Federal Court of Appeal | Cour d'appel fédérale

Date: 20250402

Docket: A-86-24

Citation: 2025 FCA 77

CORAM: **STRATAS J.A.**
MONAGHAN J.A.
WALKER J.A.

BETWEEN:

TOTAL ENERGY SERVICES INC.

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on April 2, 2025.

Judgment delivered from the Bench at Toronto, Ontario, on April 2, 2025.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on April 2, 2025).

STRATAS J.A.

[1] Total Energy appeals from the judgment of the Tax Court of Canada (*per* Pizzitelli J.): 2024 TCC 12. The Tax Court dismissed Total Energy's appeal from the Minister's reassessment. The Minister denied Total Energy's deduction of non-capital and other losses and deductions for

the 2010 and 2011 taxation years. The Minister relied on the general anti-avoidance rule under s. 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[2] The appeal must be dismissed. The current governing authority in this Court, particularly in loss trading cases such as this, is the Supreme Court's decision in *Deans Knight Income Corp. v. Canada*, 2023 SCC 16, as interpreted and applied in *Canada v. MMV Capital Partners Inc.*, 2023 FCA 234 and *Madison Pacific Properties Inc. v. Canada*, 2025 FCA 20. Total Energy has not persuaded us that the Tax Court committed an error of law by deviating from these authorities in any way. At the time it rendered its judgment, the Tax Court was bound to follow *Deans Knight* and *MMV*.

[3] In particular, the Tax Court, applying *Deans Knight*, properly identified the object, spirit and purpose of s. 111(5).

[4] The appellant notes that *Deans Knight* did not deal with trust conversions. That is immaterial. The object, spirit and purpose of s. 111(5) does not change depending on the facts of the particular case nor on the status of the acquiror.

[5] As for the addition of s. 256(7)(c.1) to the Act in 2010, this later amendment to the Act is immaterial to the analysis of the object, spirit and purpose of s. 111(5): *Canada v. Oxford Properties Group Inc.*, 2018 FCA 30, [2018] 4 F.C.R. 3 at paras. 45-46; *Univar Holdco Canada ULC v. Canada*, 2017 FCA 207 at para. 29. In *Deans Knight*, the Supreme Court did not look at other provisions enacted after s. 111(5) in order to determine the object, spirit and purpose of s.

111(5). Parliament did not change the object, spirit and purpose of s. 111(5) by later enacting s. 256(7)(c.1). In any event, in this case, as the Tax Court noted (at para. 126), the enactment of s. 256(7)(c.1) "serves to clarify the policy as well as provide automatic denial of such losses rather than resorting to the [general anti-avoidance rule] and thus creates greater certainty for taxpayers".

[6] We are also of the view that Total Energy has failed to show that the Tax Court committed any legal error or palpable and overriding error in applying the governing law to the facts of this case and finding abuse of s. 111(5) of the Act.

[7] The appellant sought to introduce the element of control, and particular types of control, and give them some primacy in the s. 245 analysis in this case at the stage of whether the object, spirit and purpose of s. 111(5) was frustrated. The focus in *Deans Knight* is on transactions, howsoever designed, that frustrate the object, spirit and purpose of s. 111(5) of the Act. As para. 124 of *Deans Knight* explains, the question to be answered where s. 111(5) is involved is whether the result of the transactions frustrates the rationale of "preventing corporations from being acquired by unrelated parties in order to deduct their unused losses against income from another business for the benefit of new shareholders". The Tax Court followed this approach (at para. 79).

[8] Though the standard of review on this point is palpable and overriding error, we agree with the Tax Court that this particular series of transactions, as found by the Tax Court, frustrates the object, spirit and purpose of s. 111(5), which is "to prevent corporations from being acquired

by unrelated parties in order to deduct their unused losses against income from another business for the benefit of new shareholders": *Deans Knight* at paras. 6, 78, 113, 124 and 140. Somewhat similar to *Deans Knight*, the appellant in this case was divested of its failed medical imaging business and was acquired by an unrelated party to be put in inventory for resale of its tax attributes. Later it was sold, by way of a reverse takeover, to unitholders of a publicly traded income trust, with its losses used to offset income from an oil and gas services business for the benefit of its new shareholders. We agree with the Tax Court (at para. 112) that "[i]f these are not the type of transactions Parliament sought to stop by the amendment of the loss streaming rules in s. 111(5) and parallel provisions, [we] don't know what are".

[9] Therefore, we will dismiss the appeal with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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