Federal Court of Appeal | Cour d'appel fédérale

Date: 20250123

Dockets: A-30-24
A-166-24

Citation: 2025 FCA 20

CORAM: **WOODS J.A.**
LEBLANC J.A.
MONAGHAN J.A.

Docket: A-30-24

BETWEEN:

MADISON PACIFIC PROPERTIES INC.

Appellant

and

HIS MAJESTY THE KING

Respondent

Docket: A-166-24

AND BETWEEN:

MADISON PACIFIC PROPERTIES INC.

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Vancouver, British Columbia, on January 22, 2025.

Judgment delivered at Vancouver, British Columbia, on January 23, 2025.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: LEBLANC J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

[1] These two appeals concern income tax reassessments which denied a carryforward of net capital losses pursuant to the general anti-avoidance rule (GAAR). The Tax Court of Canada, *per* Graham J., upheld the reassessments (2023 TCC 180). In the first appeal, the appellant challenges the substance of the Tax Court decision. In a second, separate appeal, the appellant challenges the award of costs related to the GAAR proceeding (2024 TCC 47).

The GAAR appeal

[2] The GAAR appeal concerns what is sometimes described as a "corporate restart" transaction in which a company with unused tax losses is transformed such that it is carrying on a new business with new shareholders who benefit from the carryover of the losses.

[3] The applicable legal principles were most recently discussed by the Supreme Court of Canada in *Deans Knight Income Corp. v. Canada*, 2023 SCC 16 [*Deans Knight*]. Subsequent to *Deans Knight*, this Court had occasion to apply these principles in *Canada v. MMV Capital Partners Inc.*, 2023 FCA 234 [*MMV Capital*].

[4] I will begin by discussing some of the issues raised by the appellant. A brief summary of the facts will be sufficient for this purpose since the Tax Court described the facts in detail.

[5] The central figures in this appeal are Sam Grippo and Raymond Heung. Each of them operated private real estate companies that owned rental commercial properties in British Columbia. Some of these properties were jointly owned between these companies.

[6] Together, Messrs. Grippo and Heung orchestrated a corporate restart plan with the appellant, an unrelated public mining corporation that had unused losses. In the restart plan, the appellant corporation changed its name to Madison Pacific Properties Inc., spun out its existing mining assets so that it was a shell with only tax losses, and Messrs. Grippo's and Heung's companies transferred various real estate assets, including their jointly owned properties, to the appellant for consideration that included shares of the appellant.

[7] The plan involved the creation of a dual share structure so that the interests of Messrs. Grippo's and Heung's companies in the appellant resulted in them having a combined total of 46.56 percent of the votes and 92.82 percent of the equity. Other voting shares were held by business associates which, if included, would exceed 50 percent of the votes.

[8] Over the period from 1998 to 2013, the appellant was able to use the existing losses. These consisted of non-capital losses in the amount of $9,688,703 and net capital losses in the amount of $72,718,480. However, the reassessments at issue only concerned three taxation years which used up the last of the losses. At this point, only net capital losses remained.

[9] In its reasons, the Tax Court applied the legal principles from *Deans Knight*. It also made credibility findings that were devastating to the appellant, and the Court determined that the GAAR was properly applied to deny use of the losses at issue.

[10] The appellant raises three main issues in this appeal. In my view, none of these give rise to a reviewable error.

[11] One issue is whether the Tax Court made factual errors, first, when it found that the sole purpose of the transactions was to use the appellant's losses, and second, when it found that Mr. Grippo's and Mr. Heung's companies that participated in the plan were a group in relation to their dealings with the appellant and its shareholders. According to the appellant, these errors were caused by the Court's improper rejection of the appellant's evidence and the Court's reliance on unsupported inferences of fact. These submissions go to the heart of the Tax Court's GAAR analysis. In my view, the appellant has not identified any palpable and overriding error.

[12] Related to this, the appellant also submits that the Court incorrectly framed the legal test regarding group control. I disagree. The Tax Court identified the correct legal test.

[13] The second issue raised by the appellant was whether the Tax Court erred by expanding the dispute between the parties. The appellant referred to this as expanding the *lis*. The alleged error arose when the Court considered events that took place after the appellant had been transformed in order to determine whether Messrs. Grippo's and Heung's companies acted as a group during the transformation.

[14] I disagree that this was an improper expansion of the *lis*. The Court merely considered the evidence as a whole, including events after the appellant's transformation, in order to decide the issues properly before it.

[15] Finally, the appellant submits that the Tax Court breached its duty of procedural fairness by rejecting the appellant's request to provide post-hearing submissions on this Court's decision in *MMV Capital*. In order to have a breach of procedural fairness, there must be some unfairness, and the appellant has not provided any reason to believe that there was.

[16] In summary, I conclude that the issues raised by the appellant do not give rise to a reviewable error.

[17] In addition to these issues, prior to the hearing this Court requested submissions from the parties on a further issue.

[18] In its GAAR analysis, the Tax Court determined that the series of transactions only included the transactions encompassing the corporate transformation. There was no discussion by the Court of any related transactions which may also be part of the series by virtue of the extended meaning of "series of transactions" in subsection 248(10) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). It is an error of law not to consider this provision. The legal principles to be applied are discussed in *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63 at paragraphs 39-42.

[19] In my view, considering subsection 248(10), the series of transactions had to include the claiming of losses which resulted in the tax benefit at issue. This follows, for instance, from the Tax Court's factual finding that the sole purpose of the corporate transformation was to gain access to the appellant's losses. It is inconsistent with subsection 248(10) to find that the sole purpose was to access losses and also to find that the series of transactions ended after the transformation of the appellant.

[20] The appellant submits that the series of transactions does not include the claiming of the losses because those claims arose from transactions not related to the corporate transformation. Instead, the claims arose from the disposition of properties acquired subsequent to the transformation. The suggestion is that, since the properties were unrelated to the appellant's transformation, the claiming of the losses is accordingly not part of the series of transactions.

[21] However, the question to be determined is whether the claiming of the losses at issue and the corporate transformation are related, and whether the claiming of these losses was contemplated. This test is satisfied. The claiming of the losses and the corporate transformation are certainly related transactions and events. In addition, the claiming of the losses was contemplated since, as found by the Tax Court, this was the sole purpose of the transformation.

[22] Accordingly, the series of transactions includes the appellant's claim of the losses that are at issue. The consequence of making this finding is that the Tax Court did not err in concluding that there was an avoidance transaction since the series of transactions would, but for the GAAR, result in a tax benefit – a reduction of the appellant's tax.

[23] In light of all of the above, I would uphold the judgment of the Tax Court, and dismiss the GAAR appeal with costs to the respondent fixed in the amount of $5,000 all inclusive.

The costs appeal

[24] I now turn to the costs appeal.

[25] The appellant has appealed the Tax Court's award of costs in favour of the respondent. Its submissions include that the Court erred by concluding that the amount at stake was significant simply because related litigation is outstanding in the Tax Court. The appellant further submits that it was incorrectly faulted for failing to concede that the sole purpose of the creation and use of the dual share structure was to preserve the losses. In addition, the appellant disputes a disbursement for an expert fee incurred by the respondent which the appellant argues was not necessary.

[26] In my view, there is no reason to interfere with the Tax Court's exercise of its discretion in considering the appropriate award of costs and disbursements. Accordingly, I would dismiss the costs appeal, with costs.

"Judith Woods"

J.A.

"I agree.
René LeBlanc"

"I agree.
K. A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-30-24 and A-166-24
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STYLE OF CAUSE:	MADISON PACIFIC PROPERTIES INC. v. HIS MAJESTY THE KING
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DATE OF HEARING:	JANUARY 22, 2025
REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRED IN BY:	LEBLANC J.A. MONAGHAN J.A.
DATED:	JANUARY 23, 2025

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