Docket: 2014-1744(IT)G

BETWEEN:

QUINCO FINANCIAL INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)*, heard on February **29**, 2016 at Calgary, Alberta

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Ken Skingle Dan Morrison
Counsel for the Respondent:	Rosemary Fincham Shubir (Shane) Aikat

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AMENDED 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 (the "Rule 58 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 where, as here, the Minister of National Revenue has relied upon section 245 of the *Income Tax Act* ("*Act*") to deny capital losses when reassessing the Appellant's income tax for a taxation year, arrears interest payable under subsection 161(1) of the *Act* accrues during that period of time from the taxpayer's balance-due day for the year and before the issuance of such reassessment.

Costs are payable to the Respondent in accordance with the tariff, subject to the right of either party to make further submissions within 30 days of the date of this Order.

This amended Order is issued in substitution of the Order dated September 1st, 2016, in order to correct the precise date of hearing.

Signed at Ottawa, Canada, this 9th day of March 2017.

"R.S. Bocock"

Bocock J.

Citation: 2016 TCC 190
Date: 20160901
Docket: 2014-1744(IT)G

BETWEEN:

QUINCO FINANCIAL INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bocock J.

I. Introduction

[1] On October 26, 2015, C. Miller J. of this Court issued an order concerning section 58 of the *Tax Court of Canada Rules (General Procedure)*. He directed that the following question of mixed fact and law be determined under that section (the "Rule 58 Question"):

> **If, as here, the Minister of National Revenue has relied upon section 245 of the *Income Tax Act* (Canada) ("*Act*") to deny capital losses when reassessing the Appellant's income tax for a taxation year, can arrears interest payable under subsection 161(1) of the *Act* apply to accrue in respect of any period of time after the taxpayer's balance-due day for that year and before the issuance of such reassessment?**

II. Brief Summary of the Relevant Facts and Primary Issue in the Application

[2] By notice of reassessment dated April 7, 2009 (the "GAAR assessment issuance date"), the Minister of National Revenue ("Minister") reassessed the Appellant's tax liability for its taxation year ending August 27, 2004, under the General Anti-Avoidance Rule ("GAAR"), by assessing that:

(a) a series of transactions was undertaken that included transactions not undertaken for *bona fide* purposes other than to obtain the tax benefit of a deduction of a revised capital loss of $29,266,139; and

(b) such transactions resulted in a circumvention of sections 38, 39 and 40 and a misuse of such provisions and resulted directly or indirectly in an abuse having regard to the provisions of the *Act* as a whole.

[3] Under the reassessment, the Minister increased Part I tax by $5,236,687, reduced Part I.3 tax by $163,890, increased Part IV tax by $10,364,670, for a federal total net tax adjustment of $15,437,467, and increased the amount of the dividend refund under section 129 by $9,359,494.

[4] Under that same notice of reassessment, the Minister assessed arrears interest payable by the Appellant. Beginning on October 28, 2004, (the "balance-due day"), the Minister calculated the difference between the Appellant's Part I liability for the year and the total amounts paid by the Appellant at or before that time.

[5] By notice of objection dated June 19, 2009, the present Appellant, in law the successor to the corporation originally assessed, objected to the Notice of Reassessment.

[6] No substantive issues concerning the applicable provision of GAAR, aside from the commencement date for interest, are before this Court. Relevant to the Appellant, the Rule 58 Question may be phrased plainly: does arrears interest accrue on the Appellant's tax payable determined under GAAR from the balance-due day until the GAAR reassessment issuance date?

III. Underlying Sub-Issues relative to the Start Date of Arrears Interest under a GAAR Reassessment

[7] In submissions, the parties identified several sub-issues to the main Rule 58 Question. These underlying sub-issues and the parties' respective submissions may be generally grouped and summarized in this following section.

a) The Nature of Tax Liability Under GAAR

Appellant' Submissions

[8] The Appellant contends that tax liability arising and reassessment methodology employed under GAAR constitute a distinct basis for tax assessment in contrast to other provisions under the *Act*. Strict compliance and technical conformity with the other provisions of the *Act* are overridden by GAAR where the tax benefit achieved is in disaccord with the overall object, spirit and purpose of the *Act*. Upon the application of this override, the new tax liability arises through the denial of the tax benefit (*Copthorne Holdings Ltd. v R*, 2007 TCC 481 ("*Copthorne* TCC Decision") at paragraph 77). When the Minister raises the GAAR assessment, she must determine the tax consequences reasonably necessary in the circumstances under subsection 245(5) to deny the tax benefit. The longstanding jurisprudence holds that GAAR affords the imposition of tax consequences sufficient to deny the tax benefit, but does not permit or extend to the recharacterization of the transaction for any other tax purposes (*Shell Canada Ltd. v R*, 99 D.T.C. 5669 (SCC) at paragraph 39; *Canada Trustco Mortgage Company v R.*, 2005 DTC 5523 (SCC) at paragraph 30).

[9] The Appellant acknowledges this is contrary to the underlying conclusion of Justice Hogan in *JK Read Engineering Ltd. v R.*, 2014 TCC 309, 2014 DTC 1216. In that decision, the judge described *Copthorne* TCC decision as: (i) the application of GAAR as a recharacterization of the transactions (at paragraph 9); (ii) a finding that the taxpayer had failed to fulfill its withholding obligations (215(1)) (at paragraph 14); and (iii) the striking of the withholding penalty (227(8)), a technical violation, through the exercise of due diligence (at paragraph 17). On this basis, the Appellant suggests that *JK Read Engineering* and the conclusions should be overlooked by this Court. Instead, the newly imposed tax consequences nullifying the tax benefit are the sole bases for the GAAR assessment. In the present case this would be the denial, *per se*, of the capital losses arising from the otherwise unimpacted transactions.

Respondent' Submissions

[10] The Respondent states that GAAR (section 245) of the *Act* is an integral part of the legislation and insinuates itself into other Parts of the *Act*. Its entire structure references the *Act* and all the inter-related provisions must be read as a whole. Where a transaction satisfies the applicability conditions, GAAR automatically applies. The denial of the tax benefit occurs because GAAR permits a consideration of the object and spirit of the *Act* (*Copthorn Holdings Ltd.* v *R* 2011 SCC 63 at paragraph 66 ("*Copthorne* SCC Decision")). In applying GAAR, the determination of tax consequences by the Minister permits adjustment to certain broadly enumerated summative amounts (subsections 245(1) (tax benefit

definition) and 245(5) (determination of tax consequences)). Through GAAR, the Minister effects an adjustment of tax otherwise payable under another Part of the *Act* by applying the reasonable tax consequences necessary to deny the tax benefit. It is one of the Minister's tools when assessing under other Parts of the *Act* (*S.T.B. Holdings Ltd. v R.*, 2002 DTC 1254 (TCC), at paragraph 24; affirmed 2002 FCA 386; leave to appeal dismissed [2002] SCCA No 513. In turn, Part I tax is frequently determined through utilization of different provisions under the *Act*. The employment of GAAR is no different. In this case, a capital loss was denied, taxable income increased and outstanding "tax payable" consequentially came into existence.

[11] Further, the Respondent argues that liability for tax arises from the *Act* generally, not specifically from an assessment (*R v Simard-Beaudry Inc.*, [1971] FC 396 at paragraph 20). The bi-furcation of GAAR and non-GAAR assessments is not consistent with the fundamental principle that a year's tax liability arises from the *Act in toto*. Therefore, Justice Hogan in *JK Read Engineering* correctly stated that GAAR operates from the outset. The invocation of GAAR by the Minister does not create the "avoidance transaction", "misuse" or "abuse". These are created by the legislation as is the necessary step of determining, upon the occurrence of these events in a specific taxation year, the tax consequences reasonable in the circumstances to deny the "tax benefit"; the tax benefit itself having occurred in the taxation year. Delayed, incorrect or revised assessments do not lessen the taxpayer's ultimate liability under the *Act*.

b) Self-Assessment by a taxpayer of GAAR tax liability

Appellant

[12] The Appellant submits a taxpayer cannot self-assess using GAAR. As an example, under non-GAAR provisions, taxpayers may file a lesser amount of reported income (or similar reported amount), but report a higher amount of tax payable. Upon assessment, the taxpayer may appeal using the lower reported income (or similar reported amount), but since the higher amount of tax payable was paid no interest accrues against the taxpayer. With GAAR this is not possible according to the Appellant for two reasons: the Minister alone determines, firstly, the abuse or misuse of a provision and, secondly, the reasonable circumstances leading to the denial of the "tax benefit". In short, the taxpayer cannot assume the Minister's responsibility to establish abuse or misuse or to determine what the reasonable consequences of the GAAR assessment may be.

[13] Subsection 254(4) describes obligations of the Minister when invoking GAAR. These detailed requirements are the Minister's alone to assert, prove and rely upon when interpreting the provisions of the *Act* (*Canada Trustco Mortgage Company v R.*, 2005 SCC 54 at paragraphs 64 and 65). Similarly, the redetermined tax result, comprised of the reasonable tax consequences disallowing the tax benefit, are uncertain and unpredictable (*Copthorne* SCC Decision at paragraph 123). The taxpayer must await the Minister's assessment. The alleged "abuse/misuse", "tax benefit" and "reasonable tax consequences", nullifying the tax benefit are embedded in that assessment, seen and known by any taxpayer for the first time on the GAAR assessment issuance date. The Appellant asks: how could it formulate all of those ministerial obligations and, accurately calculate and pay tax on or before the balance-due day and file in accordance with such position? In the present case, the GAAR assessment issuance date occurred approximately four and a half years following the balance-due day.

Respondent

[14] The Respondent asserts that the Appellant had a choice: consider the GAAR and the "reasonable tax consequences", both of which flow from the abused or misused section, refrain from the transactions giving rise to the "tax benefit" and file accordingly. Not only does the *Act* not preclude this, but it mandates that every taxpayer must estimate tax payable under any provision of the *Act* (*Lambert v R* [1977] 1 FC 99 at paragraph 10). This would include GAAR. All tax payable is ultimately determined by assessment or reassessment in accordance with the *Act's* provisions. Self-assessment is inherently uncertain, but provides relief and rights of independent judicial determination (*Lipson v R*, 2009 SCC 1 at paragraph 52). Again, section 245 is no different.

[15] The Respondent submits that notions of the difficulty of self-assessment under GAAR arise from subsections 245(6) to (8) inclusive. Specifically, subsection 245(7), which requires impacted third parties (non-GAAR assessed taxpayers) to apply to the Minister to utilize GAAR provisions, through its enactment as a distinct section buttresses and does not derogate from the argument that all other directly assessed taxpayers must consider GAAR when filing. To suggest otherwise, would render unnecessary the passage of subsections 245(6 through 8) (*Matthew v Canada*, 2005 SCC 55 and *Canada, Department of Financial Technical Notes (Income Tax Act)*, 245 (1987 TRSI)).

[16] Moreover, the Respondent argues the portions of *Copthorne* TCC Decision referenced by the Appellant did or not comment on interest payable after a GAAR

assessment, but whether a withholding penalty arising under Part XIII, caused by the application of one of the very "tax consequences" leading to the denial of a tax benefit, ought to have been vacated. The Court held that the taxpayer's filing position was consistent with the technical application of the *Act*. All such related conclusions in *Copthorne* TCC Decision related to the Part XIII penalty and not to interest accrual.

c) Statutory Framework for Arrears Interest Payable under GAAR

Appellant

[17] The Appellant asserts that if Parliament had desired arrears interest to accrue prior to the GAAR issuance date, then it would have enacted a specific provision. By contrast, specific provisions do exist for interest on penalties. Like GAAR, the Minister assesses penalties. Before legislative amendments under subsection 161(11), no such interest on penalties accrued until assessment. This is still the case for certain penalties under paragraph 161(11)(c), being the residual provision. From a policy perspective, penalties arising within the taxpayer's control or knowledge accrue interest from the balance-due day while others do not. Similarly, the Appellant argues GAAR's application is not within the control or knowledge of the taxpayer. Returning to *Copthorne* TCC Decision, Justice Campbell found no Part XIII penalty could arise until after reassessment.

[18] Further, when precisely should accruing interest be applied? The Appellant contends this is not ascertainable in a series of transactions where several abuses or misuses have occurred over several taxation years (*Triad Gestco Ltd v R*, 2011 DTC 1254(TCC) at paragraph 72, affirmed 2012 DTC 5156 (FCA)). Similar confusion would arise factually in *Copthorne*. By default, the only certain commencement point for arrears interest is the GAAR assessment issuance date. Consistency prevails because there are no increased "taxes payable" owing under subsection 161(1) until the GAAR assessment issuance date. Only this new liability arising at that date effectively generates taxes payable. Without this "principal sum" owing, there can be no interest (*Reference as to the Validity of Section 6 of the Farm Security Act, 1944 of Saskatchewan* [1947] SCR 394 (SCC) at page 412).

Respondent

[19] The Respondent asserts that the *Act* imposes interest in a simple way: a taxpayer owes and pays interest at a prescribed rate where the taxpayer has

outstanding taxes at a particular point which are in excess of taxes paid at or before the time after the balance-due day (subsection 161(1) "total of the taxpayer's taxes payable" and subsection 248(1) "balance-due day"). Taxes payable under section 245 are not differentiated under subsection 161(1). In any event, section 245 in the present case determined tax liability under Part I of the *Act*. Further, subsection 161(1) references payments for taxes payable "for the year" exceeding amounts paid or applied against the tax liability "for the year". Longstanding authorities have held that tax payable for the taxation year is the tax finally or ultimately fixed by assessment or reassessment for the year (*Irvine v MNR*, (1961) 28 Tax ABC 151 at paragraphs 23 – 25 and *Whent* [2000] 1 CTC 329 (FCA) at paragraph 109 and 110).

[20] Subsection 161(1) is distinguishable from the penalty subsection 161(11). The absence in subsection 161(1) of the words "but only after the Minister's assessment" which are additional in subsection 161(11), renders a consistent application to all taxpayers of the concept of balance-due day for the year. There is no textual justification to separate GAAR from other assessments.

[21] Lastly, an interpretation that interest not apply until the issuance date of a successful GAAR assessment rewards the taxpayer with the time-value of the tax otherwise payable for the period between the balance-due day and the GAAR reassessment issuance date. This occurrence would be contrary to the overall purpose of restraining what is abusive tax avoidance.

IV. Analysis

[22] As with all such deconstructive analysis, there is overlap and correlation.

a) GAAR under the *Income Tax Act*

Relevant Statutory Provisions

[23] Excerpts of the relevant and applicable provisions of GAAR which were referenced by counsel are found throughout section 245 of the *Act* as follows:

> 245 (1) In this section,
>
> "tax benefit"
>
> tax benefit means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this

Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act… (avantage fiscal)

"tax consequence"

tax consequences to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount that is relevant for the purposes of computing that amount; (attribut fiscal)

…

General anti-avoidance provision

(2) Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

…

Application of subsection (2)

(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

(a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of

(i) this Act,

(ii) the *Income Tax Regulations*,

(iii) the *Income Tax Application Rules*,

(iv) a tax treaty, or

(v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or

(b) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

…

Determination of tax consequences

(5) Without restricting the generality of subsection (2), and notwithstanding any other enactment,

(a) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part,

(b) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person,

(c) the nature of any payment or other amount may be recharacterized, and

(d) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

Request for adjustments

(6) Where with respect to a transaction

(a) a notice of assessment, reassessment or additional assessment involving the application of subsection 245(2) with respect to the transaction has been sent to a person, or

(b) a notice of determination pursuant to subsection 152(1.11) has been sent to a person with respect to the transaction,

any person (other than a person referred to in paragraph (a) or (b)) shall be entitled, within 180 days after the day of sending of the notice, to request in writing that the Minister make an assessment, reassessment or additional assessment applying subsection (2) or make a determination applying subsection 152(1.11) with respect to that transaction.

Exception

(7) Notwithstanding any other provision of this Act, the tax consequences to any person, following the application of this section, shall only be determined through a notice of assessment, reassessment, additional assessment or determination pursuant to subsection 152(1.11) involving the application of this section.

Duties of Minister

> (8) On receipt of a request by a person under subsection 245(6), the Minister shall, with all due dispatch, consider the request and, notwithstanding subsection 152(4), assess, reassess or make an additional assessment or determination pursuant to subsection 152(1.11) with respect to that person, except that an assessment, reassessment, additional assessment or determination may be made under this subsection only to the extent that it may reasonably be regarded as relating to the transaction referred to in subsection 245(6).

Jurisprudence

[24] While the GAAR provisions and the related legislative "scheme" are comparatively simple, their application contains the devilish details (*Copthorne* SCC Decision at paragraph 32). Justice Rothstein in *Copthorne* SCC Decision describes the necessary components of GAAR: an avoidance transaction, giving rise to a tax benefit; whose primary purpose was to achieve the tax benefit; and, which tax benefit is nullified where a resulting abuse or misuse of the *Act* has occurred.

[25] From certain authorities, *Canada Trustco* and *Copthorne* SCC Decision, the questions, onus and evidentiary requirements are established for any judicial inquiry into the application of GAAR.

[26] On the issue of a tax benefit, the Minister makes the assumption and the taxpayer carries the burden of disproving it. A court must examine the path chosen, the avoidance transaction, against a possible path not taken, an alternative arrangement. The path not taken, by comparison, highlights the effect of the tax benefit from the non-tax object of the taxpayer. (*Copthorne* SCC Decision at paragraphs 34 and 35).

[27] Once a tax benefit is established, the Court turns to a determination as to whether the transaction resulting in the tax benefit was an avoidance transaction. Avoidance transactions may be singular or in a series. The Minister assumes the transaction or series gave rise to the tax benefit. The taxpayer must dislodge this assumption. As such, the taxpayer bears the onus of establishing, on balance, that the transaction (or series) was executed primarily for *bona fide* purpose aside from the obtainment of a tax benefit. (*Copthorne* SCC Decision at paragraph 40).

[28] The last determination is then made: is the avoidance transaction abusive or misusive of the *Act*? It is recognized that formalistic and legalistic compliance otherwise commonplace and prevalent throughout the *Act* are, in this final GAAR analysis, set aside where technical compliance is contrary to the object, spirit or

purpose of the *Act's* utilized provisions or any combination thereof (*Copthorne* SCC Decision paragraphs 68 and 69 citing *Canada Trustco* at paragraphs 50 and 55). At this stage of the GAAR analysis, the Minister bears the onus of proving, on balance, having regard to the text, context and purpose of a provision, that its identifiable object, spirit or purpose have been abused or misused. The words of the provisions may be clear enough, but the rationale springs from the analysis of its reason for enactment. (*Copthorne* SCC Decision at paragraph 70).

[29] Thereafter, viewing the avoidance transaction against the identified purpose will reveal abusive tax avoidance where the transaction: achieves an outcome the provision sought to prevent; defeats the underlying rationale of the provision; or, where the transaction frustrates or defeats a provision's object, spirit or purpose (*Canada Trustco* at paragraph 45; *Lipson* at paragraph 40).

GAAR is Part of the Whole

[30] While all of the foregoing illustrate that GAAR is "quite a different sort of provision"…"engrafted" upon the *Act*, it is nevertheless part of it, both incorporating within it and incorporated into other provisions of which GAAR seeks to prevent abuse or misuse. As such, the Court "must to the extent possible, contemporaneously give effect to both the GAAR and the other provision of the…[*Act*]…relevant to a particular transaction". Interpretation of the *Act* functions "as a coherent whole, with respect to the particular statutory scheme engaged by the transactions" (*Canada Trustco* at paragraphs 13 and 39).

[31] An assessment under GAAR, whether alone or in conjunction with another technical omission or non-compliant act, is not an assessment divorced from the other provisions of the *Act*. Quite to the contrary, GAAR is entirely dependent upon a textual, contextual and purposive analysis of the object, spirit or purpose of the very provisions which allegedly confer the tax benefit. Where the transaction is reasonably within the object, spirit or purpose, not of GAAR, but of the transgressed non-GAAR provisions, there is no abuse. (*Canada Trustco* at paragraph 45).

[32] The other two components of GAAR, a tax benefit and avoidance transaction, remain the purview of the taxpayer who authors, executes, and bears the onus at trial of disproving. These are within the taxpayer's records, affairs and viewscape.

[33] *Canada Trustco* and, subsequently *Copthorne* SCC Decision, provide authoritative guidance from the Supreme Court of Canada on a textual, contextual and purposive analysis of GAAR within the *Act*. While those analyses identify onuses, tests and limitations specifically for the GAAR, the Appellant is not correct in suggesting the methodology for nullifying the tax benefit creates an independent, stand-alone and novel assessment of a taxpayer. The determination of tax consequences through employment of other non-GAAR provisions of the *Act* is the means by which the Minister nullifies the tax benefit, itself arising under those other provisions and "Parts" of the *Act* at the time of the transaction.

[34] The Appellant, as noted, critiques Justice Hogan's analysis of GAAR within *JK Read Engineering*. The Appellant focuses on Justice Hogan's comments on *Copthorne* TCC Decision that describe: the application of GAAR as a "recharacterization of the transactions"; the taxpayer's failure to fulfill its withholding tax obligations; and, the taxpayer's diligent actions resulting in the vacating of the penalty. The Respondent contends that Justice Hogan correctly analyzed the portions of *Copthorne* TCC Decision which determined that the time when the GAAR assessment arose was the time of the abusive transactions. GAAR, therefore, was operative at the time of the transactions and impacted the subsequent assessment of tax payable for the taxation year in question.

[35] A validating analysis by this Court of Justice Hogan's legal analysis of the Justice Campbell's decision at trial in *Copthorne*, on which the Supreme Court of Canada has already spoken, is neither this Court's role nor directly productive in the analysis of this Rule 58 Question. That was the role for an appeal court. Such an appeal was not pursued in *JK Read Engineering*.

GAAR nullifies the Part I Tax Benefit

[36] Factually, the tax benefit in this Rule 58 Question relates to the nullification of the capital loss and the correlated increase in taxable income by means of determination of the reasonable tax consequences. In *Copthorne* SCC Decision, as noted above, this was upheld by the Supreme Court when the "double counting" of paid up capital was nullified, being the reasonable tax consequences, because the artificial preservation of that paid up capital, the tax benefit, frustrated the purpose of subsection 87(3) of the *Act*. Essentially the analysis regarding the Part XIII penalty was limited to the trial decision and not countenanced by the Supreme Court of Canada. The Court agrees with both counsel that no recharacterization

took place in the Part I GAAR assessment which was upheld in *Copthorne* SCC Decision.

[37] In the present case, the same can be said. In considering GAAR, referable to the tax benefit and avoidance transactions arising in the relevant taxation year, the Minister applied reasonable tax consequences to nullify the tax benefit, namely the capital loss(es). This assessment, purely and simply, is incorporated by reference as "tax(es) payable" or "taxpayer's liability" under the *Act* generally. It raised an assessment utilizing GAAR, but insinuated itself into Part I of the *Act* to reassess the taxpayer otherwise in the normal course.

b) Can a taxpayer approach and anticipate GAAR liability?

Jurisprudence

[38] GAAR assessments, like all other assessments, under the *Act* require adherence and recognition to be effective. The different components, onuses and burdens under GAAR do not overly mystify the provision to the point of vagueness. All aggressive or complicated tax saving or tax planning initiatives carry some level of uncertainty. This is inherent with the GAAR and other situations where the law must be applied to a given fact pattern (*Lipson* at paragraph 52).

[39] The taxpayer has within its knowledge, records and view the tax benefit and the avoidance transaction(s). Again, these consistently arise from complicated, well-planned and documentary-intensive steps. Tax advisors involved in such planning exercises must weigh the consequences of a GAAR reassessment like any other assessment. The sole risk with GAAR is the nullification of the tax benefit and, even then, once, and only after the Minister has proven an abuse of the spirit, intent or object of the *Act*.

[40] Similarly, in *Copthorne* (at both trial and on appeal), no determination was made regarding the payment of interest after, but not before the issuance date of the GAAR assessment. The success of the Appellant in *Copthorne* TCC Decision, related to the imposition of a technical penalty and not the liability to pay interest on additional tax liability due arising from the consequential nullified abusive paid up capital preservation.

GAAR to be anticipated and to be considered by taxpayers

[41] In short, the Appellant, in the present case as a taxpayer possibly subject to GAAR, could have filed by deducting the future-impugned capital loss, but applying GAAR for the purposes of calculating tax payable. Upon assessment under GAAR, interest would not accrue. Moreover, thereafter the Appellant could have objected and appealed. The Court would then determine the application of the GAAR, in the first instance and the reasonableness (including timing) of the reasonable tax consequences as determined by the Minister. To suggest such an option is unavailable or dissimilar from such an option with non-GAAR provisions is not correct.

[42] Implicit within this conclusion, is this Court's determination of GAAR's clear intent and inference that all taxpayers, who are directly subject to GAAR assessments, that is, non-third parties, are required to consider and apply GAAR. Taxpayers who are directly or may be directly subject to the nullification of a tax benefit need not ask the Minister for permission to apply GAAR (*STB Holdings Ltd*. at paragraph 23).

[43] In conclusion, while not simple or uncomplicated, a taxpayer is able to approach, anticipate and account for GAAR as a taxpayer is obligated to do with all other taxing sections of the *Act* to which GAAR, by necessity, must correlate. If the Minister reassesses, nothing precludes a taxpayer's appeal to this Court.

(1) Is Arrears Interest different under GAAR?

Relevant Statutory Provisions

[44] Excerpts of the relevant and applicable arrears interest provisions are summarized below:

> 152(1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine
>
> > (a) the amount of refund, if any, to which the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year; or
> >
> > (b) the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 122.8(2) or (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.
>
> 161 (1) Where at any time after a taxpayer's balance-due day for a taxation year

> (a) the total of the taxpayer's taxes payable under this Part and Parts I.3, VI and VI.1 for the year
>
> exceeds
>
> (b) the total of all amounts each of which is an amount paid at or before that time on account of the taxpayer's tax payable and applied as at that time by the Minister against the taxpayer's liability for an amount payable under this Part or Part I.3, VI or VI.1 for the year,
>
> the taxpayer shall pay to the Receiver General interest at the prescribed rate on the excess, computed for the period during which that excess is outstanding.
>
> 248(1) In this Act,
>
> balance-due day of a taxpayer for a taxation year means,
>
> …
>
> (d) where the taxpayer is a corporation,
>
> (i) the day that is three months after the day on which the taxation year (in this subparagraph referred to as the "current year") ends, if…
>
> "Tax payable"
>
> (2) In this Act, the tax payable by a taxpayer under any Part of this Act by or under which provision is made for the assessment of tax means the tax payable by the taxpayer as fixed by assessment or reassessment subject to variation on objection or on appeal, if any, in accordance with the provisions of that Part.

Plain Language Analysis

[45] On the basis of a plain reading of the interest provisions of the *Act*, the Appellant is required to pay interest beginning on the day after the balance-due day under a GAAR assessment.

[46] Simply, tax payable is fixed by "assessment or reassessment" subject to appeal. The balance-due day occurs, in the case of a corporation, two or three months after the taxation year ends. Interest accrues, where at any time after the taxation year balance-due day, the taxpayer's taxes payable for the year are greater than amounts paid on or before the balance-due day on account of tax payable for the year as determined at any time (subject to the usual reassessment limitations, if any).

[47] Applied to the facts of this case, the GAAR assessment fixed or added, as the case may be, to the Appellant's tax payable the impact of disallowing the capital loss. That impact, by virtue of the use of the words "the total…taxes payable…for the year…exceeds…the total paid at that time on account of tax payable…for the year" is clear. Taxes payable for a year may arise by assessment or reassessment, which was the case upon the GAAR assessment issuance date. The suggestion that no taxes payable existed before the GAAR assessment issuance date, again depends upon the rejected argument that a GAAR assessment only creates tax liability upon its issuance.

Intention of Parliament's Interest Provision Omission for GAAR

[48] The Appellant's argument that Parliament did not enact a specific provision imposing arrears interest on GAAR assessments is rejected. GAAR assesses tax and interest under the provisions of the *Act* generally. This is not unlike other provisions which do not contain distinct or specific interest accrual provisions. The consequential GAAR tax payable arises by an assessment. This basis for liability is contemplated specifically by the section 248 definition of "tax payable" and reference to "balance-due day" in subsection 161(1). A delay in raising an assessment or reassessment and the argument that no "excess amount" exists until reassessment has been rejected by the Federal Court of Appeal (*Irvine* v *MNR*, (1961) 28 Tax ABC 151 and *Whent* v *R*, [1996] 3 CTC 2542).

[49] The Appellant's suggestion that arrears interest on penalties provides the Court with guidance is not persuasive for several reasons. Aside from sections 162, 163, 163.1, 235 and 237.1(7.4) relating to specific penalties, interest accrues on other penalties from the day of mailing of the penalty assessment under paragraph 161(11)(c). The Appellant suggests that this residual provision is analogous to GAAR assessments because taxpayer uncertainty and ignorance prior to assessment is common to both these liabilities under the *Act*. This analogy is not consistent. Assessment under the GAAR imposes tax liability, not a penalty for non-compliance. Consistently, Parliament has not enacted separate interest provisions for other assessment provisions.

[50] Additionally, specifically with respect to penalties, before the enactment of subsection 161(11) in 1986, there simply was no interest applicable to penalties imposed under the *Act*. The pre-enactment authority cited by the Appellant contains a broad statement by Acting Master Anglin in Ontario Master's Court. The Acting Master states that interest is not exigible on penalties payable under the *Act* (*Miller* v *Harron*, 56 DTC 1053 (Ont S.C.) at paragraph 5). The reasoning of the Appellant that interest began accruing only once the penalty was assessed is not

correct. Prior to the enactment of 161(11), interest on penalties simply did not exist at all.

[51] The more persuasive argument is that subsection 161(1) is the default provision governing interest accrual for all tax liability arising under assessments and reassessments under the *Act*. It imposes interest "at any time after a taxpayer's balance-due day" where tax payable exceeds amounts paid on account of tax for the year. The argument that Parliament intended interest to accrue only after the GAAR assessment issuance date through this legislative omission has no support legislatively by virtue of a plain interpretation of subsection 161(1).

Contextual and Purposive Analysis

[52] Moreover, using a contextual and purposive analysis in analyzing both section 245 and subsection 161(1), the argument in favour of no interest before the GAAR assessment issuance date is also not convincing. The context and purpose of section 245 is to counteract and nullify the utilization of an abusive avoidance transaction to achieve a tax benefit. The GAAR definition of tax benefit employs wording which consists of any "reduction, avoidance or deferral of tax or other amount that would be payable under the *Act*…". Similarly, "tax consequence"…means the amount of income, taxable income or other income amount payable by the person under the *Act*".

[53] If interest were not charged until after the GAAR assessment issuance date, the underlying tax avoidance or reduction would be reversed at that time, but a tax deferral is created and authored during that period between the balance-due day and the GAAR assessment issuance date. Definitionally under section 245, a tax benefit includes a deferral of taxes. Payment of tax by the Appellant four and half years after the tax benefit occurred, but without interest on the balance due, is, within the *Act'* s very own definition of "tax benefit", a deferral of tax payable *per se*. The deferred payment of that otherwise payable tax liability confers a benefit to the taxpayer, both logically and under the definition of GAAR itself. To not impose interest from the balance-due day, in the absence of some provision even vaguely directing such a hiatus, renders GAAR ineffective in nullifying the deferral portion of the "tax benefit". Parliament provided for this not just in framing the definition of tax benefit, but arguably and possibly in the language which suggests direct authority to impose interest as a tax consequence within the expressed words "…other amount payable by… a person under the *Act*" found in the combined effect of the definitions and subsection (2) of section 245.

[54] This "tax benefit" relating to the deferral of tax payable, when examined in a textual, contextual and purposive manner, having regard to the harmonious scheme and object of the *Act* as a whole and the intention of Parliament, leads to an effective conclusion. Interest under subsection 161(1) in relation to an assessment under GAAR, referable itself to Part I of the *Act*, should accrue on a GAAR assessment from the day after the balance-due day for the relevant taxation year.

V. Conclusion

[55] For the reasons above, the Court answers the Rule 58 Question as follows:

> Where, as here, the Minister of National Revenue has relied upon section 245 of the *Income Tax Act* ("*Act*") to deny capital losses when reassessing the Appellant's income tax for a taxation year, arrears interest payable under subsection 161(1) of the *Act* accrues during that period from the taxpayer's balance-due day for the year and to the issuance of such reassessment.

[56] Costs are payable to the Respondent in accordance with the tariff, subject to the right of either party to make further submissions within 30 days of the date of this Order.

Signed at Toronto, Ontario, this 1st day of September 2016.

"R.S. Bocock"

Bocock J.

CITATION:	2016 TCC 190
COURT FILE NO.:	2014-1744(IT)G
STYLE OF CAUSE:	QUINCO FINANCIAL INC. AND THE QUEEN
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	February 29, 2016
REASONS FOR ORDER BY:	The Honourable Mr. Justice Randall S. Bocock
DATE OF ORDER:	September 1, 2016

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