	**e)** le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :
(i) the amount, if any, by which the fair market value of the property <u>at the time it was transferred</u> exceeds the fair market value <u>at that time</u> of the consideration given for the property, and	**(i)** l'excédent éventuel de la juste valeur marchande des biens <u>au moment du transfert</u> sur la juste valeur marchande <u>à ce moment</u> de la contrepartie donnée pour le bien,
(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act…	**(ii)** le total des montants représentant chacun un montant que l'auteur du transfert doit payer en vertu de la présente loi […]
Emphasis added	[Non souligné dans l'original.]

[43] In reading this provision, it is useful to keep in mind that the term "property" is broadly defined and includes a "right of any kind whatever" as well as "money" (subsection 248(1)).

[44] As affirmed by this Court, the purpose of subsection 160(1) is to protect the tax authorities against any vulnerability that may result from a transfer of property between non-arm's length persons for a consideration that is less than the fair market value of the transferred property (*Canada v. 9101-2310 Québec Inc.*, 2013 FCA 241 at para. 60). The four cumulative criteria triggering the application of subsection 160(1) are "clear" and "self-evident" (*Livingston* at para. 17):

1. The transferor must be liable to pay tax under the Act at the time of the transfer;
2. There must be a transfer of property;
3. The transferee must be a person with whom the transferor was not dealing at arm's length or to an otherwise designated transferee;
4. The fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee for the property.

In the present case, the first three criteria are not disputed. The sole issue is whether Newco gave adequate consideration for the property transferred to it by Oldco.

[45] The Crown acknowledges that adequate consideration was given when the assets were conveyed from Oldco to Newco but argues, relying on the broad introductory words of subsection 160(1), that the adequacy of the consideration given by Newco could only be determined at the end of the reorganization, based on the overall result. Specifically, the Crown invites us to view the preordained transactions as a series and hold that although adequate consideration was initially given, this was no longer the case at the end of the series, as Oldco was ultimately left without anything of value (Memorandum of the Crown at paras. 17, 48, 54).

Although the transactions in issue here took place in the course of a single day, the rule that the Crown invites us to adopt would apply whether the series of transactions takes place over a week, a month or a year.

[46] The Crown correctly asserts that "series of transactions" is a well-established statutory concept that allows courts to look to the overall result sought to be achieved in assessing the legal effect of the series. However, this concept only applies when one (or more) of the transactions within the series is primarily tax driven. It has no application where, as here, each of the transactions was entered into in the pursuit of a *bona fide* non-tax purpose (see for instance subsection 245(2) when read with subsection 245(3) in a GAAR context and, in a non-GAAR context, paragraph 18(20)(*c*), subsection 69(11), paragraph 85(1.11)(*b*) and section 183.1).

[47] Beyond this, the concept of "series of transactions" is foreign to subsection 160(1). As was explained by this Court in *Canada v. Lehigh Cement Limited*, 2014 FCA 103, [2015] 3 F.C.R. 117 with respect to a similar attempt to read this concept into paragraph 95(6)(*b*):

> [49] Whenever the Act broadens its focus from an individual transaction to a series of transactions, it uses quite specific words to do so: see, for example, subsections 55(2), 83(2.1), 129(1.2), the definition of "term preferred share" in section 248, and section 245. This last-mentioned provision – the general anti-avoidance rule in the Act – illustrates this well. It provides that a transaction may be regarded as an avoidance transaction if it is part of a "series of transactions or events" giving rise to a tax benefit.
>
> [50] Paragraph 95(6)(*b*) contains no such specific language. It does not state that the tax benefit be identified as having resulted from a series of transactions of which the share acquisition or disposition was a part. Rather, the words of paragraph 95(6)(*b*) require that the tax benefit must flow from the share acquisition or disposition itself and obtaining the tax benefit must be the principal purpose of the share acquisition or disposition.
>
> [51] Parliament knows very well what words to use to give effect to the Crown's reading of paragraph 95(6)(*b*). It has not done so.

[48] Similarly, subsection 160(1) contains no such specific language. Instead, Parliament resorted to the all-encompassing words set out in its introductory words: "[w]here a person has … transferred property, either directly or indirectly, by means of a trust or by any other means whatever". These words capture all forms of transfers including those resulting from the combined effect of multiple transactions, whether preordained or not.

[49] In the present case, the assets associated with the new business were transferred in the course of a straightforward transaction at step 3 of the reorganization, so that there is no need to resort to the broad introductory language in order to identify the transfer that took place.

[50] Significantly, this broad introductory language is aimed at broadening the notion of transfer; it has no bearing on the manner in which the adequacy of the consideration given for the property transferred is to be determined. This last issue is addressed separately by subparagraph 160(1)(*e*)(i) which provides that the consideration is inadequate when the fair market value of the property transferred exceeds the fair market value of the consideration given at the time of the transfer (see *Birchcliff Energy Ltd. v. Canada*, 2019 FCA 151 at para. 47). As explained by the Tax Court judge, the price adjustment clause eliminated any possible difference between the two in the present case (Reasons at para. 48).

[51] Absent a sham or statutory language to the contrary, of which there is none, there is no basis on which the Crown can ignore the transfer of assets from Oldco to Newco for a consideration equal to their fair market value at the time of the transfer (compare *Singleton v.*

Canada, 2001 SCC 61 at paras. 27-28, [2001] 2 S.C.R. 1046; see also *Lipson v. Canada*, 2009 SCC 1 at paras. 19-20, 34-36, [2009] 1 S.C.R. 3).

[52] Finally, and perhaps most importantly, a transfer of property takes place instantaneously both at civil and common law. The precise and clearly identifiable time when a transfer takes place under both legal systems is the notion that Parliament seized on in providing both that the value of the property is determined "at the time it was transferred" and the value of the consideration given is determined "at that time". Indeed, construing these words as referring to an elastic notion of time that runs from the beginning to the end of the series of transactions, as the Crown advocates, begs the question as to precisely when the respective values should be determined and compared. This is significant because the value of property is in constant flux and can vary significantly in very little time.

[53] Were these values not determined at a precise point in time, there could be no certainty as to the extent of the consideration given for the property transferred, a prerequisite for the proper application of subsection 160(1). In this regard, I stress that the excess of the value of the property transferred over the value of the consideration given must be computed with precision as, beyond triggering the application of this provision, this excess serves to both measure and limit the extent of the transferee's liability. Allowing these values to be ascertained over a period of time, without pinpointing exactly when, would produce inherently uncertain results, something that Parliament cannot have intended.

[54] Moreover, the decision of this Court in *594710 BC* does not support the Crown's contention that the consideration given can be determined over time. In that case, the Court held that a stock dividend followed by a share redemption gave rise to a transfer of property without consideration much like the payment of a cash dividend would. The Tax Court judge did not give this precedent any weight because it was decided in a GAAR context (Reasons at para. 40).

[55] The Crown nevertheless argues that *594710 BC* remains relevant because the Court in that case relied on a textual analysis of subsection 160(1) and that, had the overall result of the transactions not been the appropriate focus, the Court would necessarily have confronted the fact that the shares were redeemed for cash (Memorandum of the Crown at para. 58).

[56] I agree with the Crown that the Court in *594710 BC* relied at least in part on the introductory words "indirectly … by any other means whatever" to hold that the combination of a stock dividend followed by the share redemption had the same effect as a cash dividend and similarly resulted in a transfer of property without consideration (*594710 BC* at para. 115). However, this transfer could not take place until the redemption price was paid since this is when property changed hands.

[57] Although *594710 BC* is authority for the proposition that a transfer of property can result from the combined effect of sequential transactions, nothing in that decision suggests that the value of the consideration, when given, can be determined at a point in time other than when the transfer actually takes place.

[58] In my view, the Tax Court judge correctly held that the adequacy of the consideration given must be measured against the value of the property transferred by way of a "snapshot" taken at the point in time when the transfer takes place. In the present case, it is not disputed that Newco gave Oldco adequate consideration at that time (Reasons at paras. 34, 55).

[59] It follows that the Crown's main contention must fail.

D. *The Tax Court judge's alternative ground for upholding the assessment*

[60] Acting on his own initiative, the Tax Court judge went on to hold that the mutual set-off of the promissory notes—step 6 of the reorganization—was a distinct transaction that gave rise to a transfer for which Oldco was not given adequate consideration. Specifically, he found that the mutual set-off gave rise to a surrender of a debt without consideration because the Oldco note had a negligible value in comparison to the Newco note.

[61] The appellant's argument that the Tax Court judge ought not to have considered this issue without first inviting the parties to comment on it is somewhat moot at this stage, as both have now had the opportunity to address it. In this respect, the Crown has not expressed any view on this alternative conclusion and has not taken issue with the appellant's contention that the reasoning underlying it is fundamentally flawed.

[62] I agree with the appellant that it was not open to the Tax Court judge to hold that the Newco note had "considerable" value and that the Oldco note had a "nominal" value since both

were backed by the same assets (Reasons at para. 57). Whatever value the Newco note may have had, the assets backing the Oldco note could not be less and vice versa. The Tax Court judge does not explain why the value of the two notes did not support each other.

[63] I also agree with the appellant that the feature of significance for present purposes is that the Oldco note represented a *bona fide* debt in the face amount of $30 million. The mutual set-off of the notes had the same effect as if both notes were discharged by cross-payments. The law is clear that the payment of a *bona fide* debt cannot trigger the application of subsection 160(1) which is precisely what took place when the notes were discharged (see *Mullins*; *D'Argys*).

[64] It follows that the Tax Court judge could not uphold the assessment on the alternative ground that he identified.

E. *The Crown's novel ground for upholding the assessment*

[65] If all else fails, the Crown submits that there is another transaction that, if examined in isolation, resulted in Oldco receiving inadequate consideration. Specifically, the Crown points to the redemption by Oldco of its class C shares—step 4 of the reorganization—and argues that although a promissory note having a face value of $30 million was issued in order to redeem the shares, no consideration was effectively given to Oldco in return.

[66] In support of this contention the Crown asserts that "[w]hen a corporation redeems its shares, it enjoys no equivalent or comparable consideration in return" (Memorandum of the Crown at para. 93, citing Kevin P. McGuinness, *Canadian Business Corporations Law*, 2nd ed.

(Markham: LexisNexis Canada, 2007) at 497, 500-501). I agree that the only benefit obtained by a corporation from a share redemption is that it allows the repurchased capital to be removed from its balance sheet. Otherwise, a corporation that redeems its shares is left short of the redemption price because the shares, once redeemed, have no value in its hands.

[67] However, when dealing with property whose value varies depending on who holds it, it is the value of the property as it stands in the hands of the transferor at the time of the transfer that governs (see *Canada v. Gilbert*, 2007 FCA 136 at para. 21; *Hewett v. Canada*, [1997] F.C.J. No. 1541, 98 D.T.C. 6003 (F.C.A.) [*Hewett FCA*] affirming *Hewett v. Canada*, [1996] 2 C.T.C. 2560, 62 A.C.W.S. (3d) 1235 [*Hewett TCC*]). Conversely, when dealing with consideration capable of similar variations, it is the value of the consideration as it stands in the hands of the transferee at the time of the transfer that governs. This is made clear by subparagraph 160(1)(*e*)(i) which refers to the value of the consideration given rather than received.

[68] There are good reasons for this symmetry in the determination of the respective values. Just as it makes sense for the value of the property transferred to be determined as it stands in the hands of the transferor since this is what would have been available to the Minister for attachment if the transfer had not taken place (*Hewett FCA* at para. 2; *Hewett TCC* at paras. 48-56), there would be no justification for allowing the Minister to recover the transferor's tax debt from a transferee who gave fair market value consideration for the property transferred to it.

[69] Reverting to the present case, the business objective pursued by Mr. Piche could not be achieved without Oldco exercising the option to redeem its class C shares. For that purpose,

Oldco had to pay the $30 million redemption price and Newco in turn had to surrender the shares which had a corresponding $30 million value in its hands. It follows that what was given by Newco as consideration are shares having a value of $30 million. Subsection 160(1) can find no application when property of identical value is exchanged.

[70] In closing, I note that the Crown has not even attempted to convince the Court that the relevant consideration in this case should be the consideration received by Oldco rather than the consideration given by Newco. This amounts to a recognition that, subject to circumstances allowing for the GAAR to be invoked, subsection 160(1) as presently framed does not capture the depletion of corporate assets that results from a share redemption.

[71] It follows that the Crown's novel argument must also fail.

DISPOSITION

[72] For these reasons, I would allow the appeal with costs throughout, set aside the judgment of the Tax Court judge and, giving the judgment that he ought to have given, I would allow the appeal on the basis that subsection 160(1) finds no application on the facts of this case.

"Marc Noël"
Chief Justice

"I agree.
Yves de Montigny J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-308-19

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE RANDALL S. BOCOCK DATED JULY 18, 2019, DOCKET NO. 2015-4583(IT)G

STYLE OF CAUSE:	EYEBALL NETWORKS INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	HEARD BY ONLINE VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 19, 2020
REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	DE MONTIGNY J.A. LOCKE J.A.
DATED:	JANUARY 29, 2021

APPEARANCES:

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