

Docket: 2013-189(IT)G

BETWEEN:

OLYMPIA TRUST COMPANY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application for a determination of a question pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)*, heard on June 25, 2014 at Calgary, Alberta

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

Counsel for the Appellant: Jehad Haymour
Counsel for the Respondent: Donna Tomljanovic

ORDER

Upon application by the parties, pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)* for the determination of a question of mixed fact and law;

And upon hearing counsel for the parties;

Now therefore in accordance with the reasons attached, this Court has determined that based upon the accepted facts in this matter, as amended, that the Appellant is a purchaser (as defined in subsection 116(3) of the *Income Tax Act* (“*ITA*”) under subsection 116(5) of the *ITA*.

Costs shall be at the discretion of the trial judge, unless the parties wish to make written submissions within 30 days from the date of this order requesting the Court order otherwise.

Signed at Ottawa, Canada, this 19th day of December 2014.

“R.S. Boccock”

Boccock J.

Citation: 2014TCC372
Date: 20141219
Docket: 2013-189(IT)G

BETWEEN:

OLYMPIA TRUST COMPANY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bocock J.

I. The Question of Mixed Fact and Law

[1] On April 9, 2014, Justice Lamarre of this Court issued an order directing that the following question of mixed fact and law be determined under section 58 of the *Tax Court of Canada Rules (General Procedure)* (“Rule 58 Question”):

Whether, on the accepted facts in this matter, as outlined in Exhibit “A” to the Amended Notice of Motion, or such other facts as the Court may accept or direct in the circumstances, Olympia Trust Company (“Olympia Trust”) is the purchaser [as defined in subsection 116(3) of the *Income Tax Act (ITA)*] under subsection 116(5) of the ITA.

[2] The Rule 58 Question comes before the Court because the Minister has raised certain assessments against the Appellant (“Olympia”), asserting that Olympia was the purchaser of certain shares (the “shares”) under subsection 116(5) of the *Income Tax Act of Canada*, (R.S.C., 1985, c. 1 (5th Supp.)) (“Act”). The Minister states that Olympia, in its capacity as an RRSP trustee, acquired the shares as taxable Canadian property from a non-resident vendor. Further, such a transaction required Olympia, as purchaser, to obtain a section 116 clearance certificate or to withhold and remit the statutorily prescribed amount representing the non-resident vendor’s deemed disposition tax. Since neither a clearance certificate pursuant to section 116 of the *Act* was obtained nor was the required

withholding tax remitted, the Minister looks to Olympia, as purchaser, for the specific tax liability of the non-resident vendors. As required for a Rule 58 question, the accepted facts and documents were agreed to and submitted to the Court. Each party provided both oral and written submissions.

II. The Agreed Facts and Relevant Documents

A. Relevant Parties and Transaction Description

[3] At all relevant times during the years 2000 through 2004 (the “years in dispute”) Olympia, in its business as a trust company, acted as trustee in respect of self-directed RRSP plans: well-known arrangements wherein the annuitant directs which property shall be acquired and held within the RRSP plan. In establishing an RRSP plan, each annuitant (“Annuitant”) completed a registered plan application. Olympia was responsible for implementing the instructions of the Annuitant with respect to the property to be acquired and held within the RRSP plan. In each instance, identification of, and acquisition terms for, the shares were memorialized under a separate share purchase agreement (“SPA”) to which Olympia was not a party. Olympia was not the beneficial owner of any shares. In some instances, the identity of the non-resident vendors was unknown to Olympia.

[4] Procedurally, each Annuitant, in the course of Olympia’s administration of the RRSP plan, would direct Olympia to accept delivery of shares into the RRSP. Prior to the delivery of such shares into the RRSP fund, Olympia would marshal and tender from each RRSP plan, cash representing the purchase moneys required for the shares. Certificates representing the shares, engrossed in the name of Olympia, were delivered to Olympia via either vendor’s counsel or Annuitant’s counsel pursuant to a written direction executed by the Annuitant.

B. RRSP Plan Application Form

[5] Each Annuitant established an RRSP plan by executing an RRSP plan application form. These particular plan applications required that the Annuitant acknowledge certain provisions consisting of the following relevant textual excerpts:

Registered Plan Application

Olympia Trust Company

Registered Plan Application

A. Plan Type (check one only):

Locked-in RSP/LIRA

[...]

4. Trading Authorization and Dealer Acknowledgment (Limited to mutual fund trades only.)

[...]

I will sign any documents required for all trades, OR

[...]

7. Confirmation of Application

[...] I certify that the information contained in this Registered Plan Application is true and correct, and that I have read and am bound by the attached Declaration of Trust that governs my Plan and any applicable Locking-in Supplements. I understand that it is my responsibility to arrange for the transfer of assets to my Plan from any predecessor registered plan or other permitted source.

8. Your Rights as a Security Holder

[...] As a non-registered holder, you have the same right as a registered security holder to vote at annual and special meetings. This voting right is provided to registered security holders in securities and corporate legislation and carries with it the right to receive notices for meetings, information circulars, and proxies. As your securities are held for you by the Trustee and not registered in your name, the Trustee may provide material directly to you. [...] Therefore, information relating to annual or special meetings, including proxies which permit you to vote, and annual financial statements will be sent to the Trustee. [...]

9. Terms and Conditions

In consideration of the Trustee accepting this account, [...]

a. The Trustee has the right to reject an order to sell any securities in my account

[...]

c. I will pay the Trustee any amounts owing to them and any fees as outlined in the Olympia Trust Company Fee Schedule. In addition, the Trustee can sell

securities in my account or otherwise deduct from my account any amounts owing to them.

d. I will deliver any securities that I sell to Olympia Trust Company promptly if not held by Olympia Trust Company. If I do not, Olympia Trust Company may purchase the security at my expense.

[...]

C. Share Purchase Transaction Documents

[6] Similarly, the following are relevant textual extracts from other various transactional documents which effected the acquisition of the shares:

(1) Share Purchase Agreement and Exhibit "A" Trust Declaration

THIS AGREEMENT made as of the 7th day of Feb, 2003

Between:

[Identification of parties]

In each case the Annuitant was described as (the "Purchaser")

1) Sale of the Securities

The seller hereby sells, transfers and assigns all of its right, title and interest in and to the Securities to the Purchaser effective from and after the Effective Date and the Purchaser hereby purchases the Securities.

[...]

4) Registration of the Securities

The Purchaser hereby authorizes and directs the Seller to take any action, either alone or together with the Trust Company which may be necessary or desirable to have the Securities registered on the books of the Corporation in the name of: Olympia Trust Company, I.T.F. [Annuitant's name], RRSP A/c # [#]

5) Representations, Warranties and Covenants of the Seller

[...]

f) it shall execute and deliver herewith a Trust Declaration in the form attached as Exhibit "A" hereto and pursuant to which it shall hold the Securities in trust for the sole use and benefit of the Purchaser from the Effective Date through to the date on which the transfer of the Securities to the Purchaser has been completed in the corporate records of the Company or its duly authorized registrar and transfer agent.

6) Representations, Warranties and Covenants of the Purchaser

[...]

b) the Purchaser is purchasing the Securities as principal, and not as agent on behalf of any other person.

[...]

Exhibit "A"

The undersigned, [name of seller], hereby declares that it stands possessed of and holds in trust for the sole use of the Purchaser [not completed] Class C – Preferred Shares, without par value, (the "Securities") in the capital of the Company standing in the name of the undersigned on the books of the Company, and further declares that:

1. during the term of this Trust Declaration it shall receive for and behalf of and distribute forthwith to the Beneficiary any and all dividends, rights or enurements of whatever nature arising out of or pertaining to ownership of the Securities;
2. during the term of this Trust Declaration it shall receive for and on behalf of and distribute forthwith to the Beneficiary any and all notices, proxies, information circulars, financial statements or any other documents or whatever nature distributed by the Company to its registered holders of the Securities; and
3. during the term of this Trust Declaration it shall execute a proxy with respect to the Securities for each meeting of the security holders of the Company as designated and instructed by the Beneficiary.

This Trust Declaration is effective from the date hereof through the date that the Securities are registered in the name of the Beneficiary, or his/her personal representatives, on the records of the Company.

DECLARED effective this _____ day of _____, 2003

[Vendor]
Authorized Signatory

(2) Letter of Indemnity

Investing in Shares or Other Obligations of Canadian Controlled Private Corporations Including Venture Capital Corporations (VCCs) and Mortgage Corporations (MICs)

I, the undersigned, wish my Self-Directed RSP/RIF to invest \$ _____ to purchase _____ shares/other obligations of [name of company]:

In consideration of Olympia Trust Company (Olympia) accepting this investment in the Plan noted below, I hereby confirm and certify that this is a “qualified investment” as the term is defined in the Income Tax Act (Canada).

1. Advice: I acknowledge that I have sought and obtained independent financial, investment, tax and legal advice to the extent that I deem necessary and appropriate in making this investment for my Plan.

I further acknowledge that it is my sole responsibility to evaluate all investment that I may elect to make in my Plan from time to time and that Olympia, by accepting this investment into my Plan, accepts no responsibility for determining either its eligibility as a “qualified investment” or the value of the investment at this time or any time in the future.

[...]

3. Purchase Options (check one)

[...]

X The Share certificate(s)/debenture, bond etc. is enclosed and funds should be remitted to: [Annuitant’s counsel, in Trust]

[...]

5. Indemnity: I agree to indemnify and save harmless Olympia for any taxes, penalties, levies, costs, expenses or any other actions or claims resulting from my instructions to make this investment and hold this security in my plan.

[...]

The Direction Regarding Funds

[...]

Shares of a privately held corporation by my RRSP account. [...]

This communication is your authorization to transfer the appropriate funds from my RRSP account(s), (see list below), and to receive the corresponding shares from:

[...]

(3) Letter of Direction to Olympia and/or Vendors' Counsel of which there were two forms in use

Form A

Please accept this letter as my request and your authority to accept delivery of share certificate number [#] in respect of the shares into the above RRSP account, and to deliver the sum of [\$] from my RRSP account in payment therefore [sic] to [vendors' counsel's name] in trust [counsel's address], on my behalf.

Dated ...

Form B

To: Olympia Trust Company

From: [name of Annuitant]

[...]

Please find enclosed the completed documents required by your firm to complete a purchase of shares of a privately held corporation by my RRSP account. The documents include a certification of the private corporation's shares and the related questionnaire.

[Annuitant's counsel or Vendor's counsel]

The following is a list of RRSP accounts from which you will need to draw funds: (if more than 2 accounts see attached list)

1. Account number: [number specified]

Fund Name: [name of account]

Account: (CND) [amount in dollars]

Funds used for share purchase:

As you can appreciate time is of the essence, please proceed to transfer and close on the purchase agreement with all reasonable haste.

(4) Transfer Authorization for Registered Investments(in regards to transfer from initial RRSP trustee to Olympia)

[...]

1) [...] If the plan or fund is an RRSP or a RRIF that conforms to a specimen plan or fund, it will conform with the specimen identified as: RSP [#]/RIF [#]. [...]

As requested we enclose the following our cheque in the amount of [\$#] and the following securities for the above noted account. Please ensure all income generating securities are re-registered without delay. [...]

(5) Certification of Private Corporation Shares

[Name of Accounting firm]

Olympia Trust company

Re: CERTIFICATION OF PRIVATE CORPOARTION SHARES OF

[name of company]

I, the undersigned, being a Certified General Accountant in the Province of British Columbia, do hereby certify that, in my opinion, the ... Shares, ...of ... (the "Company") would be a qualified investment in the RRSP/RRIF of [Name of Annuitant] and;

1. The Company is an eligible corporation as defined in subsection 5100 (1) of the Income Tax regulations.
2. The fair market value and consideration of each Preferred Share of the Company shall be \$1.00 in accordance with the Articles of the Company, a copy of the relevant section of which is attached hereto for reference.
3. The purchase of the Preferred Shares will not give [Name of Annuitant] a controlling interest in the Company.

Yours truly,

_____ CGA

[Accountant]

(6) Direction re: Title and Re-direction to Olympia in Trust

(sent from Annuitant's Counsel to Vendor's counsel)

[...]

Please make out the certificates in the following matter: OLYMPIA TRUST COMPANY. I.T.F. [Annuitant's name]. RRSP A/C # [#], changing the name and

the account numbers to suit, and have them sent to us at your earliest convenience. A certificate # [#] for the balance of [#] shares should be made out for [Annuitant's name], and copy sent to this office.

(7) Confirmation of Transfer of Shares (addressed to Annuitant's counsel and vendor)

To: [Annuitant's Counsel]

From: [Annuitant]

Please find enclosed a copy of a recently executed share purchase agreement. This communication is your authorization to request funds to close this transaction.

The following is a list of RSP accounts from which you will need to draw funds. (if more than 2 accounts see attached list)

[...]

As you can appreciate time is of the essence, please proceed to transfer and close on the purchase agreement with all reasonable haste.

[...]

I would like to confirm my wish to transfer [#] Class "A" Convertible Voting Preference shares, Series 2 to OLYMPIA TRUST COMPANY Re: . [Annuitant's name] RRSP A/C # [#] of: [address] (the "Purchaser")

Please issue a new share certificate in the name of the Purchaser.

Thank you.

[Annuitant]

It is noted that documents (6) and (7) above were added by consent order of this Court and the parties were permitted to make submissions as to their legal effect and probative value.

III. Parties Statements of Issues and Submissions

A. Olympia's Submissions

(1) Olympia is not a purchaser

[7] Olympia argues that both factually and legally it is not a purchaser. Factually, it was not a party to any SPA or described as a purchaser under the SPAs which describe only the Annuitant as the purchaser. Secondly, Olympia asserts that only the Annuitant and not Olympia was ever a beneficial owner of the shares. Further, the limited involvement of Olympia was, minimally, to effect the binding letters of direction received from the Annuitant directing Olympia to transfer the moneys from the RRSP plan to the vendor or its counsel and, thereafter, receive delivery of the shares in Olympia's name and hold the shares as property of the RRSP plan.

[8] Legally, Olympia argues that characterizing it as a purchaser is so intuitively inappropriate, given the etymology of the word, that legal authority has never developed regarding the application of section 116 to a trustee. Such textual clarity should not be clouded by over extended interpretive forays which contribute to unexpressed notions of policy or principle: *653902 British Columbia Ltd v R* [1999] 3 S.C.R. 804 at paragraphs 50 and 51. Further, the reference within subsection 116(5) refers solely to a purchaser who, in this case, is the Annuitant. Information Circular 72-17R6 provides that "disposition" normally occurs where a properly executed agreement of purchase and sale is delivered by the person acquiring the property. This conclusion is referable to the parties that executed the SPA and in this matter, does not include Olympia *qua* trustee.

[9] In referencing the "true owner of the property" as that term was interpreted in *Prévost Car Inc v R*, 2008 TCC 231 at paragraph 100, Olympia asserts it is the Annuitant and not the trustee who is the purchaser (116(3)) who acquired the shares (116(5)). The formation of the contract involving the concepts of offer and acceptance, consideration, common intention and privity of contract, based upon the facts, would apply only to the Annuitant who entered into the contract to acquire the shares from the vendor and thereafter received all incidents of title: *MNR v Wandean Drilling Ltd*, 69 D.T.C (5194 Ex. Ct.) at paragraphs 24 and 26.

(2) Olympia did not acquire the shares

[10] Moreover, Olympia asserts that the documents before the Court speak directly and clearly to defining the Annuitant as the purchaser. The Annuitant is described as purchaser, directs the vendor to register the shares in a certain manner. Each SPA contains representations and warranties of the Annuitant as principal, and reserves a trust obligation by the vendor in favour of the Annuitant until share certificates are engrossed. The letters of direction direct Olympia to make payment to the vendor's solicitor and direct Olympia, as trustee, to accept delivery of the shares as an investment for the RRSP plan.

[11] As to the issue of "disposition", subsection 248(1) of the *Act* indicates that a legal transfer, as opposed to a beneficial transfer, is excepted from inclusion in the definition. Olympia neither provided the consideration nor did it acquire any interest in the shares such as to make the shares its own; it did not have liability under the SPA nor did it hold the incidents of ownership.

[12] Olympia contends that the attraction of tax liability "personally" by the trustee, as personal representative or simple administrator, is inconsistent with a textual, contextual and purposive interpretation of the *Act* and, more specifically, the intent and purpose of subsection 116(5). Since Olympia was neither a purchaser nor a party who acquired the property from a non-resident, the attraction of tax liability, requiring both a purchaser and the acquisition of the property, is unfulfilled.

(3) Olympia is a mere Agent/Administrator

[13] Further, Olympia's counsel contends that the role of Olympia was limited to an administrator and bare trustee and not that of purchaser; Olympia was never anything more than a fiduciary and agent to the Annuitant. It is not within the ambit of subsection 116(5) to impose liability upon a fiduciary or agent. Moreover, the agent/fiduciary role attracts personal tax liability under subsection 159(1) of the *Act* and, by analogy, provides a specific example where Parliament expressly intended that personal liability attach to a legal representative, whereas no liberal or textual interpretation of subsection 116(5) could afford such a conclusion regarding legislative intent. In conclusion, Olympia's counsel indicates that the Minister failed to assess the proper party: the Annuitant and/or the RRSP plan.

B. Respondent's Submissions

(1) Trustee seized of legal title

[14] The Respondent takes the position that Olympia was a trustee of the RRSP plan and, accordingly, had authority and discretion as to whether to act on the Annuitant's directions, as reserved by Olympia in section 9(a) of the registered plan application. Olympia had possession and control of the purchase moneys, received the shares in its name, took possession and control over the shares as property constituting a portion of the *corpus* of the RRSP plan trust property and had ultimate powers of "disposition". Such authority when combined with the term "purchaser" in subsection 116(3), which in turn corresponds to the charging language in subsection 116(5), incorporates within it the meaning of the words "dispose of".

(2) Trustee only party to legally "own" the shares

[15] In turn, the definition of a "disposition" under section 248(1) of the *Act*, provides that a disposition of any property includes any transaction: (i) where the property is a share, and (ii) which is a transfer of property to a trust or a transfer of the property to a beneficiary of the trust, subject to certain exceptions not applicable in this case.

[16] Further, Respondent's counsel submits that, legally, a trust is not a distinct legal entity at common law, but a construct for splitting legal and beneficial ownership of property. The *Act* itself contains provisions such as subsections 104(1) and (2) which deem trusts to be taxable structures, but not legal entities *per se*: *St Michael Trust Corp v Her Majesty the Queen*, 2010 FCA 309 at paragraph 5 and 11, affirmed by 2012 1 SCR 520 (SCC). The trustee is the legal owner of the RRSP plan assets and, in turn, the party which bears the responsibility should it acquire and become the intended legal owner of certain property as defined within the *Act*. Although parties may vary "powers" afforded a trustee by contract, the structure of the trust and the roles and entitlements of the trustee and beneficiary, at law, do not change: *Alberta (Public Trustee) v Koska*, 2010 Carswell Alta 1059 (Alta QB), at paragraph 54.

[17] Olympia was the legal holder of title and registered owner of the shares; the Annuitant was equitably entitled to the exclusive enjoyment and benefits flowing from the RRSP plan assets and from the shares partially comprising same. None of these respective entitlements, rights or obligations was altered by the relevant

documents or statutory provisions applicable in this matter. Therefore, Olympia became the purchaser acquiring the taxable property.

(3) Context and purpose of section 116 is allocation of risk for the non-resident Vendor tax

[18] Lastly, as a matter of a public policy, Respondent's counsel argues that subsection 116(5) contextually relates to the tax liability of a non-resident vendor and provides an enforcement mechanism by which the Minister may raise assessments against parties who become legal owners of title to taxable Canadian property sold to them by non-resident vendors: *RCI Trust (Trustee of) v MNR*, 2009 FCA 373 at paragraph 15. In contrast, sections 104 and 159 relate to the taxation of trust income and the disposition of trust property by a personal representative to a beneficiary. Moreover, subsection 116(5) is not a charging provision of tax against any of Olympia, the Annuitant or the RRSP plan, or an assessment relating to the disposition of trust property to a beneficiary. Instead, it is a provision vicariously transferring liability to Olympia, as the legal owner of title, seized of the property and statutorily responsible for a portion of the non-resident vendor's tax. Within these required contextual and purposive analyses, mandated by *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54, lay the requirement of Olympia, as trustee, to pay the uncollected Part I tax of the non-resident vendor (*RCI Trust*) because Olympia used the trust funds held by it to acquire the trust property in respect of which the Annuitants never had possession or title.

IV. Statutory Provisions

[19] The following represents a summary of the statutory provisions referenced jointly and distinctly by both counsel in submissions (emphasis added).

A. Common Statutory References – by both Applicant and Respondent

Notice to Minister

116(3) Every non-resident person who in a taxation year disposes of any taxable Canadian property of [...] shall, [...], send to the Minister, [...] a notice setting out

(a) the name and address of **the person to whom the non-resident person disposed of the property (in this section referred to as the “purchaser”)**,

[...]

Liability of purchaser

116(5) Where in a taxation year a purchaser has acquired from a non-resident person any taxable Canadian property [...] of the non-resident person, the purchaser, unless

(a) **after reasonable inquiry the purchaser had no reason to believe that the non-resident person was not resident in Canada,**

[...]

(b) **a certificate under subsection 116(4) has been issued to the purchaser by the Minister in respect of the property,**

is liable to pay [...], as tax under this Part for the year on behalf of the non-resident person, 25% of the amount, [...], by which

(c) the cost [...] of the property [...] exceeds

(d) the certificate limit fixed by the certificate, if any, [...],

and is entitled to deduct or withhold from any amount paid or credited by the purchaser to the non-resident person or otherwise recover from the non-resident person any amount paid by the purchaser as such a tax.

Definition of Trust

104(1) In this Act, a reference to a trust or estate (in this subdivision referred to as a “trust”) shall, unless the context otherwise requires, be read to include a reference to the trustee, executor, administrator, liquidator of a succession, heir or other legal representative having ownership or control of the trust property, but, except for the purposes of this subsection, subsection (1.1), subparagraph (b)(v) of the definition “disposition” in subsection 248(1) and paragraph (k) of that definition, a trust is deemed not to include an arrangement under which the trust can reasonably be considered to act as agent for all the beneficiaries under the trust with respect to all dealings with all of the trust’s property unless the trust is described in any of paragraphs (a) to (e.1) of the definition “trust” in subsection 108(1).

B. Subsection 159(1) and 215(2) and (3) – Referenced by Applicant

159(1) For the purposes of this Act, **where a person is a legal representative of a taxpayer at any time,**

(a) **the legal representative is** jointly and severally, or solidarily, **liable with the taxpayer**

(i) **to pay each amount payable under this Act by the taxpayer** [...], to the extent that the legal representative is at that time in possession or control, [...], of property that belongs or belonged to, [...], the taxpayer or the taxpayer's estate, [...]

Certificate before distribution

(2) **Every legal representative** (other than a trustee in bankruptcy) of a taxpayer **shall, before distributing to one or more persons any property in the possession or control of the legal representative** acting in that capacity, **obtain a certificate from the Minister,** [...]

Personal liability

(3) **If a legal representative** [...] **of a taxpayer distributes** to one or more persons **property** in the possession or control of the legal representative, acting in that capacity, **without obtaining a certificate under subsection** [...],

(a) **the legal representative is personally liable for the payment of those amounts** to the extent of the value of the property distributed; [...]

Where an amount on which an income tax is payable under this Part is paid or credited by an agent or other person on behalf of the debtor [...], the agent or other person by whom the amount was paid or credited shall, notwithstanding any agreement or law to the contrary, deduct or withhold and remit the amount of the tax and shall submit therewith a statement in prescribed form as required by subsection 215 (1) [...]

Where an amount on which an income tax is payable under this Part was paid or credited to an agent or other person for or on behalf of the person entitled to payment without the tax having been deducted or withheld under subsection 215 (1), **the agent or other person shall, [...] contrary, deduct or withhold therefrom the amount of the tax and forthwith remit that amount**

to the Receiver General on behalf of the person entitled to payment in payment of the tax [...].

C. Definition of ‘disposition’ subsection 248(1) – Referenced by Respondent

248(1) **“disposition” of any property**, except as expressly otherwise provided, **includes**

(a) **any transaction or event** [...],

(b) [...] **by which,**

(i) **where the property is a share, [...], in it, the property is in whole or in part redeemed, acquired or cancelled,**

[...]

(v) a trust, that can reasonably be considered to act as agent for all the beneficiaries under the trust with respect to all dealings with all of the trust’s property (unless the trust is described in any of paragraphs (a) to (e.1) of the definition “trust” in subsection 108(1)), ceases to act as agent for a beneficiary under the trust with respect to any dealing with any of the trust’s property,

[...]

(c) **any transfer of the property to a trust** [...]

but does not include

(e) **any transfer of the property as a consequence of which there is no change in the beneficial ownership of the property, except where the transfer is**

(i) from a person or a partnership to a trust for the benefit of the person or the partnership,

(ii) from a trust to a beneficiary under the trust, or

(iii) **from one trust maintained for the benefit of one or more beneficiaries under the trust to another trust maintained for the benefit of the same beneficiaries,**

(f) **any transfer of the property as a consequence of which there is no change in the beneficial ownership of the property, where** [...]

[...]

D. Definition of “registered savings plan” and “annuitant” – referenced by the Respondent

146. (1) “**annuitant**” means

(a) until such time after maturity of the plan as an individual’s spouse or common-law partner becomes entitled, as a consequence of the individual’s death, to receive benefits to be paid out of or under the plan, **the individual referred to in paragraph (a) or (b) of the definition “retirement savings plan”** in this subsection for whom, under a retirement savings plan, a retirement income is to be provided, and

146. (1) “**retirement savings plan**” means

[...]

(b) **an arrangement under which payment is made by an individual** [...]

(i) **in trust to a corporation licensed** or otherwise authorized under the laws of Canada or a province to carry on **in Canada the business of offering to the public its services as trustee, of any periodic or other amount as a contribution under the trust,**

to be used ... for the purposed of providing ... a retirement income.

Canada Revenue Agency, Interpretation Bulletin IT-320R3

2. All qualified investments of a plan trust must be owned by the trustee of the plan trust and not the annuitant ... In the case of a share ... registration of the annuity in the name of the trustee of the plan trust demonstrates ownership by the trustee save and except where a broker holds it as agent for the trustee.

V. Further Identification of Issues

[20] Although only one overarching question is framed in this Rule 58 Question, as noted above, the parties embrace distinct statutory interpretations within their respective positions. Therefore, the Court finds it necessary to frame secondary or sub-topical issues for the purpose of answering the Rule 58 Question. This secondary analysis is required because, although no facts are in dispute, the

elements of the transaction *per se* are more complex owing to the existence of an RRSP plan.

[21] Therefore, based upon the accepted facts, documents and legal issues the Court has established the following secondary issues:

- a) which required parties and legal steps effected the “transfer” of property?
- b) given the foregoing, was Olympia “the purchaser” to whom the shares were disposed within the definition of subsection 116(3)? and
- c) if so, was Olympia “a purchaser [who] acquired the [taxable] property from a non-resident and thereby assumed liability under subsection 116(5)?

VI. Analysis and Answer to Rule 58 Question

A. Required Parties and Steps to “transfer” of property

[22] From the submissions and *facta*, the analysis of who undertook which steps to “transfer” the property is of material importance. It requires an examination of the admitted documents and the facts through the lens of the attendant legal structures and concepts.

[23] Factually, the following documents afford certain conclusions:

- a) **Plan Application:** While the Annuitant was required to sign all directional documents, this document acknowledges that: legal title to all securities within the RRSP plan is to be held by the trustee, the trustee could reject a securities sell order and impose an obligation on the Annuitant to indemnify the trustee for fees and other amounts arising from the arrangement.
- b) **Share Purchase Agreement regarding specific securities:** The SPA memorializes the seller’s obligation to sell, to assign its interest to the purchaser (defined within as the Annuitant), to have the securities registered in the name of the trustee and, reciprocally, the seller’s obligation to execute a pre-delivery, interim trust obligation in favour of the Annuitant. The purchaser also indicates it is purchasing as principal and not as agent.

- c) **Trust Declaration:** Accompanying the SPA, this document gives effect to the vendor's declared interim trust in favour of the Annuitant as to certain rights: dividends, voting and notices. Further, this document acknowledges such interim trust until the registration of title in the name of the Annuitant or personal representative. Within the document the Annuitant is described, ironically, as the "Beneficiary" of such interim transactional trust.
- d) **Letter of Indemnity:** This document diminishes certain of Olympia's otherwise subsisting legal obligations as a trustee: valuation, qualification and payment of expense obligations. Lastly, it directs Olympia to transfer funds from the RRSP fund to purchase certain investments and authorizes it to receive the certificates therefore in its name.
- e) **Letter of Direction:** Although two different forms existed, materially they have similar legal effect. Each embodies the Annuitant's direction to Olympia and encloses the forms required by Olympia to "proceed to transfer and close" on the purchase agreement and accept delivery of the shares to be held by the RRSP plan. The purpose of either was to have title to the shares engrossed in favour of Olympia, as trustee.
- f) **Certificate of Shares:** The import of this document provides evidence to Olympia, given it was not a party to the SPA, that the shares qualify for investments within an RRSP plan.

B. The Statutory Regime for RRSP Plans

[24] In the absence of an RRSP plan, the justification for and structure of which will be further analyzed below, any such transfer of shares would by logical necessity involve only two parties: a seller and a purchaser, (plus respective counsel). A more minimal number of documents would have been employed in such a case: a purchase agreement, interim trust declaration, and share certificate registered in the name of the purchaser. In such a situation, where privately held shares were owned by a non-resident, there is no doubt that subsections 116(3) and 116(5) would include within their ambit the "purchaser" of such securities described in such documents. Legally, a price would be agreed, moneys tendered to the seller by the purchaser and title to the securities would be transferred to the purchaser named in the purchase agreement. Moreover, in such a situation, and as was discussed from the bench during oral submissions, where the issue of legal and

beneficial ownership was not bifurcated by a trust, best practices would rest upon the purchaser's solicitor. One of the following several best practice steps would have been taken: the obtainment of a section 116 clearance certificate under 116(4), retention and remittance by the purchaser's solicitor of the prescribed withholding tax under 116(5) or the undertaking and conclusion of a reasonable inquiry that the seller was not a non-resident under 116(5).

[25] Importantly however, in the present case, there is a described trust and the concomitant documents and legal structures which accompany one. The supplementary documents and statutory provisions related to the RRSP plan are consistent with accepted trust law, namely, an express and implied confidence embedded in the trustee (Olympia) to hold title to property for the beneficiary's (Annuitant's) exclusive future benefit of the RRSP fund: *St. Michael's Trust* at paragraph 5. Traditionally, as legal owner of the trust assets (the RRSP fund), the trustee is seized of the power to manage and dispose, while all rights of enjoyment are vested in the beneficiary (the Annuitant). Modern business and tax law thinking frequently, through the use of instruments and statutory deeming provisions, attempts to "transform" trusts from legal constructs concerning the allocation of differing incidents of ownership to the same property to more modernistic entities *per se* by virtue of settlor or beneficiary (Annuitant) reserved powers or deemed entity taxation of trust income: *Waters Law of Trusts in Canada*, 4th edition, pages 568 and 1047. This theoretical metamorphosis is prevalent throughout Olympia's submissions. Also remaining within this Rule 58 Question are two sub-questions: what legally and factually constitutes the property of the RRSP plan or trust and, after considering the documents, statutes and law, to whom were the shares disposed, in respect of which the assessment is raised by the Minister?

[26] Textually, the definition of trust in subsection 104(1) is a supplementary and expansive inclusion and not a codification: "In this *Act*, a reference to a trust ... shall, unless the context otherwise requires, be read to include ... a reference to a trustee ... having ownership or control of the trust property ...". The words "shall mean", "is" or "describes a legal arrangement" are not utilized. A definition of "trust" does not exist within the *Act*: *Fraser v The Queen*, 91 DTC 5123 at page 5127 as affirmed 95 DTC 5685 (FCA). Existing jurisprudence directing that an RRSP plan is a trust applies, both as defined within the *Act* and to the extent applicable trust law has not been so statutorily modified. The rationale for this is strengthened by the fact that in this question, the Court is not determining the validity of an assessment for the trust's, beneficiary's or trustee's own income,

which is certainly distinctly subject to numerous provisions within the *Act*, but rather the vicarious assessment by a purchaser for the non-resident's unremitted disposition tax.

[27] From the documents, operation of the *Act* and the intention of the parties, and while decisions regarding the choice of investments within the RRSP plan and opportunities to find and procure same were contractually apportioned to the Annuitant, the essential legal prerequisites of a trust remain: section 146(1)(b)(i) of the *Act* and section 2 of Interpretation Bulletin IT-320R3. As to legal ownership, the least desired occurrence would have been the acquisition, registration of legal title or possession of any property within the corpus of the RRSP plan into the name of the Annuitant, at least prior to the conversion of same into cash payments in the form of an annuity at a future time. This intention was imbedded within the essential trust construct. Factually, to such extent, control of the shares as a trust asset rested with Olympia. Not only was the then transfer to the Annuitant legally and temporally not desirable with respect to the shares, but transfer of title of such property in kind, as opposed to in cash in the form of a future annuity or cash distribution, could not have then occurred to any Annuitant under the *Act* without unintended adverse results: "benefit" is defined in 146(1) of the *Act* as any "amount" received out of or under a retirement savings plan and paid to an annuitant or spouse.

[28] Even in such an event, a prior conversion of trust property to cash is required. Given this fact, there is a structural difference between the Annuitant's right of exclusive enjoyment under trust law, to the extent modified by the *Act*, of the wealth value within the RRSP plan and the right to be seized of the specific trust asset, *in specie*. Until the underlying asset is converted to cash, it cannot be paid to the Annuitant under the RRSP regime. The Annuitant and Olympia want nothing less than this. In short, the identification and procurement "power" or "right" of the Annuitant should not be confused with the trust obligation and authority of Olympia to be legally seized, titled and in control of the RRSP fund assets, whether in the form of the purchase price tendered or the property acquired, given the regime under which the RRSP plan, as a trust, subsists.

[29] This is not a question of who "owns" the greater sole right to dividends (*Prévost Car*) or residency based upon management and control (*St Michael Trust*), but rather who, at law, is the party which either of the Annuitant or Olympia intended to legally acquire, be seized of or dispose of the shares as

underlying trust property. The answer is clear: Olympia as trustee of the RRSP plan was the initial, solely seized and registered legal owner of the underlying trust property within the RRSP plan. This intention and legal consequence resulted in the disposition of the taxable property by the vendor to Olympia.

C. Was Olympia “the Purchaser” by definition in subsection 116(3)?

[30] Within subsection 116(3), textually, the purchaser is defined as the person to whom the non-resident person disposed of the property. The shares comprised an asset within the corpus of the trust (RRSP plan). This is also true of the previously existing cash within the RRSP plan before its use as purchase moneys for the shares.

[31] The purchase moneys were in the possession, and remitted in the name of Olympia, the trustee. These funds tendered by Olympia acquired, upon delivery, the shares. From a trust accounting perspective, the cash within the RRSP fund was simply converted to shares. While use, benefit and enjoyment arising from the shares were exclusively reserved for the Annuitant, the trust and related RRSP plan documents bifurcated the other incidents of ownership and delivered possession, title and management of that very property to Olympia, as trustee. In light of the construct used, no relevant party desired to have the Annuitant be the party from whom the purchase moneys were advanced (this would have involved an RRSP withdrawal) or to whom the underlying trust asset (the shares) were nominated or disposed. The Annuitant’s contractual ability to identify and commence procurement of a species of assets, as trust property, was limited to just that, since within the RRSP provisions under the *Act*, the Annuitant could never become seized of the asset to the extent of legal title and possession.

[32] On this basis, the documents are in accord with the law. The legal and statutory regime governing the RRSP plan and the property within it preclude any party, save Olympia, from becoming the purchaser of the underlying trust property, namely, the shares which partially comprise the *corpus* of the trust (RRSP plan). As a whole, the facts and documents direct that Olympia was legal owner of the shares, upon trust, purchased by it with the purchase moneys within its possession and sufficient control: *Waters, supra* at page 141 and 144. The property within and constituting the RRSP plan (and specifically within this Rule 58 Question, the shares) was the *sine qua non* of the fiduciary obligation and without which no trust

or RRSP compliant acquisition would have existed: *The Law of Trusts*, Eileen E. Gillese, 3rd edition at page 31.

[33] In reconciling this finding with that of ACJ Rip, as he then was, in *Prévost Car*, the Court notes there is no disagreement in this Rule 58 Question as to who was the beneficial owner of the RRSP Plan: the Annuitant. In *Prévost Car*, a case heard in Quebec where the civil code was applicable and considered, the Court grappled with the term “beneficial owner” in the context of Section 116 assessments where tax treaties specified differing rates of withholding tax. The determination depended upon who was the “beneficiary”. *In obiter*, the Court stated, “... it is the true owner who is the beneficial owner”. The Court did not say the inverse. Factually, the Court found no trust existed and all incidents of ownership were reposed in one party: title, control, possession, enjoyment and use. Factually, the facts in this Rule 58 Question differ: possession, title and control of the shares rested with Olympia while use and enjoyment were unequivocally with the Annuitant. In *Prévost Car*, the observation was exactly correct: the true owner, where no other party has material incidents of ownership, is *a fortiori* the beneficial owner.

[34] Additionally, the contention that the interim trust in favour of the Annuitant under the SPA somehow demonstrates the Annuitant is the sole purchaser is inconsistent with the mandated registration requirement under section 4 of the same document. By its plain wording, the SPA interim trust declaration by the vendor ceases upon the date the shares are registered to the “Beneficiary or his/her person representative.” There is nothing inconsistent between this interim trust arrangement or the direction for Olympia to be registered owner and to receive delivery of the shares. Normally – for example, in the absence of a trust -- the named party executing the SPA would take title and possession of the property. However, in the present case, the documents in aggregate determined Olympia would tender the purchase money, take title and receive delivery of the shares: all of which facts were known, acknowledged and consistent within the documents executed by the vendors or their agents and counsel.

[35] Additionally, the name of Olympia figured prominently in the relevant documentation available to the vendor and/or its counsel. This is relevant since section 116 relates to the seller’s liability and any purchaser’s vicarious liability for non-compliance in the context of that section.

D. Was Olympia liable under subsection 116(5) as “a purchaser”, who has “acquired” the property?

[36] It is necessary to further consider this subsequent question since the subsection 116(5) charging provision utilizes the phrase “where ... a purchaser has acquired ... any taxable Canadian property.”

[37] Although the language of this charging provision is slightly more sequential than the definition in subsection 116(3), given the facts and law applicable to the transaction and structures relating to the shares, the outcome is no different. Olympia acquired the shares as the party legally, as opposed to beneficially, intended, obligated and entitled to receive same. The character of the shares as underlying trust property within the *corpus* of the RRSP plan, notwithstanding the Annuitant’s identification and procurement rights, lead to this factual and legal conclusion. The “true owner” of the enjoyment and wealth of the RRSP plan is the Annuitant. However, the shares were not the RRSP plan, but an asset partially comprising its *corpus*. Further, the shares were an asset which only Olympia could have compliantly acquired and whose possession and disposition remained consistent and unchallenged at the “trust asset” level in order that the shares would remain within the structure of the RRSP regime.

[38] Olympia’s contention that subsections 159(1) and (3) of the *Act* illustrate a more consistent textual, contextual and purposive approach, to be taken in the circumstances, fails. Textually, if Olympia is a purchaser who acquired the shares, subsection 116(5) applies independently of 159(1) and (3) both of which subsections plainly relate to the distribution of trust property rather than the acquisition of taxable Canadian property. By their very text, context and purpose these sections are antipodal: one (section 159) references the transferor’s tax liability of a taxable trust after disposition of trust property to a beneficiary and the other (section 116) the transferee’s vicarious tax liability of Canadian property upon acquisition from a taxable third party.

[39] Contextually, section 116 does not relate to the “personal” tax liability of Olympia or any other party who is a purchaser. The section relates to the vicarious liability, as a collection measure, of a purchaser for the non-resident vendor’s tax liability where the purchaser fails to comply with sub-paragraphs 116(5)(a) or (b).

[40] Purposively, section 116 is a well-known charging provision of Part I tax on disposition of taxable Canadian property by a non-resident vendor. In default of the vendor remitting the withholding taxes upon disposition of taxable Canadian property, the non-compliant purchaser pays the vendor's taxes. Conjunctively, its purposes are both a charging provision and collection mechanism of the vendor's tax: *RCI Trust (Trustee of) v MNR*, 2009 FCA 373. No express or implied purpose within section 116 relates to exigible income tax of a trust, trustee or beneficiary *per se*. To the extent that a trustee (or any other person) becomes a purchaser who non-compliantly acquires taxable Canadian property from a non-resident vendor, then the vendor's liability is now the purchaser's, and in this case, the trustee's.

[41] The coincidence of the trust and acquisition of the shares at the direction of the Annuitant may have clouded Olympia's view of its role and obligations, but it cannot frustrate the distinct context and purpose of this vendor tax and enforcement provision. And although not relevant to the Rule 58 Question, this is true where the purpose of the provision is otherwise so well-known and complied with easily, even by slight modification to the sample transactional documents before the Court.

[42] For these reasons, the Court returns its answer to the Rule 58 Question: based upon the accepted facts in this matter, as amended, Olympia, as a matter of mixed fact and law, is a purchaser (as defined in subsection 116(3) of the *Income Tax Act* ("ITA")) under subsection 116(5) of the *ITA*.

[43] The Court reserves the matter of costs to the trial judge, subject to exercising its discretion should it be in receipt of written submissions from the parties requesting otherwise within 30 days of the date of this Order.

Signed at Ottawa, Canada, this 19th day of December 2014.

"R.S. Boccock"

Boccock J.

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